Case No: CO/3843/2011

Neutral Citation Number: [2012] EWHC 568 (Admin)
IN THE HIGH COURT OF JUSTICE
CARDIFF COURT CENTRE

Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: Friday 20th January 2012

Before:

HIS HONOUR JUDGE MILWYN JARMAN QC

- -

Between:

The Queen on the Application of Hughes

Claimant

- and -

Carmarthenshire County Council

Defendant

- -

(DAR Transcript of
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Mr Goodman appeared on behalf of the **Claimant**.

- -

Judgment

(As Approved)

HIS HONOUR JUDGE MILWYN JARMAN QC:

1. The claimant, Mr Hughes, has for many years carried on business as a licensed cocklepicker and is the current Chair of the Llanelli Cocklepickers Cooperative Association. He and many of his colleagues pick cockles in Carmarthen Bay. They have in recent years become increasingly concerned at very substantial cockle mortality in that area, but despite various scientific investigations there is as yet no concluded scientific view as to the cause. There have been a range of reports, including appropriate assessments in various planning matters, including the one in question, and environmental statements. There are further investigations to be carried out. One of the issues as to such mortality arises from the fact that the sewerage system in Llanelli carries both foul and surface water. At times of rain the rain combines with foul water. To prevent flooding the excess storm sewerage is discharged via combined sewer overflows to watercourses or to the estuary leading to the bay. This may be contributing to the deterioration of water quality and resulting in the release of pollutants into the estuary. There is concern that there may be a link between this and the cockle mortalities, but at present there is no direct or indirect evidence of such a link. Various works have been completed and are underway in the Llanelli area to remove surface water to release capacity for further development and I shall come onto these in greater detail in due course.

2. Mr Hughes is concerned that the problem will be exacerbated by drainage from two substantial housing developments in Llanelli, which the Carmarthenshire County Council as the local planning authority have recently approved by way of reserved matters approval under the Town and Country Planning Act 1990. On 7 October 2010 such approval was given in respect of some 200 houses at Machynys West, and on 27 January 2011, in respect of some 323 houses, at Stradey Park, the former ground of Llanelli Rugby Football Club. Mr Hughes is particularly concerned that there is a risk that such drainage will raise the phosphate levels in the water of the bay which could harm the cockles there. He seeks permission on this ground to proceed with claims for judicial review of those decisions on three main grounds. Firstly, that in making those decisions the local planning authority failed to take into account the response to consultation by the Countryside Council for Wales. Secondly, that the officer in the planning authority who made the decision has exceeded the scope of his delegated authority to do so. Thirdly, that the decisions failed to have regard to material considerations which show that there may be a risk of adverse impact on the integrity of the bay as a designated European site, and accordingly breached Article 6 of the European Council Directive 43 of the EEC on the Conservation of Habitats, commonly known as the Habitats Directive.

3. In respect of Stradey Park there is a fourth ground that the local planning authority failed to appreciate that the proposed development did not comply with the development plan policies on flood risk or to take into account the revision by the Environment Agency Wales of the flood zone maps of the area.

4. Permission was refused by HHJ Nicholas Cooke QC on 10 November 2011 on consideration of the papers. He refused permission on all but the third of those grounds on the basis that they were not arguable. HHJ Cooke adjourned the question of permission on the third ground for oral argument. Whilst far from convinced that a breach of the Directive had been made out, having had regard to the importance of the interests intended to be safeguarded thereby, he concluded that the focus for oral submission would assist the court.

5. Mr Hughes has renewed his application for permission on the other three grounds and so I have heard oral argument on his behalf, on behalf of the local planning authority as well as on behalf of the developers of Stradey Park as the interested parties.

6. I deal firstly with the law and the Directive in more detail. That was adopted in 1992 with the aim of protecting threatened species across Europe, as did Directive 79/409/EEC on Wild Birds. They provide a framework for what is known as Natura 2000 Network of Protected Sites. Article 6 of the Habitats Directive states as follows:

> "(1) For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.
>
> (2) Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> (3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site

> concerned and, if appropriate, after having obtained the opinion of the general public.
>
> (4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

7. It will be seen therefore that Article 6.3 gives rise to two requirements which are distinct. The first part has imposed a procedural requirement given effect by regulation 61(1) that projects likely to have a significant effect on the Natura 2000 be subject to an appropriate assessment.

8. The second part of Article 6.3 gives rise to a requirement to which regulation 61(5) gives effect, that a competent authority must not agree to the project unless it has made certain that the same will not adversely affect the integrity of the site.

9. Those provisions have been considered both in Europe and in the courts of England and Wales. In a case known as the Waddenzee case before the European Court of Justice on 7 September 2004 [2005] Env. LR 14 the court considered cockle-picking in the Wadden Sea in Holland. The position there was somewhat reverse to the facts of the present case. There the cockles were collected by a mechanical sea bed device under renewable authorisation. Two Dutch non-government organisations interested in nature conservation sought to challenge the authorisation that was granted for 1999 and 2000, saying that that mechanical fishing was likely to affect the Wadden Sea, and so the habitat, through silt churning.

10. The court had a number of questions posed to it, one of which was the concept of appropriate steps within the meaning of Article 6.2 of the Habitats Directive and appropriate assessment within the meaning of Article 6.3. The court said that paragraph 56:

> "56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned…
>
> 59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle

> fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects…
>
> 61 In view of the foregoing, the answer to the fourth question must be that, under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field..."

11. In the courts of England and Wales, and in particular in the R (oao Akester & Melanaphy) v DEFRA (& ors) [2010] EWHC 232 (Admin), Owen J held that the following propositions can be drawn from the Waddenzee decision. Firstly, that the Habitats Directive must be protected and applied by reference to the precautionary principle which reflects a high level of protection by community policy. Secondly, a competent national authority may authorise a public project after having determined that it will not adversely affect the integrity of the protected site. Thirdly, unless the risk of significant adverse effects on the site can be excluded by the competent authority on objective information then the plan or project must be the subject of an assessment of its implications for the site. Fourthly, if following such an assessment there remains doubt as to whether or not there will be such affects, then any competent authority must refuse authorisation unless Article 6.4 applies. Finally, if, in spite of the negative assessment and in the absence of alternative solutions, a plan or project must be carried through for imperative reasons overriding public interest, then the competent national authority must take all compensatory measures outlined in Article 6.4.

12. In R (Hart District Council) v The Secretary of State of Communities and Local Government & Ors [2008] EWHC 1204 (Admin) Sullivan J, as he then was, also considered that Article in the context of an appeal in respect of residential development. At paragraph 76 the learned judge found that the competent authority is required to consider whether the project as a whole included such measures as are part of the project is likely to have a significant effect on a protected site. If the competent authority does not agree with the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of significant effect.

13. At paragraph 81 the learned judge referred to the fact that the inspector in that case had expressed serious doubts that the measures there concerned would avoid any net effect on the site there in issue, but the judge went on to say that

that did not mean that the government authority was obliged to accept that there were such doubts or that they could not be excluded on the basis of objective information and went on to say:

> "but merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient"

14. There is also of relevance in this case the Conservation of Habitats and Species Regulations 2010. They supersede the Conservation (Natural Habitats etc) Regulations 1994 and implement the habits directive as of 1 April 2010. Regulation 61 reflects Article 6 and provides that:

> "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.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify."

15. The appropriate body within the meaning of that regulation in Wales is the Countryside Council for Wales.

16. Then (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"

17. Having dealt with the law, I should turn to the chronology in these cases. In doing so I refer primarily to the chronology of the Stradey Park proposal, but there is a substantial degree of overlap with the Machynys West proposal. Before I do that, I should also note that the Environment Agency of Wales has a statutory duty under the regulations to review all extant permissions relevant to a Natura 2000 site, and that is being undertaken in four stages. Stage 3 of the Review of Consents entails appropriate assessment to ascertain whether or not permissions are having an adverse effect on the integrity of the site, alone or in combination. Stage 4 requires the Environment Agency of Wales to affirm, modify or revoke permissions assessed within the appropriate assessment. That is now dealt with in regulation 63 of the 2010 regulations.

18. Turning to the chronology, the bay was designated an Estuary European Marine Site, (also known as CBEEMS) in April 2005, by Defra. The following year an outline planning application in respect of Stradey Park for up to 450 houses was made, and in the summer of that year a similar application was made in respect of Machynys West. The latter application was granted on the 21 June 2006. The Stradey Park proposal however was called in by the National Assembly for Wales in the summer of that year and a planning inquiry held in the early part of the following year.

19. In June 2007 a decision letter was issued, granting outline planning permission for the Stradey Park proposal subject to conditions. In respect of both such permissions there were conditions for the protection of the environment, including a requirement of a separate foul and surface water discharge, a requirement that no surface water or land drainage run should connect either directly or indirectly with the public sewerage system in Llanelli, and a requirement that no development was to commence until there was a scheme approved by the local planning authority in liaison with Dwr Cymru Welsh Water showing how the foul and surface water and land drainage would be disposed of.

20. In 2008 a request was submitted for reserved matters approval in respect of the Stradey Park proposal and details of drainage were also submitted.

21. In January 2009 stage 3 of the Review of Consents on behalf of the Environment Agency of Wales was completed. In September of that year the agency's development advice maps were updated. At about the same time, a month later, an area-wide environmental statement on water quality was carried out by the Waterman Group to inform the appropriate assessment in respect of the Habitats Directive, and at the same time a site-specific environmental statement for Stradey Park was prepared by RSK Environmental for the development.

22. In March 2010 a flood consequence assessment was carried out by Watermans for the interested party and at the same time development advice maps were further updated by the Environment Agency of Wales. Also in March the

stage 4 Review of Consents for that agency were completed. That was a busy month because at the same time what is known as AMP 4 works at Llanelli Waste Water Treatment Works and at Northumberland Avenue Sewage Pumping Station were completed. That was the fourth major environmental programme of the water company in respect of asset investment and upgrading since privatisation of the industry in 1980. At the same time the local planning authority and the City and County of Swansea funded improvements to Llanant Waste Water Treatment Works which included phosphate stripping, and that improvement was completed at that time. The reserved matters approval in respect of Stradey Park was called in by the Welsh Assembly Government in July 2010. There was then correspondence between the Welsh Assembly Government and the developer which led to the issue of a new Article 14 direction. The appropriate assessment was recorded on 24 January 2011, and on 26 January 2011 the Countryside Council for Wales responded to that assessment. A day later the reserved matters approval was issued by the local planning authority. It is necessary to go into some of those documents in greater detail.

23. In respect of the RSK environmental statement for Stradey Park, that was issued in October 2009, as I have indicated, and included at appendix B an assessment of the water quality in the upper estuary carried out by Watermans. That included the whole of the catchment served by the Llanelli Waste Water Treatment Works. It set out a methodology which included a thorough review of all the relevant information relating to previous issues raised regarding the water quality in the estuary with particular regard to compliance issues in respect of EU directives. The methodology, also expressly comtemplated close liaison with the Countryside Council for Wales and Environment Agency of Wales regarding possible concerns over the hydraulic capacity of the combined sewers and the potential impact of new development on the water quality in the estuary. Of particular concern was the potential impact of increased nutrient levels in the estuary.

24. The assessment went on to record that Dwr Cymru Welsh Water had confirmed that on completion of the AMP 4 works at Northumberland Avenue and Llanelli in March 2010 the additional storage volume provided at Northumberland to serve the whole of the western sub-catchment would accommodate the requirements of 1,600 future residential developments. It was noted that some UDP developments would be on brown field sites which already discharged to the combined system, given that it was indicated that developers would not be expected to provide supplementary storage in mitigation of foul discharges from their development.

25. In February 2010 a memorandum of understanding was entered into between the local planning authority, the Countryside Council of Wales, the Environment Agency of Wales, Dwr Cymru Welsh Water and the City and the County of Swansea. The purpose of that was expressly to create a non-binding agreement setting out how the parties intended to work together to safeguard the environmental quality of the CBEEMS when taking decisions on developments and regeneration schemes proposed within the catchment. The memorandum expressly said that it would be consistent with the parties'

obligations under the Habitats Directive and that it supersedes a previous memorandum dated December 2008. In the introduction it was expressly said that one area of concern related to the possible effects from increase of sewerage effluents and overflows of streams from sewage during wet weather conditions. At present there was no evidence of a causal link between sewage discharges and cockle mortalities and no clear evidence of direct or indirect adverse effects. The introduction to the memorandum went on to refer to the various studies which I have already referred to, and recorded that the conclusion was that the increase in domestic effluent discharge from proposed developments could be offset by reductions in the storm flow and infiltration from the development sites provided they did not dispose of surface water into the combined sewer system.

26. Furthermore, it was noted that Dwr Cymru Welsh Water's proposed improvements, specifically at the Northumbrian Avenue Sewage Pumping Station and Llanelli Waste Water Treatment Works together with a wider range of sustainable urban drainage system programme, would also more than compensate for any increased domestic discharges from the developments. Investment in sewage treatment was currently underway to ensure that the micro-biological requirements of the European Shellfish Water Directive were met.

27. The current position was then stated and reference made to the commissioning of the overarching study by Watermans into the water quality of the estuary which, it was said, should produce an environmental impact assessment to demonstrate whether or not the schemes of various developers would have any likely significance or effect on the features and integrity of the CBEEMS.

28. It was stated that the Environment Agency of Wales would accelerate current investigation work being undertaken to assess the nutrients status of the bay to allow evaluation of any need for additional nutrient removal from sewerage discharges. Reference was expressly made to stage 4 of the Review of Consents, which it was said would inform with more certainty any further investment by Dwr Cymru Welsh Water. It was said that any such need would have to be considered in line with current investment commitments already included in proposals.

29. It was agreed that the Environment Agency of Wales and Dwr Cymru Welsh Water would promote on a precautionary basis the inclusion of nutrient removal for major qualifying discharges into the bay through the agreed protocols and the investment programmes of Dwr Cymru Welsh Water.

30. Section 6 of the memorandum dealt with the freeing up of capacity for development. It was noted thereunder that the parties' commitments under the memorandum did not remove the requirement for proper consideration specifically related to any circumstances that may merit restrictions on developments. At paragraph 6.5 this was said:

> "that Carmarthenshire County Council and the City and County of Swansea have agreed as an interim

> measure to fund DCWW to install the best practical means of nutrient removal, specifically to reduce phosphates to less than the statutory limit of 1mg/l, at Llanant WwTW by the 31st March, 2010. This measure will free up capacity for development and achieve significant reductions in nutrient loadings whilst providing capacity for the equivalent of more than 2000 new domestic property developments to proceed. DCWW will continue to review its waste water treatment processes to implement longer terms sustainable methods of phosphate removal at both Llanelli and Gowerton WwTW."

And at Section 8, Review on Governance:

> "the parties agree that their commitments would be subject to on-going review and subject at a minimum frequency of every six months unless otherwise agreed."

It further agreed to establish a transparent structure of governance and decision-making that endeavours to ensure that the principles and spirit of the agreement are implemented. Then there was reference to information access.

31. The Habitats Directive Review of Consents by the Environment Agency of Wales (stage 4) was signed off on 22 March 2010. The purpose of it was expressly to ensure that permissions, plans or projects of the Environment Agency of Wales' which could not be shown to have no adverse effect or impact on site integrity in stage 3, did not cause or could not potentially cause or contribute to adverse effects on site protection alone and/or in combination.

32. The Review deals with projects involved in the ANP 4 and at page 26, which is particularly relied upon on behalf of the claimants in this matter, there was reference to the present proposal. There was specific reference to storm discharges from Llanelli Waste Water Treatment Works and Northumberland Avenue Sewage Pumping Station. They were judged adequately to address the drivers for which those assets were included in the programme, namely in respect of the Shellfish Waters Directive considerations. It is important to note that it was that directive rather than the Habitats Directive which was particularly referred to there.

33. Solutions were set out and the Review went on to say this:

> "Negligible benefit is therefore anticipated as respects reduction in nutrients discharged, which would have been expected indirect water quality improvement resulting from spill reduction."

34. It then went on to say that both discharges were considered to have spilled significant volumes of storm sewerage which was largely due to hydraulic

overload of the Llanelli sewerage catchment in wet weather. There is no express reference to the improvements at Llanant. The Review goes on to deal with the various options, including the modification of all permission for discharge or selected modification. It sets out a number of options and then states that the preferred option is option 4; that is selective modification. It was recognised that the site could not be made compliant by action on consented sources alone.

35. In the conclusion it was anticipated that in order to fully attain the required water quality improvement within the bay further additional actions elsewhere in the catchment outside the scope of the Review of Consents process would be required. Evidence considered suggested that actions focussing on the Tywi catchment, which is shown to be enacted by far the greater proportion of non-point source phosphorous is likely to yield the most fruitful results in terms of total phosphorous within the section of the site most at risk of eutrophication.

36. The planning officer's report to committee in respect of the reserved matters approval was dated 27 May 2010. In that report, in the context of the Llanelli Waste Water Treatment Works catchment area, it was noted that Dwr Cymru Welsh Water had confirmed that adequate capacity existed to accommodate the current and proposed UDP developments based on current discharge rates with no additional surface water being allowed to enter the system. There was specific reference to direct means of mitigation between the segregation of foul and surface water at the source and additional storage provided at Northumberland Avenue Sewage Pumping Station. It was said that would not eliminate overflow but should mark a reduction in frequency and duration. Then reference was made to UV treatment.

37. Reference was also made to the phosphate stripping plant installed at Llanant coupled with the increased capacity for the biological treatment of sewerage at Llanelli Waste Water Treatment Works. It was noted that that would serve to reduce the nutrient loading further. The conclusions of the Environmental Impact Assessment, it was said, showed that there was no causal link between effluent discharges in the estuary and the mass mortality of shellfish. The information provided in the Environmental Statement and the consultation response received to date would enable the local planning authority to undertake an appropriate assessment under the Habitat Regulations, and the report went on to say:

> "which, in light of the best scientific knowledge in the field, concludes that as the relevant competent authority it is convinced that there would be no adverse effect on the integrity of the [site] as a result of this development, including where considered cumulatively with other developments."

38. The Appropriate Assessment itself in its introduction referred to the Habitats Regulations Assessment. Section 5 of the Assessment dealt with the possible effects with regard to the conservation objectives, and it was stated that the

storm sewage discharges via CSOs during storm conditions have the effect of releasing additional pollutants into the estuary. The Lougher Estuary and the Carmarthen Bay were under further review, and the assessment went on to say :

> "Therefore any increase in nutrient levels would be unacceptable without mitigation and are likely to be contributing to the deterioration of water quality within the CBEEMS alone and in combination with other plans and projects."

39. Accordingly, it was considered that an appropriate assessment would be required in respect of that issue. The Assessment went on to refer to the Waterman report and to the ANP 4 works at Northumberland Avenue and Llanelli having been completed in March 2010.

40. It was also stated that Dwr Cymru Welsh Water had confirmed that the treatment capacity at Llanelli Waste Water Treatment Works is adequate to accommodate the current proposed UDP development and that on the basis of identified improvements, and taking account of conservation objectives, it was considered that the volume of foul water resulting from the proposal would not contribute to any deterioration of water quality within the CBEEMS and therefore would not have any adverse effects alone or in combination with other plans and projects.

41. Reference was also made to the improvements at Llanant Welsh Water Treatment Works which would free up capacity for development and achieve significant reductions in nutrient loaders whilst providing new capacity for the equivalent of more than 2000 new houses.

42. Accordingly, it was considered that the net increase in nutrients arising from the gross foul water generation was well within the limits identified and would not contribute to any deterioration in water quality within the CBEEMS. Specific mention was made of the integrity test and of monitoring. The Assessment concluded, as already indicated ,that there would be no significant effect on the CBEEMS. In the conclusion specific reference was made to the improvements at Northumberland Avenue and Llanelli Waste Water Treatment Works.

43. The letter from the Countryside Council for Wales to the head of planning of the local planning authority dated 26 January 2011 referred to the email consultation dated 25 January 2001 enclosing that appropriate assessment. The detailed information in that assessment, it was said, where it relates to water quality issues should have been agreed with both the Environment Agency of Wales and Dwr Cymru Welsh Water. Having considered that assessment the letter goes on that the Council could advise that it had no objection to the application provided that a number of matters were addressed, “ie on the understanding that and subject to:."

44. Then some six conditions are set out, including that the development would not be brought into beneficial use until the Dwr Cymru phosphate stripping

scheme had been implemented and was operational at Llanant; The capacity provided by the phosphate stripping scheme should not be exceeded and a register to monitor this for both extant permissions and completions would be kept by the local planning authority; that the Environment Agency of Wales would advise on the consenting requirements for those schemes and should be satisfied that the development would not prejudice compliance with the European water quality Directives; Conditions relating to land drainage and the separation of foul and surface water should be agreed with the Environment Agency of Wales and Dwr Cymru Welsh Water so that there would be no increase in storm water flow; and that the local planning authority should in turn maintain a register of compensatory surface water removal from the combined sewerage system.

45. It is not surprising in my judgment, having regard to that letter alone, that Mr Goodman on behalf of Mr Hughes in seeking to renew these applications for permission, should complain that the letter does not promote transparency in the planning system. Reading that letter itself the reader might be forgiven for concluding that there was a great deal to be done before certain matters of approval could be given and that the matters set out in that letter should be the subject of further investigation and confirmation by the local planning authority. In my judgment, however, it is clear, having gone through the documentation at some length, that most if not all of those requirements had in fact already been achieved.

46. If confirmation were needed of that it is to be found, in my judgment, in a statement dated 1 May 2011 filed in these proceedings by a Mr Adam Wilkinson, who is a director of Watermans. He is a chartered engineer and he has been involved in the Stradey Park scheme since 2006. He deals with the points set out in the letter from the Countryside Council for Wales, which I have just referred to. As to point 1, he says that in fact the phosphate stripping scheme had been operational since March 2010 in accordance with the memorandum of understanding. A similar point is made in relation to point 2. He confirms that that scheme has the capacity to accommodate future developments for 2000 dwellings and that the local planning authorities were liaising with Dwr Cymru Welsh Water regarding the focus of development and maintaining a register of consented developments. That procedure, he said, had been going on since the installation of the plant prior to 31 March 2010.

47. In respect of point 3 of the letter he confirms that the Environment Agency of Wales had agreed the requirements in respect of phosphate removal for Llanant Waste Water Treatment Works in advance of the Review of Consents for other works, but that was agreed to be done to expedite the installation of phosphate removal by March 2010. Therefore the Agency had already agreed certain measures for Llanelli which would ensure no further deterioration in water quality on account of phosphates in effluent discharges. The Agency has since carried out a review of consents and had identified other waste water treatment works which require phosphate removal by the end of the AMP 5 period. In respect of point 4, he says that this point was addressed

in agreements related to the environmental statement on water quality and the drafting of the memorandum of understanding.

48. Similarly, in respect of point 5 that principle was agreed in an area-wide environmental statement on water quality. Finally, in respect of point 6 the local planning authorities are apparently operating such a register and have fully complied with that particular point.

49. Mr Goodman in advancing the claims on behalf of his client did not initially refer to that memorandum of understanding. His case in essence was that the position regarding these two proposed developments should have been looked at again in light of the Review of Consents in March 2010. He submits that that put a different complexion on matters and made clear that modifications were needed to deal with the impact. The Appropriate Assessment, he said, was clearly material and the local planning authority should have had adequate regard to the Environment Agency of Wales, but did not do so. He placed particular emphasis on page 26 of the Review. He emphasised that the benefits were said to be negligible.

50. There was selected modification set out as the preferred option and the conclusion was that it was a high risk strategy, and additional actions were necessary to achieve compliance. In respect of the Appropriate Assessment, he emphasised that that was registered seven months after the committee report and three days before the reserved matters approval was issued. He said that that was based on matters as they were in 2009. The conclusion that the infrastructure works were sufficient to allow a further 1600 houses did not sit comfortably with the Review of Consents, which set out that further measures had to be undertaken. The Assessment, he says, does not refer to the conclusions of the Environment Agency of Wales as to what was necessary to be done. Accordingly, he submitted there was a material consideration which the local planning authority did not take into account. The Environment Agency of Wales is a statutory body and the local planning authority did not appear to have regard to this requirement of the appropriate assessment. There was no reference to the Review in the committee report.

51. He was content to put these submissions on the basis that the local planning authority had failed to take these matters into account. He emphasised that the threshold under the Directive is a high one; the local planning authority must be convinced having regard to material considerations, and if there is a disregard of such a consideration that it cannot rationally be convinced.

52. In respect of the reliance by the local planning authority and the interested party in their respective submissions on the memorandum of understanding, Mr Goodman submitted that this particular site must be looked at. It is not sufficient to have regard to matters set out in the memorandum, which deals with an area-wide set of agreements. The infrastructure as a whole, he submitted, did not secure compliance, and even the modifications selected were not sufficient.

53. On behalf of the local planning authority and interested party, however, it was submitted that the Review of Consents was looking at a much wider area. It is dangerous to take comments made in that review out of context, but it is clear that there was plentiful capacity and that everyone was working on that basis and that expectation. The timescale was particularly emphasised on behalf of the local planning authority and the interested party. Stage 4 work was being done in March 2010; that was finalised a year later, so the work was going on for at least a year, and the Environmental Statements were finalised in October 2009, some six months before the start of that review. The consideration of the documents as a whole showed that there was proper liaison between all interested parties as well as internal consultation. In respect of page 26 -- it was submitted that has to be read carefully -- spill reduction was another way of saying that there is an increase of storage capacity, and emphasis was placed particularly on the statement of Mr Wilkinson, as I have indicated, that was served in these proceedings in May 2011. There is no evidence from any source to contradict what has been said by him. His evidence, it seems to me, is consistent with and supported by the references in the documentation which I have gone through earlier in this judgment.

54. As I have indicated on looking at the letter from the Countryside Council for Wales, I can understand why Mr Hughes' concerns were articulated in the way that they were, but in my judgment it is clear by looking at all of the documentation that the letter did not fully or accurately set out the position which by then had been reached by the local planning authorities, Dwr Cymru Welsh Water and the statutory bodies. It is clear from all of the documentation that the achievements which Mr Wilkinson talks about in his statement had by then been put into place. In my judgment it is not arguable that there has been a breach of the Habitats Directive in the way asserted on behalf of Mr Hughes.

55. I have dealt with ground 3 first in time because that was the ground adjourned for oral argument by HHJ Cooke and the ground which was firstly dealt with by counsel in oral argument.

56. I now turn to the remaining grounds. As Mr Goodman accepted, ground 1 really amplifies what was being said in ground 3. He emphasised regulation 6.1.3 and the requirement to have regard. He said that the terms of the resolution of the committee to grant approval was that they were so minded subject to outstanding matters being signed off by the Countryside Council for Wales. But consent was given the day after that letter came. It was clear, submitted Mr Goodman, that that Council wished to refer to Environment Agency of Wales. The Agency responded in January 2010, but prior to the Review of Consents. The response of the Council specifically asked for reference to Environment Agency of Wales.

57. It should be apparent from the reasons I have already given that I am also of the view that there is no realistic argument in respect of ground 1.

58. I turn now to ground 2, and this is an argument that the officer in approving the reserved matters exceeded his delegated authority. Mr Goodman submits that such an officer could approve the Appropriate Assessment only on taking account of the consultation with the Countryside Council for Wales. He submits that the letter of the Council of 26 January did not constitute a signing off by that council. He accepts that the question of signing off is not a term of art but submitted that if the Council says, as it appears to in that letter, that it was content as long as the Environment Agency of Wales was consulted, that does not equate to a signing off. The authority of the officer was in strict terms and he should have made sure that in so doing he complied with those terms. In support of this argument he cited R (Kides) v South Cambridgeshire District Council [2002] EWCA Civ 1370. In that case the Court of Appeal considered the determination of a planning application pursuant to Section 72 of the Town and Country Planning Act 1990, the emergence of new material considerations and the meaning of "dealing with" and "having regard to" material considerations within those statutory provisions. The Court of Appeal held that in the context of that statutory provision the planning authority dealing with the planning application should have regard to any material consideration. The expression "dealing with" includes anything done by and on behalf of the planning authority which bears in any way directly or indirectly on the application in question.

59. At paragraph 125 it was said that where a delegated officer who was about to sign the decision notice becomes aware of, or reasonably ought to have become aware of, a new material consideration, Section 72 requires that the authority have regard to the consideration before finally determining the application. In such a situation the authority of the delegated officer must be such as to require him to refer the matter back for reconsideration in the light of the new consideration. If he fails to do so the local planning authority will be in breach of the statutory duty. In practical terms, therefore, where some new factor has arisen of which the delegated officer is aware and which might rationally be regarded as material consideration for the purpose of Section 72, it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for its specific consideration.

60. That, submits Mr Goodman, is what should have occurred in this case. On behalf of the local planning authority and interested party it was acknowledged that if the Countryside Council for Wales had broached matters which, as far as the officer was concerned, had not been dealt with, then he should have referred them back; but, for the reasons already outlined, the officer knew all of those matters had been dealt with. I accept that submission. In my judgment the contrary is not arguable.

61. Accordingly, that leaves ground 4 in respect of Stradey Park. That, as Mr Goodman acknowledges, is a discreet point. This refers again to what he says is a change of circumstances since the proposal was considered at the inquiry and in particular the alteration of flood maps, which I have referred to in the chronology. It is common ground that there was an error when these maps were originally drawn. Mr Goodman submits that that issue should have

gone back to the committee. He refers to R (Barker) v Bromley LBC [2006] UKHL 112 where the House of Lords considered an environmental impact assessment and requirements of the assessment before the giving of development consent.

62. It was held that the procedure, whereby outline planning permission would be granted subject to later approval of reserved matters relating to siting design and appearance, was to be regarded as a multi-stage development. It followed that where it had not become apparent until after outline planning permission had been granted for a development falling within the ambit of the European directive there in issue, council directive 85/337/EEC, an assessment would have to be carried out at the reserved matters stage before consent could be given for the development. Accordingly, the applicant was entitled to a declaration that the regulations failed properly and fully to implement the directive.

63. On behalf of the local planning authority it was submitted that the principal of development in respect of Stradey Park had been established by the outline consent. The policies of the UDP of themselves were not therefore relevant. Section 72 applies to planning permission and has no relevance to approved matters. There is no legislative provision in relation to the approach to be adopted in respect of such matters and the general development order is silent in that regard. Although the policies were irrelevant, it was accepted that the issue of flooding was not; the mistake in the officer's summary in this regard, which is accepted was made in the report, was therefore irrelevant. It was clear from the officer's report that flooding was dealt with comprehensively including the opening up of a stream for additional capacity. Again I am persuaded by those submissions that the alleged ground in respect of point 4 is not properly arguable.

64. Accordingly, in respect of both claims I refuse permission on each of the grounds. I will dismiss this application.