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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DEAN BLACKWOOD, REPRESENTING RIVER FAUGHAN ANGLERS LIMITED FOR JUDICIAL REVIEW

-v-

DERRY CITY AND STRABANE DISTRICT COUNCIL

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Glossary

AoHSV:	Area of High Scenic Value
ASSI:	Area of Special Scientific Interest
BCT:	Bat Conservation Trust
BS:	British Standard
CEMP:	Construction Environmental Management Plan
CJEU:	Court of Justice of the European Union
CLUD:	Certificate of Lawfulness of Use or Development
DAERA:	Department of Agriculture, Environment and Rural Affairs
DAP:	Derry Area Plan 2011
DC&SDC:	Derry City & Strabane District Council
DOE:	Department of the Environment
DRD:	Department for Regional Development
EIA:	Environmental Impact Assessment
EPS:	European Protected Species
HRA:	Habitats Regulations Assessment
NIEA:	Northern Ireland Environment Agency

PC:	Planning Committee
PPS:	Planning Policy Statement
PAP:	Pre-application Protocol (correspondence)
RFA:	River Faughan Anglers Ltd.
RM:	Reserved Matters
RPA:	Root Protection Area
SAC:	Special Area of Conservation
SES:	Shared Environmental Services
WMU:	(NIEA) Water Management Unit

McCloskey J

Introduction

[1] This judgment is structured in the following way:

[2] In this case neither the Applicant, Mr Blackwood, nor the interested party, Mrs Deery, who is the planning applicant/developer and participates as an interest party, had legal representation. As a result certain specially tailored case management measures were devised from time to time. These were designed to promote certain of the central elements of the overriding objective: fairness to all parties, expedition, efficiency and a proportionate allocation of the court's limited resources. One consequence of this is that the structure of this judgment is somewhat unorthodox. I trust that this unconventional format will be of particular benefit to Mr Blackwood, Mrs Deery and all other members of the non-legal fraternity who, foreseeably, will read this judgment with interest.

[3] A discrete consequence of this approach is that it would be both unnecessary and wasteful for the Court to rehearse the parties' competing submissions in the body of the judgment. As a result, in a context where the interested party has consistently made a legitimate plea for expedition and finality, it has been possible, consistent with the other daily commitments of the Judicial Review Court, to

provide this judgment within two weeks of completion of the hearing phase. I would add that the procedural model which has been adopted and applied in this case, or something kindred, may have potential for use in appropriate future cases.

[4] The Applicant ultimately presented his case, in articulate and measured terms, via an impressively formulated comprehensive written submission. A regrettable, though unavoidable, short break (of some days' duration) in the substantive phase of the proceedings intervened, giving rise to the Court's direction that the Respondent's case be presented in similar form through a combined electronic document. The final incarnation of this document is found in the Appendix to this judgment. Oral submissions in the ordinary way followed.

The challenge and the grant of leave

[5] The outline and contours of this judicial review challenge are contained in the court's decision to grant permission to apply for judicial review, hereby reproduced in material part. The subject matter of this judicial review challenge is the grant of planning permission number A/2014/0495/F by the Respondent Council, on 17 January 2018, whereby the following development was authorised:

> "*Construction of manager's dwelling and six No. cottage style apartments in two No. blocks with associated landscape works to provide tourism based 'fishing end use' on the site under PPS16 ….* [at a location described as] … *lands opposite 53 Lismacarrol Road/Glenshane Road, Crossballycormick, Londonderry*

[6] The Applicant, Dean Blackwood, who provides an address in Belfast, describes himself as the chairperson and a director of the River Faughan Anglers Limited (hereinafter "*the association*"), posts which he has occupied, on a voluntary basis, since 2005. He describes the association as "*a cross-community, voluntary run, not for profit organisation managing the fishing rights on the River Faughan ….* [benefiting from] .. *a lease of the fresh water section of the river from The Honourable The Irish Society and a lease of the tidal section from the Loughs Agency*". The Applicant is further self – described as a retired chartered town planner and a personal litigant.

[7] In their initial incarnation the somewhat diffuse and prolix grounds of challenge were, in summary: error of law in taking into account the allegedly unlawful partial implementation of two previous grants of planning permission in 2009; various breaches of the Habitats Regulations; a failure to "*conduct*" an EIA determination under Regulation 10(3) of the EIA Regulations 2012 and/or failing to require an environmental assessment; failing to consult the Loughs Agency; disregard of material considerations (and/or misinterpretation/misapplication of ?), being material policies enshrined in the Derry Area Plan 2011 namely policies ENV2, ENV7, ENV8, ENV9, TU1 and TU2; misinterpretation of policy TSM5 within PPS16 ("Tourism") by erroneously treating the impugned permission as authorising a minor or secondary addition to an existing or approved self-catering complex, rather

than a free standing new development proposal; and permitting the intrusion of a mistaken (or immaterial) consideration in the misconceived assessment that the holiday chalets approved will "*largely*" occupy the footprint of the corresponding approval in A/2007/0895/RM; and irrationality.

[8] At the stage when the Applicant's papers were first lodged it was immediately apparent to the Court that there was a lack of symmetry between the grounds as pleaded and those raised in the PAP correspondence phase. As a result the Respondent Council had not, in its letter of 12 March 2018, addressed certain grounds. The Applicant's further letter of 08 April 2018 refers in this context. Moreover, the Applicant was continuing to correspond with the Council. There was an exchange of letters dated 15 and 16 April 2018 respectively relating to the Habitats Risk Assessment ("HRA") and the unavailability of same on the Council's Planning Portal. The correspondence continued with the Applicant's letter of 19 April 2018 to the court, which concerns the same issue. Specifically, the Applicant expressed an intention to challenge the "*robustness*" of the HRA dated 26 June 2017 on the basis of "*scientific uncertainty over the acceptability of the proposed means of sewerage disposal from the impugned permission and the impact of any discharge consent on the River Faughan and Tributaries Special Area of Conservation*". All of these issues were addressed by appropriate case management directions, culminating in the provision of an amended Order 53 Statement.

[9] The impugned decision is noted in [4] above. The development authorised is the subject of a series of conditions: the removal of certain extant foundations; vehicular access requirements and visibility splays; maximum access road gradient; approval by the Council of a final Construction Environmental Management Plan ("CEMP") prior to commencement of the works; the maintenance of a buffer of 10 metres minimum between the boundary of the River Faughan and the location of the proposed refuelling, storage of oil/fuel, concrete mixing and washing areas, designed to protect the integrity of the River Faughan Special Area Of Conservation ("SAC"); testing to establish whether there is any ground gas on the proposed development site, having regard to the closed landfill site which has a shared boundary; non-occupation of any of the proposed units until approval of the sewerage disposal scheme; and short term holiday letting accommodation only for the proposed self-catering chalets.

The Grounds Reformulated

[10] Via the initial amendments of the Order 53 Statement *(supra)* the Applicant's grounds have crystallised into the following:

(i) Taking into account immaterial considerations, namely two previous grants of planning permission said to have lapsed.

(ii) In the alternative to (i), breach of Regulations 45, 46, 50 and 51 of the Habitats Regulations by failing to undertake a review of the previous planning permissions.

(iii) Breach of Regulations 6(3) and 43(1) of the Habitats Regulations by failing to carry out any (or any adequate) habitats assessment.

(iv) Breach of Regulations 3(4) of the Habitats Regulations by failing to consider the impact of the proposed development on a protected species, namely bats.

(v) Breach of Regulation 4(1) of the EIA Regulations by failing to require the provision of an "Environmental Statement" ("ES").

(vi) Infringement of sundry policies enshrined in the Derry Area Plan.

Following an *inter-partes* hearing, leave to apply for judicial review on the above grounds was granted.

The Developer

[11] The planning applicant is Catherine Deery, acting via her agents ASI Architects and participating in these proceedings as an interested party. The court heard briefly, and received a letter, from Mrs Deery at the *inter-partes* leave hearing. Mrs Deery is understandably frustrated by the advent of this legal challenge finding herself, in common with every developer in this litigation context, caught in the cross fire between the challenging litigant and the deciding authority. Mrs Deery has expressed herself in commendably moderate terms. Her intervention at the initial stage included an evidential contribution consisting of a report from an engineer (related to her – as declared). This concludes that:

(a) The "as constructed" foundations are "*substantially constructed within the red line boundary of the sites*".

(b) The "as constructed"" foundations are "*constructed in accordance with the topographical survey of the lands taken before the first applications*".

At the substantive hearing stage, Mrs Deery made further both oral and written contributions.

Factual Matrix

[12] In accordance with the developing practice of this Court, the parties were required to provide a joint schedule of material facts. This was a productive exercise, resulting in a document containing the parties' respective contributions. This had the merit of highlighting some of the main aspects of the factual matrix. At this

juncture I reproduce the document in its entirety. [All of the Respondent's insertions are in italicised font].

(i) That the hand-written note of Mr Ciaran Rodgers, as exhibited by the Respondent in Trial Bundle 2, [CR1, pages 29 – 30], was not prepared "…in advance…" of the Planning Committee ("PC") meeting (refer to paragraph 5 of Applicant's third affidavit affirmed on 28 August 2018*). Not agreed although it is accepted that CR made additional annotations to the document during the PC meeting.*

(ii) That the "…position of the foundations as constructed edged red…" [PAP3, page 393] of the holiday chalets and manager's dwelling, as shown on the Respondent's drawing [PAP3, DCSDC A, 403e], do not accurately reflect the shape, scale or dimensions of the actual foundations as laid out and existing on the ground (refer to paragraph 10 of Applicant's third affidavit). *Not agreed.*

(iii) That there is common ground between the Applicant's findings (as expressed in paragraph 29 of my first affidavit affirmed on 16 April 2018) and the Respondent's findings as depicted on its drawing exhibited at Trial Bundle 1a, [PAP3, DCSDC A, page 403e]. Namely, that the north-western edge of the foundations for the holiday chalets, as constructed on the ground (red), is located ten (10) metres from the north-western edge of the holiday chalets as approved under A/2007/0895/RM (blue*). Not agreed.*

(iv) That the confirmation provided by the Respondent to the planning applicant that material starts had lawfully commenced on the holiday chalets and manager's dwelling was informally given outside of the legislative provisions of section 169(1)(b) of the Planning Act (Northern Ireland) 2011 [DB1 Tab27, page 213] (refer to paragraph 14 of Applicant's third Affidavit*). Not agreed.*

(v) That the Certificate of Lawfulness of Existing Use or Development exhibited by the Respondent in Trail Bundle 2 [CR1, pages 161 – 165] does not relate to this case and has no bearing on these proceedings. *Agreed.*

(vi) That planning condition 6 of A/2007/0895/RM requiring the implementation of the access prior to all other works and development (identical to condition 4 of A/2007/0897/RM) has never been complied with (refer to paragraph 17 of Applicant's third Affidavit). *Not agreed.*

(vii) That the photograph exhibited by the Respondent at Trial Bundle 2 [CR1, page 19] is the existing agricultural field access and not the

location of the access granted under the historic reserved matters permissions, which was approved (but never constructed) some 32m to the north west of the centre line of this existing field access (refer to paragraph 17 of Applicant's third Affidavit). *Not agreed.*

(viii) That the Respondent's (repeated) statement to the PC that the impugned permission "…seeks to build the holiday chalets largely over the footprint of the approved chalets…" [DB1 Tab5, page 106] is factually incorrect (refer to paragraph 19-24 of Applicant's third Affidavit). *Not agreed.*

(ix) That the Respondent failed to inform the PC of the matter raised by the Applicant since 26 July 2016 regarding the review of extant permissions as it relates to the impugned permission [DB1 Tab5, page 101] and [DB1 Tab29, pages 224 – 226] (refer to paragraph 8 of Applicant's third Affidavit). *This does not relate to the impugned decision.*

(x) That the access road approved under the historic reserved matters permissions to serve the holiday chalets and manager's dwelling, and its associated subterranean drainage infrastructure, has not been constructed [CR1 pages 64 and 79-80] (refer to paragraph 37 - 39 of Applicant's third Affidavit). *Not agreed.*

(xi) *On 6th. October, 2014 planning application A/2014/0495/F was submitted by Catherine Deery. This application was described as the Construction of managers dwelling and 6 no cottage style apartments in 2 no blocks with associated landscape works to provide tourism based fishing end use on the site.*

(xii) *The application related to lands at Lismacarrol Road/Glenshane Road, Crossballycormick, Londonderry.*

(xiii) *These lands are adjacent to the River Faughan which has ASSI/SAC designation.*

(xiv) There were two previous applications on the site – A/2007/0895/RM which related to 6 no. self-catering tourism chalets for fishermen and was approved on the 2nd March, 2009 and A/2007/0897/RM which related to a manager's dwelling and was approved on the 11th March, 2009.

(xv) *In or about February 2011 works were undertaken at the site in relation to the permissions A/2007/0895/RM and A/2007/0897/RM. It is agreed that these works would constitute a material start if carried out in accordance with the permissions but the extent to which the works are in compliance with the permissions is in dispute.*

(xvi) *In the course of processing application A/2014/0495/F two habitats risk assessments were carried out in respect of the application – on the 25th. May 2016 and on the 26th. June 2017. These were carried out by Shared Environmental Services who provide support to Councils in Northern Ireland in their role as competent authority under the Habitat's Regulations.*

(xvii) *A/2014/0495/F was ultimately dealt with at the planning committee of Derry City and Strabane District Council ("DCSDC") on the 10th. January, 2018.*

(xviii) *At the Planning Committee on the 10th. January, 2018 the committee heard from a planning officer of the council as well as the Planning Applicant's Agent and the Judicial Review Applicant as a representative of River Faughan Anglers Limited.*

(xvix) *The relevant area plan for the purposes of the application is the Derry Area Plan of 2011.*

(xx) *The decision Notice in respect of the application issued on the 17th. January, 2018.*

[13] As a perusal of the immediately foregoing confirms, there are certain not insignificant issues of factual dispute between the parties. It has been frequently observed that the judicial review procedure is not especially suited to making findings of fact on contentious issues. One of the main reasons for this is that judicial review lacks the adversarial trappings of private law *inter-partes* litigation. One feature of this is that cross examination of those who swear affidavits is a rarity. In the paradigm judicial review case, the material facts are uncontentious. In cases where it appears to the Court that this might not be so, the practice of this Court entails a direction requiring the provision of a joint agreed schedule of material facts, simultaneously highlighting any contentious factual issues, as in the present case.

Burden and standard of proof

[14] In these circumstances it is appropriate to draw attention to one of the well-established principles belonging to the world of judicial review. Stated succinctly, the party who asserts must prove and the standard of proof, as in all compartments of civil litigation, is the balance of probabilities: see Supperstone *et al*, Judicial Review (4th ed), para 20.4.1. One of the implications of this approach in principle was spelled out by Woolf J in R v Oxfordshire Local Valuation Panel, ex parte Oxford CC [1981] 79 LGR 432, at 440:

> "*Insofar as there is a conflict between* [the accounts] *of what happened … this Court, only having the affidavits before it, cannot resolve that dispute. The position is well established that as the* [claimants] *have the onus of proof placed upon them to establish their case, in those circumstances the proper course to adopt is to act on the evidence given on behalf of the* [Defendants]

… insofar as it is impossible from the internal evidence to come to any conclusion as to which account is the more credible."

At the highest level one finds the following statement:

"*As judicial review …. is a civil proceeding, it would appear to be right … to apply the civil standard of proof.*"

Per Lord Scarman in R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74, at 112E. This principle had earlier been formulated in similar terms by the Court of Appeal in R v Board of Visitors of Hull Prison, ex parte St Germain [1979] 1 WLR 1401. In the Northern Ireland context this has featured in decisions such as Re SOS Application [2003] NIJB 252, Re Peart [2003] NIQB 34 at [19] and Re Nagra [2004] NICA 36 at [23].

[15] This is, therefore, one of those comparatively infrequent judicial review cases in which the doctrine of burden and standard of proof arises. Those of the Applicant's grounds of challenge on which this has a particular impact will become apparent.

Planning History

[16] This has three elements and is uncontentious:

(i) Approvals for the development for six self – catering anglers' chalets and a related manager's dwelling were issued on 15 December 1998.

(ii) *Ditto,* in substantially the same terms, on 02 October 2004

(iii) As per (ii), on 02 March 2009 and 11 March 2009 respectively, to be commenced (by specific condition) within two years.

Ground 1: Implementation of the 2009 planning permissions

[17] The first ingredient in this ground of challenge is both purely factual and uncontentious. It is agreed that in making the impugned decision outlined in [5] above, the Council acted on the basis that works designed to implement the two 2007 grants of planning permission had been lawfully commenced prior to their respective expiry dates of 02 and 11 March 2011. The second ingredient of this ground, which is contentious, is also purely factual: see, generally, [1] – [50] of the Appendix to this judgment. The Applicant asserts that the Council's assessment that the aforementioned commencement works had been executed is an objectively verifiable error of fact. The third, and final, element of this ground entails the legal proposition that having committed this asserted error of fact the impugned decision is vitiated by the reckoning of an immaterial/incorrect consideration: which may, in contemporary judicial review, also be "packaged" as the commission of a material

error of fact: see E v Secretary of State for the Home Department [2004] EWCA Civ49 at [66].

[18] The statutory provisions which feature in this ground of challenge are sections 61 – 63 of the Planning Act (NI) 2011 (the "*2011 Act*"). By section 61 the development to which every grant of planning permission relates "*must be begun*" within either five years of the date on which the permission is granted or such other period as the terms of the permission impose. Section 63(2) provides:

> *"(2) For the purposes of sections 61 and 62, development shall be taken to be begun on the earliest date on which any of the following operations comprised in the development begins to be carried out –*
>
> *(a) where the development consists of or includes the erection of a building, any work of construction in the course of the erection of the building;*
>
> *(b) where the development consists of or includes alterations to a building, any work involved in the alterations;*
>
> *(c) where the development consists of or includes a change of use of any building or other land, that change of use;*
>
> *(d) where the development consists of or includes mining operations, any of those operations."*

The focus in the present case is on subsection (2)(a), ie "*any work of construction in the course of the erection of the building ….*"

[19] As a perusal of [1] – [50] of the Appendix makes clear, the issue separating the parties as regards this ground are essentially factual in nature. This is expressly recognised in the Applicant's submissions: see Appendix at [5]. The paragraphs which follow, containing both parties' contentions, conveniently set forth the miscellaneous items of evidence bearing on this ground. Duplication by rehearsing these in this judgment is unnecessary.

[20] One of the features of the oral hearings phase of this litigation was the careful, at times microscopic, examination of many items of evidence – documents, maps, photographs *et al* – in the presentation on behalf of all three parties. While it may be otiose to say so, I have reviewed all of this evidence post-hearing. In doing so I have, not for the first time, been struck by the elaborate and forensic nature of the case constructed and presented by Mr Blackwood. The Respondent has reacted, and contributed, in an equally assiduous manner.

[21] The Applicant bears the burden of establishing that works designed to implement the two 2007 permissions were not commenced within the statutory five

year period. Taking his case at its zenith, I consider that he has failed to do so. Considering all of the material evidence in its totality, it seems to me more likely than not that commencement to the required legal standard, namely a "material start", was indeed achieved prior to the expiry date. The core of the Applicant's case, purely factual in nature, is in my view clearly confounded by the evidence of the developer's written communication of … to the case officer, the evidence from the Building Control Officer therein incorporated and the "ORTHO" photographic evidence. These items of evidence, considered in their totality and in conjunction with others, present a formidable hurdle for the Applicant to overcome. I consider that he has failed to do so and, in thus concluding, I am of the opinion that the evidence of the chartered civil engineer (Mr Thompson), contained in a report dated 10 April 2018, does not withstand the scrutiny to which it was subjected in the submissions of Mr Beattie QC on behalf of the Council: see the relevant section of the *riposte* inserted immediately following [22] of the Appendix. Furthermore, the Court has no reason to doubt the related averments in the case officer's affidavit.

[22] Bearing in mind the quintessentially factual character of this ground of challenge, I conclude that the Applicant has failed to discharge the legal burden on him. In thus concluding I have viewed this evidence through the legal prism most favourable to the Applicant.

[23] The alternative approach is to examine this ground from the perspective of Wednesbury irrationality, having regard to the clearly discernible elements of evaluative judgment and interpretation permeating the conduct of the Council's officers: see for example Re McNamara's Application [2018] NIQB 22 at [] and Re Alexander's Application [2018] NIQB 55 at [69]. Most recently this court has considered the contours of the Wednesbury irrationality standard in Re Sands Application [2018] NIQB 80 at [122] – [127]. The Applicant having failed to establish this ground of challenge via the less exacting standard of review applied above, it follows both logically and inexorably that if and insofar as the Wednesbury principle provides the correct standard of review the outcome of failure must follow.

[24] While the analysis and conclusion above serve to defeat the Applicant's first ground of challenge, I shall for completeness address the discrete argument that the impugned grant of planning permission is vitiated in law by infringement of what is known in the planning world as the "Whitley principle", deriving from Whitley v Secretary of State for Wales [1992] 64 P and CR 296. The *fons et origo* of this principle is found in the judgment of Woolf LJ at [page 304]:

> "*As I understand the effect of the authorities …. it is only necessary to ask the single question: are the operations …….. permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission, they constitute a*

breach of planning control and for planning purposes will be unauthorised and thus unlawful."

The Applicant formulated the argument that if and insofar as works were purportedly undertaken pursuant to the 2007 planning permissions they were unlawful as they were not exactly and strictly in accordance with what was permitted. As its formulation makes clear, this argument is alternative in nature, a fall back contingent upon the Court ruling (as it has) that the first ground of challenge is without merit.

[25] The statutory requirement enshrined in section 63(2) of the 2011 Act (*supra*) is uncomplicated. The Court is enjoined to identify "*the earliest date*" on which the relevant work "[began] *to be carried out*". In the present context the relevant work had two elements, namely the installation of a vehicular access connecting the main road to the site and the excavation and construction of certain foundations on the site. The evidence establishes to the Court's satisfaction (a) that these works were indeed carried out and (b) that the period of their execution was February/March 2011 (see the summary in the case officer's affidavit). The Applicant makes a very specific case. He asserts that the second aspect (only) of the aforementioned works did not represent a lawful 'material start' because the foundations are located in their entirety beyond the footprint of the two 2007 permissions.

[26] The affidavit response of the case officer to this assertion is this:

> "*After viewing the Building Control file I took measurements from the approved plan layout and compared these against the foundations on the ground. This showed that the foundations were not completely in the correct positions as per* [the 2007 approvals]. *However the foundations on site overlapped the approved positions for both the manager's dwelling and the fisherman's cottages. I therefore concluded that sufficient works had been carried out on site for the purpose of implementing the approvals and a material start had been made……..*"

I have considered with care these averments and the relevant surrounding evidence, mainly visual (photographs, maps and drawings). I take into account also that there was no application to cross examine the case officer. Having done so, I am satisfied about the correctness and accuracy of his averments. Furthermore, it is clear from all the evidence that the laying of foundations could not have been undertaken in the absence of a vehicular access from the main road to the site and there is sufficient evidence for the court to be satisfied that an access of this kind was installed. The Court bears in mind that in the real world something quite rough and rudimentary would have sufficed for this purpose.

[27] I am satisfied that the vehicular access was in accordance with the two 2007 approvals. I am further satisfied that the building foundations on site were at least partly in accordance therewith: those foundations that are situated within the

footprint, or so-called red line, accord with what was authorised. The Whitley principle does not avail the Applicant in consequence. I am satisfied that the 2011 works were harmonious with the statutory requirements noted above and do not infringe any legal principle. This aspect of the Applicant's challenge must therefore be rejected.

[28] The Applicant develops a further argument under the umbrella of this ground of challenge. Its foundation is the similarly worded condition contained in each of the 2007 approvals:

> "*The vehicular access, including visibility splays and any forward sight line, shall be provided in accordance with the approved plans prior to the commencement or occupation of any works or other development hereby permitted. ….*
>
> *Reason: to ensure that there is a satisfactory means of access in the interests of road safety and the convenience of road users.*"

The Applicant seeks to characterise this as a condition precedent and contends that there was a failure to comply with same.

[29] The issue of planning conditions precedent was considered by Sullivan J in the course of an extensive review of the case law relating to the Whitley principle in R (Hart Aggregates) v Hartlepool BC [2005] EWHC 840 (Admin). The Judge emphasised, first, that the Whitley principle is, in the context of a field heavily occupied by comprehensive legislation, a Judge made device to be applied with caution. Having highlighted that "condition precedent is equally a Judge made term" – at [57] – Sullivan J continued at [58]:

> "*Going back to first principles, the starting point should be the proposition that there is no scope for implied conditions in a planning permission. If a local planning authority wishes to impose any obligation upon an applicant by way of a requirement or prohibition, it should do so in express terms, because failure to comply with the condition may, ultimately, lead to prosecution for failure to comply with a breach of condition notice and/or an enforcement notice; see sections 179 and 187(A) of the 1990 Act. The need for a local planning authority to spell out any requirement or prohibition in clear terms applies with particular force where the condition is said to prevent not merely some detail of the development, but the commencement of any development pursuant to the planning permission.*"

The status of "condition precedent" is acquired only if the condition "*… goes to the heart of the planning permission ….*": [61]. Repeated exhortations of caution against the over-rigid or over-literal application of the Whitley principle has emerged as one of the major themes of post-Whitley cases.

[30] The Applicant points to evidence that consideration was given by DOE Planning Service to the possibility of enforcement action in July/August 2014. In a completed pro-forma the official concerned, having first confirmed that there has been no inspection of the site, stated:

> "*Complicated site history …. foundations in but Roads Service stated vis* [visibility] *splays were not in therefore permission expired.*"

In a letter dated 21 August 2014 to the developer, DOE expressed its view that planning permission A/2007/0897 had expired. The correspondent added a major *caveat*, however:

> "*It should be noted that this represents an informal opinion and a definitive decision can only be taken through the regulatory planning determination process. While reasonable care is taken to ensure its accuracy, it does not constitute a formal determination by the Department and is given without prejudice to such a determination.*"

In the event, no "*formal determination*" materialised. It is common case that compliance with this condition has now been effected.

[31] The construction of a planning condition is a question of law for the court. Condition No 6 of the first of the two 2009 planning approvals, dated 02 March 2009, states:

> "*The vehicular access, including visibility splays and any forward sight line, shall be provided in accordance with the approved plans, prior to the commencement, operation or any works or other development hereby permitted.*"

Condition No 4 of the second planning approval, dated 11 March 2009, employs the terminology "*.. prior to the commencement or occupation or any works or other development hereby permitted*". Contrary to the Applicant's assertion the two conditions are not identically worded. Furthermore, both the wording and the punctuation – or lack thereof – are quite unsatisfactory, giving rise to obscurity and ambiguity. They suffer from a significant lack of coherence. This consideration alone divests both conditions of the clarity necessary to be classified conditions precedent. This conclusion is readily made.

[32] Furthermore, any attempt to rationalise the difference in wording would be beset with speculation. It suffices to say that there was clearly a lack of care and attention on the part of the officials concerned, in a context where the two planning applications were obviously inter-related, involved the same planning applicant and agent, were lodged within days of each other, were probably considered and processed together, ultimately resulted in approvals (again within days of each other) and were subjected to almost identical suites of conditions. In both logic and

reason it is difficult to discern any justification for differences in either substantive conditions or the wording of individual conditions with regard to the vehicular access issue. The uncertainty to which I have adverted is compounded by all of the foregoing. The two conditions under scrutiny manifestly lacking the necessary attributes of clarity and coherence I readily conclude that they cannot be characterised conditions precedent. It follows that the court rejects this discrete attack on the lawfulness of the early 2011 works.

Ground 2: The first Habitats Regulations Challenge

[33] This ground is based on the premise of the court finding (as it has done) that there was a lawful commencement of the works authorised by the two 2009 planning approvals, with the result that the developments thereby permitted could still be lawfully completed. The Applicant's alternative contention is that there has been an unlawful failure "*… to review extant permissions granted prior to the designation of a European site …*" (per his skeleton argument). His case evidently is that there was a legal obligation to submit the two 2009 planning approvals to a Habitats Regulations Assessment (HRA). I refer also to the formulation in [10](ii) above:

> "*In the alternative to (i), breach of Regulations 45, 46, 50 and 51 of the Habitats Regulations by failing to undertake a review of the previous planning permissions.*"

The Applicant's more detailed submissions under this ground are at [43] – [56] of the Appendix.

[34] I consider that, properly analysed, this ground entails a challenge to the 2009 approvals. The Applicant's contention, in both substance and logic, is that these approvals are vitiated by the infringement of the Habitats Regulations which he asserts. The unmistakable fallacy which arises is that permission to challenge the 2009 approvals has not been granted. These proceedings concern exclusively a challenge to the planning approval made by the Council on 17 January 2018 in relation to a new planning application in respect of the same site. Leave to apply for judicial review has been granted within these constraints.

[35] Further and in any event the Court has found that the two 2009 approvals have not lapsed. From this it follows that they benefit from the principle of presumptive regularity, or validity (*the omnia praesumuntur* principle). This ground of challenge must fail accordingly.

[36] I shall nonetheless address the ground on the hypothesis that the foregoing conclusion is flawed. The European site in question is the River Faughan and Tributaries Special Area of Conservation ("SAC"). The river and its tributaries received this designation on 29 January 2013. The Habitats Regulations came into operation on 13 November 1995. On any realistic view the present intentions of the developer are to develop the site in accordance with the impugned grant of planning

permission and not the 2009 approvals. The impugned approval relates to a planning application which was subject to a HRA which concluded that there would be no adverse effect on the integrity of the European site. Given the close association between the impugned approval (on the one hand) and the two historic approvals (on the other) it seems highly likely that a HRA of the latter would yield the same outcome. It cannot in my view be realistically disputed that implementation of the impugned approval will effectively extinguish the two earlier approvals as their activation will not be physically feasible.

[37] The Council has stated unequivocally in both its affidavit evidence and PAP correspondence that if, contrary to realistic and reasonable expectations, an intention to implement one or both of the 2009 approvals rather than the January 2018 approval should emerge, the historic approvals will be the subject of a HRA. If my conclusion in [36] is incorrect, the Applicant has failed to establish that the Council is guilty of an unlawful failure to subject the 2009 approvals to HRA prior to issuing the impugned approval or, indeed, at any time subsequently.

[38] This ground of challenge fails accordingly.

Ground 3: The Second Habitats Regulations Challenge

[39] By this ground the Applicant asserts contraventions of Regulations 6(3) and 43(1) of the Habitats Regulations based on the Council's alleged failure to carry out any, or any adequate, HRA in respect of the planning application culminating in the impugned approval. The Applicant's detailed submissions and the Respondent's reply are at [57] – [80] of the Appendix.

[40] The essence of this ground is expressed in the Applicant's skeleton argument in the following terms:

> "*It is clear from the revised Appropriate Assessment conducted on 26 June 2017 … that this is not, in fact, a proper Stage 2 Appropriate Assessment. Rather, it is little more than a summary of the Stage 2 Assessment and reiterates the mitigation measures taken into account during this initial screening process ….*
>
> *It is also based on the false premise that the development approved under A/2007/0895/RM …. and the impugned permission are mutually exclusive, thus erroneously ruling out any in combination effects ….*
>
> *It is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on a European site. Essentially this is what the 26 June 2017 HRA has done.*"

[41] In common with the regime devised by the EIA Regulations, two stages are prescribed. The first, commonly known as the "screening" stage, generates a "screening" assessment/decision. A negative screening decision denotes that

nothing further is required. In contrast, a positive screening decision triggers the second stage, which requires and entails detailed consideration of possible significant effects on the European site concerned. The Applicant has correctly identified the distinctions between the two stages in his formulation of this ground.

[42] Regulation 43 of the Habitats Regulations provides:

> "***43.*** *– (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –*
>
> *(a)is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and*
>
> *(b)is not directly connected with or necessary to the management of the site,*
>
> *shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.*"

Regulation 43 and its related jurisprudence were considered by this Court in its recent judgment in Re Sands Application, at [42] – [47], which I incorporate by reference without (in the interests of economy) reproducing.

[43] I turn briefly to the relevant ingredients of the factual matrix. The planning application giving rise to the impugned approval was subjected to two HRAs. These are dated 25 May 2016 and 26 June 2017 respectively. Each was conducted on behalf of the Council by Shared Environmental Service ("SES"), a public authority which, *qua* agent, supports all Councils in Northern Ireland in matters of environmental functions and responsibilities. This court, via its litigation experience, is familiar with the role and work of this agency. The first of these HRAs concluded:

> "*The proposed development is adjacent to the River Faughan and Tributaries SAC – any works within the area proposed has* [sic] *the potential to have a significant adverse effect on the site integrity of this site and is* [sic] *contrary to the conservation objectives for the featured species of Salmon and Otter …*
>
> *Based on the information provided to date, and based on the proposed development in its current state, the proposal is likely to have a significant adverse effect on site integrity which cannot be adequately mitigated for* [sic] *and therefore is not HRA compliant and it will therefore be necessary to recommend refusal to the Council.*"

Thereafter the Council continued to interact with SES, while the Northern Ireland Environmental Agency ("NIEA") was another agency involved in this process, as explained in the affidavit of Ms Allen of SES.

[44] The foregoing gave rise to a second HRA on the part of SES. This assessment, in common with its predecessor, entailed a positive screening assessment and, hence, progressed to the second stage. The text recites:

> "*This HRA will progress to Stage 2 – Appropriate Assessment to ensure conditions are imposed on the planning approval notice to prevent any adverse impacts on these site selection features.*"

No "*uncertainties and any gaps in information*" were identified. Three "*measures to be introduced*" were identified: a final CEMP, a "*buffer to water course*" and, finally, "*works outside salmon spawning season*". The report then proceeded to formulate these three measures as "*detailed conditions*" of any planning approval. The "*Atlantic Salmon Spawning Season*" was identified as 31 October to 31 March.

[45] While the Applicant has identified certain errors in the second HRA, these are minor and technical in nature, are of no substance when one reads the whole of the two HRAs together and, finally, are satisfactorily explained in the SES affidavit. Further, while the Applicant raises the issue of sewerage effluent disposal, the case officer provides the satisfactory explanation in his affidavit that this is an issue to be addressed by NIEA Water Management Unit in the context of an application for effluent discharge consent under the Water (NI) Order 1999.

[46] The impugned approval incorporates the following conditions:

(i) A final CEMP, reflecting all of the mitigation and avoidance measures specified in the initial CEMP and containing supplementary information, must be provided to the Council prior to the commencement of any works on site and observed at all times, the expressed reason being "*to protect the integrity of the River Faughan Special Area of Conservation*".

(ii) There must be a suitable buffer of at least 10 metres between the location of the refuelling, storage of oil/fuel, concrete mixing and washing areas and the boundaries of the SAC, for the same expressed reason.

(iii) All "*in river works and works adjacent to the river*" must be carried out outside the Atlantic Salmon Spawning Season (31 October to 31 March), for the expressed reason "*to protect the spawning salmon*".

These measures/conditions are an exact replica of those proposed in the second HRA.

[47] The involvement and position of NIEA WMU can be reduced to a couple of sentences. This agency communicated that it had no objection in principle to the proposed development, provided that (in particular) the sewerage disposal

mechanism was agreed with NIW or a statutory discharge consent was granted. The former option would be appropriate if connection of the proposed buildings to a mains sewer were feasible. If not, the latter option would apply. NIEA, in a detailed consultation response, also recommended the incorporation of certain measures. The Applicant does not assert any mismatch between this recommendation and the terms of the impugned approval. Furthermore, both the initial EIA and revised EIA determinations (of October 2016 and December 2017 respectively) demonstrate that adequate consideration was given to the sewerage issue. This is reflected in condition No 9 of the impugned approval, which states:

> "*None of the units approved shall be occupied until works for the disposal of sewage have been provided on the site to serve the development hereby permitted, in accordance with details to be submitted to and approved by the Department ….*
>
> *Reason: in the interests of public health.*"

There is no suggestion of any lack of harmony between this condition and the final EIA determination which records *inter alia* that the proposed sewerage treatment mechanism will be constructed "*as per NIEA and Environmental Health requirements*".

[48] I am unable to identify any merit in the Applicant's contention that the second HRA is legally deficient. Contrary to his specific submissions, this report plainly differs from the stage 1 (screening) assessment, proposes legally appropriate mitigation measures and is not infected by a failure to recognise that the impugned approval and one of the 2009 approvals are "*mutually exclusive*". Finally, the Applicant's assault on the stage 1 (screening) decision must be considered misconceived as this was not the final determination having legal effects and consequences given that, being a "positive" screening decision, it was overtaken by the stage 2 determination.

[49] On the grounds and for the reasons elaborated above, the Court concludes that this discrete challenge must be rejected.

Ground 4: the Habitats Regulations Protected Species challenge

[50] In [10](iv) above, this ground is paraphrased as *breach of Regulation 3(4) of the Habitats Regulations by failing to consider the impact of the proposed development on a protected species, namely bats*.

[51] Regulation 3(4) of the Habitats Regulations provides:

> "*Without prejudice to the preceding provisions, every competent authority in the exercise of any of its functions shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.*"

Bats are one of the protected species under Annex (iv)(a) of the Habitats Directive. The terminology is "European Protected Species" ("EPS").

[52] By Article 12(1) of the Habitats Directive:

> "*Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex (iv)(a) in their natural range, prohibiting:*
>
> *(a) All forms of deliberate capture or killing of specimens of these species in the wild;*
>
> *(b) Deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;*
>
> *(c) Deliberate destruction or taking of eggs from the wild;*
>
> *(d) Deterioration or destruction of breeding sites or resting places.*"

The domestic law provision which corresponds with Article 12(1) is regulation 34 of the Habitats Regulations. This, in terms, provides that each of the prohibited forms of conduct enshrined in Article 12(1) is a criminal offence. Regulation 34(1)(b), which corresponds with Article 12(1)(b), is the provision which the Applicant emphasises in particular.

[53] The above provisions of the Habitats Regulations, with the exception of regulation 34(1), were considered in the recent decision of this Court in Re Sands Application [2018] NIQB ….. at [54] – [55]. Referring to regulation 3 of the Habitats Regulations and Article 12(1) of the Habitats Directive, the Court stated at [54]:

> "*In brief compass, the combined effect of these two provisions was to oblige the Council to have regard to the specified requirement of the Directive requiring prohibition of deliberate disturbance of protected species, particularly during the periods of breeding, rearing, hibernation and migration.*"

The judgment in Sands reproduces at [58] extensive passages from one of the leading cases in this sphere, R (Morge) v Hampshire CC [2011] 1 WLR 268.

[54] The Applicant's detailed submissions on this ground are set forth at [81] – [90] of the Appendix, followed by the Respondent's reply. From the written and oral submissions of the two protagonists, two salient items of evidence emerge, namely the Fauna Survey Report prepared in 2003 and the case officer's report to the PC.

[55] The 2003 Fauna Survey Report is dated 07 July 2003 and was generated in connection with an earlier planning application resulting in the grant of outline planning permission in 2004 authorising the development of six self-catering tourist

chalets on the site. Sequentially, the evidence pertaining to this discrete phase of the site's history includes a consultation response of the Environment and Heritage Service ("EHS") dated 10 December 2002 which stated:

> "*The development, if permitted, would disturb the terraced slopes, cause disturbance to woodland habitat and threaten badger activity.*"

In a supplementary response dated 28 March 2003 EHS stated:

> "*EHS Natural Heritage still has concerns with the above application and its potential impact on protected and priority species …*
>
> *EHS would require the applicant to submit a survey for the site and adjacent associated habitats for the following species: badger, otter, red squirrel, sand martin and bats.*"

Guidelines for the bat and badger surveys were provided.

[56] In this way one identifies the genesis of the Fauna Report of July 2003. The author of the report is one Chris Murphy of the enterprise Murphy's Wildlife. The report was based on his personal detailed survey of both the site and surrounding lands on two dates, encompassing both day light and dusk. The author is described as "*an experienced naturalist having previously worked as an ornithologist for the British Trust for Ornithology and Royal Society for the Protection of Birds*". The report details his other credentials and memberships. The report describes *inter alia* the Bat Survey methodology. Its conclusions include the following passages:

> "*The mature trees and river offer excellent foraging opportunities for bats, all of which in Northern Ireland, including those species recorded, are insectivorous. With this in mind it is important when considering options for developing the site that all vegetation and especially mature trees on the river bank are preserved …*
>
> *The proposed development site is of no significant value to wildlife including those species surveyed. The site is, however, adjacent to two important habitats: the mature woodland of holly plantation and the River Faughan. Care should be taken to ensure that these two habitats are not adversely affected by the development.*"

It is appropriate to reproduce in full the following passage relating specifically to <u>bats</u>:

> "*There are no standing buildings or tunnels on the site, the preferred choice for roosts and hibernacula of most species of bat found in Northern Ireland. Several mature trees in* [the] *holly plantation had cracks and hollows which could have been attractive to bats though it was not possible to prove occupancy during the present survey. All bat sightings were made on 23 June*

in the vicinity of the river with the exception of a single Leisler's Bat which passed north high above the site. The Northern Ireland Bat Group does not hold any specific bat records for the site."

[57] The final position of EHS was one of not objecting to the development proposal in principle subject to the inclusion of a series of proposed conditions. I draw attention to one of these, which appears to the Court the most pertinent in the context of this discrete challenge:

"*There shall be a 10 metre band of dense native planting along all boundaries (excluding that with the River Faughan), to consist of a native woodland mix …*

Reason: *to provide for loss of habitat, minimise potential disturbance and provide valuable corridors for movement and shelter of protected species and wildlife.*"

[58] As various maps and photographs illustrate, the holly plantation mentioned in the foregoing evidence is situated beyond and, in part, borders the boundaries of the site. A post and wire fence denotes this separation. The proposed vehicular access to the site runs along a line both adjacent and parallel to the aforementioned fence. This photographic evidence also provides a helpful visual insight into Mr Murphy's description of the site as "*a water logged corner of a field of improved pasture with no significant wildlife value*" and, I add, no trees.

[59] The third item of evidence of particular relevance to this ground is the consultation response dated 27 April 2015 of the Northern Ireland Environment Agency Natural Environment Division ("NIEA"). This consultee summarised its position thus:

"*NIEA …. has concerns with this proposal and considers that further information is required to comply with the Habitats Regulations and to fully assess the likely impacts on natural heritage interests.*"

Elaborating, the correspondent stated:

"*The proposed development could potentially lead to altered habitat within the river channel, displacement of otters, pollution and altered hydro morphology relating to increased levels of erosion.*"

Potential adverse impact on both otters and badgers was noted. The consultee requested extensive further information via a lengthy list of questions.

[60] One further piece of evidence of relevance to this ground is the case officer's report to the Council's PC. This was prepared for the purpose of the PC meeting held on 10 January 2018 which, in the event, resulted in the impugned decision. This

report is silent on the issue of bats and, indeed, other fauna. In his affidavit the case officer avers *inter alia*:

> "*Having inspected the site and viewed the plans proposed, I was satisfied that there would be no loss of habitat suitable for bats in the form of hedgerows and trees.*"

The deponent elaborates on this with references to various dimensions and angles. He highlights that the development proposal entailed no removal of trees or hedging. He indicates that the proposed construction of buildings, pathways and car parking would be situated at a distance greater from the river than the construction authorised by the two 2009 approvals. The deponent observes, correctly, that this discrete topic was addressed by him in his report to the PC. He then deals with the access laneway authorised by the historic approvals and avers:

> "*As a result, I made a judgment on the basis of the information available to me and from the site inspections that there was no requirement for the Council to seek additional surveys relating to bats … as the layout of the* [proposed development ….] *does not negatively affect bats or the habitat they would use surrounding the site.*"

[61] The Applicant, in his submissions, correctly draws attention to what this Court has said in recent decisions about the function and importance of the reports of planning officers to the planning committees of councils: see Belfast City Council v Planning Appeals Commission [2018] NIQB 17 at [58] and Alexander v Causeway Coast and Glens BC [2018] NIQB 55 at [10]. The argument developed by the Applicant under this ground has two main elements. First, he questions the adequacy of the 2003 fauna report, suggesting that it was "*weak and inconclusive*" and, further, dated. In this context he draws attention to certain bat survey guidelines. Second, he suggests that the possibility of the contaminant of *ex post facto* rationalisation in the case officer's affidavit "*… cannot be ruled out …*".

[62] I accept the Applicant's criticism of the case officer's report. Its failure to explicitly raise and address the issue of fauna and to do so in the context of the statutory overlay identified above is regrettable. In this respect the report fell below appropriate professional standards. However, the "*have regard to*" duty imposed by regulation 3(4) of the Habitats Regulations is neither absolute nor open ended. It is qualified by the important words "*.. so far as they may be affected by the exercise of those functions*". The specific requirement within the Habitats Directive to which regulation 3(4) relates in the present context is that of the duty to prohibit the deliberate disturbance of protected species, contained in Article 12(1). The exercise of applying these legislative provisions to the relevant factual framework represents the next step in the analysis.

[63] This, in my judgment, leads ineluctably to the conclusion that the legislative provisions and the relevant factual framework are separated by something of a gulf.

The specific duty imposed upon the Council, in making the impugned decision, was to have regard to the prohibition against deliberate disturbance of bats. I am satisfied from all the evidence that the Council did not perform this discrete task. However, I consider that as a matter of law the duty of undertaking this task arises only where there is material requiring the task to be performed. I consider that there was no such material. Regulation 3(4) cannot be construed as requiring consideration to be given to an issue which does not reasonably and realistically arise. It does not impose a phantom duty to be performed in a factual vacuum. Any challenge which invokes Regulation 3(4) must have an appropriate evidential foundation. I consider that there is no such foundation in the present case.

[64] It follows that the first and elementary threshold applying to this ground of challenge is not overcome. In the interests of providing maximum guidance, I would add the following. In any case where the evidence establishes that the "*competent authority*" has conducted an exercise yielding the conclusion that a specified requirement of the Habitats Directive does not satisfy the qualifying condition of "*… so far as they may be affected by the exercise of those functions*" I consider that, given the manifest element of evaluative assessment involved, the appropriate standard of review in this court will be that of Wednesbury irrationality – which, broadly, is the domestic law equivalent of the EU law standard of manifest error of assessment (see Sands at [21]).

[65] In rejecting this ground of challenge, I refer, finally, to what this Court stated in Sands at [47]:

> *"In R (Lee Valley Regional Park Authority) v Epping Forest DC [2016] EWCA Civ 404, the English Court of Appeal observed at [65] that the Habitats Directive is –*
>
> > *"… intended to be an aid to effective environmental decision making, not a legal obstacle course …*
> >
> > *Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional Wednesbury grounds'."*
>
> *Another principle which emerges from the corpus of decided cases is that a litigant who claims that there has been a failure to consider some particular risk has the onus of adducing credible evidence that there was a real, rather than a hypothetical, risk which should have been considered: R (Boggis) v Natural England [2010] PTSR 725, at [37]–[38]. To like effect, Sullivan J stated in R*

(Hart DC) v Secretary of State [2008] EWHC 1204 (Admin), at [81]:

> *"Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient …"*

I refer also to Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at [56]–[62] and [78]–[85], which is to similar effect and, further, reiterates with some emphasis the principle that the authority concerned – where it rationally chooses to do so (my emphasis) – is entitled to attribute substantial weight to the views of a presumptively expert consultee."

While the case officer's report, admittedly, lacked the attributes noted in [44] of Morge, the effect of my foregoing analysis and reasoning is that this was an immaterial defect.

Ground 6: Breach of Regulation 4(1) of the EIA Regulations

[66] The burden of this ground is that the impugned grant of planning permission is vitiated by a failure to require the provision of an Environmental Statement ("ES"). The key, basic fact pertaining to this ground is that the Council's planning officials, in the form of a so-called "screening" decision, determined that an ES was not required. The Applicant's detailed submissions on this ground, incorporating the Respondent's reply, are found at [91] – [110] of the Appendix.

[67] The legislative provisions and leading cases bearing on this ground were considered extensively by this Court in its recent decision in Sands at [11] – [41] to which I refer without reproducing. As the submissions of Mr Beattie QC reminded the Court, there is a convenient summary of the main principles in R (Long) v Monmouthshire CC [2012] EWHC 3130 (Admin) at [16]. One also recalls the memorable judicial statement that compliance with EIA requirements does not require perfection: R (Blewett) v Derbyshire CC [2004] Env LR 29 at [32] – [42].

[68] As [94] – [97] of the Appendix and the corresponding averments in the Council's affidavit make clear, the planning officials involved emerge from this discrete chapter with little credit. The time limit of four weeks measured from receipt of the planning application, imposed by regulation 10(3) of the EIA Regulations was blithely breached, with little heed given to the consensual extension statutory mechanism. Fortunately for the Council, this free standing regulatory infringement, though it could conceivably have given rise to appropriate judicial relief, for example in the form of a mandatory injunction, at the material time, does not *per se* vitiate either the screening opinion which belatedly eventuated or the impugned grant of planning permission. The Court confines itself to a stern reprimand for this unacceptable conduct.

[69] During the protracted period just noted, a revised planning application was submitted by the developer, on 19 September 2016. This omitted the proposed "fishing stands" in the river. The evidence makes clear that the impetus for this was the developer's wish to address the concern, raised in the first HRA some three months previously, that the fishing stands could have an unacceptably adverse impact on fauna (the court's paraphrase).

[70] Eventually, and belatedly, the Council's screening opinion materialised. It is dated 10 October 2016. It made a negative environmental screening assessment. First, it noted that both SES and NIEA had provided consultation responses "*.. in particular in relation to the fishing platforms that have been planning for the edge of the river*" and which had been omitted from the second, revised planning application. Second, the 3 officials concerned supplied a negative answer to the question "*Are the environmental effects likely to be significant?*" Third, a series of reasons for this assessment followed. I reproduce the main passage:

> "*The nearest form of any development to the river is an asphalt permeable walkway that stretches from the car park to the holiday cottages. This is located 31.5 metres from the river's edge. The built form of the holiday cottages is 45 metres away from the river bank. There is a SUDS attenuation tank and a storm drainage located 35 metres from the river. The construction of the cottages and the manager's dwelling means that all works could be managed through a construction method statement and as such would mean that all aspects of the build could be dealt with through the planning application …*
>
> *In conclusion I have considered all the aspects of the proposal in front of me and concluded that it would be unlikely that the development will result in any significant environmental impacts.*"

[71] During the period of some 14 months which followed, there was further interaction between the Council and DAERA (Natural Environment Division), the developer's agent and the Applicant. In short, DAERA was demanding further clarification and information, deferring its final consultation response. There was a particular focus on the need for a CEMP addressing the interrelated issues of a concrete discharge bulkhead and the disposal of contaminated surface water during the construction phase in the event of a "*flood event*" affecting the river and its tributaries. The developer produced a CEMP in May 2017. This was followed by a further HRA by SES in June 2017 which concluded:

> "*Having considered the nature, scale, timing, duration and location of the project, it is concluded that, provided the following mitigation is conditioned in any planning approval, the proposal will not have an adverse effect on site integrity of any European site.*"

[72] The case officer then conducted a further, second, EIA screening assessment, directed on this occasion to the revised planning application. This recorded both the revised application and the details in the CEMP relating to the management of site water run off; the "contented" position of NIEA, SES and the Rivers Agency; the likelihood of environmental effects on the water course/flora and fauna/the ASSI/SAC designated sites and, in addition, the factors of traffic generation, noise and visual impact. Its conclusion was that the diagnosed environmental effects were not likely to be significant (with the result that an ES was not required) for the reasons given. Consideration of each of the components of the "statutory checklist" followed.

[73] Moving beyond the foregoing somewhat lengthy preamble I turn to the criticisms ventilated by the Applicant. These, in my view, are largely characterised by bare assertion and mere subjective disagreement. While they also contain hints of improper motive, they are manifestly devoid of the requisite evidential foundation in this respect. To this I would add that leave to apply for judicial review on the well-recognised public law ground of improper motive has not been granted in any event. Furthermore, the Applicant's complaint focusing on timing and delay do not translate into a diagnosis of illegality. Finally, the stamp of evaluative judgment is unmistakable throughout the entirety of this discrete chapter. If and to the extent that the Applicant is challenging this, the leading cases make clear that the Wednesbury principle provides the standard of review and the Applicant's challenge falls measurably short of overcoming this elevated threshold. In this context I refer to, but do not repeat, paragraphs [23] – [24], [123] - [128] of Sands. This ground of challenge must fail accordingly.

Ground 7: failure to adequately consider the Derry Area Plan 2011

[74] The Applicant advances section 6(4) of the Planning Act (NI) 2011 (the "*2011 Act*") as the first statutory underpinning of this ground. Section 6(4) provides:

> "*Where, in making any determination under this Act, regard is to be had to the local development plan, the determination must be made* ***in accordance with*** *the plan unless material considerations indicate otherwise.*"

I have highlighted the three words "*in accordance with*" for reasons which will become clear. Section 45(1) provides, insofar as material:

> "*Subject to this Part and section 91(2), where an application is made for planning permission, the Council or, as the case may be, the Department, in dealing with the application, must have regard to the local development plan, so far as material to the application, and to any other material considerations ….*"

[75] The discrete policies within the Derry Area Plan 2011 (the "*DAP*") on which this ground is based are, per the amended Order 53 pleading, policies ENV1, ENV2, ENV7, ENV8, ENV9, TU1 and TU2. The amended pleading continues:

> "*However, in assessing the impugned decision against the development plan, only Policy ENV1, 'areas of high scenic value (Ao Hsv)' has been taken account of as a 'material consideration'. The Respondent has, therefore, failed to fulfil its statutory duty under sections 6(4) and 45 of the Act.*"

[76] Of the seven policies which feature in the Applicant's challenge only Policy ENV1 is expressly addressed in the case officer's report to the Council's PC. The relevant passage begins with an accurate portrayal of section 6(4) of the 2011 Act, continuing:

> "*This proposal has been assessed against the provisions of the Derry Area Plan 2011, as well as other material considerations including …….* [a series of identified free standing planning policies]."

In a later passage, entitled "Derry Area Plan 2011", it is stated:

> "*The site is located outside the development limits of Derry as defined in the development limits of Derry Area Plan 2011. The site is identified as being within an* (Ao Hsv) *and therefore Policy ENV1 of the DAP 2011 is a material consideration in this application …*
>
> *Policy ENV1 states that proposals for development which would adversely affect or change either the quality or character of the landscape within the Ao Hsv will not normally be permitted. The proposal in its present form is to essentially replace the existing development approved and started on site. The proposal will not affect the existing established character and will have no significant visual impact given the limited views of the proposal as this location.*"

The Applicant's assertion that none of the other six policies in his group of seven was addressed in the case officer's report is correct.

[77] In his main affidavit the case officer addresses each of the aforementioned DAP policies *seriatim*. He prefaces this with the averment:

> "*Although certain policies have not been specifically referenced in the report that does not mean that the issues raised thereby have not been considered.*"

In the individual sections which follow, the deponent makes the following case:

(a) As regards Policy ENV2, the relevant tests were addressed in his report in the context of his consideration of other specified policies enshrining the same policy tests, with a "compliant" conclusion.

(b) Policy ENV7, which enshrines a requirement that development proposals take into account existing trees and hedges and provide appropriate landscaping, is not infringed as no existing trees or hedges will be removed or damaged and the planning application materials included an acceptable landscape plan.

(c) Policy ENV8, which purports to prohibit development likely to introduce or increase water pollution to an unacceptable extent, was addressed in substance in the case officer's consideration of PPS2 in his report and, having regard particularly to the consultation responses of NIEA, SES and DFI Rivers, coupled with the acceptable CEMP provided, was not considered to be infringed.

(d) Policy ENV9, which in essence (in this instance) protects the landscape adjacent to the River Faughan and its tributaries, was addressed in the deponent's report in substance in the context of his consideration of other policies to substantially the same effect, giving rise to an assessment of compliance.

(e) Policies TU1 and TU2 enshrine tests which were addressed in the case officer's report in the context of his consideration of the related policy instruments PPS16 ("Tourism") and PPS21 ("Sustainable development in the countryside"), resulting in an assessment of compliance.

[78] When the detailed particulars of this ground of challenge emerged in the elaborate written submission which the Applicant deployed on the first two days of the hearing, the Court permitted the facility of a further replying affidavit from the case officer. It suffices to record that this further affidavit in effect enlarged and reinforced what I have summarised above.

[79] The English statutory equivalent of section 6(4) of the 2011 Act is section 38(6) of the Planning and Compulsory Purchase Act 2004. This was considered *in extenso* by the English Court of Appeal in BDW Trading v Secretary of State for Communities and Local Government [2016] EWCA Civ 493 at [21] and [23]:

> *"21 First, the section 38(6) duty is a duty to make a decision (or "determination") by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde's speech in the City of Edinburgh Council case [1997] 1 WLR 1447 , 1458–1459. Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognising that they may sometimes pull in different directions: see Lord Clyde's speech in the City of Edinburgh Council case, pp 1459D–F, the judgments of Lord Reed JSC and Lord Hope of Craighead DPSC in Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] PTSR 983 ,*

respectively at paras 19 and 34, and the judgment of Sullivan J in R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2) (2000) 81 P & CR 27 , paras 48–50. Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides "whether the development plan should or should not be accorded its statutory priority", and secondly, "if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration": see Lord Clyde's speech in the City of Edinburgh Council case, at p 1459–1460. Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole: see R (Hampton Bishop Parish Council) v Herefordshire Council [2015] 1 WLR 2367 , para 28, per Richards LJ and Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government [2016] JPL 171 , paras 27–36, per Patterson J. And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance: see the Hampton Bishop Parish Council case, para 30, per Richards LJ.

23. On the same theme Richards LJ said in the Hampton Bishop Parish Council case [2015] 1 WLR 2369:

> *'28. … It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan …'*

Richards LJ added, at para 33, that if the decision-maker does not do that he will not be in a position to give the development plan what Lord Clyde described in the City of Edinburgh Council case as its "statutory priority". He went on (in the same paragraph) to recall Lord Reed JSC's observation in the Tesco Stores Ltd case [2012] PTSR 983 , para 22 that "it is necessary to understand the nature and extent of the departure from the plan … in order to consider on a proper basis whether such a departure is justified by other material consideration"."

I have also taken account of the decision in R (St James' Homes Limited) v Secretary of State for the Environment [2001] JPL 1110, which held that this duty obliges the decision maker to consider the relevant development plan policies irrespective of whether they have been brought to its attention: unimpeachable common sense.

[80] I reproduce here this court's recent approach in Sands, at [62]. Section 6(4) of the 2011 Act does not impose the relatively gentle duty of merely having regard to the DAP. On the contrary, it obliges the deciding authority – in this case the Council – to determine planning applications in accordance with the DAP unless it considers that material considerations indicate otherwise. In this way DAP s are given primacy and as noted in [60] above attract a statutory presumption in their favour. I consider that a challenge based on section 6(4) of the 2011 Act obliges the court to both identify and construe the relevant provisions within the DAP. The identification issue is not contentious in the present case: the relevant policies engaged by this ground are specified above The construction issue attracts the well-established principle that the exercise of construing planning policies is a question of law for the court (Tesco Stores v Dundee City Council [2012] UKSC 13 at [18]).

[81] At this juncture I remind myself of the two elements of this ground of challenge. The first consists of assertion, it being suggested that specified policies within the DAP were not taken into account. I have addressed at the outset of this judgment – in [14] – [15] - the principles which every challenge of this species engages. They are most clearly expressed by Carswell LCJ in Re SOS Application [2003] NIJB 252 at [19]:

> *"It is for an applicant for leave to show in some fashion that the deciding body did not have regard to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did do so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review. In the present case there was no such evidence and in our judgment nothing from which such an inference could be drawn. "*

Stated succinctly, he who asserts must prove.

[82] The question of whether an assertion of this kind has been proved to the requisite standard, i.e. on the balance of probabilities, must be answered by having regard to the totality of the material evidence. In view of the absence of reference to the DAP policies in question in the case officer's report to the PC, I have considered it appropriate to subject his affidavits to particular scrutiny and, in conducting this exercise, I have juxtaposed his averments carefully with those passages of his report, and the related planning policies, which are said to address the material DAP policies in substance. I do not identify any element of impermissible *ex post facto* rationalisation or, worse, invention. This essentially forensic exercise yields the twofold conclusion that the relevant DAP policies were identified (in substance) in the report and were considered by the PC members. The second part of this conclusion is made in a context where the Applicant does not make the case that the

members failed to consider the case officer's report. To this I add that in any event there is no evidence, direct or inferential, warranting any such finding.

[83] The second, and final, limb of this ground of challenge entails the contention that the impugned grant of planning permission is not in accordance with the relevant DAP polices, thereby contravening section 6(4) of the 2011 Act. As emphasised in [62] above and in [62] of Sands this raises a hard edged question of law. The question for the Court is whether, having regard to the totality of the evidence bearing on this issue, the impugned grant of planning permission accords with the relevant policies of the area plan concerned. In Sands the Court stated at [69]:

> "*I consider that any challenge based on section 6(4) involves the court in an audit of legality. I repeat: the question is not whether specified LDP policies were identified and taken into account. Rather, section 6(4) requires the court to address, and answer, the pure question of law of whether the impugned grant of planning permission is in accordance with the LDP. This is a classic "terminus" question, an objective and dispassionate exercise, to be contrasted with one of "process". Debates about what was – and what was not – considered by the decision maker, focusing as they do on the surrounding and underlying evidential matrix, seem to me remote from the clinical task of examining the impugned decision through the* "in accordance with" *statutory prism.*"

[84] As the wording of the policies concerned makes clear and the report and affidavits of the case officer confirm, the planning policy consideration exercises carried out were replete with the factor of evaluative assessment. The several assessments conducted engage the Wednesbury standard of review. The public law irrationality threshold was considered extensively by the Court in Sands at [122] – [131]. I consider that the section 6(4) challenge in the present case must overcome the Wednesbury threshold. The evidence demonstrates that the policies were both considered and applied with appropriate care and attention, leaving nothing material out of account and involving no invasion of the immaterial. The clear conclusion is that the Applicant's challenge falls measurably short of establishing a breach of either section 6(4) or section 45(1) of the 2011 Act.

Misinterpretation of planning policy

[85] As [10] above makes clear, this is not one of the grounds of challenge permitted by the grant of leave to apply for judicial review. In the event the Applicant's written submission (see Appendix) addressed it and Mr Beattie QC, properly, raised no technical objection. The judgment of the Court shall therefore engage with this further limb of the Applicant's challenge.

[86] The argument developed by the Applicant is that there was a misinterpretation of Policy TSM5, which is enshrined within PPS16 ("Tourism"). This policy states in material part:

> "*Planning approval will be granted for self-catering units of tourist accommodation in any of the following circumstances:*
>
> *(a) One or more new units all located within the grounds of an existing or approved hotel, self-catering complex, guesthouse or holiday park …*
>
> *In …… circumstance (a) …… above, self-catering development is required to be subsidiary in scale and ancillary to the primary tourism use of the site.*"

The relevant passage in the case officer's report to the PC states:

> "*PSM5 states that planning approval will be granted for self-catering units of tourist accommodation in a number of circumstances with the first criteria being that all units are located within the grounds of an existing or approved hotel, self-catering complex, guest house or holiday park. The proposal under consideration with this application is located within the site of a previous approval for a manager's dwelling … and six self-catering chalet style apartments …. both of which were implemented on site before the applications expired. Therefore, there is a live approval on site which the land owner could proceed to development at any point which satisfies the criteria set out in this policy.*"

Having elaborated on the other requirements of the policy, the case officer advised that the proposal was policy compliant.

[87] In his main affidavit the case officer avers:

> "*The Planning Committee Report states that there is a live approval on site which could proceed to development at any point. The Respondent is of the view that this is sufficient to bring the matter within the remit of TSM5. No exception or setting aside of policy is required …. there is an approved (and commenced) permission for a self-catering complex …*"

The Applicant's attack on this assessment is elaborated in [138] – [149] of the Appendix, which I do not reproduce.

[88] A clear frailty in the Applicant's argument is that the Court has upheld the case officer's approach to the two 2009 approvals: see [26] and [32] above. The effect of this is, paraphrasing the policy language, that the impugned grant of planning permission relates to a site with an already approved self-catering complex. The six units authorised by the impugned approval substantially replicate that which is

already approved. I consider that they are not "*new*" in the sense of the policy as they are not additional to or materially different from the units already approved. While the case officer's description of the units enshrined within the impugned approval as being "*largely located over the footprint of the approved chalets*" is not accurate, as he acknowledges in his affidavit, this does not give rise to the assessment that he misinterpreted Policy TSM5. Furthermore, and alternatively, even if one were to view the six units authorised by the impugned approval as "*new*" in the sense that the previously approved units had not been constructed, it does not follow in my estimation that any material policy misinterpretation occurred.

[89] Finally, as the submissions of Mr Beattie QC make clear - Appendix at [149] - the Applicant advances two clearly unsustainable contentions, namely that Policy TSM5 does not apply to a pre-existing approval and, secondly, that the policy requires an already constructed and functioning development. Both contentions are confounded by the language of the policy. Fundamentally, the Council was required to have regard to policy TSM5 by reason of the still legally extant 2009 approvals. I can identify no substance in the policy misinterpretations advocated by the Applicant. This discrete complaint is, therefore, rejected.

Omnibus Conclusion

[90] While the court has not considered it necessary to dwell upon any aspects of the written submissions of the developer in the body of this judgment, they have not been overlooked. In common with the written submission of the Applicant, these were formulated in clear, coherent and measured terms and have been fully considered.

[91] On the grounds and for the reasons elaborated above, the application for judicial review is dismissed.

[92] A parting observation is appropriate. The substantive phase of these proceedings confirmed the correctness of the grant of leave to apply for judicial review. The Applicant's challenge raised several issues of sufficient gravity and substance to warrant an extensive and elaborate response, both evidential and otherwise, on the part of the Council and careful examination by the Court.

[93] Having considered both parties' written submissions, I identify no sufficient basis for declining to apply the general rule, which is one of some potency. The outcome of these proceedings is outright defeat for the Applicant and outright victory for the Respondent. This approach is in no way diluted by my observations in [92] above. Accordingly, the Applicant shall pay the Respondent's costs and, giving to the extant protective costs order, these shall be limited to £5,000.

APPENDIX

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY DEAN BLACKWOOD, AS LITIGANT IN PERSON, ON BEHALF OF RIVER FAUGHAN ANGLERS LIMITED
-v-
DERRY CITY AND STRABANE DISTRICT COUNCIL

RESPONDENT'S RESPONSES ARE PROVIDED IN BOLD ANTIQUA FONT

INTRODUCTION

1. The impugned permission has, I will contend and demonstrate, been characterised and is pervaded by errors of law, objectively verifiable errors of fact that have had a material bearing on the decision-making process, and after-the-event rationalisation of matters that should properly have been, but were not before the decision-making body of Derry City and Strabane District Council; the Planning Committee (PC). I will address the grounds of challenge as they appear in the Applicant's amended Order 53 Statement and draw the Court's attention to exhibits which support the Applicant's arguments.

IMMATERIAL CONSIDERATION / CONDITION PRECEDENT

2. At the heart of this ground lies what I consider to be the Respondent's first objectively verifiable error of fact as demonstrated by its own records and exhibits.

3. In Huddlestone-v-Lancashire County Council (paragraph 942a), Donaldson LJ reiterated the well-established principle in judicial review that a decision-maker will have erred in law *"…by taking into account irrelevant considerations or not taking into account relevant considerations."*

4. The Respondent relies on construction works undertaken in late February / early March 2011 in respect of historic permissions A/2007/0895/RM [DB1 Tab12] and A/2007/0897/RM [DB1 Tab13] (before their expiry in March 2011) as securing the lawful commencement of development for both the holiday chalets and a manager's dwelling, respectively. In turn, it is this (disputed) lawful commencement of development which is used to justify the granting of the impugned permission [DB1 Tab23, p203].

The Legal Question

The issue relates to the legal question whether works on the site under the 2009 consent were lawfully commenced.

The provisions of section 63(2) of The Planning Act (NI) 2011 (hereafter "the 2011 Act") are relevant:

Provisions supplementary to sections 61 and 62
63—(1) The authority referred to in section 61(1)(b) or 62 is—
(a) the council in the case of planning permission granted by it;
(b) the Department, in the case of planning permission granted by it;
(c) in the case of planning permission granted under section 58, 60 or 145, the planning appeals commission;
(d) in the case of planning permission deemed to be granted under paragraph 3(1) of Schedule 8 to the Electricity (Northern Ireland) Order 1992 (NI 1) (consents under Articles 39 and 40 of that Order), the Department of Enterprise, Trade and Investment.

(2) For the purposes of sections 61 and 62, development shall be taken to be begun on the earliest date on which any of the following operations comprised in the development begins to be carried out—

(a) where the development consists of or includes the erection of a building, any work of construction in the course of the erection of the building;
(b) where the development consists of or includes alterations to a building, any work involved in the alterations;
(c) where the development consists of or includes a change of use of any building or other land, that change of use;
(d) where the development consists of or includes mining operations, any of those operations.

(3) For the purposes of section 62(2), a reserved matter shall be treated as finally approved when an application for approval is granted, or, where on an appeal under section 58, the planning appeals commission grants the approval, on the date of the determination of the appeal.

(4) Where a council grants planning permission the fact that any of the conditions of the permission are required by this Act to be imposed or are deemed by this Act to be imposed, shall not prevent the conditions being the subject of an appeal under section 58 against the decision of the council.

(5) Where a planning permission (whether outline or other) has conditions attached to it by or under section 61 or 62—

(a) *development commenced and carried out after the date by which the conditions of the permission require it to be commenced shall be treated as not authorised by the permission; and*

(b) *an application for approval of a reserved matter, if it is made after the date by which the conditions require it to be made, shall be treated as not made in accordance with the terms of the permission.*

(Counsel's emphasis)

Summary of the Respondent's position

In summary the Planning Committee Report ("PCR") records that "*Both these applications were implemented in time and are therefore a material start on the site ...*" (TB1p98). The Applicant contends that this statement is inaccurate and misleading for various reasons. The Respondent maintains that a material start was made to works to implement the permissions in question before they expired and that the PCR was correctly informed that this was the case.

The matter is dealt with at length at paragraphs 14 – 21 of the first affidavit of Ciaran Rodgers ("CR"). In short the issue as to whether a material start was made to works to implement the planning permissions in question before they expired was fully investigated. Evidence was produced by the developer and considered, the building control files were checked and the extent to which the foundations were constructed in the footprint authorized by the planning permissions was explored. Once the proper factual context was established it was correct to conclude that sufficient works had been carried out for the purpose of implementing the approvals.

It is furthermore now clear from the material before the court that even before the foundations were constructed a material start was made when the permitted access was opened up to facilitate the construction of the foundations.

In his submissions (as perhaps is most evident in due course below) the Applicant persists in the fundamental error of suggesting to the Court that the works permitted under the 2009 consent are required to have been completed. That proposition is wholly misconceived. The Applicant misunderstands the statutory test.

1. It is recognised that there are conflicting positions from all parties in respect of this matter. However, the extent of that conflict is not as irreconcilably contradictory as seems at first glance. By drawing on areas of common ground, it can be demonstrated to this Court that the Respondent's claim of a material overlap between the foundations of the holiday chalets as constructed on site and those approved under A/2007/0895/RM can be categorically disproven. In respect of the Manager's dwelling, it will be demonstrated by use of the Respondent's own evidence, that there is significant doubt over the claims it makes regarding there being a material overlap in that case.

The Applicant's repeated claims of common ground, based on his interpretation of select references, and as made throughout his submissions, are not accepted. This statement is not repeated hereafter in order to avoid unnecessary repetition but this should not be construed as acceptance of common ground in any particular respect.

The question of overlap is dealt with below.

Holiday chalets

1. There is significant common ground between all parties in this case. First, all parties agree that this reserved matters permission has not been constructed strictly in accordance with the approved plans. Nor has it complied with the planning condition requiring the construction of the vehicular access before any other development could take place on the site. That being the case, the Department of the Environment (the planning authority at the time) deemed that the foundations laid, were unauthorised and that the historic permission for the holiday chalets had lapsed [DB1 Tab15, 178 – 179]. By placing determining weight on an immaterial consideration, the Respondent will have erred in law.[1]

"Strictly in accordance"

Whether works have been commenced or completed "strictly in accordance" is irrelevant. The Court should look to whether works have commenced by the carrying out of "any works".

The opening of the access

The assertion that the vehicular access has to be constructed in accordance with the plans is also wrong in Law for the reasons set out. Indeed as set out above, it is clear from the material before the court that even before the foundations were constructed a material start was made when the permitted access was opened up to facilitate the construction of the foundations.

The Court has already identified this as a fundamental issue. Even if the issue is that of sequenced works, the fact is that the access entrance was opened up to facilitate the construction of the foundations.

The Applicant asserted to the Court that the date upon which this occurred is unknown, but the Case Officer investigated matters and was advised that the access was opened to expressly to facilitate the construction of the foundations: see TB 1A, page 200 - email of Mrs Deery.

[1] *Huddlestone-v-Lancashire Country Council* [1986] 2 All ER, page 942a.

On that basis alone, the statutory test is made out because the agricultural field was changed to create an access to facilitate the development.

Consideration of the Ortho photos before the Court further confirms the correct factual position.

The Ortho photo of 31 August 2010 shows no access other than the field access (TB2 page 167).

The Ortho photo V4 of 8th June 2013 clearly shows an access running straight to the road (TB2, page 169).

See CR 2nd Affidavit para 25 (TB 2 R, page xxxvii)

It is irrelevant that the access works were not completed.

Relatedly, the actual planning conditions of both 2009 consents do not require the visibility splays until "occupation".

Contrary to the assertion of the Applicant, there are different conditions for the two 2009 consents: that for the manager's house and the chalets.

The manager's dwelling permission (TB1, pages 163-166) expressly requires the access to be constructed before commencement or occupation (Condition 4, page 164). "Occupation" is a well understood term of planning. It refers to occupation of the completed development.

The chalets permission (TB 1, page 148-153) has two interlinked conditions (page 149); condition 6 and 7. Condition 7 expressly does not require the visibility splays to be constructed until occupation.

<u>The Department's Position</u>

The letters from the Department relied upon expressly represent an "informal opinion" not a "definitive decision": see TB1, page 178 setting out the DoE position. The Respondent's position as now advanced before the Court is based on a complete factual picture ascertained from more complete information (see in particular the second affidavit of Ciaran Rodgers – "CR2", Affidavit page xxxvi para 22 to 25).

TRIAL BUNDLE 1a: [DB1 Tab20, page 191] – Respondent's enforcement report 26 January 2017.

1. Second, the Respondent records that:

> *"Measurements taken from these ortho photographs <u>clearly</u> show that…the foundations for the tourist chalets are <u>not</u> within the red outline…".* I consider this refers to the red line of the planning

> permission, and agree with this finding as is confirmed by the survey conducted on behalf of the Applicant and exhibited at ***[DB1 Tab24, page 208].*** If constructed outside the red line denoting the application, then it stands to reason that there will be no overlap of the as built and approved foundations.

The planning applicant also considers that the construction of these foundations has, in the opinion of the survey exhibited by Ms Deery, taken place outside of the red line of the application to the north-west of A/2007/0895/RM (albeit to a lesser extent). I draw attention to the caveat in that survey at [PAP9, page 486], which states:

> *"it must be noted that online digital imagery is not overlay accurate and depending on the position and orientation of the satellite at the time of the picture taken may distort the actual layout slightly, with poor resolution."*

TRIAL BUNDLE 1a: [PAP9, page 484 and 485] – MAY <u>NEED TO HAND OUT COLOUR IMAGE?</u>

1. This is important. Here, page 485 displays the extent of development which the planning applicant considers falls outwith the red line. Page 484, superimposes the red line of the site onto Ms Deery's satellite image. What is to be noted from this is that the red line of the application boundary appears at the outer edge of the mature tree line in the right hand corner of the site. These mature trees significantly overhang the site by at least three (3) metres, in my estimation. Therefore, if the red line were to be imposed on the actual boundary line, shifting the position of the site to the right, it is evident that the extent of the foundations which are located outside the red line of the site would be significantly greater than what is currently shown on page [485]. This would also be more reflective of the Respondent's initial measurements recorded on the enforcement file on 26 January 2017, as corroborated by the Applicant's findings of 10 April 2018, exhibited at [DB1 Tab24, pages 204 – 208]. With that common ground in mind, I would refer the Court to:

TRIAL BUNDLE 1a: [PAP3, page 403e] - Respondent's drawing.

It is irrelevant that the foundations were commenced or placed incorrectly, save that this is a clear commencement of the works, and constitutes "any works" for the purpose of the statutory standard required. In any event as set out above the access was opened and works commenced consistent with the statutory requirement.

The most (and indeed only) accurate plans before the Court illustrating the respective positions of the previous permissions, the impugned permission and the foundations as built are those prepared by Mr Mullan and those exhibited to the second affidavit of Mr Rodgers. This is addressed in further detail below.

2. Third, and importantly, it is common ground between the Respondent and Applicant in respect of the actual position of the most north western edge of the foundations (left side) of the holiday chalets, as marked in red. Both are in agreement that this has been laid out on the ground ten (10) metres north west from the approved position. At paragraph 29 of my first affidavit affirmed on the 16 April 2018 [14], I stated that what the Respondent was confirming in its enforcement report was *"…that the foundations for the tourist chalets are constructed some 10 metres (in my estimate) to the northwest of their approved position and outside the red line of the planning permission A/2007/0895/RM."*

3. The Respondent's drawing now in front of us is to a metric scale of 1:200. According to Mr Rodgers, this drawing is based on measurements he took. What the Respondent confirms is that the north western edge of the foundation on the ground is constructed exactly 10 metres from the north western edge of the approved position (blue), thus corroborating the position expressed by the Applicant at paragraph 29 of my first affidavit. Ms Deery's survey does not provide any evidence that would dispute this fact.

TRIAL BUNDLE 1a: [PAP8, page 471] – Satellite images

4. Fourth, given the common ground between the Respondent and Applicant expressed above, it only remains to examine what has actually been constructed on the ground. Here, there is common ground between the Applicant and planning applicant that what has been constructed by and large reflects the shape and footprint of the apartment block as approved under A/2007/0895/RM. This can be seen from the Applicant's satellite image and, indeed, the planning applicant's satellite image exhibited at [PAP9, page 484].

5. Only the Respondent considers that the foundations as constructed on the ground are of a significantly different shape, scale and dimensions to those granted by A/2007/0895/RM. This is obviously an objectively verifiable error of fact on the part of the Respondent as is evident from either satellite image. Although not exhibited, as I could not possibly have anticipated that Mr Rodgers would come up with new foundation layouts which do not actually exist on the ground, the Respondent's satellite images held on its enforcement file and taken on 8 June 2013 and 11 June 2015, depict exactly the same foundations plans as confirmed by the Applicant and planning applicant's surveys. Therefore, it is inexplicable how Mr Rodgers can present this court with a drawing which is at odds with the records held by all parties.

6. Fifth, the answer appears to lie in the attempt to rationalise a fundamental failure of professional assessment, *ex post facto*. The Respondent informs this Court on 21 May 2018 that:

> *"…there is a material overlap between the founds as constructed and the approved drawings"* and that *"the overlap is sufficient that it* [sic] *Council officers are of the view that it constituted a material start."* [PAP3, page 393].

It is the juxtaposition between the Respondent's red and blue lines on which it relies to demonstrate the material overlaps which it contends are sufficient to confirm the lawful commencement of development.
It is immediately apparent that the shape, scale and dimensions of the foundations depicted by the Respondent (in red) bear no resemblance to what has either been approved (in blue), or constructed (in the wrong position) on the ground.

For example, at its widest point the Holiday chalets in blue measure seven (7) metres. Being generous, we could add an extra half (0.5) metre either side to bring that up to eight (8) metres of a footprint. Yet Mr Rodgers is telling this Court that, according to him, the foundations constructed on site (marked red) always showed a building width of ten (10) metres. Of course, Mr Rodgers is wrong.

7. Considering that there is common ground between the Respondent and Applicant that the north western edge of the holiday chalets as laid out on the ground is ten (10) meters form the approved line (blue), if it is imagined that an eight (8) metre wide footprint of the foundations is placed along this line, that leaves a two (2) metre separation between the foundations as constructed and approved, disproving Mr Rodgers's claim of a material overlap.

8. Sixth, at Paragraph 19 of his affidavit, Mr Rodgers claims that:

> *"After viewing the Building Control files I took measurements from the approved plan layout and compared these against the foundations on the ground. This showed that the foundations <u>were not completely in the correct positions</u> as per approvals A/2007/0895/RM and A/2007/0897/RM. However, the foundations on site overlapped the approved positions for both the managers dwelling and the Fisherman's Cottages. I therefore considered that sufficient works had been carried out for the purpose of implementing the approvals and a material start had been made…"*

9. At this point I ask the Court to note the following:

   (i) Mr Rodgers admits that *"I did not retain a record of the measurements that I took at the time"*.
   (ii) Mr Rodgers does not address the Respondent's previous position that the holiday chalets are constructed outwith the red line of the planning permission A/2007/0895/RM as previously confirmed by the

measurements it took on 26 January 2017 and recorded on its enforcement file [DB1 Tab20, page 191].

(iii) Nor does Mr Rodgers explain the contradiction between that enforcement report (including the satellite images held on the Respondent's enforcement file) which contradict his claim *"…it is clear that there is construction inside the red line of the planning permission* [A/2007/0895/RM] *granted in 2009."* [PAP3, page 393].

(iv) Bizarrely, not having kept records which confirmed, in his opinion, the material overlap which Mr Rodgers claims informed the PC report, he returned to the site, post-consent, and again measured foundations layouts that do not exist on the ground.

10. The fact is, it is far from clear that there is construction inside the red line. The Respondent could have easily marked out the red line of the planning application A/2007/0895/RM on its drawing. But it does not, as that exercise would have confirmed what is exhibited at [DB1 Tab24, page 208], namely, that the Respondent was correct the first time when it previously concluded on its enforcement file on 26 January 2017 that the *"tourists chalets are not within the red outline…"* of the planning permission.

11. Moreover, there are no foundations of the shape, scale and dimensions depicted by the Respondent in its drawing now exhibited [PAP3 DCSDC A, page 403e]. The Respondent's claim that this red line *"…shows the position of the foundations as constructed edged red…"*, is evidently incorrect and categorically disproven. Rather this red line allegedly depicting the foundations has been distended to the south-east towards the approved position of the chalets (in blue) to create the notional material overlap where plainly none exists.

Manager's dwelling

12. Similarly, the Respondent's depiction of the juxtaposition between the approved site of the manager's dwelling and the site of its actual construction indicates that there may well be no material overlap relied on by the Respondent to justify a material start. Again, the shape of the foundations claimed by the Respondent is not what exists on the ground. It is inexplicable how Mr Rodgers could come up with foundation layouts that do not reflect the actual foundations that have been constructed on the ground since 2011. Given the serious and evident flaws in the Respondent's assessments, this provides an unsafe basis on which to informally confirm lawful commencement of development. This is compounded by the admission, that no record of this assessment was retained before Mr Rodgers's flawed logic informed this controversial decision of the PC, in a material way.

13. The Respondent's position now relied on in these proceedings is nowhere articulated in an intelligible way in the impugned permission, where a

member of the public, the Planning Committee (PC), or this Court, could reasonably expected to find, set out in clear and unequivocal terms, the justification and reasoning why the decision-maker acted in the way it did.[2]

14. In the case of Morge-v-Hampshire County Council, Lady Hale sets out the well-established principle in law that reports to inform decision-making *"…obviously have to be clear and full enough to enable them* [the decision makers] *to understand the issues and make up their minds within the limits that the law allows them."* The matter of the lawful commencement of development was a significant and controversial issue. How the Respondent reached its decision in the absence of any records to substantiate its position, was not presented or explained to the planning committee. Given this was such a controversial material consideration, the Respondent's report to the planning committee falls well short of this Supreme Court requirement.

15. By seeking to rely on a *"material overlap"* that can be proven not to exist – a mistake of fact that is objectively verifiable[3] – the Respondent will have vitiated its own argument that a material start was lawfully commenced.

All of the Applicant's submissions with respect to the true position on the ground are based on his own mistaken interpretation of various maps, plans and images and an erroneous and misleading report from Robert Thompson, whose son is a director of the Applicant company. The Respondent's evidence is clear and reliable.

The Respondent's evidence

The Respondent's witness has averred that he did not retain records. It was entirely proper for Mr Rodgers to confirm the measurements that informed his assessment by redoing the exercise which he had previously undertaken.

The issue of the enforcement file and the available material is set out in the second affidavit of Ciaran Rodgers (TB R2, page xxxvi, paras 22 to 25). CR did not gain access to the ortho technology until after the transfer of powers to the Councils in April 2015, and therefore none of that material was available to him previously.

The significance and accuracy of Ortho photos is addressed by Mr Rodgers in CR2. These photographs are the source and cornerstone of the Respondent's evidence. Consideration of them clearly confirms the Respondent's illustration of the contours and location of the foundations as constructed and contradicts the Applicant's submissions. (CR 2 TB 2 page 187 and page 403e in TB 1 – MAP 1).

[2] *Morge-v-Hampshire County Council* [2011] UKSC 2. P36.
[3] *E-v-SOS for the Home Department* [2004] QB 1044, p66.

The Respondent did mark the construction of the foundations relevant to the chalets and it is plainly commenced and at least partially within the red line (CR 2, TB2 R page 187).

The Respondent's evidence also clearly demonstrates a start to construction within the red line of the manager's house, consistent with the statutory requirement.

Setting aside for the moment the issue of access (dealt with above) whether the foundations are within the red line as the JR Applicant focuses upon is irrelevant to the statutory test – see Map 3, page 403e.

The matter is amplified as requested by the Court in the second affidavit of Ciaran Rodgers (TB 2 R, xxxiv, paras 13 to 21).

<u>The evidence of Mr Thompson for the Applicant</u>

Mr Thompson's evidence is not agreed. It is demonstrably flawed and unreliable.

His drawing suffers from two fundamental errors:-

(1) the contours are plainly demonstrably wrong. There is no 39 metre contour near either the foundations laid or the permitted buildings at any location; and

(2) it assumes that the foundations laid were identical to the permitted 2009 consent. That is demonstrably wrong from the Orthophotos and the aerial photograph at Trial Bundle 1, page 270; see also CR 2 Exhibit at TB Resp 2 page 187.

Setting aside the access point, there is indisputably an overlap of the manager's house and the chalet development. The extent of the overlap, as a matter of Law, is irrelevant. The works have commenced and, as the statutory provision provides, any works are sufficient to satisfy the statutory test.

The Court will further note CR's 2nd affidavit, (TB R2, page xxxvi, para 20-21 and the contour map at TB 2 R, page 188).

The views of the JR Applicant's engineer are not correct in respect of Orthophotography: see the second affidavit of Ciaran Rodgers, paras 5-12.

<u>Conclusion</u>

The Court is concerned with the accuracy of the evidence presented and the legal consequences of that evidence. The Respondent's evidence is accurate in all material respects. The Applicant's is not.

Having regard to the true factual position the correct conclusion in law is that a material start was made, works were commenced and the 2009 permissions

remained valid and capable of implementation. The Court has the full factual position before it. The evidence clearly demonstrates that the permissions have been implemented in time The Planning Committee was properly advised of the correct position in law and was not misled as alleged by the Applicant - "*Both these applications were implemented in time and are therefore a material start on the site ...*" (TB1p98).

Finally, *Morge* relates to the issues for a Habitats Risk Assessment, and not the statutory test of commencement of works for the purposes of a planning permission. Nothing within it contradicts the Respondent's analysis.

CONDITION PRECEDENT

Notwithstanding the above, the Respondent failed to address the law in respect of what is known as the "Whitley principle".[4] This is set out in Whitley & Sons Ltd-v-Secretary of State for Wales, where Woolf LJ states:

> *"As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question; are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful."*

The Respondent repeats what has been stated already. The works to open the access to facilitate laying of foundations was a start to works sufficient to comply with the statutory requirement at S63(2).

The works of laying foundations that are on or within the area of the development permitted by the 2009 consents are lawful.

As appears again, the applicant infers a requirement that works are exactly in compliance with the 2009 stamped approved drawings. That is wrong.

16. The Respondent did not appraise the PC as to why two historic reserved matters permissions, on which determining weight rested, were considered to be exceptions to the afore-mentioned principle, despite that expectation from subsequent authorities, post-Whitley.[5] It is noteworthy that, unlike the cases cited at footnote 5, the Respondent's PC report [DB1 Tab5, p97 - 110] is devoid of any consideration or reasoning as to why the historic permissions

[4] *Whitley & Sons Co Ltd-v-Secretary of State for Wales* (1992) 64 P&CR 296, page 6 (4th para.). See also *Greyford Properties Ltd-v-SoSCLG* [2011] EWCA Civ 908, p6.

[5] *Henry Boot Homes Ltd-v-Bassetlaw District Council (SoSCLG)* [2002] EWCA Civ 983, p27. See also *Bedford Borough Council-v-Secretary of State for Communities and Local Government* [2008] EWHC 2304 (Admin), p51 and *Ellaway-v-Cardiff County Council* [2014] EWHC 836 (Admin), p47 and p64.

represented an exception to the "Whitley principle". There is no evidence that Mr Rodgers applied the "*condition precedent*" test, asking himself whether condition 6 of A/2007/0895/RM was a condition precedent to the lawful development of the historic reserved matters applications (*Greyford Properties Ltd-v-SOSfCLG* [2010] EWHC 3455 (Admin), p7).

The case officer stated that works commenced.
Regardless of his rationale, this is now a matter of Law before the Court.
The Respondent says that works were lawfully commenced.

17. It is clear in the cases of *Henry Boot Homes Ltd-v-Bassetlaw District Council (SoSCLG)* [2002] EWCA Civ 983, p27, *Bedford Borough Council-v-Secretary of State for Communities and Local Government* [2008] EWHC 2304 (Admin), p51 and *Ellaway-v-Cardiff County Council* [2014] EWHC 836 (Admin), p47 and p64, that the courts were alert to the importance of the decision-makers engaging with the "Whitley principle" and the exceptions to it. The Respondent's report to the planning committee displays no such understanding or engagement with the Whitley principle. The decision-makers were not appraised and, therefore, unaware of the controversy which surrounded this decision that conditions had not been complied with. They were unaware of the conflict between the position it was being asked to adopt and that of the former planning authority, the Department of the Environment, Northern Planning Division. In itself, a failure to provide adequate reasons for a decision will amount to an error in law. The case of Campaign to Protect Rural England-v-Dover District Council, set out that "*the reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved.*[6] Given the above, it would have been expected that the PC should have been alerted to this matter and how it was resolved.

18. At paragraph 21 of his affidavit, Mr Rodgers states that "*distinction must be drawn between a pre-commencement condition and a condition precedent." The latter must be explicitly worded and go to the heart of the development. I did not consider this condition as a condition precedent but rather a pre-commencement condition.*" No distinction was drawn. There can be no doubt that the matter of the lawful commencement of development was the "*principal important controversial*" issue in the determination of the impugned permission. Yet there is no intelligible or adequate explanation on the planning committee report which would have alerted or allowed decision-makers the opportunity to understand how the controversy had been resolved.

As the Court has observed, the issue is something of a red herring in the context of the statutory test. The Respondent repeats what has been stated already.

[6] *R(CPRE)-v-Dover District Council* [2017] UKSC 79, p35.

19. The laying of foundations to secure material starts for the historic approvals, breached (identical) planning conditions 6 and 4 of the two (2) reserved matters permissions, respectively. That condition required that:

> *"The vehicular access, including visibility splays and any forward sight line, shall be provided in accordance with the approved plans, prior to the commencement* ***or occupation*** *of any works or other development hereby permitted.*
> *Reason: To ensure there is a satisfactory means of access in the interests of road safety and the convenience of road users."* [DB1 Tab12] [DB1 Tab13].

The Respondent emphasises the words "*or occupation*" (TB 1, page 164). That is a disjunctive issue and allows the visibility splays to be provided either prior to commencement or occupation.

The conditions relating to the chalet development in 2009 are different – they are not identical as asserted (TB 1, page 149). Condition 7 requires the splays to be in position and permanently retained at the time of occupation/operation.
Both conditions are consistent in their requirement and occupation is the key trigger.

20. Planning policy recognises (and authority records – Alexander-v-Causeway Coast and Glens Borough Council) that *"…the planning system has an important role to play in promoting road safety."* [7] These developments justifying the impugned permission required access on to the A6 "Protected Route" where road safety is of paramount importance. Therefore, permitting these developments on the basis that road safety must be prioritised and safe access must be provided prior to the commencement of all other works or development, was no trivial matter to be rectified at any time after other construction works began.

The Respondent repeats what has been stated regarding the requirement of the conditions.

21. On plain reading and particular circumstance, there can be no doubt that the planning condition constitutes a "condition precedent"[8]. It is clearly a prohibitive condition and went to the heart of the permissions, primarily, by seeking to ensure public safety. It could not be any more explicit in its prohibition of *"…any works or other development hereby permitted."* In fact, the wording suggests a copper-fastening of the serious intent and restrictive nature of the planning condition. That the access arrangements had not been implement on 31 July 2014 led the enforcing authority to conclude *"…therefore permission expired."* [DB1 Tab14] and [DB1 Tab15]. Whilst Mr Rodgers

[7] *Alexander-v-Causeway Coast & Glens Borough Council* [2018] NIQB 55, p[33].
[8] *Hart Aggregates Ltd-v-Hartlepool Borough Council* [2005] EWHC 840 (Admin), p58.

considers that the failure to comply with the planning condition did not rendered all other works on the site unauthorised, it is noteworthy that this consideration leaves no trace on the planning committee report.

The Respondent repeats what has been stated already.

22. Prior to the grant of the impugned permission, the Respondent failed to grapple with, or has ignored the fact that its own enforcement investigation identified that the foundations constructed to secure a material start, have not been built strictly in accordance with the required planning permissions and approved drawings. Rather, it resorts to an after-the-event explanation which did not form part of its original justification as to why the historic permissions remain extant. In such circumstance where the Court has raised concern over the rationalisation of a decision *ex post facto*, it has shown a willingness to intervene to quash the offending decision.[9] The case of Lamont-v-Department of the Environment being a case in point.

This is dealt with in the second affidavit of Ciaran Rodgers. In summary, the deponent did not have access to the sophisticated information technology that allowed accurate overlaying of sites with aerial photography, which was not available until after 2015. Significantly the Respondent's deponent did not have the imagery of 2010 and 2013 that demonstrated that the access had been opened up; that the access was opened on expressly to facilitate the laying of foundations; or that foundations had been laid; or that building control had expressly recorded the laying of those foundations: see the materials from Harpur Morrison of Building Control (TB R2, pages 32 to 61). It is expressly stated that the works are to units 2, 3 and 4 and the manager's house. The intention is indisputable, regardless of the position. There is express reference to the access road (TB R2, page 34).
Mr Morrison twice confirms erection of four dwellings (TB R2, pages 39 and 54)

23. Notably, the requirement for works to be undertaken *"strictly in accordance"* with the planning permission, is a material factor taken into account by the Courts, since *Whitley,* when determining the lawful commencement of development.[10] In the cases of Ellaway-v-Cardiff County Council and Henry Boot Homes-v-Bassetlaw District Council, it was material that both authorities considered it important that the works relied on to attempt to justify the lawful commencement of development be undertaken strictly in accordance with what was permitted under the planning approval. That is not the case in respect of the historic permissions relied upon to justify the impugned permission, as previously set out.

As note at the outset the applicant misunderstands the legal significance of the difference between the commencement of works, and the completion of works.

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[9] *Lamont-v-Department of the Environment* [2014] NIQB 3, p[71].
[10] *Ellaway-v-Cardiff County Council* [2014] EWHC 836 (Admin), p21, 33, 55, 57 and 65. See also *Henry Boot Homes Ltd-v-Bassetlaw District Council (SoSCLG)* [2002] EWCA Civ 983, p60.

24. Mr Rodgers claims that *"enforcement could have been taken for a breach of condition at the time."* However, this was never a remedy considered or sought, first by the Department [DB1 Tab16, p181 – 183] and subsequently, by the Respondent [DB1 Tab19, page189]. Rather, the remedy for either enforcing authority has always been to seek the removal of the unauthorised foundations. I pause to note that whilst Mr Rodgers seeks to distance the Respondent from the Department of the Environment's previous stance on the enforcement issue by claiming it was incorrect, it is noteworthy that Mr Rodgers was the lead enforcement officer in this case, both as a Departmental official and, subsequently, the Respondent.

25. If Mr Rodgers got it wrong, or changed his mind, this leaves no trace on the enforcement file [DB1 Tab14] to [DB1 Tab21]. It is odd that he only sought to carry out measurements so late in the planning process, when it was clear that there were foundations constructed on the site. This would have been obvious from the site inspection carried out by Mr Rodgers, usually conducted early on in the processing of a planning application. If it was not, it was certainly drawn to the Respondent's attention by RFA on 26 July 2016 [DB1 Tab29, page 225].

26. Importantly, he should have informed the Planning Committee of the questions being raised by RFA regarding the lawful commencement of development and the lawful requirement to review extant permissions [DB1 Tab29, pages 224 – 226] and how these controversial matters had been addressed. He remains opaque on why this representation was not considered as an integral part of the decision-making process, or put before the Planning Committee in his report.

TRIAL BUNDLE 2: [CR1, Page 19] – access photo

Enforcement was not an option for the DoE for the reasons set out above.

27. Also at paragraph 21 of his affidavit, Mr Rodgers's claims that he has *"subsequently inspected the site and this inspection reveals that the condition has now been complied with".* A most cursory inspection of the site at its proposed junction with the A6 protected route exposes the Respondent's second (2nd) objectively verifiable error of fact. This photograph exhibited by the Respondent is not the access required by the planning condition precedent imposed by the historic reserved matters applications. What we are looking at is the existing agricultural access which is located some 32 metres to the south east of where the proposed access was conditioned to be constructed as part of the historic planning permissions.

TRIAL BUNDLE 1a: [PAP8, page 471] (satellite image)

As set out above the Applicant is wrong.

28. Here, it can be seen the existing access and blinded laneway utilised to provide access to the locations where the foundations have been constructed in 2011.

The applicant expressly acknowledges the commencement of works.

TRIAL BUNDLE 1b: [DB3 Tab49, page 552] – Access photos

29. These photographs depict the actual location of the required access as conditioned by the historic permissions.

30. What you cannot, and will not see here is the formed kerbed radii, the 6m wide road entrance, the engineered "dwell area", including the raising of ground levels, the visibility splays, etc., which Mr Rodgers informs this Court have been carried out in accordance with the planning condition. Rather, it is evident that the planning condition has never been complied with prior to the expiry of the reserved matters applications. Contrary to Mr Rodgers's claim, the photographs now exhibited at [DB3 Tab49, pages 522 - 523] demonstrate, beyond doubt, that none of these works have been carried out in accordance with the stipulated planning condition.

TRIAL BUNDLE 1a: [DB1 Tab12, page 162] (drawing showing access)

The JR applicant continues to misunderstand the significance of the commencement of works, and relatedly the requirement to provide the visibility splays permanently before occupation or operation. The Court is again asked to equate the statutory test with the completion of works, rather than the commencement.

The commencement of the access is a change of use of the land from an agricultural field.

Non-material change

31. As there appears a suggestion by the Respondent that permission for the manager's dwelling may be acceptable on the basis of a non-material change to what was granted permission under A/2007/0897/RM (the manager's dwelling) [DB1 Tab20, page 191], it is important that this matter is addressed.

32. Mr Rodgers (and other officers) would have been aware of *Development Management Practice Note 25: Non-Material Change*, issued by the Department for Infrastructure in April 2015 **[DB3 Tab48, pages 504 - 521]**. This gives direction to councils on what (and what is not) considered to represent a non-material change. It sets out the view on why planning authorities, historically, adopt the position that "*…developments must be built <u>entirely</u> in accordance with*

the approved plans and that any deviation from those plans rendered the development unauthorised" [page 506].

33. It is common ground that neither A/2007/0895/RM and A/2007/0897/RM have been built *"…entirely in accordance with the approved plans…"*. Nonetheless, I pause to note that the planning applicant's husband, Mr Kieran Deery was previously advised by the Department of the Environment on 21 August 2014, that the location of the holiday chalets as constructed *"…would not be acceptable as a minor amendment"* [DB1 Tab15, page 178]. This is entirely consistent with this subsequent Development Management Practice Note 25 published in April 2015 on "non-material" change and renders the development unauthorised.

34. Section 67 of the *Planning Act (Northern Ireland) 2015* confers on a council the power to make a change to any planning application relating to land if it is satisfied that the proposed change is not material. At no time did the planning applicant make applications under Section 67 to seek confirmation that the deviations from the approvals A/2007/0895/RM and A/2007/0897/RM were acceptable as non-material changes.

This is irrelevant.

35. Nor did the planning applicant seek to confirm that the construction of the foundation works carried out in February / March 2011 had been lawfully commenced by applying for a Certificate of Lawfulness of Use or Development (CLUD) under Section 169(1)(b) of the Planning Act (Northern Ireland) 2011, as advised would be required by Mr Rodgers on 19 September 2017 [DB1 Tab27, page 213]. Why Mr Rodgers considered it appropriate to dispense with the legal provisions of the Planning Act in favour of an informal (and fundamentally flawed) approach to confirming the lawful commencement of development on such a controversial issue, finds not trace on the planning file and (unjustly) shifts the burden of proof from the planning applicant and on to the Applicant. Moreover, the PC remained unaware from the PC report that the confirmation of the lawful commencement of development was such a controversial matter.

S.63(2) of the 2011 Act does not require a lawful development certificate. The statutory test is that works commenced.

REVIEW OF EXTANT PERMISSIONS

36. If the Respondent's express position is accepted; namely, that A/2007/0895/RM and A/2007/0897/RM remain extant permissions that *"…could proceed to development at any point"* [DB1 Tab5] then, clearly, both fall within the ambit of Regulation 45(1) and require review in accordance with the provisions of Regulation 43. They require Appropriate Assessment.

37. The Respondent confirms that no Appropriate Assessment has been completed for either "extant" permission but that had it been, it would have *"likely"* concluded there would be no adverse effects on the integrity of the European site.[11] This is not the strictly precautionary test imposed by Regulation 43 of the Habitats Regulations for extant permissions requiring review; namely, that extant permissions that are likely to have a significant effect on a European site will be subject to appropriate assessment. Neither historic application falls within the exceptions of Regulation 50(1) or (2). Therefore, they fall to be reviewed under Regulation 50(3) by the Respondent. It does not have the power to waive, in an informal way, the lawful obligation to comply with legislation.

TRIAL BUNDLE 1a: [PAP3, DCSDC A, page 403e] – Respondent's drawing

38. The Respondent's disregard for the provisions of Regulations 45, 46, 50 and 51, is compounded by its objectively verifiable error which formed the material basis on which the impugned decision was granted. This is because, at all times, the Respondent was under the erroneous impression that the new chalets are to be built "*…largely over the footprint of the approved chalets therefore there will be no build-up of development at this part of the site"* [DB1 Tab5, page 106] and that both could not proceed in tandem. Therefore, its unlawful breach of the Habitats Regulations is further infected with objectively verifiable error. I pause to note that irrationality includes proceeding with a decision based on flawed logic,[12] as is the case with the impugned permission.

39. The Respondent's drawing now objectively confirms the Applicant's position, as exhibited at [DB1 Tab28, page 215], that Mr Rodgers has made an error of fact which misled the PC in a material way. Decision-makers granted the impugned permission on the mistaken premise the holiday chalets approved under the impugned permission were located *"largely"* over the footprint of the chalets approved under A/2007/0895/RM and that "*there will be no build-up of development at this part of the site"* [DB1 Tab5, page 106].

40. The Collins Concise English Dictionary (second edition) defines "*largely"* as "*principally; to a great extent."* The overlap believed to exist by Mr Rodgers, is virtually non-existent. As such, Mr Rodgers misled the PC in a serious and material way into believing that build-up of development was controlled on site.

41. The prevention of build-up at the site was a clear objective of the impugned permission as it imposed planning condition 2 to ensure the removal of the foundations of the manager's dwelling. This stated:

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[11] See paragraph 22 of Mr Rodgers's affidavit, page xvi, Trail Bundle 2.

[12] *Trustees of Barker Mill Estates-v-Test Valley Borough Council* [2016] EWHC 3028 (Admin), p26.

> *"No development hereby permitted shall commence on site until the foundations within the area shaded blue on approved drawing 04 date stamped 6 October 2014 have been removed and confirmed in writing by the Council."*

The reason for this condition was *"To ensure no build up of development on the site."* [DB1 Tab5, page 106].

42. No such condition was imposed requiring the removal of the foundations of the holiday chalets due to the objectively verifiable error of fact on the part of the Respondent and despite the objective to ensure "*…no build-up of development at this part of the site."*

43. This flawed logic contaminated the decision-making process from the outset. Indeed, it was evident that the penny had still not dropped with the Respondent, post-approval, when it remained under the impression that the chalets approved by the impugned permission were to be located *"largely"* over the footprint of the chalets approved by A/2007/0895/RM. This objectively verifiable error of fact has now been tacitly acknowledged by the Respondent in its drawing exhibited at [PAP3, DCSDC A, page 403e], but subsequently denied by the Respondent's skeleton argument. I digress for a moment to draw the Court's attention to paragraph 26 of that skeleton argument. Here it has evidently misunderstood the material error of fact that Mr Rodgers has misled the PC on; namely the juxtaposition between the holiday chalets as approved by the impugned permission and those approved under the historic reserved matters. Instead it mistakenly refers to the other objectively verifiable error made by Mr Rodgers in regard to the (notional) overlap of foundations which he constructs to justify the lawful commencement of development. It fails to understand that there are two (2) distinct objectively verifiable and material errors of overlap which contaminate the Respondent's decision-making. As a result of its confusion, the Respondent appears to demonstrate that at this late stage in the proceedings, it remains oblivious to how Mr Rodgers misled the PC in a material way in respect of controlling build-up of development on the site. I pause to draw the Court's attention to the Respondent's skeleton argument, paragraph 5, where it cites the authority of *Mansell-v-Tonbridge and Malling Borough Council*, setting out that *"unless there is some distinct and material defect in the officer's advice, the court will not interfere."* The fact is, is seems unaware and remains silent on this material error of fact which it has objectively verified by its own exhibit at [PAP3, DCSDC A, page 403e].

44. Returning to the requirement to review extant permissions: in the Respondent's view, A/2007/0895/RM remains an extant permission that could be implemented at any point. By the Respondent's same logic so, then, could the lower road running parallel and close to the river be developed to service the apartments it contends have lawfully commenced. As it has tacitly

demonstrated that the holiday chalets approved under that historic permission, are essentially free-standing from those granted by the impugned permission [PAP3, page 403e], therefore, A/2007/0895/RM could, either individually or in combination with the impugned permission, have a significant effect on the SAC. That being the case, there is clearly a lawful obligation (and always was) laid down in Regulations 45, 46, 50 and 51 to review this permission to understand the likely effects on the integrity of the European site. By failing in this duty, the Respondent is in breach of the strictly precautionary Regulation 43(1).

45. Indeed, the juxtaposition of the apartments of the impugned permission and those approved under A/2007/895/RM appear to complement each other. Nowhere in the planning applicant's Construction Environmental Management Plan (CEMP) exhibited by the Respondent at Trail Bundle 2, CR1, pages 136 – 165, does it propose the removal of these foundations. Moreover, the planning applicant has already been in discussion with the Respondent on 8 February 2018, post-approval, seeking a "relaxation of the condition to remove the foundations" of the manager's dwelling [DB1 Tab44, page 373].

46. Irrespective of the planning applicant's future proposals for this site, the Respondent's material error of fact has presented Ms Deery with the opportunity to develop both the impugned permission and (not or) the permission A/2007/0895/RM, or part thereof, that it considers to be extant, but is declining to review, contrary to its lawful obligation to do so. Moreover, this is a serious and material error the PC was not alert to and did not consider when it granted the impugned permission.

47. I ask this Court to note that at paragraph 27 of her affidavit, Ms Suzanne Allen of SES, being under the same misapprehension as the Respondent – that the implementation of A/2007/0895/RM and the impugned permission are mutually exclusive – confirms that SES failed to consider the likelihood of "*in combination effects*", on the SAC should both permissions, or part thereof, be developed.

48. The legal obligation imposed under Regulations 45, 46, 50 and 51, is a precautionary and pre-emptive one to avoid adverse impact on the integrity of the European site. Reviews and records of extant permissions are essential if an accurate ecological baseline for European sites such as the River Faughan and Tributaries SAC is to be accurately established and maintained, against which the cumulative effects of new projects seeking planning permission can be assessed. Without this information, there is a case to argue that decisions on new plans or projects cannot be appropriately assessed with the degree of scientific certainty required of Article 6(3) of the Habitats Directive and set

down in seminal authorities such as Waddenzee[13] and Sweetman[14], if the extent of and effects from extant permissions remain unknown. This is the position the Respondent places itself in by failing to conduct the review of extant permission as it is legally obliged to do by law.

49. It is evident Mr Rodgers gave no thought to the matter of the review of extant permissions despite it having been raised by the Applicant in direct relation to the impugned permission on 26 July 2016 [DB1 Tab29, pages 224 – 226]. He was unaware of the need to conduct such a review when he advised the planning applicant on 19 September 2017 that, *"if works were carried out in accordance with the planning approvals council would have no issue or reason to take enforcement action."* [DB1 Tab27, page 213]. He was unaware when he failed to advise the PC on 10 January 2018, eight (8) days before the impugned permission issued. The note he claims was prepared "in advance" of the PC which mentions extant permissions [CR1, page 30] bears an uncanny similarity to the content and form of the presentation given by RFA on the day of the PC and, I would contend, could only have been prepared during or after the PC. If this matter was considered by Mr Rodgers before the issue of the decision, it certainly was not recorded or brought back before the PC.

The Respondents has not waived any responsibility or obligation on it.

As set out in its pre-action protocol response (TB1p393-394) there was no review of the commenced permissions by the Respondent following the transfer of planning functions to it as it was not at that stage aware that the permissions had been substantially commenced but not completed. This only came to light in the context of the processing of the impugned application.

No HRA was carried out on the commenced permissions during the processing of the impugned application because that application was intended to supersede the commenced permissions.

Nevertheless as averred by Mr Rodgers (CR at paragraph 21):

> ***"21. Should, however, the applicant proceed instead with applications A/2007/0895/RM and A/2007/0897/RM then the Council would be obliged to complete an HRA in respect of these applications. From the information available to me to date that there would not be any basis for the Council to issue a Notice of Discontinuance in respect of these earlier applications."***

Far from waiving the Regulations, the Respondent expressly avers that it will apply the regulations and require an HRA before the commenced applications

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[13] *Landelike Vereniging tot Betoud van de Waddenzee-v-Statsecretaris van Landbouw Natuurbehher en Visserij* Case C-127/02.

[14] *Sweetman-v-An Bord Pleanála* Case C-258/11.

proceed. It is perfectly proper for the Respondent to inform the Court that there is no information available to date to issue a Notice of Discontinuance of any works. Mr Rodgers has acknowledged (in his second affidavit) that the term "largely" is not appropriate. That said, the Court is concerned with the legality of the decision, and the critical issue with respect to implementation of the previous permissions is whether the works were lawfully commenced, and whether the Planning Committee was led into error. The proper factual position is before the Court as set out at length above and it supports the Respondent's position and confirms that the Planning Committee was not materially misled in any respect.

All this in any event simply distracts from the real question in respect of this ground which is whether there was any error of law in the failure to carry out a HRA on the 2009 permissions.

The Respondent's answer is straightforward. There is no need to date to carry out a HRA on the 2009 permissions because it would simply duplicate the work grounding the HRA of the impugned application unnecessarily in circumstances in which the developer intends to develop the new permission not the 2009 permissions. If however the developer should seek to develop the 2009 permissions instead a HRA will be carried out.

Both permissions will not be implemented. The Respondent has not and will not relax conditions. There was no need to consider in combination effects arising out of the development of both permissions.

There are three planning permissions under consideration. Two are 2009 consents (not one as the Applicant has inferred) - one for the manager's house and one for the six chalets. The third consent (the impugned consent) is both for a manager's house and six chalets.
There is no permission that permits more than six chalets on the planning unit.

The "build up" the Applicant refers to, in essence the concurrent development of the 2009 permissions and the impugned permission, is nothing more than a spectre created by the Applicant to suit his argument.
The conditions of the impugned permission requires the development to be carried out in accordance with the approved specified plans: condition 11, TB 1A, page 144.
A new planning chapter has been opened, and if the planning applicant seeks to revert to the 2009 consents, a fresh HRA would be required.
There was no error of Law.

NO PROPER HABITATS REGULATION ASSESSMENT

50. Article 6(3) of the Habitats Directive, requires that *"any plan or project not directly connected with or necessary to the management of the* [European] *site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives,"* before (planning) consent

can be granted. It is settled in European case law (the seminal case of Waddenzee) that: *"that is the case where no reasonable scientific doubt remains as to the absence of such effects"*.[15] In other words, the absence of such effects must be proven.

Although a strict precautionary approach is to be applied to HRA[16] the standard of review is the *Wednesbury* standard[17]. The relevant competent authority "*is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not)*"[18].

Overall, the Habitats Directive is "*intended to be an aid to effective environmental decision making, not a legal obstacle course*"[19]. Furthermore "*Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional Wednesbury grounds*"[20]

An applicant claiming that a risk has not been considered which ought to have been bears an onus to produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered[21]. Even if some flaw is found in the process overall the Court is entitled to form the view that quashing the decision on that ground would be pointless[22].

***Sweetman* is authority for the proposition that there cannot be a negative screening assessment where the developer proposes mitigation or where mitigation is required. Once that threshold is crossed, then an HRA is required.**

***Sweetman* is not an authority for setting aside how this Member State determines how to assess the responsibilities of competent authorities.**

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[15] Refer to footnote 13, p59.

[16] *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, at paragraphs 56 - 62

[17] *Smyth,* at paragraphs 78 – 80

[18] *Smyth,* at paragraph 85 (for the more general discussion on reliance on expert evidence see paragraphs 78 – 85)

[19] per the English Court of Appeal in *R (on the application of Lee Valley Regional Park Authority) v Epping Forest District Council and another* [2016] EWCA Civ 404 at paragraph 65 citing with approval the comments of Sullivan J in *R (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 16, [2008] EWHC 1204 (admin) (at paragraph 71)

[20] *Lee Valley* at paragraph 65

[21] per Sullivan LJ in *R (Boggis) v Natural England* [2010] P.T.S.R. 725 at paragraphs 37 -38, approved by Treacy J in *Newry Chamber of Commerce* at paragraph 65. See also *R (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 16, [2008] EWHC 1204 (admin) at paragraph 81 - "*merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient*" before the requirements of article 6(3) of the Directive are applied.

[22] Paragraph 69 of *Newry Chamber of Commerce*

51. The impugned permission was subject to a revised HRA on 26 June 2017 [DB2 Tab45]. An integral element of the project includes a sewage disposal system which will require a Consent to Discharge to the River Faughan and Tributaries SAC. In their affidavits lodged on 10 August 2018, both the Respondent (as the competent authority) and Shared Environmental Services (SES) make clear that they consider it lawful and correct to grant a development consent whilst deferring Appropriate Assessment of certain effects of the impugned permission on the integrity of the SAC; namely sewage effluent disposal. Regulation 47(2) of the Habitats Regulations is cited in support of this position and identifies NIEA Water Management Unit (WMU) as the competent authority with responsibility for conducting this additional and discreet element of the Appropriate Assessment, post-development consent.

52. Under the heading "*Co-ordination where more than one competent authority involved*", Regulation 47(2), and its engagement with Regulation 43(1), relates specifically to the first stage of Article 6(3) of the Directive;[23] namely, conducting (and co-ordinating in accordance with 47(2)) Appropriate Assessment(s).

53. In the case of Sweetman-v-An Bord Pleanála, the Court of Justice of the European Union makes clear that:

> "*Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site*" (page 5 of 5, 2nd para).

54. Furthermore, this same Authority dictates an Appropriate Assessment "*cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned.*" [24]

This, I would contend, must include the removal of all reasonable scientific doubt as to the effects of sewage effluent disposal – an integral element of the project – if the provisions of Article 6(3) of the Directive and Regulation 43(5) of the Habitats Regulations are not to be violated.

55. For the purpose of Article 6(3), the impugned permission is a project. It must be assessed in its totality, including the likely effects of effluent disposal on the integrity of the SAC. Postponing the assessment of the effects of effluent disposal until after the decision has been granted, flies in the face of the

[23] *Sweetman-v-An Bord Pleanála* Case C-258/11, page 5 of 6, 2nd paragraph.
[24] Ibid., page 6 of 6, 4th paragraph.

strictly precautionary Article 6(3) which requires a *"prior examination"* of the environmental effects before a project can be authorised.

56. Neither Regulation 47(2), nor 43(1) are concerned with authorisation of a plan or project on the condition that it will not adversely affect the integrity of the European site. That remains the preserve of the strictly precautionary Regulation 43(5) as transposed from the second stage of Article 6(3). This occurs following Appropriate Assessment and only *"…allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the* [European] *site concerned…"* [25] Again, this is made clear in the seminal judgment of Sweetman-v-An Bord Pleanála.

57. Whilst Regulation 47(2) states, *"nothing in regulation 43(1) or 45(2) requires a competent authority to assess any implications of a plan or project which would be more appropriately assessed under the provision of another competent authority"*, nothing in regulation 47(2) permits the authorisation of a project where there remains scientific doubt or lacunae in the (coordinated) Appropriate Assessment process, in this case, the unknown effects of effluent disposal on the integrity of the SAC. The clue is in the title of Regulation 47, that is: *"co-ordination"*. Co-ordination of Appropriate Assessments where more than one competent authority is involved.

TRIAL BUNDLE 1a: [DB2 Tab46, page 451] – NIEA WMU

58. The Respondent was warned by NIEA WMU on 27 March 2015 that *"…there is no guarantee that discharge consent will be granted, as a number of site specific factors need to be taken into account in assessing the suitability of the proposed means of sewage effluent disposal."*

At page 453

WMU went on to alert the Respondent that: *"Mitigation measures to address water quality concerns have not been covered at this stage."*

At page 455

WMU subsequently confirm on 16 April 2018, post-approval, that *"an application for consent to discharge under the Water (NI) Order 1999 has not been received for this site, to date. A detailed assessment of the means of sewage disposal at this site has therefore not been undertaken."*

59. Therefore, in granting the impugned permission where scientific doubt evidently remains, post-development consent, the Respondent has

[25] Ibid., page 5 of 6, 4th paragraph.

misunderstood the provisions of Regulations 47(2) and 43(1) and misdirected itself, resulting in the breach of the strictly precautionary Regulation 43(5).

TRIAL BUNDLE 1b: Refer to Book of Policy, PPS21 (at rear)

60. My contention that the Respondent misdirected itself and breached Regulation 43(5) when it granted the impugned permission is supported by *Planning Policy Statement 21: Sustainable Development in the Countryside*, Policy CTY16; *Development Relying of Non-Mains Sewerage*, which states:

> *"Planning permission will only be granted for development relying on non-mains sewerage, where the applicant can demonstrate that this will not create or add to a pollution problem.*
>
> *Applicants will be required to submit sufficient information on the means of sewerage to allow a proper assessment of such proposals to be made.*
> *In those areas identified as having a pollution risk development relying on non-mains sewerage will only be permitted in exceptional circumstances."*

61. As well as being designated a European site, the River Faughan is the main source of Derry's water supply, providing over 60% of the city's water, abstracted down-stream of the impugned permission. Deferring assessment of the likely effects of effluent disposal, post-consent, is clearly not in accordance with policy CTY16, but more so, when the development has the potential to impact on a SAC (and public water supply). Rather, if we turn the page, paragraph 5.93 of the Justification and Amplification of CTY16 makes clear that where planning applications for development in the countryside are made <u>prior</u> to applications for "consent to discharge" under the Water (Northern Ireland) Order 1999, *"it then falls to the planning system to assess whether the arrangements for the treatment of effluent would create or add to a pollution problem."* If necessary, through the EIA process.

62. Section 3(6) of the Planning (General Development Procedures) Order 2015, affords the Respondent the power to request the environmental information necessary to properly assess the potential impacts from effluent disposal, including on the SAC, during the planning decision-making process. Instead, and despite the clear indication from NIEA WMU that there was no guarantee that a Consent to Discharge would be granted because of a lack of information [DB2 Tab46, page 451], the Respondent negated its lawful responsibility under Regulation 43(5) when it granted the impugned permission, in the knowledge that scientific doubt remained in respect of the effects of sewerage disposal on the integrity of the SAC; and when there was a gap in the Appropriate Assessment process; a gap that goes unacknowledged and unanswered in the Appropriate Assessment, despite the prompt to do so [page 445], which I will refer to shortly.

63. Moreover, whereas NIEA WMU recommended that no development be permitted until such times as it could be ascertained that a suitable means of effluent disposal could be established [page 451], the Respondent, by the imposition of planning condition 9 [DB1 Tab10, page 144] commuted this to preventing the occupation of units of accommodation, thereby allowing the development to be commenced and completed without Appropriate Assessment of the effects of sewerage disposal ever having be undertaken.

64. The planning applicant, Ms Deery, has previously confirmed to the Court that it was her intention to begin construction works in July 2018. Yet, as already pointed out, no consent to discharge had been applied for, as of 16 April 2018, giving rise to the real prospect that the works granted by the impugned permission could have been significantly advanced without the means of sewage effluent disposal having been subject to Appropriate Assessment. This is not compatible with the strictly precautionary provisions of the Habitats Directive or Regulations.

The final and operative HRA carried out is addressed in detail in the affidavit of Susanna Allen (see also CR paras 25 – 26 and 34 - 38). This was the second HRA carried out, the application having been revised in the interim period following the first HRA to remove proposed fishing stands and drainage.

The final <u>full stage</u> 2 HRA (TB1p422 – 450) concluded that (TB1p450):

> ***"Having considered the nature, scale, timing, duration and location of the project it is concluded that, provided the following mitigation is conditioned in any planning approval, the proposal will not have an adverse effect on site integrity of any European site."***

The necessary conditions were imposed. In short a full, detailed and adequate stage 2 assessment was carried out and appropriate mitigation was identified and applied.

The JR Applicant focuses upon the issue of discharge consent. The NIEA Water Management Unit (WMU) was consulted. It responded on 27th March 2015 (TB1A, page 451-454).

The WMU response expressly states (page 451):

> ***"NIEA WMU has no objection in principle to this proposal providing all the statutory permissions for this development are obtained."***

Whilst the letter says (entirely properly) that there is "no guarantee" the Court will note the recommendation at the bottom of page 451:

> *"NIEA WMU recommends that no development should take place on site until the method of sewerage disposal has either been agreed in writing with Northern Ireland Water or a consent to discharge has been granted."*

This is a suggested condition. It is not an objection in principle. Nowhere does the consultation response suggest that there is any objection or site-specific issue relating to the development site.

The Court is asked to contrast the specific and detailed matters that are set out in respect of the construction works at the site – pages 452 453. This includes matters that are material to the Construction Environmental Management Plan (CEMP) and the requirement for an interceptor.
The NIEA WMU is a competent authority for the purposes of water discharge consent. Regulation 47 makes clear that the Council Planning Department is not required to undertake the HRA for water discharge. Regulation does not apply only to stage 1 assessment as contended for by the Applicant. This is plain from an ordinary reading of the regulations.

Planning guidance is prayed in aid in PPS16. However planning guidance does not set aside nor add to the statutory provisions.

Read in *bonem partem*, the NIEA WMU raised no objection in principal, and further raised no site-specific issues that would give rise to a sustainable objection.

The Respondent was entitled to give that response weight subject only to *Wednesbury* irrationality.

Furthermore the Respondent did consider the issue of sewerage. In the first EIA determination (Trial Bundle 1A, page 112 at 115) the characteristics of development stated:

> **"d. the production of waste:**
>
> **There is a treatment works proposed for the site. The percolation area is at 33m contour level to be above the 100 year flood level of the river faughan and the new sewerage treatment system and percolation is per as environmental health and NIEA regulations."**

The revised EIA determination of 6th December 2017 (TB1A, page 119 at 122 re-visits the issue of waste production. It is different and contains refinements to the consideration and assessment:

> **"d. the production of waste:**

> **The development proposes a treatment works to manage sewerage produced by the development. The percolation area for this treatment works is proposed to be placed onsite between the 32-33 contour which is located above the 100 year flood level of the River Faughan to ensure no pollution enters the river during flooding events. The sewerage treatment works and percolation system proposed will be constructed as per NIEA and Environmental health requirements…"**

The Applicant essentially contends for a requirement that every competent authority engaged in the consideration of different aspects of the same project should carry out a full HRA of all aspects of the project. Not only is that not required by the regulations but rather the Regulations expressly guard against one competent authority having to carry out the function of another. Unnecessary duplication of consideration is thereby avoided and assessment of different aspects of a project is left to the competent authority with the most appropriate expertise.

Put another way, regardless of the assessment of the Respondent, a further HRA screening is required in respect of the assessment of the NIEA WMU as a separate competent authority. There is no gap in assessment. The separate responsibility is recognised and dealt with in conditions.

As to whether the developer has yet sought consent any development carried out without the consent in place is carried out at risk. The NIEA WMU screening and consent will be required. If no such consent is forthcoming, the development cannot be occupied and the Respondent will address that should it arise.

Flaws in the HRA

65. In the case of the Alternative A5 Alliance-v-Department of Regional Development, Stephens, J drew the distinction between the first two stages of a Habitats Regulations Assessment, stating:

> *"a screening opinion is different from an appropriate assessment which involves detailed consideration."* [26]

66. It is clear from the revised Appropriate Assessment conducted on 26 June 2017 [DB2 Tab45, pages 445 – 449] that this is not, in fact, a proper Stage 2 Appropriate Assessment. Rather, it is little more than a summary of the Stage 1 Assessment and simply adopts the mitigation measures taken into account during this initial stage [422 – 444].

[26] [2013] NIQB 30, p[91].

67. In the April 2018 judgment in the case of People Over Wind / Sweetman-v-Coillte Teoranta, the CJEU ruled that is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on a European site. [27] This is no new phenomenon in environmental law. In the 2015 case of Champion-v-North Norfolk District Council, Lord Carnwath stated that:

> *"it is said to be common ground that mitigation measures may be considered as part of the process of appropriate assessment once it has been decided following screening that appropriate assessment should be carried out,"*[28]

This is not the process reflected in the Respondent's 26 June 2017 HRA. Rather, mitigation measures at the "stage one assessment", pre-appropriate assessment, identify the mitigation measures which subsequently inform planning conditions (incorrectly, in the case of the period where in-river works should only take place).
TRIAL BUNDLE 1a: [DB2 Tab45, page 462] – Revised HRA

68. By no means exhaustive, but for example, mitigation measures are taken into account as part of the "stage one assessment" of the impugned permission, where it is plainly stated at page [426] *"provided mitigation measures are implemented as stated, it is unlikely that there will be any significant effects on the site features."* Essentially, this reflects the outcome of the Appropriate Assessment, but is a conclusion that has clearly been reached before the Appropriate Assessment was undertaken.

Any reasonable reading of the HRA reveals the full two stage process being carried out. On no reasonable interpretation of the HRA in this instance can it be said that only a stage 1 assessment was carried out. Applicant full stage two assessment was carried out, at which stage it is permissible to take mitigation into account.

69. Mitigation is also specifically considered at pages [432], [433] and [435] of the stage one assessment. At pages [432] – [433], the HRA acknowledges the Loughs Agency requirement *"…that in salmonid catchments, all in-stream works should be carried out during the period May – September…"*. At page [442] it acknowledges the importance of ensuring that proposed works to the river bank *"will take place outside the Atlantic salmon spawning and migration season"*. But the HRA incorrectly identifies this as 31 October to 31 May.

TRIAL BUNDLE 1b: [DB3 Tab61, page 608 – 609] - Loughs Agency

70. In fact, the salmon spawning and migration season to be protected, is the 1 October to 30 April. Historically, April is the most important month on the

[27] *People Over Wind / Sweetman-v-Coillte Teoranta* Case C-323/17, page 5 of 5, 5th para.
[28] *Champion-v-North Norfolk District Council* [2015] UKSC 52, p48.

River Faughan SAC for smolt (juvenile Atlantic salmon) migration out to sea. In any event, the Appropriate assessment imposed planning condition 7 [DB1 Tab10, page 143] limiting in-river works to between 31 October to 31 March, which again, incorrectly identifies that spawning season to be protected, as is clear from the Loughs Agency advice at page [608] on which it claims to have acted on.

71. In granting the impugned permission, the Respondent has permitted in-river works during the months of April and October, when the experts in fisheries conservation and protection – Loughs Agency – stipulates that no in-river works should take place during those two months. Essentially, through a flawed HRA process, the Respondent has imposed a lesser environmental restriction on a European site than the acknowledged fisheries experts – the Loughs Agency – deem appropriate for non-designated salmonid rivers under its jurisdiction.

72. At page [427], the stage one assessment considers it appropriate to assume that discharge consents will be granted. This is despite the fact that NIEA WMU had already set the marker down that there was no guarantee that a discharge consent would be forthcoming, as it did not have sufficient environmental information, as has already been covered. This is evidently an "uncertainty" or a "gap" in information which should have been acknowledged in Section I of the Appropriate Assessment ***[445].*** However, that section is left blank.

The Respondent was provided with two different date ranges by NIEA.

The first was in an NIEA response dated 28th October 2016 (TB1, page 131). That gave a range of 31st October to 31st May. This appears to have informed the HRA.

The second was in an NIEA response dated 2nd October 2017 (TB 1, pages 139-140 and sought 31st October to 31st March.

The Respondent imposed the second date range consistent with the advice and the express condition sought by NIEA (TB 1, page 140)

The Respondent does not object to a Court remedy that amends the condition and the dates sought if appropriate, and notwithstanding the advice of NIEA and SES.

73. As is Section K on "in combination effects". Of course, as previously pointed out in my second (2nd) affidavit affirmed on 3 May 2018, paragraph 13(ii), the obvious but unnoticed errors (excused by Ms Allen, SES at paragraphs 22 – 25 of her affidavit sworn on 10 August 2018) further question the rigour of the Appropriate Assessment process undertaken by the Respondent. As does the fact that the Appropriate Assessment is also predicated on and contaminated by the false premise that the development approved under A/2007/0895/RM

(if considered to be extant) and the impugned permission are mutually exclusive, thus erroneously ruling out any in combination effects [page 436].

This has already been dealt with above.

FAILURE TO CONSIDER IMPACT ON A EUROPEAN PROTECTED SPECIES (BATS)

74. Regulation 3(4) the Habitats Regulations requires that:

> *"...every competent authority in the exercise of any of its functions shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions"* [29]

75. Article 12(1) of the Habitats Directive states that:

> *"Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range,* [including] *prohibiting:*
>
> *(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;*
> *(d) deterioration or destruction of breeding sites or resting places."*

76. All species of bats are protected under Article 12(1) of the Habitats Directive. Regulation 34(b) of the Habitats Regulations transposes this Article in to domestic law in respect of Northern Ireland. Together with Regulation 3(4), these place a lawful obligation on the Respondent to have regard to bats, in so far as this European Protected Species (EPS), may be adversely impacted by the impugned permission.

77. In *Morge-v-Hampshire County Council*, the Supreme Court was satisfied that the Planning Committee (PC), having been *"…advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations…"* was, in the view of Lady Hale, *"enough to demonstrate that they had regard to the requirements of the Habitats Directive for the purpose of regulation 3(4)."* [30]

78. In planning judicial reviews, in the case of Alexander-v-Causeway Coast and Glens Borough Council, the Courts recognise that the planning officer's report to the PC occupies *"…centre stage…"* in the proceedings.[31] Therefore, *"those reports obviously have to be clear and full enough to enable them* [the decision-

[29] This reflects the direction of Regulation 3(4) of the Conservation (Natural Habitats, etc.) Regulations 1994, cited in *Morge-v-Hampshire County Council* [2011] UKSC 2, p3.
[30] *Morge-v-Hampshire County Council* [2011] UKSC 2. p44
[31] *Alexander-v-Causeway Coast & Glens Borough Council* [2018] NIQB 55, p10.

makers] *to understand the issues and make up their minds within the limits that the law allows them."* [32] This is particularly important when applied to the new Northern Ireland planning regime, in effect since 1 April 2015. The Courts recognise that, presently, there is no evidential basis that decision-makers here possess the same level of "*… presumed experience and expertise…*"[33] as those of their counterparts in England and Wales. Therefore, the PC report takes on significant importance. In the case of the impugned permission, this decision-making responsibility was made all the more impossible (and irrational), when a material consideration which should have been before PC members was not presented for their consideration.

79. The protected species of bats is a material consideration in planning decisions [DB3 Tab50] to [DB3 Tab54]. Notwithstanding, the inadequacies and age of the historic bat survey, it confirmed evidence of bats at and adjacent to the site of the impugned permission in 2003. The survey was weak and inconclusive on the potential for roost sites in the adjoining trees. Given that key features of that habitat remain and fulfil the criteria for sites with *"high suitability"* for bats as set out in Table 4.1 of the Bat Conservation Trust's 2017 guidance [DB3 Tab51, 551], there is no logical explanation for the planning officer to presume that bats are not present, their habitats will not be adversely impacted, or do not require protection from the effects of the impugned permission.

80. Unlike in the case of Morge, no contemporaneous evidence exists that the Respondent was alert to, or had regard to the requirements of the Habitats Directive, as it is legally obliged to under Regulation 3(4) of the Habitats Regulations. That the Northern Ireland Environment Agency made no mention of bats in its consultation response cannot be equated with relieving the Respondent of its lawful obligation under Regulation 3(4). In the case of the *Alternative A5 Alliance-v-Department of Regional Development*, Stephens J rejected that Respondent's inference that a consultee's failure to raise a concern is to be equated with there being no concern. [34]

81. The crux of the Respondent's defence to this element of my challenge is that, although he did not mention bats in his PC report, or anywhere else on the file, Mr Rodgers did have regard for Regulation 3(4) of the Habitats Regulations and decided that "*…there would be no loss of habitats suitable for bats in the form of hedgerows or trees."* In the absence of any evidence, the Respondent expects the Court to take Mr Rodgers's word that he was fully alert to the Respondent's lawful obligations in this regard.

82. There is a myriad of guidance on European Protected Species available to planning applicants and officers as exhibited in Trail bundle 1b, [DB3 Tab50] to [DB3 Tab55] and the Applicant's case is set out in some detail at

[32] Refer to footnote 22, p36.
[33] *Belfast City Council-v-Planning Appeals Commission* [2018] NIQB 17, p58.
[34] [2013] NIQB 30, p[108].

paragraphs 35 to 56 of my third (3rd) affidavit. I do not consider it necessary to take the Court through those documents in detail. Rather, I would simply make the following points in support of my argument that the Respondent has not complied with its lawful obligation to have regard to the Habitats Directive as required under Regulation 3(4).

(i) Mr Rodgers's assertion finds no trace on the planning application file or PC report. The PC members were left unaware of previous concerns in respect of bats, or that there is historic evidence that bats are to be found in close proximity to the impugned permission.

(ii) Mr Rodgers is not the decision-maker. Nor is he qualified to take decisions on what impact there would be on bat habitats, particularly by placing reliance on a bat survey that was eleven years old when the impugned permission was submitted and over fourteen years old when the decision was taken. Indeed, there is simple no evidence that Mr Rodgers was even aware of the existence of the 2003 bat survey.

(iii) There is a requirement that bat surveys comply with the Bat Conservation Trust guidelines, which did not exist when the 2003 bat survey was undertaken. It falls significantly short of what is required in order to ensure compliance that impacts on bats have been taken into account.

(iv) By his own admission, any consideration of an impact on this European Protected Species was curtailed to loss of habitats suitable for bats. He did not consider how no disturbance would occur through the construction works, or artificial lighting, to name by two identified potential impacts on bats from development.

(v) Mr Rodgers's assessment at paragraphs 32 and 46 of his affidavit is contaminated by the flawed logic that the access road granted under the historic reserved matters permissions, which encroaches significantly into the crown-spreads and root systems of the mature woodland of the adjacent Holly Plantation, *"…was already in place and therefore there would be no further impact upon trees or boundaries of the site through the utilisation of this access road in the current application."* This is another objectively verifiable error of fact on the part of the Respondent, addressed below.

(vi) That in deciding it unnecessary to seek an additional assessment for bats, Mr Rodgers ignored the requirements of the Biodiversity Checklist which he is required to administer, which states that in such instances, *"…clear justification for this must be provided."*

83. At paragraph 6 of his affidavit, Mr Rodgers refers to the report to the PC as a "*key document*". However, there is simply no trace on this key document that the decision-maker was informed of, or was aware of its lawful obligation to consider the impact on the European Protected Species of bats. In light of the fact that there is no contemporaneous evidence whatsoever, it cannot be ruled out that Mr Rodgers is engaging in the *ex post facto* rationalisation of what he should have done, as opposed to what he actually did during the planning assessment process.

The impact of the proposed development on bats was considered. The Case Officer's consideration and analysis in this regard is set out at CR paragraphs 27 – 33. In particular he considered and ruled out the need to request a survey beyond that available from 2003. Nor did the expert statutory consultee on the Environment (NIEA) raise any concern about bats even though it did specifically raise concerns regarding otters and badgers in its response of 27 April 2015 (TB1p403i – 403k).

Furthermore the Applicant produces no actual evidence to ground any concern regarding bats, much less any "*credible evidence of a real, rather than hypothetical, risk*". As such he has not established the ground on even a prima facie basis. In the alternative it would be pointless to quash the permission on this ground.

There is simply nothing to undermine the analysis of the Case Officer or to suggest that any concerns arises with respect to bats that ought to have been placed before the Planning Committee for consideration.

Further the two HRAs, the consultation responses of SES and NIEA failed to raise bats as a material issue in the context of the site.

In accordance with the principles in *Morge* therefore, regard having been had to the issue, and NIEA being satisfied, no unlawfulness is established (see paragraphs 30 and 44 of *Morge* in particular).

FAILURE TO UNDERTAKE AN ENVIRONMENTAL IMPACT ASSESSMENT

84. European Commission guidance (2001) *Assessment of plans and projects significantly affecting Natural 2000 sites* makes clear that where a project is likely to have significant effects on a Natura 2000 site it is also likely that both an Article 6 assessment [Appropriate Assessment] and an EIA, in accordance with the EIA Directive, will be necessary.[35]

85. The Court of Appeal in Champion-v-North Norfolk District Council (2013) considered that "*…there is no material distinction between the test for an EIA and the test for an Appropriate Assessment, both as regards the threshold of likelihood and*

[35] European Commission (2001) *Assessment of plans and projects significantly affecting Natural 2000 sites*, p12, para.2.4. Exhibited at [DB1 Tab33, 275].

as regards the relevance of proposed remedial measures in determining whether a significant effect is likely."[36]

86. In the Supreme Court case of Champion-v-North Norfolk District Council, it acknowledged that planning authorities should, in principle, conduct EIA determinations early in the planning process[37] and that the timing of "screening" as a matter of law, is one which arises under the EIA Regulations.[38] Under Regulation 10(3) of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012, an EIA screening is required to be conducted within four (4) weeks of receipt of the application or an extended period as agreed in writing with the planning applicant.[39] As pointed out by the planning applicant on 16 September 2016, this was not complied with in respect of the impugned permission [see DB3, Tab55, page 582].

The Legal Principles

A general summary of the relevant principles as applied to screening decisions can be found at paragraph 16 of *R (Long) v Monmouthshire County Council* [2012] EWHC 3130 (Admin):

[16] **As to the screening opinion, a number of principles are identified in the relevant authorities:**

(i) A screening opinion does not involve a detailed assessment of factors relevant to the grant of planning permission and does not require all considerations to be mentioned. In *Respondent (Bateman) v South Cambridgeshire District Council* [2011] EWCA 157 Moore-Bick LJ (with whom Jackson LJ agreed) said:

> **"11 . . . the decision taken on a screening opinion must be carefully and conscientiously considered and must be based on information which is both sufficient and accurate. The opinion need not be elaborate, but must demonstrate that the issues have been understood and considered . . . .**
>
> **20 . . . I think it important to bear in mind the nature of what is involved in giving a screening opinion. It 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 involve a full assessment of any identifiable environmental effects. It involves only a decision,**

[36] *Champion-v-North Norfolk District Council* [2013] EWCA Civ 1675, p15.
[37] *Champion-v-North Norfolk District Council* [2015] UKSC 52, p43.
[38] Ibid., p42
[39] The *Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012,* Regulation 10(3).

almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term screening opinion.

21 Having said that, it is clear from *Mellor* that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion itself or in separate reasons, if necessary combined with additional material provided on request."

In *Zeb v Birmingham District Council* [2010] Env LR 30 Beatson J said:

"It is important to remember what the purpose of a screening opinion is. It is to ascertain whether a development proposal requires an environmental assessment under the Directive. Detailed reports are not required. What is required is an initial assessment of an intended proposal. One sees this from the terms of the Regulations, in particular para 5(2)(aa). That refers to sufficient information to identify any planning permission granted for development for which a subsequent application is made. In relation to the nature and purpose of the development, para 5(2)(b) states that a 'brief description' is required. Although an authority is empowered to call for further information, the default position, (see para 5(4)), is that an authority is required to adopt a screening opinion within three weeks of a request. That default position gives some indication of the level of detail and the investigation required of the authority."

(ii) As to the reasons they "can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for the decision": *South Bucks District Council and another v Porter (No 2)* [2004] UKHL 33, [2004] 4 All ER 775, [2004] 1 WLR 1953. A negative screening direction does not need to contain the reasons, these can be given subsequently, *R (Mellor) v Secretary of State for Communities and Local Government* (2010) Env LR 2 by the Court of Justice;

(iii) In assessing possible environmental effects remediation measures can, to a certain extent, be taken into account. *Jones v Mansfield District Council* [2003] EWCA Civ 1408, [2004] 2 P & CR 233 Dyson LJ (as he then was) at 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 of 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."**

***R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2012] 3 CMLR 709, Pill LJ at 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."**

(iv) The judgment as to whether a development has significant effects upon the environment is a matter of planning judgment for the decision maker, only reviewable on *Wednesbury* grounds (*see Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680); *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at 31, 36 and 43, [2012] 3 CMLR 709.

Furthermore the Respondent "*is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not)*" *Smyth*, at paragraph 85 (for the more general discussion on reliance on expert evidence see paragraphs 78 – 85)

Compliance with EIA requirements does not require perfection[40]. A broad summary of applicable principles was also provided by Weatherup J in *National Trusts' Application* [2013] NIQB 60 at paragraphs 40 onwards.

Screening should take place at an early stage in the design of the project but can occur after the application has been made or even after an appeal has been made.

87. In fact, no EIA screening was conducted for the proposal, as originally submitted, between 6 October 2014 and 10 October 2016, a period of two years. In Champion, Lord Carnwath states:

> "*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* [planning] *authority and not by reference to the steps subsequently taken to address those effects.*" [41]

88. For two years, the Respondent considered it was unable to conduct an EIA screening of the "*…proposal as presented...*". Yet, on the basis of the environmental information sought and available to it, the Respondent was able to complete its Appropriate Assessment of the project on 25 May 2016.

89. After that, on 26 July 2016, the Respondent was insistent that it was not in a position to screen for EIA until after it conducted a further (unnecessary) consultation exercise. This was despite having:

    (i) by 2 May 2016, been in possession of the environmental information it requested [DB3 Tab55, 582 – 583];
    (ii) completed a HRA on 25 May 2016, which concluded significant adverse effects on the integrity of the European site [DB1 Tab4, 90 – 91].

TRIAL BUNDLE 1b: [DB3 Tab56, page 585] – PMcC letter 26 July 2016

90. The subsequent (and unnecessary) round of consultations on 22 July 2016 was undertaken to specifically inform its EIA determination process. This was completed on the 9 September 2016, the outcome of which was the same; namely, significant adverse effect on the European site [DB3 Tab56] – [DB3 Tab59]. The Planning Portal reveals that no new environmental information had been submitted or received to warrant the additional consultation process. At that stage, and long before it, the Respondent could not rule out significant effects.

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[40] *R (Blewett) v. Derbyshire County Council* [2004] Env LR 29 at [32]-[42]

[41] *Champion-v-North Norfolk District Council* [2015] UKSC 52, p47.

91. The case of *Berkeley-v-Secretary of State for the Environment,* made clear that the primary obligation of the EIA Directive, under Article 2(1) is for a Member State to require an EIA before consent is given in every case in which a project is likely to have significant effects on the environment.[42] Furthermore, Champion makes clear that it is a subversion of the EIA process to seek to mitigate against identified significant (adverse) effects, outside of the procedural framework.[43] This subversion is made all the more irregular by the Respondent's continued processing of the impugned permission in the long-term absence of <u>any</u> EIA screening ever having been conducted and with no consideration or recorded understanding of potential *"mitigation measures"* to inform whether EIA was necessary. [44]

92. I would contend that after the Respondent concluded there to be significant adverse effects on 25 May 2016, for the purpose of Article 6(3) of the Habitats Directive, it was not in a position to set aside the primary obligation of Article 2(1) of the EIA Directive by negotiating away those significant (adverse) effects outside of the EIA process, with the ultimate aim of conducting a negative EIA determination. Clearly, by 25 May 2016, if not before, the stage had long been passed at which declining to conduct the EIA screening was frustrating the purpose of the Directive, including engaging the public in the process of assessing the efficacy of any mitigation measures.[45]

93. There is no disagreement with the Respondent that authority has established that a negative screening lawfully arrived at on the information then available, may need to be reviewed in light of subsequent information (Champion, p45). However, this is not what has occurred in the case of the impugned permission. Rather, the Respondent repeatedly declined to conduct any EIA determination despite being in possession of extensive environmental information which was capable of informing the much more detailed, scientific based Appropriate Assessment process, which was concluded on 25 May 2016. Rather, it sidestepped the procedural EIA framework, by continuing to process the planning application in the absence of any EIA screening, until such times as it was in a position to conduct a negative EIA determination.

The Respondent has carried out two EIA determinations (TB1, page 112 to 118; 119 to 128).

The Respondent does not understand the Applicant challenges the EIA determination save in the context of the NIEA WMU consent issue which has already been dealt with above.

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[42] *Berkeley-v-Secretary of State for the Environment* [2000] UKHL 36, section 7 (page 7 of 11).

[43] *Champion-v-North Norfolk District Council* [2015] UKSC 52, p45

[44] Ibid., 48

[45] *Champion-v-North Norfolk District Council* [2015] UKSC 52, p49(45).

The complaint appears to be that there was a delay, and an assertion of an unspecified "illicit" conduct. This is dealt with below after all of the Applicant's argument regarding same.

TRIAL BUNDLE 1a: [DB1 TAB36, page 333]

94. It cannot be ruled out that the Respondent's reluctance to screen positively for EIA was unduly influenced by the potential for legitimate complaint and embarrassment over its inordinate delay in complying with Regulation 10(3) of the EIA Regulations, which by that time was alarming the planning applicant. As can be seen from the exchange of correspondence dated 14 September 2016, there was now a suspicion and a concern that an Environmental Statement was on the cards. Certainly, had a screening been carried out on that date, or before, it could only have been positive in favour of EIA, as the Respondent had already determined by 25 May 2016, for the purpose of Appropriate Assessment, that the development would give rise, not only to significant, but significant adverse effects.

This assertion is mere speculation. It is not supported by the chronology or the events. The exchange of correspondence on 14th September 2016 that is exhibited is incomplete. The complete chain of emails is contained in the second affidavit of Mr Rodgers. As appears from that chain, the planning applicant was complaining about the approach of the Respondent. Regardless of the planning applicant's complaints, the Respondent met with the planning applicant's representatives on 16th September 2016 and the response was the amended plans received on 19th September 2016.

TRIAL BUNDLE 1b: [DB3 Tab55, page 583] – MKA letter

95. A meeting took place on 16 September 2016 between the Respondent and the planning applicant / agent. Whatever, was discussed – the Respondent kept no record of the meeting – the planning application was amended that same day by the applicant and received by the Respondent on 19 September 2016. It is evident from the planning agent's accompanying letter, that the scheme was amended in order to allow the Respondent to screen negatively for EIA [DB3 Tab55, page 583].

96. The revised application was duly screened negatively for EIA on 10 October 2016. This was the first EIA screening carried out on A/2014/0495/F since it was submitted two (2) years previously. Screening of the proposal as originally submitted was, thus avoided. Up until the revised application was submitted, the Respondent was adamant that it was unable screen the original proposal for EIA [DB3 Tab55, page 583]. The negative EIA screening swiftly conducted on the revised application, is a clear indication that the Respondent considered the development as originally submitted would give rise to likely significant effects. Significant effects it had been aware of for a prolonged

period before then, and certainly since it conducted its Appropriate Assessment on 25 May 2016 which concluded significant adverse effects on the integrity of the SAC.

97. An authority cited by the Respondent – *National Trust-v-Department of the Environment* [2013] NIQB 60, p57 – states as a general principle of environmental law that a planning authority *"…cannot postpone the decision on likely significant effects or on whether mitigation measures will mean that there is no likely significant effect."* [Respondent's book of authorities, page 124]. Yet this is how it has illicitly behaved in respect of the impugned permission.

The Respondent rejects the unfounded assertion of "illicit" conduct. There was no postponement. Instead the issues of concern were considered, consulted upon, drawn to the attention of the planning applicant, and assessed.

98. The actions of the respondent in failing to screen for EIA and postponing its determination of significant effects in light of the overwhelming evidence of significant (and adverse) effects demonstrated a closed mind on the part of the planning authority and not only a predisposition, but an illegitimate predetermined path to conducting a negative EIA determination.[46] In such instances, as explained in the case of Persimmon Homes Teesside Ltd-v-the Queen in the case of KP Lewis, predetermination will be an objectionable and contaminating factor capable of rendering a decision unlawful.

99. Alternatively, the Respondent, at crucial times, failed to recognise the "*archetypal case*" for environmental assessment under the EIA Regulations as set out in Champion.[47] This is where it was impossible for the competent authority to reach the view that there was no risk of significant effects; made all the more impossible for the Respondent as it had never actually undertaken an EIA screening to determine what those likely significant effects might be. But it had plenty of clues from the consistent concerns being raised by its statutory consultees for two (2) years and, importantly, the unfavourable HRA the Respondent conducted on 25 May 2016, which concluded significant adverse effects [DB1 Tab4].

100. Rather it set out on a (irrational) path to avoid screening the original proposal for EIA. That failure to treat the impugned permission as EIA development was a procedural irregularity which was not cured by the belated negative EIA determination(s) following the amendment of the impugned permission, or final decision.[48]

101. The Respondent seeks to rely on the Applicant not having taken issue with the final negative EIA screening conducted on 6 December 2017. In doing so,

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[46] *Persimmon Homes Teesside Ltd-v-the Queen in the case of KP Lewis* [2008] EWCA Civ 746, p107 - 108.

[47] *Champion-v-North Norfolk District Council* [2015] UKSC 52, p46.

[48] Ibid., p53.

the Respondent misses the point that the abnormally protracted negative EIA screening process and its unwillingness to conduct an EIA determination for the original proposal, because it was aware of significant adverse effects, was predetermined to avoid consideration of those likely significant effects through the lawful EIA process.

102. Moreover, in that the impugned permission has been predicated on the objectively verifiable and material error of fact that the holiday chalets of the impugned permission would be *"largely"* located over the footprint of those granted under A/2007/0895/RM is, in itself, a contaminating factor [49] which pervaded not only the professional assessment of the impugned permission but contaminates the negative EIA determination process. This is because in failing to recognise that planning permission A/2007/0895/RM and the impugned permission are not mutually exclusive, the Respondent blinded itself to need to consider the likely significance of the cumulative effects of both permissions. In that sense the negative EIA determination conducted on 6 December 2017 is inherently flawed.

103. For that reason (and other objectively verifiable errors of fact which meant that certain material environmental effects were not taken into account in the decision-making process) it would be unsafe for the Courts to exercise discretion and not quash the impugned decision, should it find the Respondent has erred in law.

The application was screened on 6th December 2017 in light of all available information at that time and it was deemed that no Environmental Statement ("ES") was required (see CR at paragraphs 34 – 40 and TB1p119-128).

The real focus of the Applicant's attack is an alleged failure to screen the decision at an earlier stage at which stage he says an ES should have been required. This argument goes nowhere. It cannot be said that immediately upon receipt of a negative comment from a statutory consultee a positive screening is required. It is permissible to seek or await further information or to take into account revisions to an application. Indeed even had a positive screening decision been reached that would have had to have been reconsidered in light of changed circumstances. What is key is that the application is screened and that at that time it is properly and lawfully screened as was the case in this instance.

The procedure for assessment is set out in the Regulations, and the assessment is to be carried put within four weeks or such extended period as is agreed with the planning applicant. As appears hereafter, the planning applicant did agree extension of time until 10th October 2016.

The first EIA screening of 10th October 2016:

[49] *Hegarty-v-Department of Justice* [2018] NIQB 20, p[41].

The first screening was determined on 10th October 2016 following receipt of amended plans on 19th September 2016: see Trial Bundle 1A, page 112. The first screening notes (TB1A, page 113) three consultations with Shared Environmental Services (SES), and three with NIEA. It records the initial proposal and the concerns with the fishing platforms. SES raised site integrity. NIEA raised otter and badger as concerns. Otter and badger surveys were requested. These did not alter the opinions regarding the fishing platforms. Information on methodology was requested and this failed to satisfy SES and NIEA on the fishing platforms. The reasons are clear and entirely adequate for the purpose of informing the public as to the level of consultation and the concerns that persisted.

The revised screening of 6th December 2017 (CR Affidavit at paragraphs 34–40 and TB1p119-128):

The revision records:

(i) two further consultations with SES (TB 1A, page 120)
(ii) three further consultations with NIEA and one that had been previously omitted (TB1A page 120);
(iii) consultations with Rivers Agency.

The determination records the SuDs (sustainable drainage system) being proposed on site, as well as the Construction Environmental Management Plan (CEMP). The provision of a sewerage treatment system on the 32-33 contour line above the 100 year flood level that satisfies NIEA requirements and Environmental Health is also noted (TB1 page 122).

In carrying out a screening for EIA, the Respondent is permitted to have regard to residual measures and undertakings. The Applicant seems to imply that the Respondent could not, or should not, have regard to amended plans. It is clear that the proposed construction of fishing stands in the river, together with a pathway close to the river were matters of concern to Shared Environmental Services.

As appears from the chain of email correspondence between 14th September 2016 and the screening determination on 10th October 2016, the Respondent sought and agreed extensions of time, and in particular received amended plans from the planning applicant on 19th September 2016. These plans formed the basis for the reconsideration by SES and the final HRA.

Even if an application is not screened within the time set down in the regulations or any agreed extended timeframe that does not vitiate the application or absolve the Respondent from having to screen it and determine it. It is still required to screen the application and thereafter determine it (whether or not an Environmental Statement is then required as a result of screening). Delay in carrying out the screening exercise cannot render a subsequently granted permission unlawful provided that the screening that was ultimately carried out displays no errors of law.

FAILURE TO ADEQUATELY CONSIDER THE DERRY AREA PLAN 2011

104. The impugned permission falls under the jurisdiction of the Derry Area Plan (DAP) 2011.

105. Local Government Reform on 1 April 2015 introduced a new planning regime, representing a radical change from the system which operated in Northern Ireland between 1972 and 2015.

106. Sections 6(4) and 45 of the Planning Act (Northern Ireland) 2011 (the Act) require that an application must be determined in accordance with the local development plan unless material considerations indicate otherwise. It gives primacy in decision making to the local development plan.

107. The case of BDW Trading Ltd-v-Secretary of State for Communities and Local Government ruled that this imposes a statutory obligation on the Respondent to establish whether a proposal accords with the development plan.[50] Moreover, in the case of Tesco Stores Ltd-v-Dundee City Council, this found that interpretation of (development plan) policy is a matter for the Courts and not for the planning authority to determine "*as it pleases*".[51] Irrespective of the fact that relevant local development plan polices are not presented before the PC, the case of St James Homes Ltd-v-Secretary of State for the Environment considered that there is still a lawful duty on the decision-maker to take them into account.[52] I would contend this is necessary if the Respondent is to perform its duty to establish if the impugned permission accords with the development plan <u>as a whole, as stipulated by the first authority mentioned</u>.[53]

108. There is no evidence that the Respondent has done this. With the exception of Policy ENV1 – *Areas of High Scenic Value* (AoHSV), the relevant development plan policies set out the Applicant's amended Order 53 Statement, paragraph 20, appear nowhere in the PC report. These are Policies ENV1, ENV2, ENV7, ENV8 and ENV9 found in Section 4: Natural Environment and Policies TU1 and TU2 of Section 11: Tourism of the Derry Area Plan 2011. I should, of course, have mentioned policy TU3, but little turns on that omission.

109. Mr Rodgers presents no reasoning to the PC on how the impugned decision accords with the development plan, <u>as a whole</u>. Perhaps not surprisingly, given the relative infancy of the new planning regime,[54] nor did the PC engage with those development plan policies which Mr Rodgers failed to draw to their attention.

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[50] *BDW Trading Ltd-v-Secretary of State for Communities and Local Government* [2016] EWCA Civ 493, p21.
[51] *Tesco Stores Ltd-v-Dundee City Council* [2012] UKSC 13, p18.
[52] *St James Homes Ltd-v-Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 30, p47 – 48.
[53] Refer to footnote 43, p21.
[54] *Belfast City Council-v-Planning Appeals Commission* [2018] NIQB 17, p58

110. I curtail my detailed intervention to Policies ENV7 and ENV8 as it is the Respondent's non-compliance with these specific policies which I consider risks inflicting actual environmental harm on interests of acknowledged importance if the impugned permission is implemented; namely, the AoHSV; a European Protected Species (bats) and the River Faughan and Tributaries Special Area of Conservation.

111. However, insofar as features of the AoHSV are impacted, policy ENV1 is engaged, if the Derry Area Plan is to be complied with, as a whole. Furthermore, I consider that the Respondent's requirement to comply with the local development plan as a whole is clearly articulated in Policy ENV9, fourth bullet point (thus engaging that policy), which requires that development which is to be located adjacent to rivers must be *"…in conformity with other plan policies."*

112. There is simply no evidence from the file or the report to the PC that the Respondent engaged with other DAP policies or understood this lawful requirement. Instead, the PC report is curtailed to addressing policy ENV1: Area of High Scenic Value to demonstrate compliance.

TRIAL BUNDLE 1a: [DB1 Tab37, page 339] – Policy ENV7

113. In the case of Policy ENV7: *Retention of Trees and Hedges and Landscape Requirements*, this omission has a direct material consequence for the impugned decision. Namely, failure to protect important trees and potential habitats which will likely be damaged by the development.

114. Policy ENV7 contains two distinct parts. It is the first part of this policy to which this element of the challenge relates; namely:

> *"Development proposals will be expected to take account of existing trees and hedges which in the interests of visual amenity and wildlife habitat should be retained."* [DB1 Tab37, page 339].

115. At paragraph 45 of his affidavit, Mr Rodgers refers to a landscape plan, exhibited at CR1, page 166 of Trial Bundle 2. He states that *"the proposal does not seek to remove trees…with additional planting proposed within the site."*. This plan makes no reference to tree retention, nor protection during construction. Insofar as mature trees are located within the boundaries of the application site and control of the planning applicant, no planning condition has been imposed by the Respondent to ensure their retention [DB1 Tab10].

116. The amplification of this policy and the Planning Appeals Commission's interpretation of it [DB1 Tab40, pages 352 – 353 (paragraph 14)] clearly

establish that taking account of trees goes beyond their retention. It includes the protection of (retained) trees if threatened by development. It requires:

> *"…that where existing trees and hedges are an important element of the landscape, a survey is carried out which indicates how the trees and features are to be protected during construction. Before development is carried out the Department* [read Council] *will require the submission of a site survey accurately showing the positions, species, heights and canopies of all significant trees and hedgerows."*

ENV7 goes on to state:

> *"The Department will seek to achieve layouts which avoid the root systems of existing trees…"* and *"will seek to ensure the protection of such features through the inclusion of conditions in any permission granted."*

TRIAL BUNDLE 1a: [DB1 Tab5, page 111] – Approved drawing

117. The proposed road approved as part of the impugned permission to service the accommodation impinges upon the root systems of important trees in the adjacent Holly Plantation [DB1 Tab39]. Trees that are not within the control of the applicant, but which nonetheless, make a significant contribution to the AoHSV and should have been taken into account. Trees that may contain suitable habitats for European Protected Species. This road is a significant engineering operation in its own right, with both excavation and land-forming involved in its construction.

118. No planning condition has been imposed to ensure mature trees and hedgerows are retained or protected. No site survey was requested despite being a clear requirement of policy ENV7. In the absence of adequate enquiry, the Respondent could not possibly have understood the extent of the impact of the development, and particularly the access road will have on the important landscape features of the AoHSV.

TRIAL BUNDLE 1a: [DB1 Tab40, p353] – PAC report

119. In its interpretation of Policy ENV7 in respect of planning application A/2011/0246/F, a hydro-electric scheme in the same vicinity as the impugned permission, the Planning Appeals Commission considered that Policy ENV7 was not complied with if the development proposal was not accompanied by a site survey. At paragraph 14 of its recommendation to the Department for Infrastructure it stated that:

> *"given the unacceptable level of uncertainty relating to the landscape details and that such matters are integral to the overall acceptability of*

the development of the site, the proposal accordingly, does not meet the requirements of Policy ENV7 of the DAP."

Mr Rodgers failed to consider or resolve the uncertainty of the impact the access road would have on the important trees of the Holly plantation, despite acknowledging the encroachment into the crown-spreads / root systems of the mature trees of the Holly Plantation (see paragraph 46 of his affidavit).

TRIAL BUNDLE 2: [CR1, page 64 and 79 – 80] – MKA Report

120. At Paragraph 32, Mr Rodgers claims that the "*access*", including the laneway adjacent to, and within the root systems of the mature trees of the Holly Plantation has already been "*…put in place as part of the implementation of planning approvals A/2007/0895/RM and A/2007/0897/RM and could be used at any time if the landowner sought to move forward with the original approved scheme on site.*" At paragraph 46 he states: "*…therefore, there would be no further impact upon the trees or hedgerows along this boundary of the site…*". <u>This is the fourth (4th) objectively verifiable error of fact Mr Rodgers presents to this Court, as now demonstrated the by the Respondent's own evidence.</u>

121. What Mr Rodgers demonstrates exists on site is / was an at-grade laneway of approximately 3 – 4 metres in width, blinded with stones and designed to temporarily facilitate construction traffic for the laying of the foundation works undertaken in late February/early March 2011 [CR1, pages 79 – 80]. It is noteworthy that such a claim has only surfaced after the grant of the impugned permission, but was never cited, at any time, either by the planning applicant or the Respondent, as justifying the lawful commencement of development (as such operational development would). This is because the access road Mr Rodgers now claims to be in place, has never been constructed.

TRIAL BUNDLE 1a: [DB1 Tab12, page 162] – RM drawing

122. These existing laneway works on which he relies to justify why no further harm will be caused to trees of significant importance, bears no resemblance to what was, and is proposed under either the historic reserved matters permissions or the impugned permission.

123. What was approved, but has not been implemented, is a properly constructed road varying in width from 5 - 6 metres, involving significant excavation and land-forming and which must accommodate a storm drainage system [DB1 Tab12, page 162]. This objectively verifiable error of fact on the part of Mr Rodgers illustrates that, as he clearly has not understood what was approved under the reserved matters permissions, he could not possibly have understood or assessed the potential impact the road will have on the mature trees of the "Holly Plantation" which abut, overhand and encroach significantly (roots systems) into the site of the impugned permission.

TRIAL BUNDLE 1a: [DB1 Tab39, pages 343 – 346] – tree photos

TRIAL BUNDLE 1b: [DB3 Tab62, pages 619 – 668] - BS

124. The *British Standards Publication BS 5837: 2012 – Trees in relation to Design, demolition and construction: Recommendations*, sets out guidelines for the root protection area from encroaching development in order to avoid damaging trees **[DB3 Tab62, page 619 - 668]**. In relation to the construction of the road, it is clear the impugned permission falls far short of complying with BS 5837: 2012. I do not intend to go into the technical detail of BS 5837, but would refer this Court to the following sections.

(i) Section 5.3: Proximity of structures to trees. **[637]**
Here, at paragraph 5.3.1 it states that *"the default position should be that structures (see 3.10) are located outside the RPAs* [Root Protection Areas] *of trees to be retained."* Paragraph 3.10 defines a "structure" as a *"manufactured object, such as a building, carriageway, path…and built or excavated earthwork."* **[628]**

(ii) Section 4.6: Root Protection Area (RPA) **[634]**
Here, paragraph 4.6.1, in conjunction with Annex D sets out how the RPA should be calculated. For example, single trunk trees of a modest diameter of 500mm require a radius of six (6) metres RPA. **[664]**

(iii) Section 6.2: Barriers and ground protection **[643]**
Here, at paragraph 6.2.1.1 it states that *"all trees that are being retained on site should be protected by barriers and / or ground protection."*

(iv) Section 7.2: Avoiding physical damage to the roots during demolition and construction **[647]**

Here, at paragraph 7.2.1 it states, *"to avoid damage to tree roots, existing ground levels should be retained within the RPA."*

125. None of these basic considerations were applied to the impugned permission. Nor does it comply with Policy ENV7, which prescribes that the Respondent *"will seek to achieve a layout which avoids the root system of existing trees..."* [DB1 Tab37, page 339], as could have been easily assessed by the submission of a site survey stipulated by that policy. Road construction within roots systems can undermine, harm and lead to the death of trees, with the knock-on effect of impacting on potential wildlife habitats. As the Tree Officer for the planning authority for some ten (10) years, Mr Rodgers should have known this.

126. Notwithstanding Mr Rodgers's fundamental error of fact, that the access road has already been constructed, his *ex post facto* evaluation of policy ENV7 leaves no trace on the impugned permission which he now claims informed

the Respondent's decision. If he did not raise these material considerations before the PC, it could not possibly have taken them into account before granting the impugned permission. Even if he did (as he claims) give consideration as set out in paragraphs 44-47 of his affidavit, this has been contaminated by his objectively verifiable error of fact.

Policy ENV8

127. At paragraphs 48 to 53 of his affidavit Mr Rodgers refers to various consultees in justifying why the Respondent considers the policy test of ENV8 – *development which is likely to introduce or increase water pollution to an unacceptable extent…will not be permitted"* has been met. Oddly, he omits any reference to the warnings of NIEA WMU regarding Consent to Discharge. No account has been given to the unknown effects from effluent disposal on the River Faughan [DB2 Tab46, page 451], and integral part of the project, which should have been addressed, pre-consent.

128. The development has already been sanctioned by the impugned permission without an assurance that it will not introduce or increase water pollution to an unacceptable extent. It has already been pointed out that where planning applications for development are made prior to applications for consent to discharge, *"…it then falls to the planning system to assess whether the arrangements for the treatment of effluent would create or add to a pollution problem"* (see paragraphs 28 – 30 of the Applicant's third (3rd) affidavit). More so, given the status of the River Faughan as a European site (an objective of which is to maintain and if possible enhance the chemical and biological quality of the water) and which is the main source of Derry's water supply. Yet by granting the impugned permission the Respondent has negated its responsibility under ENV8.

Policy ENV9

129. In as far as the Derry Area Plan policies referred above have not been considered or complied with, this offends policy ENV9: *Development adjacent to Rivers and Open Water Bodies*, which requires a development proposal to demonstrate that it *"…is in conformity with other plan policies"* [DB1 Tab37, page340] if it is to comply with the development plan as a whole. This has simply not been grasped by the Respondent.

The Case Officer expressly advised the Planning Committee that the proposed development complied with the Derry Area Plan 2011 in his slide presentation (Trial Bundle 2 – Respondent, pages 15 and 27).

The JR Applicant having particularised the elements of the policy issues relating to ENV7, 8 and 9, Mr Rodgers has responded -
The issues are addressed in CR 2, (TB R2 affidavit page xxxvii, paras 27 to 42)
Policy ENV 1 is specific to the applicant site.
The policy in ENV 1 emphasises, *inter alia*:

"4.8 The quality, character and importance of the AoHSV derives from a combination of the following

- **the contribution they make to the setting of the City;**
- **their relatively unspoilt nature and their relationship with the Rivers Foyle and Faughan in providing an attractive setting for the enjoyment of the rivers;**
- **their proximity to the urban area and their contribution in providing a high quality environmental image along the major approach roads to the City; and**
- **their intrinsic landscape quality based on the inter-relationship between river, riverbank, large country houses, many of considerable historic character set in mature parkland/woodland and well maintained agricultural land uses."**

"4.9 All AoHSV lie within the Green Belt and will remain undeveloped in the long term interests of the City and District. Whilst a limited number of uses may be acceptable within the Green Belt this does not imply that these uses will necessarily be acceptable within the AoHSV. In addition to meeting Green Belt policies, the development must demonstrate that there will be no adverse impacts or changes on the character or quality of the landscape. Particular attention will be paid to the way proposals conserve and enhance the landscape of the AoHSV."

ENV1 expressly requires assessment of the landscape in the context of the river setting and landscape quality.
The ENV 7 issue regarding trees resolves to the issue of the photograph of one root at a holly tree near the fence. There is (again) no evidence of damage or harm and no evidence was presented at any time in respect of such an issue. The matter is more fully set out at CR Affidavit 2 (TB Resp 2, page xxxviii, paras 30-35.
There is no evidence that the single tress root identified, or the tree is material to habitats as asserted.
This is an issue (like many others) that could have been the subject of submission at any time during the planning process, when the JR applicant was in correspondence and made presentations to the Planning Committee.

TUI 1 is a permissive policy and TUI2 requires compliance with basic principles of good design and landscaping. The proposition that design and landscaping matters were not at the forefront of the EIA consultations is unsustainable.
MISINTERPRESTION OF PPS16: TOURISM, POLICY TSM5

TRIAL BUNDLE 1a: [DB1 Tab 41, pages 362 – 364] – PPS 16: TSM5

130. As previously stated, the interpretation of planning policy is, ultimately, a matter for the Courts.[55] Moreover, the case of Lamont-v-Department of the

[55] *Tesco Stores Ltd-v-Dundee City Council* [2012] UKSC 13, p18.

Environment makes clear that the decision-maker must have had proper regard to and understood the relevant policy if a permission is to withstand legal challenge.[56] Applying flawed logic to decision-making is irrational.[57]

131. In seeking to justify the impugned permission under Policy TSM5[58] [DB1 Tab41, 362 – 364], as found in the PC report under the heading *"Planning Policy Statement 16: Tourism"* [DB1 Tab5, 105], the Respondent began from a position of flawed logic when it:

(i) misunderstood the wording of policy TSM5 by omitting the word *"new"* from category a), and
(ii) made an objectively verifiable error of fact by misleading the PC in a material way[59] into mistakenly believing that the proposed chalets were to be *"largely located over the footprint of the approved chalets…"* [DB1 Tab5, 105], which it considered justified compliance with policy.

132. At paragraph 62 of his affidavit, for the first time, Mr Rodgers sets out the actual and correct wording of Policy TSM5(a) of PPS16: Tourism. Here, he states that permission will be granted for self-catering units of tourist accommodation in any of the following circumstances:

> *"a) one or more <u>new</u> units all located within the grounds of an existing or approved…self-catering complex"* [DB1 Tab41, page 362].

133. This is not the policy wording defended by the Respondent when opposing my application for leave to judicially review A/2014/0495/F, five (5) months after granting the impugned permission [PAP3, page 401]. In its pre-application protocol response dated 12 March and up-dated on 21 May 2018, the Respondent was clearly under the mistaken impression that the policy under which the impugned permission was justified, read:

> *"a) one or more units all located within the grounds of an existing or approved…self-catering complex* [page 401]. It omitted the word *"new"*.

Moreover, it is evident that this post-decision error is a carry-over from the erroneous policy test applied by Mr Rodgers in his report to the Planning Committee [DB1 Tab5, page 105] where the word *"new"*, leaves no trace in the policy evaluation. What this demonstrates is that the Respondent, both pre-decision and post-permission, did not consider the correct policy wording or thrust of TSM5(a) when (i) determining the impugned permission and (ii) resisting the application for leave to judicially review.

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[56] *Lamont-v-Department of the Environment* [2014] NIQB 3, p[76] – [77].
[57] Refer to footnote 12. Refer also to footnote 48, p[74].
[58] Department of the Environment (2013*) Planning Policy Statement 16: Tourism*.
[59] *Mansell-v-Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, p[42](3).

134. If the Respondent's misinterpretation of PPS16 needs reinforcing, Policy TSM5 goes on to state that *"in either circumstance (a) or (b) above, self-catering development is required to be subsidiary in scale and ancillary to the primary tourism use of the site"* [page 362]. Essentially, the additional, *"new"* units of self-catering holiday accommodation being approved must be subsidiary and ancillary to that which has already been approved.

135. Whilst at paragraph 63, the Respondent considers that the (disputed) *"live"* approval on the site is sufficient to bring the matter within the remit of TSM5, it is unable to explain how the impugned permission is subsidiary and ancillary to the live permission it relies on to justify the granting of A/2014/0495/F. Mr Rodgers opts to remain opaque on this point.

136. The justification and amplification of TSM5 (paragraph 7.26 of PPS16) further reinforces that this policy specifically and only relates to extensions of already existing or approved tourist accommodation schemes. Here, it states [363]:

> *"Where self-catering units are permitted on the basis of an associated tourist accommodation…it is imperative that the primary tourism use which provides the justification is in place and functioning,* ***before*** *the units become operational. The policy therefore requires a condition to be attached to approvals to this effect"* [DB1 Tab41, page 363] (my emphasis).

137. The Respondent's interpretation of TSM5 is entirely at odds with this imperative requirement to attach such a planning condition to ensure the justifying permission is, first, *"…in place and functioning…"*. This was never envisaged by the Respondent. Indeed, the impugned permission was predicated on the justifying permission A/2007/0895/RM not being capable of implementation (refer to paragraph 22 of Mr Rodgers's affidavit). This is a clear indication that the Respondent has not understood the policy it has used to facilitate the granting of the impugned permission.

138. Mr Rodgers states at paragraph 63 of his affidavit that: *"the fact that the commenced permissions came into effect prior to the coming into effect of PPS16 is irrelevant"*. I do not accept this position. This is because, in Mr Rodgers's own words, Policy TSM5 *"was more restrictive than previous policy"* [DB1 Tab42, page 365]. New policy tests which did not apply to the historic permissions, needed to be understood, considered and applied (or set aside as an exception) in the determination of the impugned permission.

139. Similarly, a new policy test requiring that the *"detailed design of individual units must deter permanent residential use"* [DB1 Tab41, page 362] has been introduced with the publication of PPS16. This specific point is justified and amplified at paragraph 7.28 of TSM5 [page 363]. This was not a test applicable to A/2007/0895/RM.

140. It is clear from the detailed design that these units are very capable of comfortably accommodating permanent residential use and are reflective of many modern-day urban apartment style accommodation. Mr Rodgers failed to address this test in his report to the Planning Committee.

141. In terms of the proper interpretation of Policy TSM5, the approved development is neither *"…subsidiary in scale…"* or *"…ancillary to…"* the (disputed) extant permission on which the impugned decision is justified. Nor, was it envisaged by the Respondent that the justifying permission (A/2007/0895/RM) would ever be built; contrary to the imperative requirement emphasised in paragraph 7.26 [363] of the "Justification and amplification" of policy TSM5. In fact, the PC report makes clear that the impugned permission is predicated on the requirement that the historic reserved matters permissions which provide the policy justification for the impugned permission, would <u>not</u> be implemented.

142. Of course, this flawed logic is compounded for the Respondent by its objectively verifiable error of fact set out at point (ii) above. An objectively verifiable error of fact it was unaware of during the decision-making process and post-permission. An objectively verifiable error of fact which is of material consequence. An objectively verifiable error of fact it appears reluctant to explain.[60]

Respondent response:
The policy relates to "existing or approved". That disjunctive plainly captures developments with planning permission that are not developed. The proposition that the development must be "in place and functioning" is manifestly unsustainable by reference to the actual wording of the policy. Further the assertion of the JR Applicant that the PPS16 policy does not apply to a permission that preceded it is equally unsustainable. The policy expressly directs regard to "approved" sites.

The impugned proposal is "new", with the positioning and stamped approved drawings, but that distinction is irrelevant. The Respondent was entitled to have regard to the policy as it expressly relates to sites with planning permission.

The issue of the commencement of development is already addressed, as is the issue of the lawfulness of that approach.

THE SUBMISSION OF THE PLANNING APPLICANT, MS CATHERINE DEERY

143. As an interested party, Ms Deery has made a submission to the Court, which is exhibited at [PAP9, pages 472 – 492]. In the interest of completeness it is considered appropriate to address the points she makes to the Court.

[60] *Huddlestone-v-Lancashire Country Council* [1986] 2 All ER, page 945e.

144. It is common ground that between the Applicant and Ms Derry that the foundations have remained in place and were inspected by the then Derry City Council's Building Control prior to the expiry of the permissions. Notwithstanding the divergence in opinion over the extent to which the foundations deviate from what was approved under the historic reserved matters planning permissions, Ms Deery survey confirms that both permissions have not been carried out strictly in accordance with what was granted. Why I consider Ms Deery's survey to be unreliable has been covered already.

145. Ms Deery expresses surprise that I have sought further time to amplify the issue of the foundations being built in the wrong location, when I was in possession of a satellite image since early March 2018. The explanation for this is very simple. The satellite image was submitted under [PAP8, pages 470 and 471] on 8 June 2018 as rejoinder to the drawing lodged by the Respondent on 25 May 2018 [403e], as afforded by the Court's case management directions [13](ii) at [PAP10, page 498]. This drawing, which I believe to represent an objectively verifiable error of fact on the part of the Respondent, indicated sets of foundations which bear no resemblance to those that are constructed on site. The satellite image proves the material error of the Respondent, as does Ms Deery's satellite image (and survey) exhibited at [PAP9, page 484].

146. The matter of the review of extant permissions A/2007/0895/RM and A/2007/0897/RM was first raised with the Respondent on 26 July 2016 [DB1 Tab29, pages 224 – 226]. It was again raised with the Respondent at meetings between senior officials and directors of RFA on 8 October 2016 and again on 11 January 2017. Records of these meetings were requested by myself as part of disclosure on 9 February 2018. The Respondent was unable to provide any official records as none were kept. This is confirmed by the Respondent's response contained at [PAP3, page 389, points 1 and 2]. Therefore, it is not correct that this objection was only raised on the eve of the PC. However, it is understandable how Ms Deery could reach the conclusion she has as the matter of the review of extant permissions being raised by RFA since 26 July 2016 finds no trace on the PC report or planning file. Nor was it addressed by any member or council official when put once more before the PC on 10 January 2018, as confirmed by the PC minutes of that meeting exhibited at [DB1 Tab23, pages 202 – 203]. That Ms Deery was not alert to that issue because of a lack of record on file and failure by the Respondent to inform the PC of the material concerns being raised by RFA cannot be attributed to the Applicant.

147. The matter of how HRAs are made publicly available remains a concern for RFA, but not a matter that this Court can address.

148. The Respondent's practice of granting planning permission in the absence of a Consent to Discharge is a ground for challenge covered above.

149. Ms Deery considers the Applicant is engaging in delaying tactics to hinder the impugned permission and Court hearing. I can assure this Court RFA is engaging in nothing of the sort. Our voluntary organisation is concerned with the impact bad planning and poor environmental regulation is having on our river, a European site. As a personal litigant I have endeavoured to and believe I have comply with all legal requirements and case management directions handed down by this Court.

150. Until late December 2017, RFA's clear understanding was that the historic permissions had lapsed as first advised by the Respondent on 25 July 2016. As encouraged to do by the Respondent, RFA relied on the planning portal to track the progress of this application. However, none of the considerations which led the Respondent to confirm the lawful commencement of the development, notes of meetings, or even the revised HRA conducted on 26 June 2017, made their way onto the planning portal. Therefore, it was a surprise to RFA that a special meeting of the PC had been convened to approve the impugned permission. The postponement of that specially convened meeting to January 2018 was because in the rush to get this permission through, Mr Rodgers's presented for approval the original application which failed Appropriate Assessment in May 2016. By intervening RFA prevented the PC from being presented and considering the wrong details.

CONCLUSION

151. Given the above breaches of law on the part of the Respondent and the irrationality which pervades and contaminates its decision-making at every stage in the process, I respectfully request that the impugned permission is declared unlawful and quashed in the public interest.

Dean Blackwood BSc (Hons) LLM MRTPI
Director
River Faughan Anglers Ltd. 17 September 2018