Neutral Citation Number: [2020] EWHC 1298 (Admin)

Case No: CO/3653/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2020

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **on the application of**	**Claimant**
CAMILLA SWIRE	
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
(1) ASHFORD BOROUGH COUNCIL **(2) TREVOR HEATHCOTE LLP**	**Interested Parties**

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David Wolfe QC and Heather Sargent (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Richard Honey and Ashley Bowes (instructed by the **Government Legal Department**) for the **Defendant**
The **Interested Parties** did not appear and were not represented

Hearing dates: 29 & 30 April 2020

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Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of the screening direction made by the Defendant, on 6 August 2019, that an environmental impact assessment ("EIA") was not required for the proposed development by the Second Interested Party ("the developer"), as it was not EIA development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations").

2. Permission to apply for judicial review was refused by Lieven J. on the papers, but later granted by Supperstone J. at an oral renewal hearing on 1 December 2019.

Facts

3. On 12 December 2017, the developer applied to the First Interested Party ("the Council") for outline planning permission for a proposed development at Thruxted Mill, Penny Pot Lane, Godmersham, Canterbury, Kent CT8 7EY ("the Site").

4. The proposed development comprised "demolition of the existing structures and hard standing on the site and the erection of up to 20 dwellings with improved vehicle access and extensive areas of planting and landscaping".

5. The Site is located in the Kent Downs Area of Outstanding Natural Beauty ("AONB"). The entire property comprises approximately 2.9 ha (7.16 acres) with an estimated 40% comprising buildings and areas of hardstanding. The Site of the proposed development is on the previously developed area of the property, comprising 1.94 ha (4.79 acres). It has an unrestricted B2 (General Industrial) use. It appears that it was originally used as a saw-mill, but more recently it was in use as an animal carcass rendering facility. During the 1990s, it was one of four sites in the UK licensed by the Department for Environment, Food and Rural Affairs ("DEFRA") to dispose of cattle infected with bovine spongiform encephalopathy ("BSE"), which resulted in the outbreak of Creutzfeldt-Jakob disease ("CJD") in humans. It has been disused for more than ten years. However, its permit for animal carcass rendering remains in force.

6. The Claimant lives nearby and objects to the proposed development.

7. It was common ground that the land at the Site is contaminated. The developer commissioned some risk assessment and remediation reports which it submitted to the Council in support of its application for planning permission.

8. On 3 March 2017, FGS Agri Ltd ("FGS"), which is associated with the developer, provided a Remediation Method Statement. It was based upon a "Site Investigation & Risk Assessment Report" which the parties were unable to provide to me. That report apparently found that asbestos in the ground was the key risk, and it also found other soil contaminants including elevated levels of lead, arsenic and cyanide and BaP. The risk assessments confirmed that there were no risks to controlled waters. The FGS report made no reference to the Site's former use for BSE-infected animal carcass rendering, nor any risk of contamination from such use.

9. FGS's proposals were to demolish the structures; remove the hardstanding; and then excavate the upper 1.5 metres of "made" ground. After testing for contaminants, the soil would either be processed and re-used, or disposed of off-site. Imported soil would be laid in garden and soft landscaping areas after construction of the dwellings. A pathway break would be reconstructed above the re-engineered ground for safe access.

10. In August 2017, CET Infrastructure ("CET") provided a Phase 1 Preliminary Risk Assessment. This was based on desk top research and a site survey. It identified that the Site had previously been used as an animal carcass rendering facility and had a Local Authority Integrated Pollution, Prevention and Control permit for that purpose. It assessed the potential sources of contamination from this use as including fuels, hydrocarbons, and pathogens from waste waters and other organic waste, including bacteria such as e coli and salmonella, anthrax, and hazardous ground gases. It did not refer to or assess the specific risk of contamination from BSE-infected animal carcass rendering. It also assessed the risk of contaminants in the soil and "made" ground from the former timber mill usage, including metals and asbestos.

11. The report set out potential receptors and exposure pathways in a detailed conceptual model table. On-site human receptors include site workers and future users. Exposure pathways could include ingestion, inhalation and dermal contact of contaminated soil and air.

12. In August 2017, CET also provided a Ground Investigation & Generic Risk Assessment. Informed by the Preliminary Risk Assessment, they carried out a ground investigation, digging eight trial pits followed by laboratory analysis. A quantified risk assessment was undertaken which found some potential contaminants (including pathogens and anthrax) were not detected, and the majority of concentrations of contaminants which were detected were below the level which would present a minimal risk and so would not need remediation. The exceptions to this were petroleum hydrocarbons in one of the eight trial pits (TP01) and asbestos in two of the eight trial pits (TP06 and TP07). The report recommended further investigation of the ground to check for contamination. The assessment also concluded that groundwater monitoring standpipes would be required. The assessment did not refer to the risk of contamination from BSE-infected animal carcass rendering.

13. In a letter dated 24 October 2017, Lee Remediation summarised the results of the CET assessments and said:

> "**Recommendations**
>
> Limited site investigation works have been conducted that the site to date, gaps are evident within the data set provided and a supplementary intrusive environmental assessment is required to enable a Detailed Quantitative Risk Assessment (DQRA) to be completed to facilitate the residential redevelopment of the site. The completion of the DQRA will enable appropriate remediation targeted criteria to be derived for both soils and groundwater and agreed with the Local Authority and Environment Agency.

> Following the completion and regulatory agreement the DQRA a Detailed Remediation Strategy and Validation Plan, inclusive of a Safe System of Works (SSOW) to mitigate against the potential release of in-ground fibres will require preparing and agreeing to satisfy anticipated Planning Conditions for the residential redevelopment."

14. Lee Remediation gave an estimate for the further assessments required and broad categories of work such as structural demolition, provision for asbestos management and disposal, earthworks monitoring for asbestos fibres, and soil and groundwater remediation allowances and provisions. The total sum was £1,759,000 exclusive of VAT. Neither the recommendations nor the estimate referred to the assessment of risk of contamination from BSE-infected animal carcass rendering, and any remediation in respect of the same.

15. On 18 January 2018, the Environment Agency, a statutory consultee, wrote to the Council stating:

> "Based on the submitted information we consider that planning permission could be granted for the proposed development if the following planning conditions are included as set out below. Without these conditions, the proposed development poses an unacceptable risk to the environment and we would object to the application."

It confirmed CET's own position that its Ground Investigation and Risk Assessment report only provided a preliminary risk assessment and a fuller site investigation would be required. It also stated that it could not accept the remediation statement as submitted.

16. On 5 February 2018, a local resident, Dr Geoff Meaden sent an email to the Council and CET expressing his concern over CET's assessment which had been posted on the Council's planning application website. He said that the assessment omitted mention of the fact that it was chosen by DEFRA in 1998 to be one of only four sites in the UK licensed to take cattle carcasses suffering from the highly infectious BSE disease. He concluded that these facts needed a thorough investigation.

17. Dr Meaden also sent a BBC news website link reporting evidence from Dr Colchester, consultant neurologist at Guy's Hospital, London, to the public inquiry into BSE in 1998, concerning CJD patients in the Ashford area whom he had been treating. Dr Colchester believed that local water supplies may have been contaminated by the disposal of infected carcasses at Thruxted Mill, given the number of fatalities from CJD in Kent. He also referred to evidence that there had been poor practices at the mill, and infected remains of animals were left lying around, which probably contaminated the soil. David Richardson, the manager at the mill was quoted as saying "raw material" was put outside the plant before he arrived in 1994: "It was outside when I first came here: there wasn't odour control, there was poor infrastructure, no proper effluent treatment, so therefore we were, from day one, fighting an historic battle."

18. Mr Michael McNaughton, Principal Environmental Scientist at CET, responded to Dr Meaden's concerns in an email dated 23 February 2018. He explained that the usual sources of information which CET used in the preparation of its preliminary assessment did not disclose that Thruxted Mill had been used for BSE-infected cattle rendering:

> "Whilst compiling information and data for Preliminary Risk Assessment Reports (desk top of phase one studies) CET use many differing sources of information. Some of these sources of evidence are taken directly from known agencies and societies such as the British Geological Survey (BGS) for soil and geological information, and the Environment Agency for Hydrology, pollution incidents etc. For information on pollution events and licences for known processes we use the Envirocheck report from Landmark which encompasses information on licenced processes such as that of animal rendering plants. Because much of this information is taken from stakeholders such as the Environment Agency, any information on special arrangements for the safe rendering and disposal of cattle infected with BSE, would have been, or should have been, contained and provided for in the Landmark Envirocheck report.
>
> Given the fact that any such premises will have been governed by licence, and have had to have been approved by the Government, would mean strict controls in working practices for such a plant would be in place. If any breach of these licence conditions was realised then it would have triggered an entry into the accessible database that is utilised by the likes of Landmark Envirocheck. It is therefore reasonable to assume that any such incident would have been, or even should have been reported and as such, would have been available for scrutiny by any company or organisation purchasing such a report from Envirocheck. CET have no idea why this was not the case for Thruxted Mill."

19. Mr McNaughton went on to say that the risks of infection were negligible:

> "The government guidance on how Creutzfeldt-Jacob Disease (CJD) the human variant of BSE is very clear. The prions which have the defective proteins that cause CJD, need to be either injected or enter the body by the consumption of brain and/or nervous tissue. There is no evidence that CJD can be spread through normal every day processes or activities. The laboratory analysis of the generic risk assessment did not return positive results from any of the commissioned microbiological tests that may have given an indication that there was a microbiological problem at the site.
>
> Given the underlying geology of the site as being predominantly sandy gravelly clay over chalk and flint, the

> recharge rate of the groundwater is likely to be relatively high and so any potential bacterial contamination if present at any time in the past will be significantly diluted in the near surface water and certainly within the chalk aquifer. It is noted that the CET report recommends further investigation of areas of contamination which includes that of the groundwater. It should also be noted that there are no mechanisms for detecting CJD in the soil at this moment.
>
> Given the above, it is reasonable to presume that at the moment the risks from acquiring CJD from the land or water in or under the site is negligible."

20. Dr Meaden sent a further letter to the Council, dated 8 March 2018, responding to Mr McNaughton's email, stating:

> "…. You may recall that my concern was with the fact that the hazard risk assessment completely failed to pick up the fact that this site was where BSE infected cattle had been rendered from 1998. At that time there had been a major inquiry into the suitability of this site given the potentially toxic prions that might have been released into the environment. The fact that the hazard risk assessment had not picked up on any of this clearly indicated that ABC's hazard risk procedures appear to be very inadequate or alternatively there may have been some other reason for not wishing this information to be divulged. I have had no reply to my request from any of the four people I wrote to, and until I hear to the contrary, I must put my own interpretation on this.
>
> However, I now see that Mr Michael McNaughton (CET-UK) has placed a clarification statement on the list of "plans and documents" made about this planning application (dated 23rd Feb). While some of this material might indeed be correct it does not state a reason why ABC planning procedures failed to pick up on this matter. Mr McNaughton mentions the fact that rendering plants need to be governed by licence, and the documents on the planning application site do contain a permit issued by ABC in August 2004. However, this site was dealing with BSE infected cattle from 1998 so the developer needs to show ABC Planning the licence to do this from that time. This earlier permission may in fact show what activities were allowed and whether any stipulations were made regarding cleaning up the site at some future date.
>
> It must be remembered that concern about the use of this plant for rendering cattle was of national importance at the time and many people gave lucid statements at the inquiry as to why disposal of wastes from the mill onto adjacent fields was a dangerously risky solution. I have spent some time reviewing online articles, papers, etc on prions and contrary to what Mr

> McNaughton says there is ample evidence that prions can survive for a lengthy time period and that they may have possibly dangerous consequences. Here are three examples: …..”

The examples provided by Dr Meaden in his letter are set out at paragraph 96 of my judgment below.

21. On 14 March 2018, the developer’s planning consultant wrote to the Council’s planning officer saying she had sought advice from the developer and the owner of the Site who both confirmed that “a comprehensive remediation scheme will have to be implemented to decontaminate/clean up the site” and the remediation scheme “will be informed by further contamination survey work and any works that are required to decontaminate the site will be carried out”.

22. The Council’s Environmental Health Practitioner advised, in an email of 7 March 2018, that CET’s Generic Risk Assessment was a “basic, initial document” which acknowledged that it “is by no means exhaustive and has been devised to provide an initial indication of potential ground contamination”. Its Summary stated that “a comprehensive site investigation and risk assessment would ultimately be required”. The Environment Agency also considered the report to be only “an initial indication” and they will be expecting much more detail in future documents. Therefore, the Environmental Health Practitioner advised as follows:

> “I request the application of conditions EO23 and EO26 in terms of contamination, and this requires full investigation and reporting before and after any works have been carried out. I would, of course, be expecting full discussion of any potential contamination related to the past use of the site in these reports, including prions associated with BSE/CJD (I mention this in particular as it has been highlighted as a particular concern by some objectors). I would expect that reference would be made to the DoE Industry Profile for Animal and Animal Products Processing Works also.”

23. In response to consultation, the Environment Agency advised the Council in a letter dated 16 January 2018 that there was a risk that contamination from the previous use of the Site could pollute controlled waters. The Site was sensitive as it was located upon a principal aquifer and was just outside Source Protection Zone 3. It proposed conditions for a fuller risk assessment and investigation, verification and remediation and advised that, without these conditions, “the proposed development poses an unacceptable risk to the environment and we would object to the application”. The Environment Agency noted that CET’s Ground Investigation and Generic Risk Assessment was not exhaustive and was only designed to provide an initial indication of potential ground contamination, therefore a proper investigation was required, following demolition. The Environment Agency also said “[w]e cannot accept the remediation method statement [from FGS] as submitted. It should be prepared after the ground investigation is submitted”.

24. In response to the concerns raised about contamination from BSE-infected carcasses, the Environment Agency explained, in an email dated 13 March 2018:

> "Please be advised that we only comment on issues relating to groundwater protection: the issues relating to human health are addressed by the Local Authority's Environmental Health Officer. Also it does not fall within our remit to indicate how the site is to be remediated. The remediation method will be proposed by the applicant based on the results of the ground investigation."

25. In its consultation response dated 24 January 2018, the Kent Downs AONB Unit did not oppose the principle of redevelopment of the Site as it was currently a detracting feature in the AONB, but considered that the nature of the development should conserve and enhance the protected landscape of the AONB. This proposal, which aimed to provide the maximum number of dwellings to achieve viability, did not meet this objective.

26. The Planning Officer's Report ("OR") to the Council's Planning Committee advised that the proposal would be a departure from development plan policies TRS1, TRS2, HOU3a and HOU5 as the Site was in an isolated location, within the countryside, designated as an AONB. It was not well located in respect of amenities and public transport and had not been allocated for development. However, the Planning Officer concluded that there were material considerations of sufficient weight to justify departure from the development plan, in particular, the environmental benefits of improving the appearance of the existing Site, and removing contamination, as well as the economic and social benefits of constructing housing. Employment use was not believed to be viable. The significant abnormal cost of cleaning the site meant that the scheme would be unviable if affordable housing and section 106 Town and County Planning Act 1990 contributions were required at this stage, but financial contributions could be required later under a review mechanism, based upon a percentage of any increase in the gross development value figures in the developer's viability assessment.

27. On the issue of contamination, the OR advised as follows:

> "97. As stated above the extent of contamination on the site is relatively unknown although given the previous uses of the site the extent of contamination will be significant. The applicant has commissioned a Phase 1 preliminary report which states that the site will be heavily polluted as a result of its previous use and that a comprehensive site investigation and risk assessment will be needed. From there significant remediation works will be required. The results to date have not shown there to be widespread contamination and the concentrations did not exceed thresholds that consider a residential use unacceptable in principle. Heavy levels of contamination were found around existing sceptic tanks on the site. Further investigation is needed to see if these are localised hotspots or whether the contamination of hydrocarbons is more widespread. Brown and white asbestos were also revealed on the site.

> 98. Environmental Services were consulted on this information and raise no objection acknowledging it is an opportunity to address and remediate this contaminated site. They suggest conditions covering ground contamination, unexpected contamination and sewage disposal. They require further reports to establish potential contamination of the site including prions associated with BSE/CJD. The site does currently have an Environmental Permit (currently dormant) but has been kept 'alive' as to surrender it would result in relevant conditions of the permit to remediate the site becoming enforceable. If redevelopment does take place, the permit is surrendered and these works would have to take place under the requirements of the permit as well as any conditions on the grant of planning permission. The remediation required under the planning permission is likely to go further than those on the permit as it would introduce residential use on the site. The owner is entitled to keep renewing the permit in perpetuity which would mean the remediation conditions would not come into force."

28. The Planning Officer provided the Planning Committee with an 'Update Report' for its meeting on 14 November 2018 which referred to representations received from neighbours, including the failure to refer in the OR to the use of the Site to dispose of BSE-infected carcasses, and the need for testing.

29. The Update Report also referred to a letter sent by Richard Buxton Solicitors on behalf of the Claimant, pointing out that, under paragraph 10(b) of Schedule 2 to the EIA Regulations, an EIA was likely to be required given the sensitivity of the development and characteristics of the impact. A screening opinion did not appear to have been undertaken by the Council, and so it would be premature and unlawful to determine the application. The Update Report stated in response: "The application has been screened by officers in respect of the need for an EIA. Officers are of the opinion that an EIA is not required for this development." However, a written screening opinion, with reasons, as required under the EIA Regulations, was not published, nor provided to Mr Buxton, despite his request to see it.

30. At its meeting on 14 November 2018, the Planning Committee heard oral representations from the developer's agent and Dr Meaden, who advised that, since the prions could be dormant for many years and could be spread in a number of ways, consultation with the UK Medical Research Council's Prion Unit was needed to ensure that the necessary testing was carried out.

31. On 14 November 2018, the Planning Committee resolved to grant outline planning permission for the proposed development, with all matters reserved except for access, subject to the prior completion of an agreement for deferred contributions and detailed conditions. Conditions 21 and 22 which provided as follows:

> "21. The development hereby permitted shall not be begun until a scheme to deal with contamination of land and/or groundwater has been submitted and approved by the Local Planning Authority and until the measures approved in that scheme have been implemented. The investigation report shall

be conducted and presented in accordance with the guidance in CLR11 "Model Procedures for the Management of contaminated land" published by the Environment Agency. The scheme shall include all of the following measures unless the Local Planning Authority dispenses with any such requirement specifically and in writing:

• A desk-top study carried out by a recognised expert in the field to identify and evaluate all potential sources and impacts of land and/or groundwater contamination relevant to the site. The requirements of the Local Planning Authority in consultation with other relevant agencies shall be fully established before the desk-top study is commenced and it shall conform to any such requirement. Two full copies of the desk-top study and a nontechnical summary shall be submitted to the Local Planning Authority without delay upon completion.

• A site investigation shall be carried out by a recognised expert in the field to fully and effectively characterise the nature and extent of any land and/or groundwater contamination, and its implications. The site investigation shall not be commenced until:

i) A desk-top study has been completed, satisfying the requirements of paragraph (1) above.

ii) The requirements of the Local Planning Authority for site investigations have been fully established, and

iii) The extent and methodology have been agreed in writing with the Local Planning Authority. Two full copies of a report on the completed site investigation shall be submitted to the Local Planning Authority without delay upon completion.

• A written method statement for the remediation of land and/or groundwater contamination affecting the site shall be agreed in writing with the Local Planning Authority prior to commencement, and all requirements shall be implemented and completed to the satisfaction of the Local Planning Authority by a competent person. No deviation shall be made from this scheme without the express written agreement of the Local Planning Authority. Two full copies of a full completion report confirming the objectives, methods, results and conclusions of all remediation works shall be submitted to the Local Planning Authority.

Reason: To control pollution of land or water in the interests of the environment and public safety.

…

> 22. If unexpected contamination is found at any time when carrying out the approved development it must be reported in writing to the Local Planning Authority. An investigation and risk assessment must be undertaken, and where remediation is necessary a remediation scheme must be prepared.
>
> Following completion of the remediation scheme a verification report that demonstrates the effectiveness of the remediation carried out must be prepared and submitted for approval in writing by the Local Planning Authority.
>
> Reason: To ensure that risks from land contamination to the future users of land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors."

32. On 28 May 2019, the Council published its screening opinion. It accepted that the proposal was for development within the meaning of paragraph 10b of Schedule 2 to the EIA Regulations as an Urban Development Project within a sensitive area (an AONB). However, it concluded that an EIA was not required because "the redevelopment of the site for residential use is not likely to have any significant adverse effects on the environment as any likely significant adverse effects on the environment can be overcome either through the imposition of conditions or at the reserved matters stage".

33. The basis for the Council's conclusion was set out as follows:

> "Conditions are proposed that ensure:
>
> Contamination of the site is to be remediated to a standard acceptable for residential development. Specialist advice will be sought to consider the remediation of Prions associated with CJD/BSE. This may require removal of contaminated soil by specialist contractors and replacement with uncontaminated top soil. This is a matter that will be dealt with fully and in detail through the suggested conditions. The Council's Environmental Services Section raise no objection subject to the imposition of such conditions.
>
> Drainage conditions along with the contamination conditions would ensure that there would be no contamination of ground water (aquifer/ground water protection zone)….."
>
> …..
>
> "g) Risk to Human Health (for example due to water contamination or air pollution)

> Risk to human health will be improved through the remediation of contamination on the site (including possible BSE/CJD from the previous use of the site). This is a positive effect.
>
> There are risks during the construction process in respect of contamination and prions associated with BSE/CJD as a result of the former use of the site however there are conditions that require the remediation of all contamination on the site to bring it up to a standard suitable for residential use to address these risks. This is a higher standard than that required by the Environmental permit which would take effect following the permanent cessation of the use of the site for animal rendering.
>
> The cessation of the animal rendering use would ensure no further contamination of the site and noise/odour issues from the general industrial use.
>
> In terms of the risk to human health due to the nature and scale of the development it is not considered likely to give rise to significant effects."

34. In a letter dated 27 June 2019, Richard Buxton Solicitors requested a screening direction from the Defendant, submitting that the proposed development was EIA development on the basis *inter alia* of "the significant possibility of significant harm to human health" arising from contamination of the soil and water supply. A bundle of relevant documents was supplied with the letter.

35. The Defendant consulted the Environment Agency who replied by email dated 15 July 2019, as follows:

> "We no longer respond to screening opinion consultations from Local Planning Authority's (LPAs). Our guidance (attached) advises LPAs when we should be consulted. We leave the decision on whether a proposal requires an EIA to the LPA to decide.
>
> However, we were consulted on the planning application 17/01919/AS. In such matters as with this site, we only comment on issues within our remit, in this instance these related to protection of soil (where this relates to potential impacts on the water environment or regulation of waste) and to groundwater protection. The issues related to human health are addressed by the Local Authority's Environmental Health Officer. In our response to the consultation we advised that LPA that we had no objection subject to conditions being included in any permission granted. From our perspective we consider this would be satisfactory to mitigate against potential adverse impact of the groundwater.
>
> Having reviewed the solicitors letter (paragraphs 13-16) their main concern appears to be impact on human health, which as

> previously advised is a matter for the LPAs Environmental Health Officer. We did find the applicant proposed remediation statement inadequate as stated in their letter, paragraph 15, but we have requested conditions that will require them to submit appropriate information for sign off before any construction works can start. Written approval would be required from the LPA (in consultation with us).
>
> They also state in paragraph 16 that we state there could be "a risk of contamination as a result of previous use of the site during construction stage". This is correct but it should be noted that this is a paragraph we use for any proposal where the previous use of the site, or historical use of the site could have resulted in land contamination. Hence the conditions we requested for site investigations.
>
> I hope the information clarifies our position in relation to this site…."

36. In a letter dated 6 August 2019, the Defendant gave a direction pursuant to regulation 5(3) of the EIA Regulations that the proposed development was not EIA development. The Defendant accepted that the proposed development fell within the meaning of paragraph 10b of Schedule 2 to the EIA Regulations as an Urban Development Project within a sensitive area (an AONB). However, the Defendant's opinion was that it was not likely to have significant effects on the environment, for the reasons set out in the attached Written Statement.

37. In the Written Statement, the Defendant considered the potential contamination issues, including the reports and representations which I have referred to above. He said:

> "**Potential contamination issues**
>
> …..
>
> The Council's Environmental Protection Team and the Environment Agency have considered the contamination issue in detail as part of the processing of the planning application and have offered no objections to the proposal on grounds of contamination, subject to specific conditions requiring the remediation of the site to a suitable standard for residential development and a verification report to consider it. On the recommendation of both parties, the Council has agreed to impose a series of stringent environmental conditions to ensure development shall not begin until a scheme to deal with contamination of land and /groundwater has been submitted and approved by the local planning authority and until measures approved in the scheme have been implemented; if unexpected contamination is found during the investigation an risk assessment must be undertaken and where necessary a remediation scheme must be prepared; restricting the

> infiltration of surface water drainage into the ground and precluding piling and any other foundation designs using penetrative methods (proposed conditions 18, 19 and 21 to 24).
>
> The Secretary of State has considered fully the third parties representations, the comments and advice of the Council's Environmental Protection Section and the Environment Agency, the Government specialist advisers on pollution and water quality issues, and the detailed list of conditions proposed by the local planning authority to manage, mitigate and safeguard the development and minimise any environmental impacts. Having considered all these issues the Secretary of State is satisfied that the proposed measures would satisfactorily safeguard and address potential problems of contamination."

38. The Defendant then went on to consider the potential impact on groundwater, stating as follows:

> "**Potential impact on groundwater**
>
> The application site lies within a Ground Source Protection Zone, an area of Ground Water Vulnerability over principal acquifer. The Environment Agency has advised that there could be a risk of contamination from the previous use of the site during construction and this is a sensitive location being on a principal acquifer and just outside Source Protection Zone 3. The Agency has, however, offered no objections to the proposal subject to imposition of conditions covering a site investigation scheme, risk assessment and verification plan, which the Council has incorporated into the proposed grant of planning permission. The Agency is dissatisfied with the submitted remediation strategy and requires further investigation. In response the Council has imposed a planning condition requiring the submission of a revised remediation strategy, which would have to be agreed by the Agency, prior to it being discharged.
>
> The Secretary of State has considered fully the third parties representations, the comments and advice of the Environment Agency, the Government specialist advisers on pollution and water quality issues, the Council's Environmental Protection Team and the detailed list of conditions proposed by the local planning authority to manage, mitigate and safeguard the development and minimise any environmental impacts. Having considered all these issues the Secretary of State is satisfied that the proposed conditions would ensure that the development does not affect the principal acquifer and groundwater."

39. The Defendant also considered potential harm to human health and said:

> "**Potential harm to human health**
>
> The application site currently contains the remnants of Thruxted Mill which was an animal rendering processing facility and has been vacant for over 10 years. The third party, referring to representations submitted by a local doctor, contends that the redevelopment proposal represents a risk to human health and BSE contamination arising from its use as one of four UK sites for the disposal of BSE cattle. The Council contends that the risk to human health will be diminished through the remediation of contamination on the site, which is a positive effect. It acknowledges that there are risks during the construction process in respect of contamination and prions associated with BSE/CJD as a result of its former use but considers that the proposed conditions 21 & 22, which require the remediation of all contamination on the site, will bring it up to a standard suitable for residential use, would provide appropriate mitigation.
>
> The Secretary of State has considered fully the third parties representations, the comments and advice of the Council's Environmental Protection Team and the conditions proposed by the local planning authority to manage, mitigate and safeguard the development and minimise any environmental impacts. He is, therefore, satisfied that the proposed measures would safeguard the health of prospective residents of the development"

40. The Defendant concluded as follows:

> "Following receipt of the third party request, the Secretary of State has screened the proposal to determine whether it constitutes EIA development. He has considered the proposal in relation to the selection criteria identified in Schedule 3 of the EIA Regulations and the potential impacts, identified by the third party, considered above within this written statement. In preparing the Screening Direction, the Secretary of State has considered fully third parties representations. He has consulted Natural England, the Government's specialist advisers on landscape and ecological issues, the Environment Agency, the Government specialist advisers on flooding, pollution and water quality issues and Historic England, the Government's specialist advisers on heritage issues and given due consideration to their comments submitted both in relation to the EIA and the planning application. The Secretary of State has also considered the detailed comments submitted by the Borough Council's Environmental Protection Team, Kent County Council and other agencies. He has also considered carefully the proposed planning conditions which would accompany the proposed planning approval for the Thruxted Mill development and, in accordance with regulation 5 (5) (b)

> of the EIA Regulations 2017, to ascertain whether these measures would avoid or prevent what might otherwise have significant adverse effects on the environment.
>
> Having considered carefully all these issues the Secretary of State is satisfied that the proposed measures to mitigate the environmental impacts and concluded that these are sufficient to obviate the need for an Environmental Impact Assessment."

41. Unusually, the Defendant relied upon an internal departmental email sent by Mr Carpenter, the civil servant who assessed the application, to his manager for his approval. Mr Wolfe QC did not object to its admissibility. It is not, of course, part of the decision, but it affords some insight into the thinking of the *de facto* decision-maker. Mr Carpenter BSc (Hons) MRTPI is a Senior Planning Manager in the Planning Casework Unit, and joined the Department in February 2000 after many years working in the planning field.

42. Mr Carpenter summarised the representations made, observing that the statutory consultees did not consider this to be EIA development. In a separate email exchange, the Environment Agency told Mr Carpenter that it did not respond to screening opinion consultations from local planning authorities, but its view was that "the conditions would be satisfactory to mitigate against potential adverse impact of the groundwater". The impact on human health was a matter for the Environmental Health Officer to address. In his email to his manager, Mr Carpenter referred to the conditions sought as "appropriate" and "stringent".

43. Mr Carpenter's conclusions were as follows:

> "I have undertaken a forensic assessment of the case and the proposed planning conditions and conclude that they provide the necessary safeguards and fulfil the requirements of the aforementioned regulation 5. On this basis, I conclude that the proposal does not constitute EIA development and propose to issue a Direction to this effect."

Grounds of challenge

44. The Claimant submitted that the Defendant's decision was vitiated by legal error because he unlawfully reasoned that the proposed development was unlikely to have significant effects on the environment simply because all such effects were, in his view, likely to be eliminated by mitigation measures that would be secured by planning conditions. In so doing, the Defendant misunderstood and misinterpreted the EIA Regulations, failed to take into account a material consideration, and acted irrationally.

Statutory framework

45. Article 2(1) of EIA Directive 2011/92/EU, as amended by EIA Directive 2014/52/EU, requires Member States to adopt all measures necessary to ensure that, before consent

is given, projects likely to have a significant effect on the environment are made subject to an assessment of their effects. The Directive is implemented into UK domestic law by the EIA Regulations.

46. A planning authority is prohibited from granting planning permission for "EIA development", as defined, unless it has carried out an EIA in respect of the development (regulation 3 EIA Regulations).

47. Part 2 of the EIA Regulations makes provision for a local planning authority and/or the Secretary of State to determine whether or not a proposed development is EIA development by screening.

48. Regulation 5(4) EIA Regulations provides:

> "**General provisions relating to screening**
>
> 5(1) Subject to paragraph (3) and regulation 63, the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.
>
> (2) The events referred to in paragraph (1) are -
>
> (a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or
>
> (b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development.
>
> (3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development.
>
> (4) Where a relevant planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development, the relevant planning authority or Secretary of State must take into account in making that decision -
>
> (a) any information provided by the applicant;
>
> (b) the results of any relevant EU environmental assessment which are reasonably available to the relevant planning authority or the Secretary of State; and
>
> (c) such of the selection criteria set out in Schedule 3 as are relevant to the development.

(5) Where a relevant planning authority adopts a screening opinion under regulation 6(6), or the Secretary of State makes a screening direction under regulation 7(5), the authority or the Secretary of State, as the case may be, must –

(a) state the main reasons for their conclusion with reference to the relevant criteria listed in Schedule 3;

(b) if it is determined that proposed development is not EIA development, state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been, significant adverse effects on the environment; and

(c) send a copy of the opinion or direction to the person who proposes to carry out, or who has carried out, the development in question.

(6) The Secretary of State may make a screening direction either -

(a) of the Secretary of State's own volition; or

(b) if requested to do so in writing by any person.

(7) The Secretary of State may direct that particular development of a description mentioned in column 1 of the table in Schedule 2 is EIA development whether or not the conditions contained in sub-paragraphs (a) and (b) of the definition of "Schedule 2 development" are satisfied in relation to that development.

(8) Where the Secretary of State makes a screening direction in accordance with paragraph (6), the Secretary of State must –

(a) take such steps as appear to be reasonable to the Secretary of State in the circumstances, having regard to the requirements of regulation 6(2) and (3), to obtain information about the proposed development in order to inform a screening direction;

(b) take into account in making that screening direction –

(i) the information gathered in accordance with sub-paragraph (a);

(ii) the results of any relevant EU environmental assessment which are reasonably available to the Secretary of State; and

(iii) such of the selection criteria set out in Schedule 3 as are relevant to the development.

….."

49. "EIA development" is defined in regulation 2(1) EIA Regulations as Schedule 1 development or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

50. Regulation 2(1), EIA Regulations defines "Schedule 2 development" as development of a description mentioned in column 1 of the table in Schedule 2 to the EIA Regulations 2017, where (a) any part of that development is to be carried out in a sensitive area; or (b) any applicable threshold or criterion in the corresponding part of column 2 of that table is met.

51. It was common ground that the proposed development in this case was an "urban development project" within the meaning of paragraph 10(b) of Schedule 2 to the EIA Regulations. It fell below the indicative thresholds of 150 dwellings or an area in excess of 5 ha, but it was located in a "sensitive area" within the meaning of regulation 2 EIA Regulations as it was an AONB.

52. Thus, the issue was whether the proposed development was "likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

53. In determining that issue, the Secretary of State was obliged to take into account the selection criteria in Schedule 3 to the EIA Regulations which are as follows:

> "**SELECTION CRITERIA FOR SCREENING SCHEDULE 2 DEVELOPMENT**
>
> **Characteristics of development**
>
> 1. The characteristics of development must be considered with particular regard to –
>
> (a) the size and design of the whole development;
>
> (b) cumulation with other existing development and/or approved development;
>
> (c) the use of natural resources, in particular land, soil, water and biodiversity;
>
> (d) the production of waste;
>
> (e) pollution and nuisances;
>
> (f) the risk of major accidents and/or disasters relevant to the development concerned, including those caused by climate change, in accordance with scientific knowledge;
>
> (g) the risks to human health (for example, due to water contamination or air pollution).
>
> **Location of development**

2 (1) The environmental sensitivity of geographical areas likely to be affected by development must be considered, with particular regard, to –

(a) the existing and approved land use;

(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas –

(i) wetlands, riparian areas, river mouths;

(ii) coastal zones and the marine environment;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) European sites and other areas classified or protected under national legislation;

(vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or in which it is considered that there is such a failure;

(vii) densely populated areas;

(viii) landscapes and sites of historical, cultural or archaeological significance.

Types and characteristics of the potential impact

3. The likely significant effects of the development on the environment must be considered in relation to criteria set out in paragraphs 1 and 2 above, with regard to the impact of the development on the factors specified in regulation 4(2), taking into account -

(a) the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected);

(b) the nature of the impact;

(c) the transboundary nature of the impact;

(d) the intensity and complexity of the impact;

> (e) the probability of the impact;
>
> (f) the expected onset, duration, frequency and reversibility of the impact;
>
> (g) the cumulation of the impact with the impact of other existing and/or approved development;
>
> (h) the possibility of effectively reducing the impact."

54. Where the proposed development is EIA development, as defined, the applicant must provide an environmental statement. By regulation 18(3) EIA Regulations, an environmental statement must include at least:

> "(a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;
>
> (b) a description of the likely significant effects of the proposed development on the environment;
>
> (c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
>
> (d) a description of the reasonable alternatives studied by the developer, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;
>
> (e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and
>
> (f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected."

55. Schedule 4 requires that the following information is included, amongst other matters:

> "6. A description of the forecasting methods or evidence, used to identify and assess the significant effects on the environment, including details of difficulties (for example technical deficiencies or lack of knowledge) encountered compiling the required information and the main uncertainties involved.
>
> 7. A description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any

> proposed monitoring arrangements (for example the preparation of a post-project analysis). That description should explain the extent, to which significant adverse effects on the environment are avoided, prevented, reduced or offset, and should cover both the construction and operational phases."

56. An environmental statement must be made available to the public, and be consulted upon.

Conclusions

(1) The Court's role

57. It is well-established that the screening authority, be it the local planning authority or the Secretary of State, has been entrusted with the task of judging whether the development is likely to have significant effects on the environment, and the Court will only intervene if the decision-maker errs in law.

58. In *R* (*Hockley) v Essex County Council* [2013] EWHC 4051 (Admin), Lindblom J. helpfully reviewed the authorities at [23] to [25]:

> "23. In *R. (on the application of Jones) v Mansfield District Council* [2004] Env. L.R. 21 Carnwath L.J., as he then was, emphasised (in paragraph 58 of his judgment) that "the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle race", and that "it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case."
>
> 24. In *R. (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 Moore-Bick L.J. said (in paragraph 20 of his judgment) that it was important to bear in mind "the nature of what is involved in giving a screening opinion". A screening opinion, he said, "is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others". Nor does it require "a full assessment of any identifiable environmental effects". What is involved in a screening process is "only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all". The court should not, therefore, impose too high a burden on planning authorities in what is simply "a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment …". In the light of the decision of the *European Court of Justice in Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris*

> *Van Lnadbouw, Natuurbeheer en Visserij* [2004] E.C.R. I-7405 and the Advocate General's opinion in *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* [2010] Env. L.R. 18 Moore-Bick L.J. said (in paragraph 17 of his judgment) that a likelihood in this context was "something more than a bare possibility … though any serious possibility would suffice".
>
> 25. In *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, Pill L.J., with whom Toulson and Sullivan L.JJ. agreed, said (in paragraph 31 of his judgment) that there was "ample authority that the conventional *Wednesbury* approach applies to the court's adjudication of issues such as these". That principle is firmly established in the domestic jurisprudence. For example, in *R. (on the application of Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114*)* Beatson L.J. said (in paragraph 22 of his judgment) that the "assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of "likelihood" and "significance"" (see also paragraph 40 of Laws L.J.'s judgment in *Bowen-West v Secretary of State* [2012] EWCA Civ 321). In *Jones v Mansfield* Carnwath L.J. said (at paragraph 61) that because the word "significant" does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped."

59. In *Hockley*, Lindblom J. went on to say, at [102], that unless it is obvious that relevant and potentially significant effects on the environment have been overlooked, the Court will need some objective evidence to show this was so. Mere conjecture is not enough.

60. In *R (Kenyon) v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302, Coulson LJ cited paragraph 102 of Lindblom J.'s judgment in *Hockley* with approval (at [15]), and added, at [43]:

> "43. An appellant seeking to argue that the decision-maker …. reached a conclusion for which there was no evidential basis invariably faces an uphill task. Such a task is made even more difficult in a situation like the present case, given that the screening direction is a preliminary, broad-based assessment of environmental impacts, undertaken by those with relevant training and planning expertise."

61. Where a screening decision is based on the opinion of experts, which is relevant and informed, the decision-maker is entitled to rely upon their advice: see the judgment of the Court of Appeal in *R (Langton) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWCA Civ 1562, at [68] – [70]. Where a statutory regulator

makes a decision based upon an evaluation of scientific, technical and predictive assessments, the Court should afford the decision-maker an enhanced margin of appreciation (*R (Mott) v Environment Agency* [2016] 1 WLR 4338, applied in *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) at [171]).

(2) Mitigating environmental effects

62. Directive 2014/52/EU amended Directive 2011/92/EU by inserting into Annex 3 a new factor to be taken into account in the determination of "likely significant effects", namely, "the possibility of effectively reducing the impact". That amendment is reflected in paragraph 3(h) of Schedule 3 to the EIA Regulations.

63. The amendments also provided, in Article 4(4) of the EIA Directive, that the developer, at the screening stage, "may […] provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment".

64. Amended Article 4(5)(b) then requires the screening authority – if it decides that EIA is not after all required – to "state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment", where those have been proposed by the developer. This amendment is included in regulation 5(5)(b) of the EIA Regulations.

65. Although the term "measures" is only to be found in regulation 5(5)(b) and not in paragraph 3(h) of Schedule 3 to the EIA Regulations, I do not consider that the amendment alters the position established in the domestic case law (set out below) which requires the screening authority to make an informed judgment on the likely environmental impacts and the effectiveness of any remedial measures in deciding whether the proposed development was "likely to have significant effects on the environment".

66. The original Commission proposal for these revisions to the Directive clearly contemplated that the proposed mitigation measures relied upon to obtain a negative screening opinion would adapt the project so as to satisfactorily address the relevant environmental impacts (COM (2012) 628 final at p. 5).

67. Even before this legislative change, the domestic courts recognised that proposals for remediation or mitigation measures could be taken into account in the determination of whether EIA was required. The approach adopted in those cases remains good law, as confirmed by the Supreme Court in *Champion v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710.

68. In *R(Lebus) v South Cambridgeshire DC* [2002] EWHC 2009 (Admin) [2003] Env LR 17, the High Court held that the local planning authority erred in law in concluding that an EIA was not required for a proposed egg production facility. Sullivan J. identified two legal errors in the authority's reasoning. First, in its decision letter, the authority identified the relevant considerations, but concluded it was not necessary to require a formal environmental statement as it was going to be able to get the required information in sufficient detail as part of the application. It

did not therefore decide whether or not the development was likely to have significant effects on the environment. This approach was impermissible.

69. The second error was in its approach to measures to mitigate the environmental impacts. On a fair reading, Sullivan J. found that the Planning Director's conclusion was: "I consider that through the implementation of pollution control measures and appropriate management techniques, the egg production unit will not cause an unacceptable level of environmental pollution or have a significant or material adverse impact on the health of the community or the local residents." (at [40]).

70. Sullivan J. set out the correct approach as follows:

> "45. Whilst each case will no doubt turn upon its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.
>
> 46. It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance.
>
> …
>
> 50. It must have been obvious that with a proposal of this kind there would need to be a number of non-standard planning conditions and enforceable obligations under s.106. It is precisely those sort of controls which should have been identified in a publicly-accessible way in an environmental statement prepared under the Regulations.
>
> 51. Thus the underlying approach adopted …. was in error. In so far as one can discern the Council's reasoning, it was erroneous on the two grounds set out above: it was no answer to the need for an EIA to say the information would be supplied in some form in any event, and it was not right to approach the matter on the basis that the significant adverse effects could be rendered insignificant if suitable conditions were imposed. The proper approach was to say that potentially this is a development which has significant adverse environmental

> implications: what are the measures which should be included in order to reduce or offset those adverse effects?"

71. In *Gillespie v First Secretary of State* [2002] EWCA Civ 400, [2003] Env LR 663 the Court of Appeal dismissed an appeal against the quashing of a decision by the Secretary of State that an EIA was not required. Pill LJ gave the leading judgment. The case concerned the redevelopment of a former gasworks to residential use and the site was acknowledged to be extensively contaminated as a result of its former use.

72. The developer provided a survey and a remediation statement and strategy. The Inspector found (at [18]):

> "Because of its previous use, the site is obviously contaminated to a significant degree. The type and extent of the contamination is not fully known at this stage. I am satisfied that sufficient basic information has been made available to the appellants to enable them and the Council to conclude on the most effective way to proceed with developing a programme for decontamination of the site whilst further submissions required by planning conditions are being prepared, subject to planning permission being granted. Further investigation such as a risk assessment would be undertaken prior to deciding on the most appropriate method of remediation. Environmental Impact Assessment was not required for the proposal as provided for under the appropriate regulations. The Council considers the imposition of an appropriately worded condition would ensure that the issue of contamination would be properly addressed. The Environment Agency accepts that contamination could be dealt with by planning conditions. PPG23 supports remediation strategies which address contamination in situ. Therefore, the tar tanks and the most contaminated land may well remain on the site depending what is found in the more detailed investigations. Nevertheless, despite the concerns of the Save Stepney Campaign ("SSC") and other local residents, decontamination procedures would be consistent with government policy in PPG23. I accept that the planning conditions as agreed between the appellants and the Council would provide for an appropriate remediation strategy for the site if planning permission were to be granted."

73. The Secretary of State broadly agreed with the Inspector, concluding:

> "20. The Secretary of State considers that there is sufficient information available to come to a view that the proposed development is unlikely to cause significant effect on the environment and therefore an environment assessment is not required having regard to the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. The Secretary of State is satisfied that the remediation work required can be dealt with by condition and that condition VI sets out the procedure to be followed by the developer and does

> not indicate the likelihood of significant effects on the environment."
>
> 21. Condition VI, in its final form, provided:
>
> "Before any development commences a detailed site investigation shall be undertaken to establish the nature, extent and degree of the contamination present on the site. The scope, method and extent of this site investigation shall be submitted to and approved by the local planning authority prior to the commencement of the site investigation. The site investigation work shall also propose a scheme for remediation of this contamination, including measures to be taken to minimise risk to the public, the environment and prevention of contaminated ground and surface water from escaping during the remediation, together with provisions for monitoring during and after remediation. The detailed site investigation shall be submitted to and approved in writing by the local planning authority prior to the commencement of the remediation works on site and no remediation or development works on site shall proceed other than in accordance with the approved measures.""

74. Pill LJ described the approach which should be taken, at [37]:

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

75. Pill LJ concluded that the Secretary of State applied the wrong legal test by assuming that the remediation proposals in condition VI would be effective, without a sufficient assessment of the contingencies and uncertainties:

> "40. In my judgment the Secretary of State erred in the test he has expressed in para.19 of his final decision letter. I read the second part of para.19 as including an assumption that condition VI provides a complete answer to the question whether significant effects on the environment are likely. That is too narrow an approach. In the circumstances, it was necessary to consider the stage which the site investigation had reached (condition VI requires a future site investigation in detail to be undertaken), the nature and extent of the scheme for remediation, including its uncertainties, the effects on the environment during the remediation and the likely final result. The condition is properly drafted but itself demonstrates the contingencies and uncertainties involved in the development proposal, as does the evidence of Mr Simmons already quoted.
>
> 41. When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in condition VI could be treated, at the time of the screening decision, as having had a successful outcome."

76. Laws LJ agreed, stating:

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

77. In *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408, [2004] Env LR 21, the Court of Appeal upheld the dismissal of a claim, challenging the grant of permission for an industrial estate on a 28 ha site, on the ground that EIA was required because of the potential impacts on bats and golden plovers.

78. Dyson LJ set out the general principles to be applied at [38] and [39]:

> "38 ….. It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply because all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*). The effect on the environment must be "significant". Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment.
>
> 39 I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case."

79. Applying these principles to the particular case, Dyson LJ concluded:

> "53 This was plainly not a *Gillespie* case. The committee had a great deal of information about the likely effects of the development on the environment. It had representations from various consultees. It also had a number of ecological reports from the developer's consultants which described the various surveys that had been undertaken; and it had two comprehensive reports by the Head of Planning and Building Controls. The committee did not rely on the conditions and undertaking in order to arrive at its conclusion that the development was unlikely to have an environmental effect in relation to bats, golden plovers or birds generally. The judge was right to say that the imposition of conditions with regard to surveys, and the acceptance of the undertaking, did not preclude the council from being satisfied that it was unlikely that the project would have a significant effect on the

> environment. Having regard to the information already available, it was reasonable for the committee to decide that the development would be unlikely to have significant effects in relation to birds and bats….
>
> 54 The judge was also right to say that the comments by English Nature ….. were important. The Officer was right to say, as he did in the first report, that these comments enabled him to advise the committee that the development would not have a significant environmental impact on the golden plover habitat. As the judge pointed out, English Nature did not suggest, still less request, that further investigations be carried out which might reveal the likelihood of a significant impact.
>
> 55 The members of the committee had to make a judgment on the material that was before them as to whether the proposed development would be likely to have a significant effect on the environment. For the reasons that I have given, which are substantially the same as those expressed by the judge, I am satisfied that they were entitled to conclude as they did…."

80. In *R (Catt) v Brighton and Hove CC* [2007] EWCA Civ 298, [2007] Env LR 32, which concerned potential disturbance from visitors to an expanded football stadium, Pill LJ distinguished the case of *Gillespie* on the facts, and found that the Council's screening opinion was lawful. He said:

> "27. …. In *Gillespie*, the need for substantial future site investigation was crucial to the decision whether an EIA was required. I stated, at paragraph 39, that to consider the proposed development shorn of remedial measures incorporated into it "would be to ignore the 'actual characteristics' of some projects". Scrutiny of the likely effects of the particular development project is required: "All aspects of the development project must be considered; the relevant considerations may be different in a case where the central problem is the eventual effect of the development upon the environment and a case such as the present where the central problem arises from the current condition of the land."
>
> …..
>
> 33. This is a very different development from that proposed in *Gillespie*. Developments come in all forms and the approach to the screening opinion must have regard to the development proposed. There will be cases, such as *Gillespie*, where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.
>
> 34. On the other hand, there will be cases where the likely effectiveness of conditions or proposed remedial or

> ameliorative measures can be predicted with confidence. There may also be cases where the nature, size and location of the development are such that the likely effectiveness of such measures is not crucial to forming the opinion. It is not sufficient for a party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that an EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment, and a planning judgment made. (See also the judgment of Ouseley J. in *Younger Homes (Northern) Ltd v First Secretary of State* [2003] EWHC 3058; [2004] J.P.L. 950 at [59]–[62] citing Dyson L.J. in *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408).
>
> …..
>
> 37. When forming a screening opinion, the Council were not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures. The consequences of providing the additional seating, and other changes, could not be predicted with certainty but, as Collins J. noted, the Council had extensive knowledge and experience, supported by surveys, of the impact of existing football league and cup matches upon the environment. On the basis of that, and the studies into future impact, they were entitled to assess the likely impact of the additional capacity proposed in the context of the continuing ameliorative measures also proposed and to form the screening opinion they did."

81. In *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2013] PTSR 406, the Court of Appeal upheld the dismissal of a claim challenging a negative screening opinion for a proposed re-development of a bowls club. Pill LJ said:

> "43. …. The decision-maker must have regard to the precautionary principle and to the degree of uncertainty as to environmental impact at the date of the decision. Depending on the information available, the decision-maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision-maker.
>
> …..
>
> 47. Applying that approach to the present facts, I have no doubt that the inspectorate was entitled to conclude that the proposed development would not have significant effects on the

> environment. A checklist was completed and no complaint is made about its contents. Judgment was exercised and reasons given for the decision ….which justify the conclusion reached. It may be added that the application for planning permission in this case did not involve the uncertainties which have presented difficulties of analysis in some of the cases considered. Moreover, judgment was exercised, not at the early stage of the procedure when such decisions are often made, but after full consideration of the planning issues by the local planning authority and also by an inspector appointed by the Secretary of State. Full information as to the nature of the proposal and its likely effects was available."

82. In *Champion*, the Supreme Court held that the local planning authority had erred in deciding that an EIA was not required for the proposed erection of two barley silos, and the construction of a lorry park and wash bay with ancillary facilities, at a site from which contaminated surface water discharge could pollute a nearby river, which was designated as a Special Area of Conservation and a Site of Special Scientific Interest. However, in the exercise of its discretion, the Court declined to grant relief.

83. The application for planning permission was accompanied by a "Site specific flood risk assessment" which recognised that the proposal had the potential to pollute the river. This risk was to be mitigated by a staged system of drainage, involving an interceptor/separator facility and thereafter a storage infiltration basin. There was a substantial degree of common ground between the applicant, the authority and the statutory consultees that more information was required about the effect of run-off to the river, and how the risk could be managed.

84. The screening opinion, completed by the planning officer, Mr Lyon, concluded that the proposed development was not likely to have significant effects on the environment and no EIA was required, the reasons being given as follows:

> "Subject to the applicant/agent ensuring that appropriate mitigation and safeguarding measures are put in place to prevent the possible discharge of pollutants and contamination from the site in the River Wensum (SAC & SSSI). Advice received from Natural England (Mike Meadow) that subject to pollution prevent measures being clearly identified and addressed, EIA would not be necessary."

85. Lord Carnwath concluded, at [46] – [47]:

> "46. In the present case, there is no disagreement that it was appropriate for the authority to undertake a screening exercise in April 2010, once the application was formally registered. Nor is it now in dispute that the exercise was legally defective. As [Mr James Dingemans QC, sitting as a Deputy High Court Judge] said:
>
> > "in circumstances where the pollution prevention measures had not been fully identified at that stage … the

> council could not be satisfied that the mitigation measures would prevent a risk of pollutants entering the river, when the mitigation measures were not known." (para 60)
>
> Mr Lyon evidently relied on his understanding of the advice of Mr Meadows, but he in turn had not regarded it as a formal consultation, and it was not part of his role to advise on EIA issues. More importantly, it was impossible at that stage to reach the view that there was no risk of significant adverse effects to the river. All the expert opinion, including that of CMGL's own advisers, was to the effect that there were potential risks, and that more work was needed to resolve them. It was also clear that the mitigation measures as then proposed had not been worked up to an extent that they could be regarded as removing that risk. This could be regarded as an archetypal case for environmental assessment under the EIA Regulations, so that the risks and the measures intended to address them could be set out in the environmental statement and subject to consultation and investigation in that context.
>
> 47. In my view that defect was not remedied by what followed. It is intrinsic to the scheme of the EIA Directive and the Regulations that the classification of the proposal is governed by the characteristics and effects of the proposal as presented to the authority, not by reference to steps subsequently taken to address those effects. No point having been taken about delay since the date of the defective screening opinion (an issue to which I shall return), Mr Buxton's request in June 2011 that the development should be reclassified as EIA development was in principle well founded. It was not enough to say that the potential adverse effects had now been addressed in other ways."

86. In his review of the statutory framework, Lord Carnwath emphasised that recital 2 of the preamble to the EIA Directive 2011/92/EU states that Union policy is based on "the precautionary principle" and that effects on the environment should be taken into account "at the earliest possible stage in all the technical planning and decision-making processes" (at [4] and [43]).

87. Lord Carnwath confirmed that a negative screening opinion may need to be reviewed subsequently in the light of later information. However, he explained, at [45], that a legally defective opinion not to require EIA, or even a failure to conduct a screening exercise at all, cannot be remedied by the carrying out of an analogous exercise outside the EIA Regulations. He said:

> "Even if that exercise results in the development of mitigation measures which are in themselves satisfactory, it would subvert the purposes of the EIA Directive for that to be conducted outside the procedural framework (including the environment statement and consultation) set up by the Regulations."

88. On the treatment of mitigation measures in EIA screening, Lord Carnwath cited with approval paragraphs 45, 46 and 50 of the judgment of Sullivan J. in *Lebus*, and said:

> "51. Those passages to my mind fairly reflect the balancing considerations which are implicit in the EIA Directive: on the one hand, that there is nothing to rule out consideration of mitigating measures at the screening stage; but, on the other, that the EIA Directive and the Regulations expressly envisage that mitigation measures will where appropriate be included in the environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA."
>
> 52. We were shown various statements on the same issue, with arguably differing shades of emphasis, in a number of judgments of the Court of Appeal: *Gillespie v First Secretary of State* [2003] Env LR 663, paras 37, 48, 49; *R (Jones) v Mansfield District Council* [2004] Env LR 391, paras 38-39 and *R (Catt) v Brighton and Hove City Council* [2007] Env LR 691, paras 33-35. Some were cited by the Court of Appeal in the present case. Mr Lockhart-Mummery, rightly in my view, did not rely on any of those statements as representing a material departure from the approach of Sullivan J. They simply illustrate the point that each case must depend on its own facts. In *R (Jones) v Mansfield District Council* (in a judgment with which I agreed), Dyson LJ said, at para 39:
>
> > "39. I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case."
>
> 53. As far as concerns the present case, it is not now in dispute that the screening opinion should have gone the other way. The mitigation measures as then proposed were not straightforward, and there were significant doubts as to how they would be resolved. I do not ignore Mr Meadows' evidence to the court that the proposed mitigation did not represent "novel or

> untested techniques" and that "similar methods have and are being successfully used around the country". But that was said in the light of the further reports produced in July 2010, and even then there remained unresolved problems for the Environment Agency and the council's own officers, for example in relation to the maintenance regime. The fact that they were ultimately resolved to the satisfaction of Natural England and others did not mean that there had been no need for EIA. The failure to treat this proposal as EIA development was a procedural irregularity which was not cured by the final decision."

89. Before me, counsel were in agreement that the principles established in these authorities remained applicable, despite the introduction of the 2014 amendments to the EIA Directive, which explicitly refer to mitigating measures.

(3) The Defendant's decision in this case

90. Applying the principles established in the case law, a screening authority must have sufficient evidence of the potential adverse environmental impacts and the availability and effectiveness of the proposed remedial measures, to make an informed judgment that the development would not be likely to have significant effects on the environment, and that therefore no EIA is required. See *Gillespie*, per Pill LJ at [37], [40], [41] and per Laws LJ at [46]; *Jones*, per Dyson LJ at [38], [39], [53], [55]; *Catt*, per Pill LJ at [27], [33], [34]; *Loader*, per Pill LJ at [43], [47]; *Champion*, per Lord Carnwath at [51] – [53]; all cited above.

91. The difficulty facing the Defendant in this case was that there was very limited evidence as to the presence and nature of contamination from BSE-infected carcasses at the Site; the hazards which any such contamination might present for the homes and gardens to be constructed on the Site; and any safe and effective methods of detecting, managing and eliminating any such contamination and hazards.

92. The developer commissioned risk assessment and remediation reports which he submitted to the Council in support of his application for planning permission. None of these reports made any reference to the Site's former use for BSE-infected animal carcass disposal from 1998, nor any risk of contamination from such use. The authors of the reports were not even aware of this former use. In my view, the reports were very inadequate in this regard. The information was available in the public domain, the BSE crisis had occurred within living memory, and it was well-known in the locality, as demonstrated by the objections made by the Claimant and others to the planning application.

93. CJD emerged in Britain in the 1990's. The scandal of disease transmission from BSE-infected cattle to humans, and the perceived failures by public bodies and government to prevent and control it in time, led to a public inquiry (chaired by a High Court Judge), which reported as recently as 2000. During this time, there was substantial media coverage of the disease, the extensive slaughter of cattle and the restrictions on the consumption of beef. It was so well known among the public that it acquired a colloquial nickname – "mad cow disease". The media coverage was illustrated by the

contemporaneous BBC news report about the dangers of the Site, obtained online by Dr Meaden.

94. When Dr Meaden expressed a "major concern" to CET and the Council about the absence of a thorough investigation into the risks posed by the rendering of BSE-infected cattle at the Site, Mr McNaughton, Principal Environmental Scientist at CET, replied stating that it was reasonable to presume that the risks from acquiring CJD from the land or water in or under the Site was negligible because CJD could only be transmitted to humans by injecting or consuming the prions which have the defective proteins that cause CJD; the laboratory tests from the trial pits did not indicate any microbiological problem at the Site; and given the geology of the Site, any past contamination would be significantly diluted.

95. Mr Honey relied upon Mr McNaughton's email as the basis for his submission that the Defendant was entitled to dismiss the concerns raised by Dr Meaden and the risk of CJD as negligible. I do not accept that submission for the following reasons.

96. First, it was a brief email, not a full and considered report, and it was unsupported by any scientific research. CET did not reply to the further response from Dr Meaden, which specifically identified reasons why investigation was required at the Site, saying:

> "It must be remembered that concern about the use of this plant for rendering cattle was of national importance at the time and many people gave lucid statements at the inquiry as to why disposal of wastes from the mill onto adjacent fields was a dangerously risky solution. I have spent some time reviewing online articles, papers, etc on prions and contrary to what Mr McNaughton says there is ample evidence that prions can survive for a lengthy time period and that they may have possibly dangerous consequences. Here are three examples:
>
> "A University of California research team, led by Nobel Prize winner Stanley Prusiner, has provided evidence for the theory that infection can occur from prions in manure. And, since manure is present in many areas surrounding water reservoirs, as well as used on many crop fields, it raises the possibility of widespread transmission." (See https://clubalthea.com/2018/02/09/infected-waterfrom-animal-manure-prion-disease-and-parkinson/)
>
> "In 2015, researchers at The University of Texas Health Science Center at Houston found that plants can be a vector for prions. When researchers fed hamsters grass that grew on ground where a deer that died with chronic wasting disease (CWD) was buried, the hamsters became ill with CWD, suggesting that prions can bind to plants, which then take them up into the leaf and stem structure, where they can be eaten by herbivores, thus completing the cycle. It is thus possible that there is a progressively accumulating number of prions in the

> environment." (See https://phys.org/news/2015-05-grass-infectious-prions.html)
>
> "Bovine spongiform encephalopathy (BSE), commonly known as mad cow disease, and other infectious diseases caused by prions have long been thought to spread almost exclusively by ingestion and direct inoculation. That assumption has now been challenged by results of a study by Haybaeck and colleagues, who conducted a series of experiments demonstrating airborne transmission of the prion disease, scrapie, to mice." (See http://www.upmc-cbn.org/report_archive/2011/cbnreport_0121 2011.html)
>
> It may also [be] worth looking at Kovacs G.G. (2014) Neuropathology of Neurodegenerative Diseases for accounts of the transmissity and infectivity of prions, and an extensive *Prion Exposure Protocol* that is detailed at http://ehs.ucsf.edu/prion-exposure-protocol
>
> My reading of the situation is that the utmost caution needs still to be taken when dealing with situations such as that existing at Thruxted Mill …"

97. Secondly, the absence of evidence of BSE-related contamination in CET's Ground Investigation and Generic Risk Assessment was far from conclusive. As the Council's Environmental Health Practitioner rightly pointed out in her email of 7 March 2018, CET's Generic Risk Assessment was a "basic, initial document" which itself acknowledged that it "is by no means exhaustive and has been devised to provide an initial indication of potential ground contamination". The Summary in the report said that "a comprehensive site investigation and risk assessment would ultimately be required". The Environment Agency also considered the report to be only "an initial indication" and they would be expecting much more detail in future documents. I also observe that the entire property is more than 7 acres in size, and only 8 trial pits were assessed. Moreover, it was not confirmed that BSE-related contamination could or would have been identified by the tests which were carried out for the other contamination risks which the reports had identified. Indeed, Mr McNaughton himself said "there are no mechanisms for detecting CJD in the soil at this moment".

98. Thirdly, although it would have assisted Mr Honey's case if the Defendant had discounted Dr Meaden's concerns and any risk of CJD as negligible, this was not in fact the approach which was adopted either by the Defendant or the Council. Unlike Mr McNaughton, they adopted a precautionary approach, accepting that there was a risk arising from the former use of the Site to dispose of BSE-infected carcasses which needed to be assessed, though their knowledge and understanding of the risk was limited by the absence of evidence.

99. When the Planning Officer received Dr Meaden's first email, she consulted the Environmental Health Practitioner who advised in an email dated 7 March 2018 that "the concerns raised are valid but it appears that the relevant authorities are aware of the limitations of the report provided at this stage, and are therefore requiring, and

expecting, much more detailed information prior to any works progressing on site." (*emphasis added*)

100. The Environmental Health Practitioner advised that steps should be taken to investigate and report potential contamination related to the past use of the Site for BSE-infected cattle, saying:

> "I have requested the application of conditions EO23 and EO26 in terms of contamination, and this requires full investigation and reporting before and after any works have been carried out. I would, of course, be expecting full discussion of any potential contamination related to the past use of the site in these reports, including prions associated with BSE/CJD (I mention this in particular as it has been highlighted as a particular concern by some objectors). I would expect that reference would be made to the DoE Industry Profile for Animal and Animal Products Processing Works also."

101. The Planning Officer's OR to the Planning Committee advised Members that "the extent of contamination on the site is relatively unknown although given the previous uses of the site the extent of contamination will be significant". She also advised that Environmental Services "require further reports to establish potential contamination of the site including prions associated with BSE/CJD".

102. The Council's screening opinion, dated 28 May 2019, accepted the potential risk of BSE-related contamination of the Site, both for workers during the construction process and future residents. It stated that "[s]pecialist advice will be sought to consider the remediation of Prions associated with CJD/BSE". Thus, it did not adopt Mr Honey's suggestion that, even if the soil was contaminated by the BSE-infected carcasses, the solution was just to dig out the top layer of soil and replace it, as CET recommended for other forms of soil contamination. Nor did the Defendant.

103. In its Written Statement, attached to the screening opinion, under the heading "Potential contamination issues", the Defendant referred to Mr Buxton's ("the third party") representations concerning links between ground contamination and CJD infection, and the need for detailed specialist investigation and assessment. In response, the Defendant did not refer to Mr McNaughton's email (which he had), and he did not suggest that Mr Buxton's concerns should be discounted because the risks of infection were negligible and could be discounted. Instead, he accepted the need for further investigation of potential contamination of the soil/groundwater, and a remediation scheme to bring it up to the standard required for residential use, which he considered should be achieved by way of conditions. He said:

> "On the recommendation of both parties [the Council's Environmental Protection team and the Environment Agency], the Council has agreed to impose a series of stringent environmental conditions to ensure that development shall not begin until a scheme to deal with contamination of land and groundwater has been submitted and approved by the local planning authority and until measures approved in the scheme have been implemented; if unexpected contamination is found

> during the investigation [a] risk assessment must be undertaken and where necessary a remediation scheme must be prepared …"

104. Similarly, under the heading "Potential harm to human health", the Defendant summarised Mr Buxton's representations regarding the risk of BSE contamination. In response, the Defendant did not refer to Mr McNaughton's email, and he did not suggest that Mr Buxton's concerns should be discounted because the risks of infection were negligible and could be discounted. Instead, he accepted the need for further investigation of potential contamination of the soil/groundwater, and a remediation scheme to bring it up to the standard required for residential use. He said:

> "The application site currently contains the remnants of Thruxted Mill which was an animal rendering processing facility and has been vacant for over 10 years. The third party, referring to representations submitted by a local doctor, contends that the redevelopment proposal represents a risk to human health and BSE contamination arising from its use as one of four UK sites for the disposal of BSE cattle. The Council contends that the risk to human health will be diminished through the remediation of contamination on the site, which is a positive effect. It acknowledges that there are risks during the construction process in respect of contamination and prions associated with BSE/CJD as a result of its former use but considers that the proposed conditions 21 & 22, which require the remediation of all contamination on the site, will bring it up to a standard suitable for residential use, would provide appropriate mitigation.
>
> The Secretary of State has considered fully the third parties representations, the comments and advice of the Council's Environmental Protection Team and the conditions proposed by the local planning authority to manage, mitigate and safeguard the development and minimise any environmental impacts. He is, therefore, satisfied that the proposed measures would safeguard the health of prospective residents of the development."

105. Unfortunately, although the Defendant correctly recognised that the issue of BSE-related contamination required further investigation, assessment, and remediation of any contamination found, he then applied the wrong legal test and thus committed the errors identified in *Gillespie* at [41] and [46].

106. There was a lack of any expert evidence and risk assessment on the nature of any BSE-related contamination at the Site, and any hazards it might present to human health. The measures which might be required to remediate any such contamination and hazards had not been identified. This was a difficult and novel problem for all parties to address. It was acknowledged by the Council in its screening opinion, acting on the advice of the Environmental Health Practitioner, that specialist advice would be needed to consider the remediation of prions associated with CJD/BSE. Therefore condition 21 merely referred to the requirement that a written method statement for

the remediation of land and/or groundwater would have to be agreed by the Council without any party knowing what the remediation for BSE-related infection might comprise. The Defendant adopted the Council's approach in his screening opinion. But because of the lack of expert evidence, the Defendant was simply not in a position to make an "informed judgment" (per Dyson LJ in *Jones*, at [39]) as to whether, or to what extent, any proposed remedial measures could or would remediate any BSE-related contamination. It follows that when the Defendant concluded that "he was satisfied that the proposed measures would satisfactorily safeguard and address potential problems of contamination" and that "the proposed measures would safeguard the health of prospective residents of the development", he was making an assumption that any measures proposed under condition 21 would be successful, without sufficient information to support that assumption. As Pill LJ said in *Gillespie*, at [41], "the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in condition VI could be treated, at the time of the screening decision, as having had a successful outcome". Whilst "not all uncertainties have to be resolved" (per Dyson LJ in *Jones* at [39]), on the facts this case was not one "where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence" (per Pill LJ at [34]). As the Site was proposed for residential housing, a higher standard of remediation would be required than if it were intended to adapt it for an industrial use, or merely to decontaminate it and return it to woodland (some sites will never be suitable for residential housing, because of industrial contamination).

107. Mr Honey relied upon the advice given to the Defendant by the Environment Agency, which advised that conditions requiring risk assessment and remediation proposals would be sufficient to mitigate against potential adverse impact on the groundwater. The Environment Agency previously advised the Council that without conditions "the proposed development poses an unacceptable risk to the environment". I do not consider that the advice from the Environment Agency justified the approach adopted by the Defendant. It confirmed the view of the Environmental Health Practitioner and the Council that further investigation and assessment was needed. It did not provide the Defendant with any evidence that there was no risk of adverse environmental impacts, nor that mitigating measures had as yet been identified which would satisfactorily overcome any such risk. Moreover, it advised that its remit was limited to the protection of the soil and groundwater, and the impact on human health – crucial to this case – was a matter for the Environmental Health Officer. It was not the Environment Agency's responsibility to advise the Defendant on the legal requirements for undertaking a screening opinion, in the light of *Gillespie* and the other authorities, and on my reading of the email, it did not purport to do so.

108. Finally, I have some concerns about the final paragraph of Mr Carpenter's email to his manager, dated 6 August 2019, whilst reminding myself that this was not part of the formal decision. He said:

> "I acknowledge that this case is quite finely balanced. …I am, however, not convinced by what would be achieved by issuing a positive Screening Direction as all the issues have been thoroughly investigated in detailed studies/assessments submitted as part of the planning application process, other than giving the objectors "another bite of the cherry"."

Plainly he was mistaken in believing that the issue of BSE contamination had been thoroughly investigated in the reports submitted with the planning application, as they were all completed before the developer became aware that BSE-infected carcasses had previously been disposed of at the Site. If this view informed his decision-making, it was a significant error.

109. Further, on my reading, he appears to suggest that, in a case where the question whether the proposed development was likely to have significant effects on the environment was "finely balanced", an EIA would be an unnecessary extra step if the issues were "thoroughly investigated" outside the EIA procedure. However, in *Champion* Lord Carnwath warned against using analogous procedures instead of EIA as to do so "would subvert the purposes of the EIA Directive for that to be conducted outside the procedural framework (including the environment statement and consultation) set up by the Regulations" (at [45]). In this case, the general public does not have the right to be consulted on the developer's reserved matters applications under conditions 21 and 22, and so the EIA procedure would provide the only opportunity for local people to be consulted on proposed measures relating to BSE contamination at this Site, as they were not set out in the reports submitted with the planning application. So, contrary to Mr Carpenter's belief, an EIA procedure would not provide objectors with "another bite of the cherry".

110. It is not entirely clear what Mr Carpenter meant by the case being quite "finely balanced" as he did not set out the factors which he found to be in favour of an EIA, but it is important to bear in mind that Lord Carnwath also advised in *Champion* that "[a]pplication of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA." (at [51]).

111. In conclusion, I consider that the Defendant made the same error as in the *Gillespie* case, and thus his decision that EIA was not required was vitiated by a legal error. In the light of this conclusion, it is not necessary for me to go on to decide the Claimant's alternative grounds alleging a failure to take into account a material consideration and irrationality. The Defendant's decision in this case has important consequences – it is not merely a technical or procedural error – and therefore it must be quashed.