Neutral Citation Number: [2021] EWHC 1059 (Admin)

Case No: CO/1327/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

The Queen on the application of MARK KEIR	**Claimant**
- and –	
NATURAL ENGLAND	**Defendant**
-and-	
(1) MORGAN SINDALL CONSTRUCTION & INFRASTRUCTURE LIMITED, BAM NUTTALL LIMITED, and FERROVIAL AGROMAN (UK) LIMITED **(2) HIGH SPEED TWO (HS2) LTD**	**Interested Parties**

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Charles Streeten (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Leon Glenister (instructed **by Browne Jacobson LLP**) for the **Defendant**
James Strachan QC and Victoria Hutton (instructed by **Government Legal**) for the 2nd **Interested Party**
The 1st Interested Party was not represented and did not appear

Hearing date: 23rd April 2021
- -

Approved Judgment

Mr Justice Holgate :

Introduction

1. The High Speed Rail (London - West-Midlands) Act 2017 ("the 2017 Act") authorises the construction of the HS2 high speed railway. High Speed Two (HS2) Limited, the second interested party ("IP2") is the "nominated undertaker" under the 2017 Act. The first interested party, previously described as Fusion and Murphy Joint Venture, is the contractor for the enabling works for the central section of the phase 1 route.[1]

2. This case concerns a small section of the route which crosses an area of ancient woodland forming part of Jones Hill Wood, near Wendover, Buckinghamshire. The project requires 0.7ha of land used for this purpose.

3. The Wood contains a number of different species of bat which are "European protected species" under regulation 42 of and Schedule 2 to the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) ("the 2017 Regulations"). Under regulation 43 it is an offence *inter alia* to deliberately capture, injure or kill any wild animal of such a species, or to deliberately disturb, or damage or destroy a breeding site or resting place of such an animal.

4. By regulation 55 a licence may be granted for any of the purposes set out in subparagraph (2), including "imperative reasons of overriding public-interest, including those of a social or economic nature." Anything done in accordance with such a licence is not an offence under *inter alia* regulation 43 (see regulation 55(3)). Such a licence is often referred to as a derogation licence.

5. The construction of the railway through the Wood requires a number of trees to be felled. Some 19 of those trees have "potential roosting features" with varying degrees of suitability for bats.

6. The 2017 Act does not disapply the licensing regime under the 2017 Regulations or grant any licence for the purposes of regulation 55 in relation to the works authorised to be constructed. Accordingly, IP1 had to make an application for a regulation 55 licence in relation to certain works in the Wood, including the felling of the 19 trees. It did so on 18 December 2020.

7. The relevant licensing body for the purposes of regulation 55 is the defendant, Natural England ("NE") (pursuant to s. 78 of the Natural Environment and Rural Communities Act 2006).

8. On 3 February 2021 NE notified IP1 that it would not grant a licence at that stage because it was not satisfied that the information provided met the third of three statutory tests, namely that the actions to be authorised would not be detrimental to maintaining certain bat species at a "favourable conservation status" ("FCS"). They indicated the nature of the further information that should be considered.

[1] On 21 April the Court was informed that this joint venture does not exist as a legal entity. The first interested party is collectively (1) Morgan Sindall Construction & Infrastructure Limited, (2) BAM Nuttall Limited and (3) Ferrovial Agroman (UK) Limited. An appropriate order substituting the correct parties has been made.

9. On 5 March 2021 IP1 submitted to NE a revised application with additional information. On 25 March 2021 NE issued a further decision to the effect that it was satisfied that the FCS test had been met.

10. On 30 March 2021 NE granted the licence to IP1 which is the subject of this proposed claim for judicial review. It is a detailed document which incorporates a number of other documents approved by NE. The licence authorises the works and activities described in the Annex WML-OR58(B). They include inspection of the 19 trees before any works are carried out and the loss of any bat roosts actually present in those trees. The licensee must comply with *inter alia* the Jones Hill Wood Method Statement and the work schedule (see condition 7). Condition B2 in Annex B also requires adherence to the approved work schedule. The schedule requires felling to be carried out in April. Pre-felling surveys must be carried out under condition 12.

11. Condition B5 requires that before any destructive works may be undertaken inspections must be carried out to search for any bats that may be present. All searches and felling must be carried out, or directly supervised by, a named ecologist or accredited agent. Any bat discovered must be relocated to a suitable roost or to a suitable foraging/commuting habitat.

12. Condition B13 prohibits licensed activities which affect *inter alia* maternity and habitation roosts while any such roosts are in use for those purposes. A "maternity roost" is defined in condition B27 as one where female bats give birth and rear their pups to independence. Condition B2 prohibits felling until "after temperatures have not dropped below 8ºC for 4 days." The object of that condition is to prohibit felling until the point is reached when bats emerge from hibernation.

13. Condition B19 requires the provision of a number of defined compensation features under the direct supervision of the named ecologist or accredited agent. They include 24 replacement roost features (specific designs of "bat boxes") and the planting of 3.2ha of woodland habitat and fruit trees on an adjacent site. Condition B24 requires maintenance and monitoring of the mitigation and compensation measures until 2031 together with annual reports to NE (see condition B25).

The proceedings in the High Court

14. The claimant, Mark Keir, is a member of a group of ecologists and citizens opposed to the HS2 project, known as "Earth Protectors". Some of the group were camping in that part of the wood which is planned to be felled until IP2 regained possession in October 2020.

15. On 16 February 2021 the claimant's solicitors wrote to NE to ask that copies of the licence application and documentation be provided to them before the grant of any licence so that the group's ecologists could review the material and raise any concerns they might have before any final decision was made. NE replied on 19 February 2021 stating that they do not follow that practice in other cases and would not do so here. I note that Parliament has not imposed any requirement for public consultation in relation to applications for licences under regulation 55 and that the claimant raises no complaint about the procedure followed.

16. Once the licence was granted on 30 March 2021, the claimant's solicitors requested the relevant papers from NE. NE provided them by late morning on the following day. The claimant's legal team and experts studied the papers over the Easter weekend.

17. On Tuesday 6 April the claimant's solicitors wrote to NE to set out their concerns at that stage. They noted that the assessment accepted by NE had proceeded on the basis of a worse case assumption that the area to be felled included one maternity roost for the barbastelle bat. The claimant's group had serious concerns about the efficacy of the mitigation to be provided and its adequacy to achieve compliance with the FCS test. The letter referred to the loss of that assumed roost and indicated that a challenge might be made to the lawfulness of the licensing decision on that basis. However, the authors accepted that "NE may have been provided with confidence in its decision by proven success of these techniques elsewhere." They asked to see evidence that bat boxes can be used to provide compensation for the loss of a barbastelle breeding site. The letter did not indicate any of the other grounds of challenge now pursued. No pre-action protocol letter was sent.

18. NE responded on Friday 9 April expressing confidence in the adequacy of the mitigation and compensation measures which would be provided to maintain the conservation status of any species of bat affected by the works at the Wood. The response also pointed out that barbastelle bats may use several maternity roosts, each for a few days at a time, and that the loss of one roost feature within a network of woodlands had been considered in that context. However, the response did not refer to any evidence of the kind requested on behalf of Mr Keir.

19. Over the following weekend, the claimant obtained advice and grounds of challenge were drafted. The claim was served on NE on 12 April. The grounds range much more widely than the points raised in the letter of 6 April. The claim was accompanied by expert reports from two ecologists, Mr. Dominic Woodfield and Mr. Rob Mileto.

20. The claim was also accompanied by an urgent application in form N463. The interim relief sought included an order for a rolled up hearing, an injunction prohibiting the carrying out of any works or activities under the licence, and an order suspending the licence. The claimant's solicitors accepted that it would be appropriate for a hearing to be held to deal with these matters. NE and IP2 opposed the application. IP2 also requested a hearing. NE submitted that the issue of whether permission be granted should be dealt with initially on paper.

21. It is to be noted that paragraph 3(b) of the Statement of Facts and Grounds accepted, rightly in my judgment, that a key issue in determining whether the interim injunction should be granted is whether the licensed works would result in environmental damage undermining the "favourable conservation status of a rare species protected by the Habitats Regulations", namely the barbastelle bat. That is relevant to any attempt to justify the injunction on the grounds of the preservation of the *status quo*.

22. The applications came before Lang J. on 16 April 2021. After considering the matters on the papers, she ordered that permission be dealt with at a rolled up hearing to be listed in the week commencing 24 May 2021 or as soon as possible after 8 June 2021, with a time estimate of 2 days. The judge also granted an injunction restraining the carrying out of "works or other activities" within the licensed area until the

determination of the claim or future order. It became common ground between the parties at the hearing that (a) this went beyond the scope of the order that had been sought and (b) that there was no legal justification for any interim order in the present claim to go beyond restraining works or activities pursuant to the licence which the claimant seeks to impugn.

23. It appears that the judge made her order initially without having received written submissions by counsel for IP2. She subsequently had the opportunity to consider that document and issued a further order in the same terms, but with additional reasoning which addressed the submissions for IP2. The order is said to have been issued at 5:18pm on 16 April, just before the weekend.

24. The judge also gave liberty to apply on 2 days' notice for the variation or discharge of the order. On Monday 19 April IP2 made an urgent application for the order of Lang J to be varied on the grounds that (a) the felling of trees pursuant to the licence needed to take place before the end of April 2021 and would take 3-4 days and (b) if the works were not carried out until October, after the maternity season is over, there would be serious and costly delay to this part of the HS2 project.

25. The application came before me on the papers on 19 April, at which stage I indicated provisionally the directions I was minded to make so that the parties could respond. In the light of their representations I made an order on 20 April which provided for a 1 day hearing to take place on 23 April to deal with the issues of whether the injunction should be continued or discharged and whether permission should be granted to apply for judicial review.

26. The claimant's Solicitors suggested in correspondence that IP2's application had failed to give 2 days' notice and/or that I was prevented by the terms of the order made by Lang J from making the order I did go on to make on 20 April. A request for the solicitors to explain and justify their stance did not cast any real light on the matter. In my view the standard language of paragraph 7 of the order of Lang J simply required 2 days' notice to be given before the court could consider and determine an application to vary or discharge that order. It did not mean that either IP2 had to give notice by letter or email 2 days before filing its application, or that a judge could not make any order on the application, such as the giving of directions for a hearing, until 2 days had elapsed from the filing of the application. The building in of either of these delays into the procedural timetable would have served no real purpose. They would also frustrate the court's ability to respond urgently to an application to vary an order, which itself had been made in response to an urgent application and without the hearing which the claimant had acknowledged to be appropriate. The stance adopted on behalf of the claimant appeared to be purely tactical, just as the initial reluctance that the injunction, if continued, should be restricted in scope to that originally sought by the claimant. It is difficult to see how such conduct could comply with CPR 1.3.

27. I acknowledge that the claimant's solicitors did also raise a concern as to whether the hearing I proposed to order for 23 April would allow sufficient time for preparation. However, the claimant was able to file a detailed skeleton argument and three further witness statements all within the timetable set. Fortunately, Mr. Charles Streeten, who appeared on behalf of the claimant, confirmed at the hearing on 23 April that there was no objection to the matter going ahead that day and that his clients had not been prejudiced by the timescale.

28. I also recognise that the timetable indicated by me on 19 April, and ordered on 20 April, was challenging for the parties. But it turns out that the parties did co-operate successfully with each other so as to comply with the order. I appreciate that substantial efforts had to be made by each of the legal teams and those providing evidence or instructions during the week commencing 19 April. I am grateful for this and for all the help received by the court by way of both written material and oral submissions.

29. The help I received contrasts with what was put before Lang J. The claimant's main bundle contained 472 pages and a supplementary bundle contained a further 514 pages. Much of the documentation was of a highly technical nature and in sequence which was difficult to follow. A good deal of time and assistance was needed to navigate this material during the hearing. I had the benefit of very focused and carefully cross-referenced skeletons. The same cannot be said of the Statement of Facts and Grounds put before Lang J, which did not identify the key passages in the application and decision-making documents upon which the legal submissions depended. For example, the list of essential reading referred to 120 pages of such material *en bloc*, without identifying any specific passages and so was of no assistance. This was a serious problem in the present case. A key document for the submissions of all parties at the hearing, the "Method Statement Assessment: Additional Notes", which contained a good deal of the explanation for NE's final decision, and is over 40 pages long, was not mentioned at all in either the Statement of Facts and Grounds or the list of essential reading. It was simply buried within the Supplementary Bundle. NE and IP2 have expressed their concern that these factors might have affected Lang J's consideration of the applications before her.

Statutory framework and legal principles

30. Regulation 43 of the 2017 Regulations provides (so far as is material) :-

> "(1) A person who—
>
> (a) deliberately captures, injures or kills any wild animal of a European protected species,
>
> (b) deliberately disturbs wild animals of any such species,
>
> (c) deliberately takes or destroys the eggs of such an animal, or
>
> (d) damages or destroys a breeding site or resting place of such an animal,
>
> is guilty of an offence.
>
> (2) For the purposes of paragraph (1)(b), disturbance of animals includes in particular any disturbance which is likely—
>
> (a) to impair their ability—
>
> (i) to survive, to breed or reproduce, or to rear or nurture their young; or

> (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
>
> (b) to affect significantly the local distribution or abundance of the species to which they belong."

31. Regulation 55 provides (so far as is material): -

> "(1) Subject to the provisions of this regulation, the relevant licensing body may grant a licence for the purposes specified in paragraph (2).
>
> (2) The purposes are—
>
> (a) ….; (b) ….; (c) ….; (d) ….
>
> (e) preserving public health or public safety or other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
>
> (f) ….; (g) ….
>
> (3) Regulations 43 (protection of certain wild animals: offences), 45 (prohibition of certain methods of capturing or killing wild animals) and 47 (protection of certain wild plants: offences) do not apply to anything done under and in accordance with the terms of a licence granted under paragraph (1).
>
> ……..
>
> (9) The relevant licensing body must not grant a licence under this regulation unless it is satisfied—
>
> (a) that there is no satisfactory alternative; and
>
> (b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range."

32. Accordingly, three tests had to be met to NE's satisfaction before it could grant the licence dated 30 March 2021:-

> (1) the demonstration of one of the purposes in regulation 55(2), in this case "imperative reasons of overriding public importance, including those of a social or economic nature and beneficial consequences of primary importance for the environment";
>
> (2) the absence of a "satisfactory alternative" to the proposal (regulation 55(9)(a));

> (3) the actions authorised will not be detrimental to the maintenance of the population of the relevant species at a "favourable conservation status in their natural range" (regulation 55(9)(b)).

33. NE was satisfied in relation to tests (1) and (2) by the time of their decision on 3 February 2021. The claimant raises no legal challenge in relation to either of those two aspects. NE was not satisfied with the information provided initially to address test (3).

34. It is solely the decision of NE on 30 March 2021 that it was satisfied on test (3), after taking into account further information, which has given rise to this legal challenge. Even then, the claimant's complaint is concerned with what Mr Streeten described in paragraph 2 of his skeleton as a narrow issue: the licence involves the destruction of maternity roosts of a rare European protected species, the barbastelle bat, "*without certainty* that this will not be detrimental to the maintenance of the population of the species at a favourable conservation status." Mr Streeten confirmed that the claimant raises no challenge in relation to the way in which the decision-making by NE or the licence deals with other bats as European protected species.

35. It is agreed that the barbastelle bat is a rare species included on the IUCN Red List for British terrestrial mammals. In his first report at paragraph 31 Mr. Woodfield says that the barbastelle is one of the rarest mammals in the UK. The population has been estimated to be as low as 5,000. Few maternity roosts are known in the UK, none in Buckinghamshire and only one in Berkshire.

36. The precautionary principle enshrined in Article 191(2) of the Treaty on the Functioning of the European Union is relevant to the application of regulation 55(9)(b). Thus, where, in the light of the best scientific knowledge in the field, there is a reasonable doubt that a human activity will not have adverse effects on the conservation of habitats and protected species, that activity cannot be authorised (see para. 63 of the Opinion of Advocate General Oe in *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo - Kainbury* [2020] CMLR 1 otherwise referred to as the *Tapiola* case). This principle is implicit in the requirement that it be demonstrated that a derogation will not be "detrimental" to the FCS of a species (*ibid*). It explains what was meant by the CJEU in the passage at [66] cited by Mr Streeten:-

> "In that context, it must also be noted that, in accordance with the precautionary principle enshrined in Article 191(2) TFEU, if, after examining the best scientific data available, there remains uncertainty as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation."

37. Mr Streeten agreed that "certainty" in that passage cannot mean "absolute certainty" for obvious reasons. Instead, as the Advocate General explained, it refers to the absence of reasonable doubt. Indeed, Mr Streeten agreed that the court should proceed on the basis that where the precautionary principle is engaged, the test requires that there be no "reasonable scientific doubt" about the relevant detrimental effect (see Jay

J in *Wealden District Council v Secretary of State for Communities and Local Government* [2017] EWHC 351 (Admin) at [44]).

38. Reg 3(1) of the 2017 Regulations relies on the definitions of "conservation status" and "favourable conservation status" contained in Article 1(i) of Council Directive 92/43/EEC:-

> "(i) *conservation status* of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;
>
> The *conservation status* will be taken as 'favourable' when:
>
> - population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
>
> - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
>
> - there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis."

39. It is important to note that regulation 55(9)(b) focuses on the conservation of the *species*, not individual members of that species. That has to be so because in an appropriate case a licence may authorise even the killing of a wild animal belonging to a protected species (see regulation 43(1) (a)).

40. It is also plain that the identification of the "conservation status" of a species is itself a multi-factoral judgment about the sum of the influences acting on the species in question, affecting its distribution and populations in what is judged to be a long-term period. Whether that status is favourable is another multi-factoral judgment to do with whether the species is maintaining itself as a viable component of its habitat in the long term, whether the natural range of the species is being or likely to be reduced in the foreseeable future, and whether there is and will continue to be a sufficiently large habitat to maintain populations in the long term. Similarly, regulation 55(9)(b) refers to the maintenance of the population of the species at a favourable conservation status *in their natural range.* These tests or considerations are concerned with a much broader perspective than the effects of the development or an activity on the individual specimen or specimens of a protected species on a particular site.

41. Given that it is agreed that none of these considerations have to be established in any given case with absolute certainty, Mr. Streeten accepted, rightly in my judgment, that it is relevant for a decision-maker to consider degrees of likelihood or confidence when evaluating these matters. However, I agree with Mr. Streeten that that approach must accord with the precautionary principle. In other words, levels of confidence, or likelihood, or risk, may be judged to be acceptable if the decision-maker does not consider that there is a reasonable scientific doubt about whether an action authorised by a licence would be detrimental to the maintenance of the population of a species at

a "favourable conservation status in their natural range." On the other hand, as Mr. Streeten put it crisply, an expression of likelihood, such as the balance of probabilities, should not be *substituted* as a decision-making test for the "absence of reasonable scientific doubt" required by the precautionary principle.

42. As the Advocate General in the *Tapiola* case indicated, the word "detrimental" in Article 16(1) of the Directive (or regulation 55(9)(b) of the 2017 Regulations) is all of a piece with the precautionary principle, and thus with the analysis set out above. The term has to be read together with all the remaining language of the provision. Regulation 55(9)(b) requires an overall judgment to be made comprised of a number of elements, or, as Mr. Glenister put it on behalf of NE, building blocks. I also accept Mr. Glenister's submission, which Mr. Streeten did not dispute, that the judgment required by regulation 55(9)(b) involves consideration not just of the impact of the activities to be authorised, but also the mitigation and compensation measures to be secured by the licence.

43. It is well-established that the court affords an enhanced margin of appreciation to judgments of a scientific expert deciding issues of the kind raised by regulation 55(9)(b). Furthermore, a challenge to the rationality of a judgment on the application of planning or environmental controls faces a high hurdle (see e.g. *Newsmith Stainless Limited v Secretary of State for the Environment, Transport and Regions* [2017] PTSR 1126*; R (Mott) v Environment Agency* [2016] I WLR 4338; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [170] to [179]; *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [177]; *R (BACI Bedfordshire Limited) v Environment Agency* [2020] Env L.R. 16 at [98]-[99]). In the present case, the reasoning of NE challenged by the claimant involved evaluative judgment and matters of degree, dependent upon expert technical opinion.

44. The principles determining when fresh evidence and expert evidence may be received in proceedings for judicial review are also well-established (see e.g. *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649). Although the Statement of Facts and Grounds proffered expert evidence in this case in order to help the court understand technical matters (see para. 49), in fact those documents were largely directed at challenging the merits of the judgments reached by NE and advancing alternative expert opinions. Mr. Streeten said that they would be admissible to support the attack on the rationality of certain of NE's judgments. But where there is room for reasonable differences of opinion, including those of the decision-maker, a rationality challenge cannot succeed (*Law Society* case at [41]). As Lindblom LJ stated in *Plan B Earth* at [180] "the court's reviewing role does not stretch to determining disputed issues of technical, expert evidence."

45. There is also common ground on the approach which should be taken by the court to the grant of any injunction (*R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) at [6] to [7] and [12]; *Packham v Secretary of State for Transport* [2020] EWHC 829 (Admin) at [116] to [117]). First, it is necessary for the claimant to show a real prospect of success on one or more of his legal grounds of challenge. It is accepted by the claimant that if that test is not satisfied that the injunction must be discharged. Second, if that test is met then the court should go on to consider the balance of convenience which includes the public interest issues raised by the effect of the licence on the conservation status of the barbastelle bat and the effect of continuing the injunction on the HS2 project.

46. It is firmly established that decision letters of Planning Inspectors are to be read fairly and with an appropriate degree of benevolence when seeking to understand how a decision was reached. They must be read as a whole and in the context of the material and issues with which the parties to an appeal are taken to be familiar. They must not be read in an overly forensic or legalistic way (see e.g. *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2017] PTSR 1283 at [19]; *St Modwen Developments Limited v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [6] referring to *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at [41] and [62]-[64]). In that context the Inspector is under a statutory obligation to give reasons for his decision.

47. Here it is common ground that NE was under no general duty to give reasons. The legislation for the grant of derogation licences does not include any requirements for public involvement. There is no opportunity for representations to be made. NE is not deciding issues as between several parties. Instead, it is reaching its own independent determination as to whether to grant a licence. There is no reason why any more rigorous approach should be taken than that summarised in [46] above.

48. There was no dispute about the relevance of the principles in [46]. Indeed, Mr. Streeten went a little further. He submitted that the line of cases which includes *Jones v Mordue* [2016] 1 WLR 2682 should be applied by analogy. The decision-maker in NE should be treated as being familiar with the statutory framework, the precautionary principle and the legal and policy principles applicable to FCS (including NE's policy guidance) and to have taken them into account and applied the relevant tests, unless there is a sufficient, positive contra-indication. I agree.

49. It became clear during the hearing that there is no real disagreement about the principles to be applied to the issues now before the court as summarised above. The dispute between the parties concerns the application of these principles. But the principles are so important to the determination of those issues that it has been necessary for them to be set out.

The context for the decision being challenged

50. The barbastelle is said to have a wide distribution and is thinly spread across southern and central England. Mr. Woodfield states that the species requires a complex mosaic of habitats, in particular large areas of mature woodland or well-connected smaller woodland patches and riparian habitat. Mature trees with cracks and loose bark provide important roosting opportunities. These particular bats prefer pastoral landscapes with deciduous woodland, wet meadows and water bodies, such as woodland streams and rivers. They prefer dead trees with holly understorey. In summer, breeding females move regularly between a large number of tree roosts (see paras. 35 to 37).

51. The court was informed that the site in question does not presently contain water bodies, but the compensation required by the licence includes the creation of such features.

52. Following NE's decision on 3 February 2021 IP1 submitted a revised Application Method Statement and Mitigation Strategy ("AMSMS"). Appendix 10, "Response to NE's Further Information Request", records that barbastelle breeding sites are often

associated with transient features such as lightning strikes and tear outs. Such features are "infrequently present" in the wood in question, given the dominance of beech trees in good condition. Appendix 2 referred to the suboptimal quality of the wood for barbastelle, noting a lack of thick understorey and few dead trees.

53. The home range for a barbastelle colony, or the colony sustenance zone, is given as 6km. IP1 obtained records of any sightings within 6km. There was one 2km away from the Wood in 2016. The Environmental Statement for the project prepared in 2013 noted there were no records within 5km of the HS2 line and none in the Wendover area during surveys in 2013. No barbastelles were found within 3km of the Wood according to the 2020 surveys carried out by SES. Another ecologist (Ecotech) found a Barbastelle "day roost" in September 2020 in an old oak outside the statutory limits for the HS2 scheme on the eastern edge of the woodland. This was the outcome of surveys carried out in "late summer 2020" and on 29 September 2020. One barbastelle was seen.

54. Within the relevant part of the HS2 limits there are a few hundred trees. An initial ground assessment of all those specimens was made to identify those trees, 37 in number, which merited further survey. The remainder had only negligible potential for bat roosts. According to Appendix 1 to the AMSMS, of the 37 trees within HS2 limits, 19 are to be felled and 18 are to be retained in an ecological management zone. Overall, 2 out of the 37 trees were assessed as having features with high suitability for roosts for bats generally, 12 moderate, 16 low and 7 negligible. Of the 19 trees to be felled with suitability for bat roosts, only 1 tree was assessed as having high suitability, and 11 were assessed as moderate and 7 as low. According to guidelines issued by the Bat Conservation Trust, even trees with moderate suitability are unlikely to support a roost of high conservation interest.

55. Only one of the trees to be felled was considered to have the potential to support a barbastelle breeding site. However, appendix 10 to the AMSMS notes that the feature in question "is not a typically favoured roost site." But because it had not been possible to inspect the feature fully, and given the limitations on the data collected for the licence application, it was *assumed* that a barbastelle breeding site is present as a worse case scenario. Plainly, it is impossible to divorce the making of this assumption from all the scientific evidence and opinion gathered in the application documents on the degree of likelihood that the tree would be used as a breeding site if it were not to be felled. The worse case assumption also assumed that there is one barbastelle resting place potentially present in the Wood. It is then a matter of judgment for the decision-maker as to what are the implications of a worse case assumption. At times the claimant's evidence and submissions appeared to be turning this assumption into an artificial construct far removed from the reality of the circumstances of the Wood and the local area. That is not what the precautionary principle requires.

56. The material submitted by IP1 in Appendix 10 also gave detailed consideration to the habitat available for barbastelle which would remain and not be affected by the HS2 project. This is plainly of relevance to the application of the FCS test. There are 2,670.4 ha of deciduous woodland within 6km, of which Jones Hill Wood represents 0.07% as a resource for barbastelle. Within HS2 limits and within 6km of the Jones Hill Wood, 140 trees out of 487 trees suitable for bat roosting would remain. By extrapolation it was estimated that over 88,000 trees would be suitable for bat roosting within 6km but outside HS2 limits. It was explained why that extrapolation was likely

to provide an under-estimate. "Given the expanse of the habitat available, it can be assumed that the surrounding landscape is not at carrying capacity for [Natterer's bat or barbastelle] and that if bats from JHW were displaced, their colonies would continue to persist within the local area." On this basis, the loss of 0.7ha of woodland at Jones Hill Wood would amount to no more than 0.02% of the overall estimated tree roosting resource for barbastelle within 6km. Accordingly, the removal of that woodland would have an impact no higher than the "local level", based on the worse case scenario that a maternity colony is assumed to be present. The analysis also considered "core foraging areas" less than 6km. The retained woodland within a minimum range of 3km did not alter that conclusion. "Given the roost-switching nature of the barbastelle…. it is likely that bats would switch to another suitable tree within the local landscape and continue to forage across the 273.3ha of retained woodland within their minimum 3km core foraging range"

57. I acknowledge that some of the material to which I have referred above is disputed by the experts instructed by the claimant. But as I have already explained, the judicial review procedure does not enable such disputes to be resolved by the court. For example, Mr. Woodfield expresses the view that there may be a greater number of barbastelle roosts in the Wood. However, Mr. Streeten rightly accepted that there is no legal basis for the claimant to challenge the worst case assumptions which have been accepted by NE.

58. The matters to which I have referred inevitably represent only a selection of the highly detailed analysis carried out in a suite of documents for IP1. NE concluded *inter alia* that:-

> "At JHW, due to the large areas over which bats forage, the wider available foraging resource (adjacent woodlands in the vicinity) and the extensive habitat creation measures to be delivered, it can be concluded that the activities authorised under the licence will not be detrimental to the maintenance of the population of the bat species concerned at a favourable conservation status in their natural range."

A summary of the grounds of challenge

59. Mr. Streeten summarised the grounds of challenge in paragraph 5 of his skeleton. NE erred in law in that:-

> **Ground 1**
> It failed to apply the correct approach under regulation 55(9)(b) of the 2017 Regulations. Specifically, it did not ask itself whether the proposed works would not be detrimental to the maintenance of the FCS of population of the barbastelle on the basis of the best available scientific information, giving the benefit of the doubt to conservation. It did not require "certainty", as it should have.
>
> **Ground 2**

> It failed to give reasons justifying a departure from its own policy/guidance documents and/or failed to have regard to obviously material considerations;
>
> **Ground 3**
> It erred in fact regarding the whether HS2 had consent to erect the mitigation proposed;
> **Ground 4**
> It failed to give reasons justifying the inconsistency of its decision with its previous decision refusing the IP's application for a derogation licence;
>
> **Ground 5**
> It acted irrationally in that it failed to acquaint itself with sufficient information reasonably to be able to take a decision, relied on documents which are internally inconsistent and contradictory resulting in a decision which simply does not add up, and reached a conclusion which no rational decision maker, properly directed, could have reached.

60. Ground 3 was simply concerned with whether IP2 had control of an area of land in which it was proposed to locate certain of the compensatory bat boxes. On 14 April 2021 NE told IP1 that no work authorised by the licence should proceed until it was established that it could be carried out in accordance with the conditions of the licence. On 18 April 2021 IP1 prepared a modified location plan under the conditions of the licence relocating certain of the bat boxes. On 20 April NE gave their "formal agreement" to the amendment. At the hearing it was suggested that IP1 might lack the necessary legal control for the revised locations. Mr. James Strachan QC for HP2 disputed that assertion. I asked counsel to discuss the issue over the luncheon adjournment to see whether this could be resolved. When the hearing was resumed, Mr. Streeten told the court that the claimant was not pursuing ground 3. I will refer to the remaining grounds by their original numbering.

61. In this judgment I will address the grounds pleaded in the light of the written and oral submissions. Attempts were made to raise further issues in the expert evidence and also in oral submissions. I indicated that I would not deal with these points in the light of *R (Dolan) v Secretary of State for Health and Social Care* [2021] 1 All ER 780. Subject to that, I have considered all of the submissions made, and the documents to which I was referred.

Ground 1

62. Mr. Streeten submits that the NE's approach to the FCS test failed to apply the precautionary principle required for regulation 55(9)(b) which requires reasonable scientific doubt to be removed. With respect, that submission lacked necessary precision. Instead, the law required NE to be satisfied that it had no reasonable scientific doubt that the licensed actions would not be detrimental to maintaining the barbastelle population at a favourable conservation status in their natural range. That is a judgment which is applied to the overall effect of the licence, not simply for example, the tree-felling authorised, but also all the mitigation and compensation measures required by the licence. That judgment is made in the context of those

matters considered by NE to affect the conservation status of the barbastelle at the local level and more widely.

63. It is common ground that both NE's licensing decision on the FCS test and the licence itself expressly referred to the test which regulation 55(9)(b) required to be satisfied. NE concluded that in the absence of mitigation, there would be an adverse effect on the conservation status of the assemblage of bats within the licence area. For the more common bats it was judged that the impacts could be significant at the site level and for the rarer species up to the local level. NE then addressed the mitigation and compensation measures and monitoring that would be secured by conditions of the licence. Taking into account also the wider area over which bats may forage and roost, NE reached the conclusion that the activities to be licensed would not be detrimental to the maintenance of each species at a favourable conservation status within their natural range.

64. Accordingly, Mr. Streeten accepted that ground 1 depends upon the claimant being able to identify sufficient, positive contra-indications which show that NE's decision did not comply with the precautionary principle.

65. He relied upon two statements in the Method Statement Assessment: Additional Notes document which summarised further information supplied by IP1 after the decision dated 3 February 2021 and NE's reaction thereto. First, taking into account the extensive amount of woodland available for barbastelles within either 3km or 6km of Jones Hill Wood, it was said by IP1 that the loss of 0.7ha was "unlikely to have a significant impact at any higher than the local level on the breeding colony (if present)." Second, NE concluded that "there is reasonable likelihood that the loss of roosting, foraging and commuting resource will impact the species at the site level only …". Mr. Streeten submits that these references to likelihood are inconsistent with the need to exclude reasonable scientific doubt.

66. This contention is unarguable. As I have previously explained, and is not in dispute, expressions of likelihood may be taken into account as factors in a FCS assessment. But NE did not commit the error of substituting "likelihood" as a test for absence of *reasonable* scientific doubt. The precautionary principle does not require the exclusion of *any* scientific doubt. NE explained in several places where they considered the information provided to be satisfactory.

67. I also note NE's reasoning in the following passage:-

> "It has been identified that a barbastelle maternity roost could be present in the assessment of the possible worst-case scenario. This is considered to be unlikely. Even if a barbastelle maternity roost is present it is likely to be occasionally used, with small numbers of bats present and part of a much wider roosting resource for the colony. The works will be compensated and mitigated for in accordance with the predicted worst-case scenario assessment.
>
> A single tree (1EW03-SOE-BF005627) has been identified with the potential to support a barbastelle maternity roost and this tree cannot be fully inspected; however, the potential roost

> feature comprising a trunk cavity (1m above ground level) does not appear to be particularly suitable and not characteristic of barbastelle. Roost cavity preference is mainly beneath loose bark and at a greater height above ground, usually above the understorey and facing south more frequently than in random cavities.
>
> The further clarification regarding roosting and foraging resource and the importance of JHW to the bat assemblage predicted is provided with clear justification and referencing of data sources and peer reviewed papers throughout. The further information provides context regarding the importance of the site relative to the wider landscape. The loss of 19 trees comprising 0.7ha of the woodland will be a minor impact at the site level only to the bat assemblage considered in the worst-case scenario assessment. The justification provided regarding barbastelle roosting preferences, the potential roosting resource at JHW and the constrained survey of tree reference number BF005627 is fully justified and the supporting information provided in Row F of the table in Appendix 10 is satisfactory."

68. Taking into account the limitation of the survey data, a worse case scenario has been assumed that a barbastelle breeding roost is present in one tree. That has resulted in a mitigation and compensation package being approved by NE. That approach does not preclude regard also being had to factors making it unlikely that the barbastelle is present in the Wood. These are all legitimate matters of evaluative judgment for the decision-maker.

69. I reach the same conclusion in relation to Mr. Streeten's third example taken from the "Licensing Decision" document. The first three pages of the document record that NE was satisfied with the material put forward by IP1 under 5 headings in a checklist leading to the conclusion that the test in regulation 55 (9)(b) had been satisfied. The document does not repeat NE's underlying reasoning. That had been set out elsewhere. Mr. Streeten relies on one sentence on the fourth page of this document: "Medium risk due to the extreme use of LP4 and the potential presence of the barbastelle." The impact was also described as "medium" but that simply reflects the loss of an *assumed* maternity roost (p. 37 of the Bat Mitigation Guidelines) and not all the other considerations taken into account in NE's more detailed reasoning. The heading to the fourth page explains that it is dealing with the adviser's "licence recommendations" to the technical services licensing team "*following* a satisfied decision being reached on the FCS test." This text should not be wrenched out of context and treated as explaining NE's FCS decision. For that it is necessary to look at the detailed documentation dealing with that aspect, to which I have already referred. Much of the focus of the remaining parts of this document is on provisions for inspection and compliance under the licence.

70. Next Mr. Streeten referred to one line in table 3 of schedule 2 to the AMSMS, where the entry against "conclusions on worse case local population conservation status" is "unknown." He suggested that this involved a failure to assess the impact of the proposed licence on the conservation status of the barbastelle population at the local level, contrary to [61] of *Tapiola.* There is an air of unreality about this submission.

The straightforward point has been made in table 3, and in much more detail elsewhere, that what is being referred to is a lack of observations of the barbastelle recorded in the local area. Similarly in relation to the Wood, table 3 assessed that if the barbastelle is present in that location at all, it would be in "very low numbers". None of this reveals any arguable legal error or failure to apply the precautionary principle. Instead, table 3 went onto explain the worse case assumption that was being adopted for the purposes of assessment.

71. The criticisms made of NE fail to read the documentation as a whole. The claimant's case involved highly selective filleting of the material and an excessively legalistic or forensic approach.

72. Finally, Mr Streeten relied upon the criticisms of NE made under ground 4, namely that NE had failed to address points of dissatisfaction they had raised in their decision dated 3 February 2021. For reasons set out below, I do not consider ground 4 to be arguable. It does not assist the claimant under ground 1.

73. For all these reasons, I consider ground 1 to be unarguable.

Ground 2

74. Mr. Streeten submitted that the defendant had departed from policies in two of its documents without dealing with the matter in its reasoning (see *R (UTAG) v TFL and Mayor of London* [2021] EWHC 72 (Admin) at [106]-[107]).

Bat Mitigation Guidelines

75. This document was published in January 2004. Mr. Streeten relied upon Figure 4 at p.39 which ranks requirements for mitigation and compensation according to the "status" of the roost. At the "high significance" end of the scale the guidance given for maternity sites of the rarest species is that, "depending on the impact", there should be no "destruction of former roost until replacement completed and significant usage demonstrated." Mr. Streeten criticises the licence because it does not require any significant usage of the bat boxes by barbastelle bats to be demonstrated before any tree containing a roost may be felled.

76. Mr. Glenister replied that the Method Statement Assessment: Additional Notes does expressly refer to the Guidelines although not to the particular passage relied upon by the claimant.

77. Figure 4 needs to be seen in context. The Guidelines explain that the level of mitigation required depends on the size and type of impact and the "importance of the population affected." This is a complex site-specific and species-specific issue. Figure 4 only purports to give "general guidance" as to what would be an "appropriate starting point" for preparing a mitigation scheme.

78. When this issue is considered properly and in context, the claimant's criticism, once again, has a complete air of unreality about it. NE's judgment is that barbastelle are unlikely to be present in the Wood. But the Guidance proceeds on the basis that a maternity site is *in fact* present (i.e. no destruction of "former roosts"). Then the claimant's argument fails to address the conditions of the licence. As we have seen,

they prevent felling during both the hibernation season and the maternity season. Condition 13 prohibits the licensed activities from taking place while any *actual* maternity roost found to be on site is being used for that purpose. In reality, the bat boxes provide compensation for the loss of what is no more than a single "potential roosting feature" in one tree, which would not be "typically favoured" by the species. NE's decision also had regard to the substantial availability of habitat within 3 or 6 km, in addition to the compensation and mitigation measures.

79. The licence and the reasoning in the documentation make it perfectly obvious why there was no need to require the bat boxes to be significantly used by a breeding barbastelle before a maternity roost is destroyed. Read sensibly and fairly, and avoiding a legalistic approach, there was simply no need for NE to refer expressly to the "starting point" in Figure 4. NE's consideration of this issue had gone far beyond that starting point. The claimant's criticism is unarguable.

Policy LP4

80. Surveys were carried out for IP1 in October 2020 after the maternity season for that year had ended. NE referred to this point in its decision dated 3 February 2021. It said that "further hibernation surveys" were required to be carried out before the application for a licence could be resubmitted. However, I note that NE did not consider that any resubmission would have to await the carrying out of a survey for any maternity roosts between May and August 2021. The extent to which further surveying was required so that NE could make a decision under regulation 55(9)(b) was a matter for their judgment.

81. Because IP1 was aware that a less than full suite of surveys had been carried out, its licence application was made relying upon NE's policy LP4 which states:-

> "Natural England will be expected to ensure that licensing decisions are properly supported by survey information, taking into account industry standards and guidelines. It may however accept a lower than standard survey effort where: the costs or delays associated with carrying out standard survey requirements would be disproportionate to the additional certainty that it would bring; the ecological impacts of development can be predicted with sufficient certainty; and mitigation or compensation will ensure that the licensed activity does not detrimentally affect the conservation status of the local population of any EPS."

82. Paragraph 2.1 of the policy document explains that LP4 is expected to apply predominantly to bats and great crested newts. The policy provides the opportunity to reduce survey requirements where the impacts of development on a species can be predicted confidently (para. 3.1). The policy arose from concerns that there had been insufficient flexibility in requirements for surveys and the suggestion that greater reliance be placed on expert judgment (para. 3.2). There were also concerns about high survey costs and delay, whereas the costs of precautionary mitigation are relatively moderate in many cases (para. 3.5).

83. Against that background paragraphs 4.1 to 4.3 states:-

"4.1. Good survey information must remain the cornerstone of our decision making. We do not wish to see survey standards diluted, and we must not accept poor quality surveys that pose unacceptable risks to EPS.

4.2. As such this policy must only be used if the following circumstances apply:

- the costs or delays associated with carrying out standard survey requirements would be disproportionate to the additional certainty that it would bring

- the ecological impacts of development can be predicted with sufficient certainty

- mitigation or compensation will ensure that the licensed activity does not detrimentally affect the conservation status of the local population of any EPS

4.3. We feel that this proposed policy offers further scope to increase flexibility and pragmatism to survey standards, in circumstances where a reduced surveying effort can be clearly justified, and where safeguards can be provided in the form of mitigation or compensation measures. We recognise the risks of relying on expert judgement but if we use this policy in a way which will reward expertise and good judgement this could help to drive up standards."

84. Paragraph 5.1 states:-

"This assessment requires us to find the right balance between obtaining information through surveying, and relying on expert judgement. A number of factors will be relevant including:

- The amount of money a full survey programme would cost, relative to the scale of the project and the scale of potential impact

- The delays that would be incurred if it was necessary to stop work and wait for a full survey programme to be undertaken

- The level of surveying that it is possible to undertake. For example:

    - if bats are discovered towards the end of the survey season there may still be time to

> undertake a proportion of the standard survey requirements;
>
> - If health and safety concerns prevent access to a building, it should still be possible to perform"

85. Paragraph 6.2 indicates that whether ecological impacts can be predicted with "sufficient certainty" will depend on "whether the situation is routine or whether it is novel or complex."

86. Paragraph 7.1 states:-

> "There needs to be the same level of confidence that the 3 licensing tests are met as there would be if standard surveys were carried out. This policy is about using alternative information to survey data, not about lowering the level of confidence required to make decisions."

87. In its decision letter dated 3 February 2021 NE stated:-

> "Due to the proposed use of LP4 and your predicted worst-case scenario assuming the presence of barbastelle maternity roost, additional clarity will be required before the Favourable Conservation Status test for barbastelle can be met. For a rare species of bat such as barbastelle, the use of further advanced level bat survey techniques would normally be required in addition to the standard baseline surveys. This would inform how the colony utilises the development site and wider landscape, in order to assess the importance of the site for the continued viability of the colony and to fully assess the impacts of the works on future breeding success."

88. Mr. Streeten emphasises that NE asked for further information on how the woods are being used to establish how important the application site might be within a bat population's home range. But I note that they also asked for more information on other related aspects, such as the likelihood of breeding roosts being present, the likelihood of the single tree identified being used by barbastelle, whether it is "typically favoured by the species", the wider impact of the roost and habitat loss, and how the foraging resource on the site functions in the wider landscape. Just as when we come to deal with the answers given, it is important not to look at particular questions in isolation when it is obvious that the subject-matter is inter-related.

89. As I have mentioned, IP1 provided a substantial amount of material in reply, some of which the court has been taken to. It included additional hibernation surveys and a walk-over survey, the use of bat detectors and the availability and extent of potential roosts and habitat in the wider area.

90. Mr. Streeten submits that in its decision reached on 30 March 2021, NE failed to apply the requirement in paragraph 7.1 that "the same level of confidence" as would have been achieved if "standard surveys" or indeed those indicated in February 2021 had been carried out. He submits that no information was given about "the importance

of the site for the continued viability of the [barbastelle] colony." Instead, it was simply said that the local conservation status was "unknown". No justification was given for not requiring the "normal" level of certainty required.

91. I have already rejected several of these criticisms. In my judgment, it is fanciful to suggest that adequate information was not given about the importance of the site for barbastelle. Mr. Streeten speaks of the "continued viability of the colony" as if it actually exists. But the worse case scenario is simply an assumption which enabled the effects of, for example, the loss of one potential maternity roost to be assessed in the broader context explained by IP1 and also precautionary mitigation to be identified, both as inputs to the application of the statutory test laid down by regulation 55(9)(b).

92. It is particularly important that the Method Statement Assessment: Additional Notes is read as a whole. Towards the beginning of this assessment the author expressly set out key paragraphs from the LP4 policy document, including those upon which the claimant relies.

93. Mr. Streeten says that NE's document does not set out a response by IP1 or by NE to the point made in the February 2021 decision that advanced level techniques would normally be required. But this part of the March 2021 document must be read in the context of NE's assessment of the additional information supplied by IP1 in other parts of that document, both before and after the short section referred to by Mr Streeten. I have already referred to some of this material (see e.g. [67] above). In addition, NE expressed its satisfaction with the adequacy of the information it had received. NE also had regard to the low number of the trees to be felled, habitat quality, size and connectivity of the woodland. It regarded the further tree inspections carried out as "very thorough." "The professional opinion of the ecologist regarding roosting potential for hibernating and breeding bats is satisfactory".

94. It is therefore impossible to argue that NE failed to have regard to any aspect of policy LP4. In effect the claimant is really seeking to argue that NE has failed to *apply* the policy in paragraph 7.1 that the same level of confidence be achieved as if "surveys had been carried out" (claimant's skeleton at para. 53(b)). But having clearly referred to the relevant policy requirements, the question is whether there is any positive indication in NE's document that it has departed from its policy. In my judgment there is none. This has simply been an attempt to argue that NE has departed from its policy from the way in which it has handled the technical information supplied by IP1. But this complaint is simply unarguable. NE has expressed its satisfaction with the overall information supplied to it in the context of applying the guidance on policy LP4. It has not sought to lower the level of confidence which it judges to be appropriate in the circumstances of this case when applying regulation 55(9)(b).

95. Equally, the suggestion that LP4 is inapplicable to situations which are "novel or complex" is unarguable. This is not what the policy document states and no question of law arises. Instead, this is a matter of expert judgment for NE.

96. There is also nothing in the complaint that there is no adequate scientific evidence to support the use of bat boxes as mitigation for the loss of maternity roosts for barbastelle bats, particularly where there is disruption caused by the felling works (paragraph 53(c) of the claimant's skeleton). NE has relied upon scientific papers

published in 2004 and 2018 to support the use of bat boxes for this species in woodland. It is NE's judgment that this mitigation is also appropriate in this case where felling is to take place. Mr Woodfield's report states that other experts disagree. That is a legitimate dispute between experts, but it is not a legitimate ground for judicial review. Furthermore, as Mr. Strachan QC, points out, additional mitigation will be provided, including avoidance of the felling works during the breeding season. There is also the availability of extensive areas of other woodland.

97. For all these reasons, ground 2 is unarguable.

Ground 4

98. Mr. Streeten relies upon the principle established in planning law that where a decision is taken which is materially inconsistent with a previous decision, it must ordinarily give reasons for disagreeing with that decision (*North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137). NE submitted that this principle does not apply to decision-making under regulation 55. I will assume that it does.

99. The alleged inconsistencies relied upon are set out in paragraph 57 of the claimant's skeleton, comparing the Method Statement Assessment: Additional Notes with the decision letter dated 3 February 2021. In summary the points are:-

> (i) NE no longer maintained that for a rare species of bat, such as the barbastelle, advanced level survey techniques would be required, in addition to standard surveys, to inform how the colony used the license site and the wider landscape and to assess the importance of the site for the continued viability of the colony and the impact of the works on future breeding success;
>
> (ii) In relation to the predicted scale of impact of the felling, NE changed its position from treating the conservation status of a barbastelle maternity roost from regional to local;
>
> (iii) NE ceased to be concerned about the adequacy of the proposed arrangements for monitoring the success of the compensation measures given the lack of sufficient baseline data.

100. It should be remembered that the decision dated 3 February 2021 was not a final decision, as, for example, where planning permission has previously been granted or refused for a particular type of development on a site. Here, NE's earlier decision did not rule out in principle the grant of the licence sought. Instead, it indicated a number of areas where further information, explanation, clarification or proposals were judged to be necessary.

101. Dealing with the claimant's point (i), it is to be noted that the decision letter of 3 February 2021 stated that advanced level surveys would *normally* be required. The letter did not in fact lay down any such requirement in this case. The immediately preceding sentence sought clarification. In fact the interaction between NE and IP1 is

easier to follow in row E of IP1's document dated 5 March 2021 responding to NE's requests for further information, where there is less disaggregation of the material. IP1 also relied upon the information in row F dealing with impacts. Following the decision in February 2021, IP1 carried out further surveys and provided further information to support the case that there was only one tree of potential interest for the barbastelle and that that species was unlikely to be present. NE made it plain that they were satisfied with the information provided. NE was not obliged to go further and spell out that analysis to show how "the colony utilises the development site and the wider landscape" was unnecessary, given that it was unlikely that the barbastelle was present and, even if it was, its presence would be only occasional and in small numbers, taking into account the much wider roosting resource available.

102. There is nothing in the complaint under (ii). NE had merely said that a paper published by Wray in 2010 had considered a maternity roost to have regional importance. The defendant did not go as far as to say that it adopted that assessment for this particular location. Instead, it asked IP1 to justify its assessment. It is apparent from the papers that IP1 provided that justification and NE accepted it. NE's position in deciding to grant a licence did not involve any disagreement with its earlier position so as to require any further reasoning, according to the law.

103. There is also nothing in point (iii). NE asked for further information. IP1 referred to the further material they had submitted on monitoring. It is plain from the decision document that NE was satisfied with the information ultimately provided. Mr. Glenister also drew attention to regulation 47 of the 2017 Regulations which will enable NE to amend the licence in response to the monitoring reports it receives during the 10 year duration of the licence. Once again there is no change of position on the part of the decision-maker requiring the provision of any additional reasoning.

104. Mr. Streeten advanced a new point in his oral submissions that NE had failed to address its earlier criticism that the 2020 surveys should be re-assessed so as to disregard any discouragement of bats resulting from the presence of a protestor's camp in the vicinity. IP1 explained that its surveys on potential roost features aligned with results obtained in 2016, in relation to which there is no suggestion that protestors were present. Reference was also made to the surveys in the 2013 Environmental Statement. NE stated that it was satisfied with the material provided. No error of law arises.

105. Ground 4 is unarguable.

Ground 5

106. Under this ground the claimant alleges irrationality. The claimant does not arguably surmount the high hurdle which applies to challenges of this nature, particularly in the field of specialist scientific expertise.

107. Mr. Streeten began by relying upon submissions which he had made under other grounds and which I have already rejected as unarguable.

108. He also submitted that NE had failed to take reasonable steps to obtain information to enable it to make its decision lawfully. However, the "Tameside principle" has been qualified by the decision in *R (Khatun) v Newham London Borough Council* [2005]

QB 37 at [34] – [36]. The decision-maker's judgment on how much information to obtain can only be challenged on the grounds of irrationality. No arguable basis has been shown for a challenge of that kind in this highly specialist field.

109. Finally, Mr. Streeten relied upon *R (Balchin) v Parliamentary Commissioner for Administration* [1996] EWHC 152 (Admin) at [27] for the proposition that a decision "which does not add up" because "there is an error of reasoning which robs the decision of logic" is flawed for irrationality. The four steps in his argument were set out in paragraph 61 of the claimant's skeleton. Some of the points involve a misreading of material accepted by NE, or are simply an inappropriate challenge to their judgment, for reasons I have already given. But, in any event the claimant has inappropriately filleted four points from the overall material accepted by NE. The argument suffers from the elementary flaw of failing to read both that material and the decision as a whole. It wrongly assumes that there was no other material going to the rationality of this decision when there plainly was.

110. Ground 5 is unarguable.

Interim injunction

111. Because the proposed grounds of challenge are wholly unarguable, and certainly do not satisfy the "real prospect of success" test, the injunction granted by Lang J on 16 April 2021 must be discharged.

112. However, I have gone on to consider the balance of convenience on the assumption, contrary to my judgment, that one or more of the proposed grounds of challenge has a real prospect of success. I will set out my conclusions on this aspect briefly.

113. The first issue is whether to continue the injunction would effectively dispose of the claim, because in practical terms IP2 would cease to be able to rely upon the licence by the time a rolled-up hearing might take place towards the end of May. Although condition 7 of the licence prohibits felling during the maternity season assumed to begin on 1 May, condition B12 also prohibits felling until the hibernation season ends, as expressed by the temperature criterion. It was suggested that there might be some leeway for the licence to be modified, so as to reflect a recent spell of cold weather, and that a super-expedited rolled-up hearing could take place before an assumed delay to the start of the breeding season. Unfortunately, this is subject to the vagaries of the weather. Mr Glenister said that he had been told that NE might be prepared to treat the start of the breeding system as delayed, but only by a week or so. In any event, up to 2 weeks would be necessary for evidence to be filed in response to the claim, final submissions would have to be prepared, time allocated for a 2 day hearing with pre-reading, time would be needed for the preparation of a judgment and then 3-4 days for the felling to take place. Realistically I can have no real confidence that felling could take place before the time limit in a revised condition 7 would apply to protect any delayed start to the breeding season. Accordingly, a continuation of the injunction would effectively preclude reliance by IP2 on the licence granted on 30 March 2021.

114. I accept the evidence in Mr. Dineen's witness statement as to the impact which delay in felling the trees would have on this part of the HS2 project. If the felling could not take place until October 2021, earthworks could not begin until March or April 2022.

Currently those works are scheduled to begin in June 2021. In paragraph 5 of IP2's submission to the court dated 14 April 2021, a conservative estimate of the costs of the delay was given in the broad order of £25 to £50m. Mr. Dineen now says that those figures have been re-assessed as being in the range of £60.7-£88.8m. His statement dated 19 April 2021 was accompanied by a schedule. Plainly there has not been time for the claimant to consider this in any detail or to raise any questions. The claimant simply says that these costs will not be incurred because the claim could be dealt with at a super-expedited hearing, a point which I have already rejected. I proceed on the basis that the continuation of the injunction would cause additional costs in the region of at least £25m to £50m, and probably substantially more. I attach very considerable weight to this factor.

115. I also attach considerable weight to the public interest in the continuation of work on the HS2 project without substantial interruption. Parliament has decided that it is in the public interest for the project to be undertaken and the Government has subsequently confirmed that it continues to agree with that decision (see e.g. *Packham*). There is no challenge to NE's decision in this case applying regulation 55(2)(e) to the works which are the subject of this dispute.

116. Mr. Streeten submits that the injunction should be continued in order to preserve the current *status quo*. It is necessary to be clear as to what is meant by this. It cannot mean merely the retention of the 19 trees within the licence site. The relevant *status quo* must have a more limited ambit. The object of the injunction sought is to prevent reliance upon the licence where, it is said, legal errors have been made in the application of the FCS test. So, the question is whether the injunction is necessary in order to avoid a significant risk to the maintenance of the favourable conservation status of the barbastelle. Mr Streeten accepted that that is the correct approach.

117. Even if it were to be arguable that NE has made an error of law in one or more of the respects alleged, I am not persuaded that the injunction is necessary to avoid that risk, or, alternatively, that any significant weight should be attached to that factor. I reach that conclusion after having considered all the ecological material before the court as a whole. I do not propose to analyse the varying conflicting points of view. I mention, by way of example, certain factors which have been accepted by NE the independent statutory authority responsible for applying regulation 55. There is only one tree in the licence area of relevance. It is not particularly attractive for breeding by the barbastelle. The habitat of the site itself is sub-optimal. On the other hand, there are many potential opportunities within 3 or 6 km for roosting by the barbastelle, including maternity roosting, in so far as the species may be present in the area. In my judgment, the evidence does not persuade me that the maintenance of the FCS of the barbastelle depends upon, or is affected by, the retention of the 19 trees.

118. Mr Strachan QC rightly did not pursue the issue of delay in relation to the continuation of the injunction.

119. A few other peripheral matters were raised (e.g. conduct), but I attach no significant weight to any of them.

120. I have no hesitation in concluding that the balance of convenience comes down firmly in favour of the injunction being discharged.

Conclusion

121. The application for permission to apply for judicial review is refused and the injunction on 16 April 2021, as varied on 23 April 2021, is discharged. I reiterate my gratitude for all the help I have received from the parties and legal teams in this case.