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Case No: CO/1619/2015 and CO/1623/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2015

Before:

THE HONOURABLE MR JUSTICE CRANSTON

Between:

R (on the application of Derek Foster)
R (on the application of Tom Langton)

First Claimant
Second Claimant

- and -

Forest of Dean District Council

Defendant

- and -

Homes and Communities Agency
Natural England

1st Interested Party
2nd Interested Party

Richard Turney (instructed by **Leigh Day Solicitors**) for the **First Claimant**
Jenny Wigley (instructed by **Richard Buxton Solicitors**) for the **Second Claimant**
Celina Colquhoun (instructed by **Forest of Dean District Council**) for the **Defendant**
Heather Sargent and **Timothy Corner QC** (instructed by **Berwin Leighton Paisner**) for the
1st Interested Party

The 2nd Interested Party was not represented and did not participate in the proceedings

Hearing dates: 05/08/2015

Approved Judgment

Mr Justice Cranston:

Introduction

1. The claimants seek permission to apply for judicial review of the decision of the Forest of Dean District Council (“the Council”) of 26 February 2015 to grant planning permission to the Homes and Communities Agency for a mixed use development in the Northern Quarter, Cinderford, Gloucester. Their objections to the development are essentially because of what they claim will be its impact on bats (in particular, the lesser horseshoe bat) and bat roosts nearby.
2. The Northern Quarter lies within a few kilometres of the Wye Valley and Forest of Dean Special Area of Conservation for bats (“the SAC”), which is a European site for the purposes of the Conservation of Habitats and Species Regulations 2010, SI 2010, No. 490 (“the Habitats Regulations”). The application site includes areas which are used by the bat colonies for foraging and roosting. Former colliery buildings within the application site and the artificial bat roost in the adjacent Hawkwell Inclosure wood support the bat population of the SAC. The planning permission covers outline permission for 195 dwellings, a hotel and employment and non-residential use, and permission for a College and a new link road between the A4136 and Broadmoor Road (the so-called “Spine Road”).
3. There have already been a number of unsuccessful challenges to the redevelopment proposals for the Northern Quarter: *Forest of Dean Friends of the Earth v. Forest of Dean District Council* [2013] EWHC 1567 (Admin); *Forest of Dean Friends of the Earth v. Forest of Dean District Council* [2015] EWCA Civ 683; *R (Forest of Dean Friends of the Earth) v. Forest of Dean District Council* [2014] EWHC 681 (Admin).
4. These current applications are a challenge to the Council’s approach towards its assessment under the Habitats Regulations because of the bat SAC. The challenge falls under three heads: (1) the decision to grant the permission was unlawful because the mitigation measures which had been identified as necessary to address the potential recreational impacts of the proposed development on the bats in the Hawkwell Inclosure were not secured, either by way of a condition attached to the permission or in the accompanying section 106 agreement (first claimant); (2) the Council unlawfully failed to ascertain that the proposed development would not adversely affect the integrity of the SAC (second claimant); and (3) the Council failed to take into account “in combination” effects (both claimants). The second claimant abandoned another ground – a failure to consult Natural England – so nothing more need be said about that.
5. Patterson J rejected these grounds in the following terms:

“(1) It is contended that the mitigation measures identified were not secured by the conditions or section 106 agreement when in fact all the measures required by the Appropriate Assessment were secured by conditions 3, 18, 21, 23, 72 and 73.

(2) [Natural England's] concerns were satisfied during the drafting of the Appropriate Assessment. In reality this is a disagreement on the merits.

(3) The HCA did in fact consider the cumulative effects and provided the assessment to the Council as chapter 16 of the [Environmental Statement]. It concluded that there was no residual effect in combination with development proposals within 5km. [Natural England] had independently concluded that there would be no residual impact on the SAC so that there was no requirement for a cumulative assessment.”

Background

6. The factual background regarding bats and bat roosts and the SAC is set out in the Council's Cinderford Northern Quarter Biodiversity Strategy Technical guidance (“BSTg”), June 2014:

“2.14 The Wye Valley and Forest of Dean Bat SAC consists of a complex of 13 SSSIs in Monmouthshire and the Forest of Dean. Westbury Brook Ironstone Mine SSSI is the nearest component site lying 2.4km away from the CNQAAP [Core Strategy and the Cinderford Northern Quarter Area Action Plan] area. The SAC was designated in 2005 for its exceptional breeding population of lesser horseshoe bats (totalling 26% of the national population) and for its greater horseshoe population (totalling 6% of the national population) in the northern part of its range. Whilst the CNQAAP area contains no SSSIs or SACs itself, a purpose built artificial roost and nearby disused mining buildings at the Northern United Colliery site support a large breeding colony of lesser horseshoe bats. Individuals from this colony are considered to be necessary to the integrity of the Wye Valley and Forest of Dean Bat SAC as they are likely to hibernate at cave sites such as Westbury Brook Ironstone Mine SSSI. They are also considered to be necessary to the integrity of the Wye Valley Woodlands SAC, where lesser horseshoe bats are a qualifying, but not primary, reason for the sites selection, as the species is known to forage in these areas.

...

2.16 The CNQAAP area contains two non-statutory designated wildlife sites. The Hawkwell Inclosure KWS [key wildlife site], covering part of the Hawkwell Inclosure, was designated for its woodland and associated shrub layer and ground flora...”

7. The BSTg dealt with ecological corridors for bats to migrate and disperse at paragraphs 3.17–3.18. It was said that the corridors were critical and their interruption a key issue. There was a risk that development of the Spine Road could

result in an increased mortality of bat species as a result of road collisions. The BSTg returned to the issue under the heading “road design scheme”.

“Key flyways for bat species should not be interrupted by road development. Roads should be aligned to avoid these flyways wherever possible. Where this is not possible roads should be designed to minimise their widths and traffic speeds. Where roads unavoidably cross these key flyways safe passes designed specifically for the species concerned and aligned on the route of the existing flyway will be required.”

Paragraphs 4.32 and 4.33 set out conditions for the design of underpasses for the lesser horseshoe bats. Paragraph 4.34 referred to the need where roads cross key flyways of other bat species for under/over-pass designs suitable to the species concerned. An important objective of these under/over-passes should be to retain the original route of key flyways and achieve flight heights which avoid the risk of collision with vehicles. Under the heading “Recreational Strategy”, the BSTg stated:

“In order to minimise recreational impacts to Key Ecological Components retained within the CNQAAP area, and those found in the area beyond, development proposals should carefully consider access provision. In particular, proposals should demonstrate how resident/visitor movement will be actively managed to dissuade access to the most sensitive areas, and promote responsible behaviour. Measures may include for example; layouts which encourage pedestrian/cycle movements away from sensitive areas and provide and promote dedicated local recreational space; defensive native planting along woodland edges; dog waste bins; no dog fouling signs; and interpretation boards to increase understanding about biodiversity in and around the CNQAAP area and its sensitivity.”

8. Before planning permission was granted there had been correspondence between the Council and Natural England. Natural England made clear that it would oppose the development as then proposed. Natural England raised a number of issues such as impact of the Spine Road on bats and the proposed culverts and flyways to avoid collisions with vehicles. The Council responded with changes in its mitigation measures. After receiving drafts of the Appropriate Assessment, Natural England indicated on 30 September 2014 that (1) the project would not affect the integrity of any European Site alone, subject to the imposition of mitigation measures set out in Tables 1 and 2a-f of the draft Appropriate Assessment; (2) there would be no residual effects and therefore it was deemed unnecessary to assess “in combination” effects with other places and projects; and (3) it had no objection to the application for planning permission. Natural England had stated in relation to mitigation measures, i.e., point (1), that it should be consulted regarding the imposition of these since they would have to be accurately drafted and implemented. During October 2014 there was further correspondence between the Council and Natural England and the Council made further revisions to the mitigation measures. On 27 October, the Council wrote to Natural England, including a revised proposal for condition 20 and also a copy of the draft Appropriate Assessment, which explained that the requisite

mitigation measures would be secured through both planning conditions and a section 106 agreement.

9. On 30 October 2014, Natural England wrote, in response to three questions put to it by the Council.

“1. Does Natural England agree with the assessment conclusions in that the project would not affect the integrity of any European site alone, subject to the imposition of mitigation measures set out in Tables 1 and 2a-f?

Yes.”

The letter then stated that the changes to the mitigation measures had the potential to impact on bats due to light spill, barriers to bat movement, and changes to available bat foraging habitat. Having outlined an approach of phased felling, initially along the road edge allowing a broadleaf scrub/tree belt to develop, before felling the remainder a few years later, required by the management plan, the letter continued “and so we are satisfied that there will be no adverse effect on integrity due to this issue”. As to barriers to species movement, and changes to available foraging habitat, Natural England agreed with the reasoning set out in the Council’s covering email of 27 October, “which explains why these potential issues will not result in an adverse effect on integrity”. The Natural England letter then considered the other questions the Council raised:

“2. Does Natural England agree with the assessment that, subject to the imposition of mitigation measures set out in Tables 1 and 2a-f, there would be no residual effects and therefore it is deemed unnecessary to assess in combination effects with other plans and projects?

We do.

3. Does Natural England agree that, with regards to Habitats Regulations Assessment, should the LPA wish to proceed to positively determine the application it may do so subject to securing the mitigation measures outlined in Tables 1 and 2a-f?

We do.”

10. Natural England emailed the Council again on 3 November 2014 as regards the draft planning conditions, explaining that it was the Council’s responsibility to ensure that they were fit for purpose, but “[i]n general terms we see no matters of significant concern to us...” The Council’s evidence, which I accept, is that Natural England will be consulted again on the detail of the measures when reserved matters applications are received.
11. The 30 October 2014 version of the final Appropriate Assessment found that the project would not affect the integrity of any European site, subject to the imposition of certain mitigation measures. No residual effects were identified so it was deemed unnecessary to assess the effects of the project in combination with plans and projects.

The tables in the draft identified potential impacts and the proposed means by which those impacts would be mitigated. Table 2c referred to road collisions and severance impacts associated with lesser horseshoe bat flyways. The ramifications of the Spine Road were mentioned. Among the mitigation measures to address the uncertainty on residual effects identified was adaptive management measures, secured by conditions and a section 106 agreement. It might include additional landscaping to guide bats to safe crossing points; removal of landscaping to dissuade bats from crossing at unsafe points; additional dissuasive lighting; and walls/fences at hop-overs to increase flight heights and reduce collision risk.

12. Table 2e referred to “Wye Valley and Forest of Dean Bat Sites SAC – operational disturbance to lesser horseshoe bat roosts”. Mitigation measures were set out in Box B, such as reducing recreational access to the Hawkwell Inclosure. Box D contained additional mitigation measures to address the uncertainty and residual effects identified in Box B. These included:

“ii. Requirement to submit measures to discourage additional access to the Hawkwell Inclosure.

...

iv. Requirement to submit, and implement, a detailed early warning monitoring scheme for recreational disturbance at the existing artificial roost and replacement roost to include: purpose, aims and objectives of monitoring; identification/provision of adequate baseline data; appropriate success criteria, thresholds, triggers, targets against which effectiveness of mitigation can be monitored and judged; methods of data gathering and analysis; location of points/areas where monitoring will be undertaken; timing and duration of monitoring; responsible persons and lines of communication; review and publication of results/outcomes; adaptive management that will be implemented if monitoring shows that measures are ineffective or not reaching stated aims and objectives,

- Measures to dissuade access such as defensive planting;
- Measures to further increase secureness of roosts dependant [sic] on nature of vandalism risk assessed.”

The conclusion in Box E was that the outcome with the additional mitigation measures was that operational disturbance to the lesser horseshoe bat roosts from the project was avoided and there were no residual impacts expected.

13. The planning permission granted reflects that the development is to be phased. Phase 1 is the Spine Road from Broadmoor Road to the College site and the College (plot E), and phase 2 is the remainder of the Spine Road and the remainder of the development (plots A, B, C, D, F, G and H). Phase 1 was set out in detail, along with the remainder of the Spine Road in phase 2, the remainder of the development in phase 2 being submitted in outline. Planning condition 1 sets out those areas subject

to detailed planning permission. Condition 2 sets out outline areas where detailed matters are reserved for consideration through further applications, up to 10 years hence. Conditions 13–15 control the demolition of the two roosts at the Northern United Colliery site. The conditions require that, in addition to the existing purpose built roost, two new day roosts are to be constructed and in use to an agreed level with Natural England before these can be closed and demolished. (The new roosts are called RR1 and RR2b). A European Protected Species licence would also be required prior to demolition. The Spine Road connection cannot be completed until such time as the buildings can be demolished. (In evidence are photographs of the two new additional roosts, which were substantially completed in March 2015. The three purpose built roosts are on land let on 50 year leases by the Council from the Forestry Commission.)

14. Condition 18 and its relevant part reads:

“18. At the time the details are submitted under condition 2 for each plot, A1, A2, A3, B, C, D, F1, F2, G and H... a Biodiversity Management Plan for that plot shall be submitted to and approved in writing by the Local Planning Authority... The Plan shall include, but is not limited to:

- A description and evaluation of features to be retained, managed and enhanced within the relevant plot...
- Constraints and opportunities (including biodiversity enhancement);
- Aims and objectives for management;
- Appropriate management options for achieving aims and objectives;
- Prescriptions for management;
- A strategy to demonstrate how management will address the potential disturbance to the surrounding key ecological components as identified in the Biodiversity Strategy Technical Guidance;
- Work schedule (including an annual work plan capable of being rolled forward over a five year period);
- Review arrangements, monitoring and remedial measures;
- Responsibilities for implementation.

The development of each plot shall be carried out in accordance with the approved Biodiversity Management Plan for that plot and thereafter similarly maintained.”

15. Condition 19 provides that, within six months of the opening of the College on plot E1, a Biodiversity Management Plan shall be submitted to and approved in writing by the Council.

16. Condition 21 reads, in part:

“21. Prior to any development in each of the plots A1, A2, A3, B, C, D, H, G, F1, F2 or phase 2 of the Spine Road (as defined in the Environmental Statement)... details for a scheme of implementation of biodiversity mitigation, including timetable and 20 year management plan and habitat and species monitoring, shall be submitted to and approved in writing by the Local Planning Authority. The submitted scheme for each plot area shall be in accordance with... [approved details]... The schemes shall incorporate the Habitats Regulations [Appropriate] Assessment 30 October 2014 and shall be agreed in accordance with the details in the table... The scheme shall be implemented in accordance with the approved details and thereafter similarly maintained.”

17. Condition 23 provides:

“Prior to the commencement of the development hereby permitted a bat monitoring strategy shall be submitted and approved in writing by the [Council]. The Strategy shall:

- Cover the full length of the Spine Road and development areas as shown on drawing [] including its bat culverts, bridges as shown on drawing [] and dark corridors including that shown on drawing [].
- Cover major and minor lesser horseshoe flyways as shown in Fig 7.4 (Lesser Horseshoe Bat flight lines) of the Addendum to the Environmental Statement Volume 3: Figures and Appendices (June 2014).
- Cover the Main Office, Bath House, Canteen as shown on figure 6, page 17 of Appendix 7.4 (Bat Survey Report) of the Addendum to the Environmental Statement Volume 3: Figures and Appendices (June 2014) and existing artificial roost and replacement roosts RR1, RR2 as shown in figure 7.5 (Development phases and mitigation proposals) of the ES Addendum Volume 3: Figures and Appendices (June 2014) and two night roosts as required pursuant to condition 13;
- ...
- Identified adaptive management options that may include: Removal of landscaping to dissuade bats from crossing at unsafe points, additional dissuasive lighting

and walls/fences at hop-overs that could be implemented if monitoring shows that measures are ineffective or not reaching stated aims and objectives.

The bat monitoring strategy shall be implemented in accordance with approved details.”

18. The section 106 agreement, clause 8.7, contains a covenant between the HCA and the Council that the HCA will “implement or procure the implementation of the monitoring of the Bat Roost Replacement Works as more particularly set out in Schedule 5”. Clause 8.8 is the HCA’s covenant to implement or procure the implementation of the Phase 1a and Phase 1b General Mitigation Creation and associated General Mitigation Management and Monitoring tasks set out in Schedules 1, 2, 4 and 5 (Phase 1a mitigation relates to Phase 1 of the development; Phase 1b mitigation relates to the development of the remainder of the Spine Road in phase 2). Clause 10.5 is the covenant:

“to comply with the terms of Schedule 5 and in particular to implement or procure compliance with the requirements of Table 2 of Schedule 5 to achieve the aims and objectives set out in Table 1 of Schedule 5 in respect of the monitoring of the Phase 2 Mitigation.”

19. Schedule 5, “Mitigation Monitoring”, provides that mitigation monitoring is to be carried out for the appropriate phase of development and mitigation areas as set out in Table 2. Under the heading “Monitoring requirements”, Table 2 reads:

“Comprehensive and detailed early warning monitoring scheme for bat roosting, foraging and commuting to include: purpose, aims and objectives of monitoring; identification/provision of adequate baseline data; appropriate success criteria. Thresholds, triggers, targets against which effectiveness of mitigation can be monitored and judged; methods of data gathering and analysis; location of points/areas where monitoring will be undertaken; timing and duration of monitoring; responsible persons and lines of communication; review and publication of results/outcomes; adaptive management that will be implemented if monitoring shows that measures are ineffective or not reaching stated aims and objectives.”

There is also to be monthly monitoring of bat presence and activity at the new roosts, monthly monitoring of temperature and humidity within those roosts and regular maintenance checks of the roosts.

Under clause 3 of Schedule 5, HCA covenants:

“3.1.1 to undertake or procure the implementation of the Phase 1a Mitigation Monitoring and Phase 1b Mitigation Monitoring; General Mitigation Management and Monitoring and generic monitoring as set out in Table 2 above; and

3.1.2 to undertake or procure a report on the monitoring as set out in Table 2 above to the Council by 1 June for the previous calendar year.”

Moreover, the developer covenants:

“3.2.1 to undertake or procure the implementation of the Phase 2 Mitigation creation and enhancement of the southern wildlife corridor pursuant to payment of the Southern Wildlife Corridor Enhancement Contribution; and

3.2.2 to report on the monitoring as set out in Table 2 above to the Council by 1 June for the previous calendar year.”

Legal framework

20. The Habitats Regulations implement the Habitats Directive 92/43/EEC. Tracking Article 6 of the directive, regulation 61 provides:

“61. – Assessment of implications for European sites and European offshore marine sites

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.

...

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.”

21. Mitigation measures can be taken into account in making the regulation 61 assessment, *R (Champion)* [2015] UKSC 52; [2015] 1 W.L.R. 3710, [48]–[53]. Natural England is the appropriate nature conservation body for the purposes of regulation 5(1)(b)(i) of the Habitats Regulations. Its views deserve great weight: see the case law collected by Lindblom J in *R (on the application of Prideaux) v. Buckinghamshire County Council* [2013] EWHC 1054 (Admin); *R (on the application of Forest of Dean Friends of the Earth) v. Forest of Dean District Council* [2014] EWHC 1353 (Admin) at [18], per Burnett J; [2015] EWCA Civ 683, [20], per Sales LJ with whom Longmore LJ and Hildyard J agreed. See also *Smyth v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [85], per Sales LJ.
22. At a very late stage, Ms Wigley for the second claimant raised an issue of European law, even suggesting that the matter needed to be referred to the Court of Justice of the European Union (“CJEU”). It turns on a paragraph in Case C-258/11 *Sweetman v. An Bord Pleanála (Galway County Council intervening)* [2014] PTSR 1092, where the CJEU said this about the assessment required by the Habitats Directive:

“[44] So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it 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: see *European Commission v. Spain* (Case C-404/09), paragraph 100 and the case law cited. It is for the national court to establish whether the assessment of the implications for the site meets these requirements.”

Ms Wigley submitted that, in the light of this passage, a *Wednesbury* standard of review by this court would not reflect European law: it was clear that it is for the national court to establish whether the assessment of the implications for the SAC meets the requirements.

23. To my mind there is an air of unreality about this submission. The CJEU could not have been suggesting that, as Ms Wigley submitted, national courts themselves must decide when the assessment has lacunae, whether it contains complete, precise and definitive findings, and whether its conclusions are capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. Judges may be clever, but not that clever. The submission also misunderstands the role of courts in European societies. To my mind the CJEU was simply stating that the national court had to evaluate the assessment in the ordinary way, not become the primary decision-maker.
24. In any event, the submission is contrary to authority binding on me, despite the different context. In *Smyth v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [79]–[80], Sales LJ rejected a submission that in applying the Habitats Directive the national court must apply a more intensive standard of review, in effect making its own assessment afresh. Sales LJ rejected the submission, reaffirming earlier authority that the standard of review is the *Wednesbury* standard, which is substantially the same as the relevant standard of

review of “manifest error of assessment” applied by the CJEU in equivalent contexts: see [80].

25. As well, the question whether or not any cumulative effect with other developments ought to be assessed at all is a matter of fact and judgment for the decision-maker: *R (on the application of Larkfleet Ltd) v. South Kesteven District Council* [2014] EWHC 3760 (Admin); [2015] Env LR 16 per Lang J at [76] to [78], citing the decisions of the Court of Appeal in *Bowen-West v. Secretary of State for Communities and Local Government* [2012] EWCA Civ 321; [2012] Env 22 and *Brown v. Carlisle City Council* [2010] EWCA Civ 523; [2011] Env LR 5.
26. There is European Commission Guidance on the implementation of the Birds and Habitats Directives in estuaries and coastal zones, 2011. At paragraph 3.3 it states that:

“A widespread misunderstanding is that the EU nature directives are based on a “no-unless” approach. This is an interpretation based on the view that environmental policy objectives always take precedence over economic policy objectives. This approach is in contradiction with sustainable development principles, which balances environmental benefits and societal and economic requirements (see article 2.3 of the Habitat Directive). Early integral planning and the development of integrated projects are crucial, as they will promote a “yes, if” approach and pave the way for win-win solutions.

...

The following guidelines propose recommendations on the concept of integrated projects, the correct use of the appropriate assessments and “significant impact” issues, the use of adaptive management and the assessment of compensation needed as a last resort.”

Under the heading “Guidelines for assessments” it states at paragraph 3.3.3:

“Following a thorough appropriate assessment that includes collecting all relevant data, and subject to the reversibility of actions, minor remaining uncertainties should however not block or restrain projects indefinitely. This needs to be judged on a case by case basis. In case of uncertainty on particular mechanisms of complex estuarine or coastal ecosystems port and waterway developers should assess the nature of the remaining uncertainties and manage them through targeted monitoring and adaptive strategies. Monitoring schemes should be designed in a way that they signal any unexpected developments at a stage where effective corrective measures can still be taken.”

Issue 1: mitigation measures for recreational disturbances

27. In succinct and cogent submissions, Mr Turney contended for the first claimant that, under the planning permission, there was no obligation to discourage additional access to the Hawkwell Inclosure and the consequent disturbances, nor for requirement (ii) of Box D of Table 2e of the Appropriate Assessment. Condition 18 was incapable of discouraging such access. The requirement under it was to submit a Biodiversity Management Plan for each plot, but such plans were concerned with the management of land within each plot, not with the management of the Hawkwell Inclosure which is outside any of the plots. Yet the inclosure is capable of being directly accessed from those plots via public highways and rights of way. Thus the requirement in condition 18 is incapable of preventing people resident or working in those plots from causing disturbance to it. Moreover, the requirement in condition 18 does not relate to all parts of the development. As to the requirement in condition 19 to submit a Biodiversity Management Plan in respect of the College, plot E1, that only arises after the College there has been constructed and open for 6 months. Further, there is no provision to ensure the effectiveness of any measures in any particular plan.
28. As to condition 21, Mr Turney submitted that it relates to management of specific areas as each comes forward for development and is not concerned with measures to prevent recreational disturbance. Condition 23 does not secure any mitigation measures. Thus Mr Turney contended that there was nothing in the conditions nor in the section 106 agreement to require any measures to be taken at the Hawkwell Inclosure roost, which was not within any of the development plots. The reference to the “Bat Roost Replacement Works” as required in the section 106 agreement was misplaced since these works relate to the new replacement roosts, i.e., RR1 and RR2.
29. In my view, Patterson J was correct in concluding that none of this is arguable. As regards requirement (ii) – measures to be submitted discouraging additional access to the Hawkwell Inclosure – condition 18 relates to reserved matters plots, plots (D and H) bordering the inclosure, and requires that a Biodiversity Management Plan be submitted for the Council’s written approval at the same time as details of reserved matters are submitted for approval. The plan’s requirements include as the sixth bullet point a strategy to demonstrate how management will address the potential disturbance to the Hawkwell Inclosure. Measures could include planting (as a barrier), layout, and recreational areas within the plots. However, condition 18 could have effect beyond the ambit of the plots themselves. Measures not confined to the plots could include additional planting, say, elsewhere. Thus condition 18 secures requirement (ii).
30. Condition 21 offers reinforcement in providing that prior to the development of any of the reserved matters plots or of phase 2 of the Spine Road, a scheme of implementation of biodiversity mitigation must be submitted for the Council’s written approval. The scheme must incorporate the Appropriate Assessment and must be implemented with the approved details and maintained after that. Some of the mitigation areas referred to in condition 21 falls within the Hawkwell Inclosure. The upshot of condition 21 is that the related development plots cannot be brought forward until the Council has approved an applicable scheme meeting requirement (ii). I accept the Council’s submission that mitigation measures must be considered as a whole. That, in part, meets the timing point raised about condition 19 and the

College: condition 19 must be read in conjunction with other conditions such as condition 23, examined shortly. Moreover, the phasing of the development is such that the Spine Road, perhaps the easiest access to the inclosure, will not be completed until after the College.

31. As regards requirement (iv) in Table 2e, Box D, conditions 21 and 23, backed by the section 106 agreement, provide the answer. In particular condition 23 tracks the wording of requirement (iv) with the bat monitoring strategy being required to cover the Hawkwell Inclosure roosts. It expressly covers mitigation measures, which can be compelled if approval is to be granted. Adaptive measures which can be required are not limited to what is referred to there. The aspects of requirement (iv) not covered – measures dissuading access and vandalism – are covered by condition 21, in as much as the requisite schemes of implementation of biodiversity mitigation must incorporate the Appropriate Assessment. The section 106 agreement also demands bat roost monitoring, in particular through Schedule 5, Table 2. On my reading, it is not as limited, as was suggested, in its application.

Issue 2: adverse effects on integrity of the SAC

32. Ms Wigley developed her submission for the second claimant that no reasonable competent authority could have concluded, to the legally required standard, that the findings and conclusions in the Appropriate Assessment were capable of removing all reasonable scientific doubt as to the absence of effects of the proposed development on the SAC. On the face of the assessment itself there were uncertainties and doubts as to the likely effectiveness of the mitigation, in particular in relation to the impact on the bats of the new Spine Road between the existing and new roosts, RR1 and RR2. There was the early warning monitoring system to identify problems with the mitigation, but what was proposed was only more of the same, doubtfully successful measures. There could be no confidence that they would overcome the earlier problems. Ms Wigley spent time canvassing the uncertainties, and their open-ended nature, referred to in both the Appropriate Assessment and in Natural England's correspondence. An aspect was the positioning of the culverts and the flyways allowing bats to pass between the roosts. At this point, it is unknown whether the bats, or how many, will use the culverts and flyways. In the presence of those uncertainties, she submitted, it was irrational to conclude that the requirements of the Habitats Directive were met. This issue was plainly arguable on conventional *Wednesbury* review principles.
33. In my view the second claimant did not come close to establishing that the Council's conclusion met the applicable *Wednesbury* threshold. First, the Council carried out an Appropriate Assessment and it applied the relevant test of whether the proposed development would adversely affect the integrity of the site. The conclusion was that with the mitigation measures in the conditions and the section 106 agreement, including the adaptive management requirements, no adverse effect would arise from the project on its own. The European Guidance recognises the legitimacy of relying on adaptive management. In my view it is simply not arguable that it was irrational for the Council to conclude that the conditions and section 106 agreement together would provide the requisite assurance that there would be no residual effects from the proposed development and thus no adverse effects upon the integrity of the SAC.

34. Secondly, Natural England agreed with the Council. All the earlier correspondence from Natural England, on which Ms Wigley built a considerable part of her case, is beside the point because Natural England finally accepted in its letters of 30 September and 30 October 2014 that there would be no residual effects from the proposed development. That, of course, was subject to the imposition of the mitigation measures as set out in the 30 October 2014 version of the Appropriate Assessment, including the early warning management scheme. As we have seen, the authorities require that Natural England's conclusion in this regard be given great weight. The issue of the culverts and flyways was classically an issue of judgment. The Council's decision was against the background that Natural England had accepted that an early warning system could work as could the movement pathways. Taken together, it cannot be said that the Council and Natural England acted irrationally.

Issue 3: "in combination/cumulative" effects

35. Mr Turney realistically conceded that if the Council's finding that there were no residual effects for bats was sound, it was an uphill struggle to contend that this issue was arguable. It is certainly too late at this point to attempt to undermine the Council's finding by raising residual effects not previously identified. Ms Wigley's submission on this point was that it was wrong for the Council and Natural England to conclude that there were no residual effects: that was not a valid conclusion given the uncertainties.
36. The fact is that the conclusion of the Appropriate Assessment was that there were no residual impacts as a consequence of the development, that conclusion was supported by Natural England, and it was not arguably irrational for the Council's decision to base planning permission on it. There is no basis to carry out an assessment of in combination effects when there are no effects to take into account.

Conclusion

37. Accordingly I refuse permission to apply for judicial review.