Judgment Approved by the court for handing down.

Neutral Citation Number: [2015] EWCA Civ 174

Case No: C1/2013/3708

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
MRS JUSTICE PATTERSON
CO/8108/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE KITCHIN
and
LORD JUSTICE SALES

- -

Between :

Dianne Smyth	**Claimant**
- and -	
The Secretary of State for Communities and Local Government	**Respondent**
- and -	
Ms Elizabeth Archer Arthur & **Ms Angela Lucie Baker-Mercadal &** **Ms Carol Ann Land**	**Interested Parties**

- -
- -

Mr Gregory Jones QC and Mr David Graham
(instructed by **Leigh Day Solicitors**) for the **appellant**
Mr James Maurici QC (instructed by **The Treasury Solicitor**) for the **respondent**
Mr Rhodri Price Lewis QC (instructed by **Ashfords LLP)** for the **interested parties**

Hearing dates: 17 and 18 FEBRUARY 2015

- -

Approved Judgment

LORD JUSTICE SALES:

Introduction

1. This is an appeal by the Appellant, Mrs Smyth, against the decision of Patterson J - [2013] EWHC 3844 (Admin) - in which the Judge dismissed an application by Mrs Smyth under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") against a decision dated 20 June 2012 of the Inspector (John Wilde C.Eng M.I.C.E.), on behalf of the Secretary of State, to grant planning permission for a development of 65 residential dwellings on land at Sentry's Farm, Exminster, Devon EX6 8DY ("the development site"). The Inspector granted planning permission in respect of the development site on an appeal by the developer ("Bellway") against a decision of the local planning authority, Teignbridge District Council ("the Council"), to refuse planning permission.

2. Mrs Smyth is Chair of "Get Involved Exminster" ("GIE"), an association of local residents which was a party to the planning inquiry before the Inspector and objected to the proposed development.

3. The development site is located close to the Exe Estuary Special Protection Area for birds ("the SPA"), which is also designated as a Site of Special Scientific Interest. The SPA incorporates the Dawlish Warren Special Area of Conservation ("the SAC"). The entire SPA is an area protected under EU law, in particular (so far as is relevant on this appeal) for the purposes of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"). The development site is only about 350m from the closest part of the SPA, an area known as the Exminster Marshes which is managed as a nature reserve by the RSPB.

4. The principal ground of appeal in this Court has focused on the question whether the decision of the Inspector to grant planning permission complied with the requirements set out in Article 6(3) of the Habitats Directive, as incorporated into domestic law in regulation 61 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"). It was common ground that the Regulations simply reflect the relevant provisions of the Habitats Directive, so the argument before us proceeded by way of direct reference to the terms of the Habitats Directive, and it is not necessary to refer further to the Regulations in any detail.

5. Although the Council refused planning permission for the development, that was for reasons unrelated to the application of the Habitats Directive. Pursuant to the Habitats Directive, the Council carried out a screening assessment by its officer, Mary Rush, and an "Appropriate Assessment", also by Ms Rush. The net effect of these assessments was that, having regard to certain mitigation measures, the Council's view was that the development proposal would have no significant adverse impact on the SPA and the SAC. The national agency with responsibility for nature conservation, Natural England, endorsed Ms Rush's assessment.

6. At the planning inquiry, the Inspector heard from an expert ecologist (Mr Goodwin) called by Bellway, whose evidence was to the same effect. No other expert ecology witness gave evidence. Having reviewed the material available to him, the Inspector was persuaded by the assessments of Ms Rush, Natural England and Mr Goodwin, and concluded that there was no risk of significant harm to the SPA or the SAC associated with the implementation of the development.

7. The Appellant challenged this assessment on her application to Patterson J, as Ground 2 of her application to the Judge ("the Habitats Directive Ground"). In a careful and thorough review, the Judge rejected that challenge: see paras. [144]-[176] of the judgment. The Appellant appeals on that issue to this Court.

8. In the course of her complaint under the Habitats Directive Ground, the Appellant makes a number of subsidiary complaints about findings made by the Inspector and upheld by the Judge. I will address below what appear to be the main subsidiary complaints, albeit for the most part they were touched on only very lightly by Mr Jones QC in his oral submissions for the Appellant. However, the observation of Mr Maurici QC for the Secretary of State that a "scattergun" approach had been adopted by the Appellant is a fair one. Where an appellant adopts a "scattergun" approach and presents a range of sub-complaints under the umbrella of a main Ground of appeal, but without proper focus in submissions, as here, it is not necessary or appropriate for this Court "to examine every pellet in detail" (*R (Richardson) v North Yorkshire County Council* [2004] 1 WLR 1920, at [80] per Simon Brown LJ).

9. As further grounds of appeal in this Court, the Appellant says that the Inspector misapplied national policy contained in paragraph 119 of the National Planning Policy Framework ("NPPF") (Ground 4 of the Appellant's application to the Judge: "the Policy Ground") and failed to give adequate reasons for his decision (Ground 5 of the Appellant's application to the Judge: "the Reasons Ground"). These grounds are, in the main, parasitic upon the Appellant's principal ground of appeal based on the Habitats Directive. The Judge rejected these grounds at paras. [198]-[217] and [218]-[221] of her judgment, respectively.

10. The Appellant also advances distinct grounds of appeal (covered by Ground 3 of her application to the Judge: "the CIL Grounds"), that the Inspector failed to apply regulation 122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations") and/or failed to have proper regard to the effect of regulation 123 of the CIL Regulations, in accepting that the developer could make a contribution to required ecological mitigation measures in respect of the SPA and the SAC by way of a payment under a contribution agreement made under section 106 of the 1990 Act. The Judge rejected these grounds at paras. [178]-[197] of her judgment.

The legislative framework

11. The developer, Bellway, applied for planning permission to the Council, as the designated local planning authority under the 1990 Act. This meant that the Council, in taking its decision, was the competent authority for the purposes of the Habitats Directive and the Habitats Regulations to check whether the proposed development properly complied with the requirements of those instruments.

12. As mentioned above, the Council was satisfied that the proposed development would be compatible with the requirements of the Habitats Directive, but refused planning permission for other reasons. Bellway appealed to the Secretary of State, who delegated the determination of the appeal to the Inspector. This meant that the Inspector, in taking his decision, became in turn the competent authority for the purposes of the Habitats Directive and the Habitats Regulations to check for compliance with those instruments. As he explained in his Report, the Inspector understood this very well.

13. Article 6(2) and (3) of the Habitats Directive provides as follows:

> "(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."

14. It is relevant to note at this point that Article 6(3) provides for two stages of assessment: (i) under the first sentence, a screening assessment whether a plan or project is "likely" to have a significant effect on a protected site (for discussion of the precise meaning of the word "likely", see below); and, if such an effect cannot be ruled out at the screening stage, (ii) an "appropriate assessment", under the second sentence.

15. In this case, the Council, in its screening assessment, thought that the proposed development would be likely, in combination with other projects or plans, to have a significant effect on the SPA, and therefore proceeded to make an "appropriate assessment". In its "appropriate assessment", the Council came to the conclusion that the proposed development would not adversely affect the integrity of the SPA. The reason for the difference was that at the screening assessment stage the Council did not bring into account certain mitigation measures which were proposed in respect of the development, whereas for its "appropriate assessment" it did.

16. By contrast, the ecology expert at the inquiry, Mr Goodwin, pointed out in his proof of evidence that there is authority that it is legitimate to bring mitigation measures into account in making the screening assessment required by the first limb of Article 6(3): see *R (Hart DC) v Secretary of State for Communities and Local Government*

[2008] EWHC 1204 (Admin); [2008] 2 P&CR 16. This appeared to have been overlooked by the Council. Mr Goodwin's view, therefore, was that having regard to the mitigation measures which the Council required and regarded as acceptable at the "appropriate assessment" stage under the second limb of Article 6(3), the proposed development would in fact pass the test for compliance with the Habitats Directive at the first, screening stage of assessment under Article 6(3): see, in particular, paras. 5.27 to 5.31 of Mr Goodwin's proof of evidence.

17. The Inspector in his Report followed the analysis set out by Mr Goodwin. The Inspector found, under the first limb of Article 6(3), that "the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on either the SPA or the SAC" (para. 38 of his Report). On this approach, no separate "appropriate assessment" needed to be carried out (para. 39 of the Report).

18. Article 6(4) of the Habitats Directive provides that in certain cases where there are "imperative reasons of public interest", it may be possible for a competent authority to authorise a development plan or project despite the adverse effects it may have on a protected site, in particular if adequate compensatory measures are adopted to off-set those effects in other ways. In the present case, as a result of their respective somewhat differing analyses under Article 6(3), neither the Council nor the Inspector considered that reference needed to be made to Article 6(4). Their respective decisions that the proposed development would be compatible with the Habitats Directive were based on Article 6(3).

19. Regulation 122 of the CIL Regulations applies in relation to planning obligations entered into under section 106 of the 1990 Act. It provides in relevant part as follows:

> "122.— Limitation on use of planning obligations
>
> (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development."

20. Regulation 123 of the CIL Regulations, though not yet applicable, will impose further limitations on the use of planning obligations under section 106 of the 1990 Act. As it stood at the time of the Inspector's decision and the judgment below (it has since been amended), it provided in relevant part as follows:

> "123. …
>
> (3) A planning obligation ("obligation A") may not constitute a reason for granting planning permission to the extent that –
>
> (a) obligation A provides for the funding or provision of an infrastructure project or type of infrastructure; and
>
> (b) five or more separate planning obligations that –
>
> (i) relate to planning permissions granted for development within the area of the charging authority; and
>
> (ii) which provide for the funding or provision of that project, or type of infrastructure,
>
> have been entered into before the date that obligation A was entered into."

21. Regulation 123 was due to come into effect in April 2014, but that timetable has been extended now until later in 2015. In summary, when regulation 123 comes into effect, it will prevent the use of planning obligations under section 106 falling within the scope of operation of regulation 123 to fund infrastructure projects on a collective basis. Instead, it will be necessary for a local planning authority to set a community infrastructure levy under the CIL Regulations to levy money to provide collective funding for such projects.

Factual background

22. The judgment below provides a detailed review of the facts. For the purposes of this appeal, it is sufficient to set out the following.

23. The proposed development, comprising 65 dwellings, will be an extension of an existing village. It will include a new grassed area of public open space dedicated for public use of about 1.2 ha ("the POS"). The purpose of this is to absorb recreational use, such as by people walking dogs, to alleviate any impacts from the new development upon the SPA and the SAC. In an ecological report submitted by Bellway in support of its application for planning permission, it was suggested that as a result of the POS there would be little impact from the development on the SPA and the SAC.

24. When the development proposal was put forward, the Council identified that there might be possible hydrological effects (water run off) and recreational effects (more pressure from people pursuing recreational activities) upon the SPA and the SAC associated with the development. On this appeal, it is not suggested that there was any inadequate assessment in relation to the hydrological effects, and it is not necessary to consider this aspect further.

25. The Council drew the proposed development to the attention of Natural England. By a letter dated 17 March 2011 from Natural England to the Council, Natural England commented on Bellway's ecological report, to say that though some of the possible impacts on the SPA and the SAC would be removed by the on-site POS, not all the

impacts associated with the development would be. Natural England objected to the application "until the impacts under the [Habitats Regulations] have been mitigated and compensated against".

26. The Council, together with two other local planning authorities in the vicinity (Exeter City Council and East Devon District Council), commissioned a report from ecological consultants "Footprint Ecology" in relation to strategic planning and impacts from recreation in respect of the SPA and the SAC. Footprint Ecology reviewed bird surveys and carried out other work to produce a detailed report dated 19 September 2011 (Liley, D. & Hoskin, R. (2011) *Exe Estuary SPA and Dawlish Warren SAC Interim Overarching Report Relating to Strategic Planning and Impacts from Recreation* – "the Interim Report"). The Interim Report was interim in the sense that it was drawn up in the context of the developing strategic planning framework for the local area as each of the local planning authorities proceeded with the process of drawing up and adopting their Core Strategies and other local development plan documents in accordance with national planning legislation which would, together, constitute their Local Development Frameworks ("LDFs").

27. The LDFs which were being developed contemplated major housing development in the future, apart from and additional to that in the proposed development. The Council's LDF was being drawn up to provide for about 15,000 new houses in the Council's area; Exeter CC's LDF was aiming to provide for a further 12,000 new houses in its area; and East Devon DC's LDF was aiming to provide about a further 16,000 houses in its area. On any view, these plans contemplated that there would in due course be developments to house substantial additional population in the areas proximate to the SPA and the SAC which could put pressure on those protected sites. The developing LDFs recognised that an overall strategic package of mitigation measures would be required across the three local planning authority areas to avoid damage to the protected sites.

28. In particular, the developing LDFs contemplated that three substantial green parklands dedicated to public use should be acquired as suitable alternative natural green spaces ("SANGs"), with a view to attracting recreational use associated with this substantial combined residential development away from the SPA and the SAC, so as to prevent harm being caused to those sites as a result of that development. The proposed parkland SANG closest to the development site at Sentry's Farm is the Ridge Top Park of 60-70 Ha in the south west of Exeter contemplated in the Council's developing Core Strategy, in Policy SWE1.

29. The three major SANGs represent a proposed strategic approach across the three local planning authority areas to meet the overall combined effects of increased recreational pressures associated with the population which will eventually come to live in the substantial new housing to be built in those areas as the LDFs come to be adopted and then implemented. The substantial residential developments contemplated by the draft LDFs lie in the future. Similarly, the creation of the three parkland SANGs lies in the future. Relevant land for them will have to be acquired, including as necessary by use of compulsory purchase orders. Funding will have to be found to acquire the land for the SANGs. At present, there is uncertainty about how and when both the substantial residential developments contemplated by the draft LDFs and the setting up of the SANGs will take place.

30. In its Interim Report, Footprint Ecology drew on work it had undertaken for another report it had been commissioned to provide, the Exe Disturbance Study report, eventually issued in final form dated 21 December 2011 (Liley D., Cruickshanks, K., Waldron, J. & Fearnley, H. (2011) *Exe Estuary Disturbance Study* – "the Disturbance Study"). This was another very detailed report regarding disturbance to birds in the SPA and the SAC from water-based and land-based recreation, with extensive reference to various forms of evidence bearing on those matters. Footprint Ecology also drew on other published works by ecologists dealing with similar issues of human recreational disturbance of protected species' habitats. There is a considerable body of practical experience and expertise that has built up among professional ecologists in relation to these matters.

31. The Interim Report provided advice to the three local planning authorities to assist with their application of the Habitats Regulations (and the Habitats Directive) to forthcoming development projects and the emerging LDF documents. Footprint Ecology specifically drew the attention of the Council and the other local planning authorities to the stringent tests to be met under the Habitats Regulations and the need for a precautionary approach (see, e.g., p. 14 of the Interim Report). Section 6 of the Interim Report dealt with "Exploration of mitigation options and their application elsewhere". The measures discussed included "The creation of alternative sites to divert visitors from sensitive sites …" (paras. 6.11ff) and "On-site access management", including wardening of sensitive locations, use of a patrol boat, mitigation relating to dog walking and so forth (paras. 6.17ff). It was noted: "There is already wardening in place at [the SAC], however as visitor numbers increase existing wardens are likely to become more stretched and additional staffing at busy times … would be effective at reducing disturbance" (para. 6.17).

32. In section 8 of the Interim Report, entitled "Incorporating recommendations into development management", Footprint Ecology said this:

> "8.1 In accordance with the Habitats Regulations, each development project with a likelihood of significant effects upon a European site should be the subject of a more detailed appropriate assessment of the implications of the project for European sites, in light of their conservation objectives. The three authorities are responsible for undertaking appropriate assessments of any development proposals to inform whether permission can be given, and what measures may need to be added to the proposal in order to ensure that European sites are not adversely affected.
>
> 8.2 At this point in time, a strategic approach to mitigation is not yet established, which leaves the only option of assessing each proposal on a case by case basis. For larger developments, alternative greenspace will be more easily provided, and should certainly be pursued. For smaller developments, and the on site management element of larger developments, the absence of a mitigation strategy at this stage makes it more difficult to require contributions at the right level to adequately provide appropriate mitigation, although the precautionary approach must always be applied in the absence of further information.

8.3 An interim approach could therefore be to identify particular projects, in partnership with Natural England, that are costed and capable of implementation, and equate to a per house contribution that meets the anticipated level of housing growth within a given period, until a longer term strategy can be put in place. These projects could be a range of alternative greenspace, enhancement of greenspace, on-site access management projects or the funding of wardening staff to start to plan and put in place some of the longer term on site work that staff on the ground would implement.

8.4 It has been recognised by Natural England and Habitats Regulations practitioners that once the need for a large scale approach and comprehensive mitigation strategy has been identified, an initial approach can be implemented having full regard of the precautionary principle in the absence of a more refined approach, until a longer term and more comprehensive approach can be developed. This was the approach taken in the Dorset Heathlands, where an 'Interim Planning Framework' was put in place by a consortium of local authorities, with funding allocated to a set of specific projects, until a more comprehensive approach was embedded into the relevant LDFs.

8.5 Given that it is anticipated that an interim approach would need to be in place for a shorter timescale than that for Dorset Heathlands, a simple and relatively straightforward project or set of projects should be identified. This approach still recognises the need for a case by case assessment, and there may be some development proposals for which adverse effects cannot be ruled out, due to the proximity or nature of the development, and the interim approach does not provide the necessary certainty. With this interim approach suggested, it is now necessary to obtain further input from Natural England as to whether this represents an appropriate and achievable interim solution.

An initial and interim approach could include the identification of projects, in partnership with Natural England, that are costed and capable of implementation, and equate to a per house contribution that meets the anticipated level of housing growth within a given period, until a longer term strategy can be put in place. These projects could be a range of alternative greenspace, enhancement of greenspace, on-site access management projects of the funding of wardening staff to start a plan and put in place some of the longer term site work that staff on the ground would implement. It is advised that the latter may represent the most effective way of implementing and interim approach, and may be of greatest benefit to the longer term strategy.

> With this interim approach suggested, it is now necessary to obtain further input from Natural England as to whether this represents an appropriate and achievable interim solution."

33. Thus, Footprint Ecology looked forward to the development of a joint interim strategy by the three local planning authorities, in partnership with Natural England, to address the strategic in-combination pressures from the residential developments contemplated across their areas. Under such an interim strategy, the costs of implementing the strategic mitigation measures would be shared equitably across residential developments as they came forward, in proportion to the contribution each development would make to the overall increase in population in those areas and the related recreational pressures on the SPA and the SAC. At the same time, Footprint Ecology reminded the three local planning authorities of their duties under the Habitats Regulations (and Habitats Directive) to screen and assess each proposed development as it was brought forward.

34. It seems that work had already been done to develop such an interim strategy before the Interim Report was finalised. Eventually, a Joint Interim Approach to securing recreation mitigation ("the JIA") was adopted by the three local planning authorities on 1 November 2011. It had been endorsed by Natural England. The JIA provided for a developer to agree to pay a "standard Habitat Mitigation Contribution", assessed by the number of houses in the development, in addition to making any standard public open space provision in relation to the development. The standard contribution was to be used to fund a range of mitigation measures, including hiring additional site wardens and purchasing the three strategic SANGs in due course.

35. Before the finalisation of the Interim Report and the formal adoption of the JIA, Ms Rush, the relevant officer for the Council, made her screening assessment and "appropriate assessment" of the proposed development at Sentry's Farm for the purposes of Article 6(3) of the Habitats Directive, both in documents dated 14 June 2011 ("the Council's screening assessment" and "the Council's appropriate assessment", respectively).

36. In the Council's screening assessment, Ms Rush noted potential hazards to the SPA and SAC associated with increased numbers of residents, but did not conclude that the development site would have a likely significant effect on the protected sites if taken by itself. However, she went on to consider "in combination" effects which the development site might have on the protected sites in combination with other proposed residential developments. She referred to existing planning consents already given by the Council for 300 houses at Milbury Farm, Exminster, 275 houses at Secmaton Lane, Dawlish, 174 houses at Secmaton Rise, Dawlish, 60 houses at Shutterton Lane, Dawlish Warren and 45 static units and 40 touring pitches at Lady's Mile Holiday Park, Dawlish ("the existing consents), and to the large housing numbers to be provided for in the developing LDFs (see para. [27] above: 15,000 for the Council plus a total of 28,000 in Exeter and East Devon). Ms Rush commented:

> "This means that the impacts from the Sentry's Farm proposal are part of an in-combination effect of around 15,000 houses in Teignbridge and a further 28,000 in Exeter and East Devon. This many houses equates to around 2.3 x 43,000 = 98,900 people. The recreational impacts on the SPA and SAC of so

> many additional people will be large and will constitute a Likely Significant Effect."

37. Ms Rush observed that the POS would incorporate a children's play area and an informal green space, but that a financial contribution to strategic mitigation measures would be required in addition to this. The conclusion in the Council's screening assessment was that the development proposal would have "A Likely Significant Effect – in combination with other plans or projects, through … insufficiently mitigated recreational impacts of damage and disturbance to [the SPA and the SAC]". More detail was also required in relation to the POS.

38. In the Council's appropriate assessment, Ms Rush noted that the POS would provide some value in diverting recreational use away from the SPA and the SAC, particularly through the provision of an "on-the-doorstep dog walking location that is likely to 'intercept' a high proportion of day-to-day dog walking trips", but again concluded that the POS fell "well short of the full mitigation for impacts required by the legislation". The Council required to be satisfied about the detailed plans for the POS to ensure that the POS was of good quality, so that it could be expected to have an attractive effect as intended. This would be covered by a planning condition. In addition, a financial contribution was required in respect of the development in relation to providing strategic mitigation measures on a shared-costs basis. A contribution figure of £26,252.36 (to be corrected for inflation since 2008 – "the Conservation Contribution") was calculated as the required sum, based on early work the Council had done on a strategic approach to mitigation on a shared-costs basis in relation to the grant of planning permission at the Secmanton Lane site in 2008 and the likely population which would occupy the 65 houses to be built on the development site. This contribution was to be secured under a planning agreement made under section 106 of the 1990 Act. Ms Rush noted:

> "This contribution is to be spent to offset impacts with the [SPA and SAC] themselves, by a variety of visitor management measures; on monitoring of impact; and as a contribution towards a major recreational site to attract people away from the SPA/SAC."

39. In the conclusion of the Council's appropriate assessment, Ms Rush stated:

> "As a result of this Appropriate Assessment [the Council] concludes that this proposal will have no significant effect on [the SPA and the SAC] **subject to** the mitigation measures set out [in the assessment]."

40. Ms Rush supplied the Council's screening assessment and appropriate assessment to Natural England. By an email dated 29 June 2011, Natural England confirmed that it agreed with the conclusions of the appropriate assessment. It supported the proposal to require a condition in relation to the quality of the POS, since "The design of the POS will be particularly important if it is to 'soak up' as much recreation pressure as possible from the SPA."

41. In the event, on 21 July 2011 the Council refused Bellway's application for planning permission for reasons unrelated to the Habitats Directive. Bellway appealed to the

Secretary of State, who appointed the Inspector. The appeal was held by way of a public inquiry, which opened on 31 January 2012.

42. During the inquiry, GIE's representative cross-examined Bellway's planning consultant on ecology issues, with the result that the Inspector adjourned the inquiry to allow Bellway an opportunity to instruct an expert ecologist to deal with the detailed ecological matters raised by GIE.

43. Bellway then instructed Mr Goodwin as an expert. Mr Goodwin prepared a lengthy and detailed proof of evidence, to be adduced at the inquiry. In his proof of evidence, Mr Goodwin set out his view that the proposed development was not likely to have a significant effect on the SPA and the SAC within the meaning of the first limb of Article 6(3) of the Habitats Directive, either alone or in combination with other plans or projects (see, e.g., the summary of his evidence at para. 3.4 of his proof; also paras. 5.33 and 8.5).

44. Mr Goodwin referred to the relevant legislation, including in particular the Habitats Regulations and the Habitats Directive, and to the guidance given by the ECJ in its leading judgment in the *Waddenzee* case (Case C-127/02, *Landelijke Vereniging to Behoud van de Waddenzee v Staatsecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 CMLR 31) (paras. 5.2 to 5.11 of his proof). He also referred to the judgment of Sullivan J (as he then was) in the *Hart* case, above, to explain that in his (Mr Goodwin's) view it was permissible to take account of mitigation or avoidance measures which form an integral part of the plan or project when applying the test in the first limb of Article 6(3) of the Habitats Directive (paras. 5.12 to 5.14 of his proof; also, paras. 5.27 to 5.33). In Section 8 of his proof, entitled "Predicted Effects and Strategy for Avoidance, Mitigation and Enhancement", Mr Goodwin set out the detail of his reasoning on the potential likely effects upon the SPA and the SAC.

45. In my view, Mr Goodwin's proof of evidence is careful and considered, and shows a good understanding of the factors relevant to protection of the SPA and the SAC.

46. Mr Jones submitted that Mr Goodwin's evidence amounted merely to assertion, unsupported by any objective evidence. I do not agree. Three points should be made. First, I consider that on a fair reading of Mr Goodwin's proof of evidence it can be seen that he has drawn on specific information relevant to the SPA and the SAC, as well as the development site and proposed mitigation measures, in a manner which supports in an entirely conventional and acceptable way his expressions of opinion as an ecological expert. By way of example, at paras. 10.4 and 10.5 of his proof, he pointed out that, contrary to the suggestion made by GIE's representative at the inquiry, it was not appropriate to use the analogy of mitigation measures developed for heathland sites (a 400m exclusion zone), where ground nesting birds might be subject to predation by cats, since for the SPA "the designating bird features are wintering or passage species and access to large parts of the site is not possible in any event" (because it is marshland or cut off by water). He referred to the Interim Report and the Disturbance Study, as appropriate. Mr Goodwin demonstrated a good understanding of the particular ecological and mitigation features relevant to the SPA and the SAC. Contrary to Mr Jones's contention, Mr Goodwin's evidence was very far from being unsupported, free-standing assertion.

47. Secondly, in my view it is acceptable and to be expected that an expert will draw on his own background knowledge, experience and expertise in the field to inform the opinions which constitute his evidence to a relevant decision-maker (here, the Inspector). That is, indeed, in large part the point of looking to expert witnesses to provide assistance on technical matters. In this case, Mr Goodwin's own practical experience, the practical experience of ecologists generally and the knowledge shared between them all informed the expertise which he was able to bring to bear in giving his views regarding the effects of the development and the practical impact and viability of the mitigation options which he reviewed in his proof of evidence.

48. Thirdly, expert evidence of the kind given by Mr Goodwin was objective evidence on which the competent authority, the Inspector, was entitled to rely in making his assessment for the purposes of Article 6(3) of the Directive. Where, as in this case, an assessment is called for of impacts on bird species and of how large numbers of people might be expected to react to incentives to direct their recreational habits away from a protected site or of how on-site control measures could be expected to limit their impact, the views of an expert ecologist drawing on his practical experience and knowledge of the effectiveness of ecological initiatives elsewhere may constitute highly material and relevant objective evidence. The Inspector clearly thought he would be assisted by such evidence, which is why he adjourned the inquiry to provide an opportunity for Bellway to provide it. It cannot be said that this indicates any error of approach on the part of the Inspector. On the contrary, in my view it indicates the care with which the Inspector approached the question of application of the Habitats Directive in this case.

49. In Section 8 of his proof of evidence, Mr Goodwin referred to the Council's screening assessment and its appropriate assessment, discussed the JIA then in place and endorsed the conservation contribution for the development site of £26,252.36 (paras. 8.77 to 8.97 of his proof). At para. 8.97 he noted that Natural England had confirmed that the contribution measures were appropriate in scale to avoid any significant adverse effects on the SPA and the SAC. He also discussed the targeted use of the contributions, as contemplated by the Interim Report, the JIA and the Council's "Submissions on Section 106 Contributions" produced for the inquiry, in relation to site-specific mitigation projects identified by the Council (as measures additional to the three strategic SANGs), including provision of a warden and patrol boat, a bylaw review, additional signage and monitoring measures (paras. 8.98 to 8.104 of his proof).

50. Then, in an important part of his proof of evidence, Mr Goodwin reviewed the status and robustness of the joint approach to strategic mitigation on which the Council sought to rely: paras. 8.105ff. He discussed the evidence base for the joint approach, in particular by reference to Footprint Ecology's Interim Report (paras. 8.110 to 8.114). He agreed with Footprint Ecology's view that it would be "appropriate to rely upon an interim strategy [i.e. what had by this time been developed as the JIA], where Natural England are consulted on the specific details of an individual plan/project, such as is the case with the Appeal Site" (para. 8.114; see also para. 8.5 of the Interim Report, set out above). Mr Goodwin discussed the effectiveness of use of interim strategies elsewhere, of which he had knowledge (paras. 8.115 to 8.118). He again emphasised, at para. 8.118, the importance of Natural England's advice being sought "on a case by case basis, notwithstanding the adoption of a [joint interim] strategy".

The involvement of Natural England, case by case, would ensure that a properly precautionary approach to the safeguarding of protected sites would be applied. Then Mr Goodwin turned to discuss the position of Natural England regarding interim mitigation strategies, which was that it was willing to endorse such strategies (paras. 8.119 to 8.122).

51. In the following paragraphs of his proof (paras, 8.123 to 8.135), Mr Goodwin discussed the impact of the development site on the SPA and the SAC on a stand-alone basis and also in combination with other projects. His view was that, considered alone, the development proposal would "at worst give rise to a *de minimis* effect", so that no "appropriate assessment" would be required on that basis under the second limb of Article 6(3): paras. 8.123, 8.126 and 8.132. Even in combination with other residential developments which were planned, Mr Goodwin was doubtful that the effects of the development site upon the SPA and the SAC would rise above the *de minimis* level (paras. 8.126 to 8.128 and 8.132). However, even assuming that they might do, the in-combination effects from the development site would be subject to the adoption of the mitigation or avoidance measures reviewed by him, and on that footing his view was that they would not be likely to give rise to significant effects on the protected sites, within the meaning of Article 6(3) of the Habitats Directive (paras. 8.132 to 8.135; see also paras. 3.4 and 5.31).

52. Mr Goodwin was cross-examined on his proof of evidence when the inquiry resumed on 2 March 2012. He was the only expert ecologist to give oral evidence. It is clear that the Inspector considered that he could place weight on Mr Goodwin's evidence. The Inspector was lawfully entitled to take that approach.

53. In his Report, the Inspector accepted Mr Goodwin's evidence and approach, to the effect that on the material available by the time of the inquiry the compatibility of the proposed development at Sentry's Farm could be determined under the first limb of Article 6(3) of the Habitat's Directive, on a screening assessment, without the need to proceed further to conduct an "appropriate assessment" under the second limb of that provision. The Inspector dealt with the relevant ecology issues at paras. 25ff of his Report, as follows (footnotes omitted):

> "25 The appeal site lies in reasonably close proximity to the Exe Estuary Special Protection Area (SPA) and RAMSAR site and somewhat further away from the Dawlish Warren Special Area of Conservation (SAC). The Council have previously undertaken an initial screening assessment in line with the requirements of the Conservation of Habitats and Species Regulations 2010 (HSR) into whether the proposed development would be likely to result in a significant effect on this site. They concluded from this initial assessment that an Appropriate Assessment (AA) was necessary and consequently undertook such an assessment. The result of the AA was that the Council concluded that the proposed development would have no significant effect on the SPA/RAMSAR site or the SAC.
>
> 26 In an email dated 29 June 2011 Natural England confirmed that they agreed with the conclusions of this AA. In a Secretary

of State decision regarding Land at Dilley Lane, Hartley Witney, it is made clear that the *Secretary of State continues to give great weight to the views of NE as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994* and consequently I give considerable weight to their conclusion relating to the Council's AA. Notwithstanding this however, it falls to me as the 'Competent Authority' to determine whether the proposed development complies with the HSR.

27 The Conservation Objectives for the Exe Estuary SPA are to *maintain the following habitats* and *geological features in favourable condition with particular reference to any dependent component special interest features for which the land is designated*. The habitats listed are littoral sediment, supra-littoral sediment, fen, marsh and swamp and neutral grassland and the geological features are coastal cliffs and foreshore. For Dawlish Warren SAC the Conservation Objectives are similar with the habitat types being supra-littoral sediment and littoral sediment, and the geological feature being active process geomorphological.

28 The screening assessment undertaken by the Council identified disturbance of bird populations, physical damage to the habitats and invertebrate communities by recreational users and pollution from discharges of surface water and drains as the potential hazards to the Exe Estuary SPA and Dawlish Warren SAC. They noted that recreational use was already causing significant disturbance to birds and also physical damage to habitats and invertebrate communities. I note however that in the Exe Estuary SSSI condition assessment undertaken by NE there is no mention of recreational use causing disturbance and damage or having an adverse effect on qualifying bird species. The Council also identified that any impacts from the proposed development would be part of a future in-combination effect of about 15000 houses in Teignbridge and a further 28000 in Exeter and East Devon. From this information the Council concluded that there would be a Likely Significant Effect.

29 Consequently an Appropriate Assessment (AA) was undertaken which identified that the proposed public open space on the site would be of too small an area to fully mitigate the impact of the proposed development. In the absence of a robust mitigation package specific to the Exe Estuary and Dawlish Warren, the Council have accepted advice from NE that a Joint Interim Approach to securing recreation mitigation (JIA) would be suitable. Such an approach has been used for the Thames Basin Heaths and Dorset Heathlands Special Protection Areas and was utilised by the Council for a residential development proposal at Secmaton Lane, Dawlish.

This approach to securing recreational mitigation is operated jointly with Exeter City Council and East Devon District Council and was adopted in November 2011. The outcome of this approach is that a contribution would be required from residential development, based on the likely number of residents, to be spent on a variety of visitor management measures, on monitoring of the impact of visitors, and towards the provision of a major recreational site to attract people away from the SPA/SAC.

30 During the Inquiry my attention was drawn to an interim report (IR) produced by Footprint Ecology. This report related to strategic planning and impacts from recreation on the Exe Estuary SPA and the Dawlish Warren SAC. The IR indicated that there is a clear relationship between the distance people live from the estuary and how often people visit, and GIE pointed out that the IR suggests that *there may be a need for restrictions to be placed on development in close proximity to the most sensitive parts of the European sites*. Conversely, the IR also states that *proposed options for growth in very close proximity need to be carefully checked to ensure that adequate and appropriate measures can be implemented to prevent an increase in recreational pressure causing further harm to European sites*. To my mind that is the very purpose of considering the proposed development against the requirements of the HSR. I also note that the sensitive habitats (intertidal, shore and open water) within the SPA and the SAC are at least 2.5km to 3km from the appeal site.

31 The IR also concludes that in terms of visitors to the Exe, alternative sites and green infrastructure are not likely to be effective alone. However, it goes on to say that such measures may be effective if combined with on-site management measures that may serve to deter visitors, and gives an example of such a measure as dog control orders in certain areas.

32 This is very much the approach taken by the JIA, and as well as the provision of a strategic suitable alternative natural green space (SANGS), I was made aware of a list of schemes that would form part of this approach, including enforcement of exclusion zones, provision of a patrol boat, dog control orders and enhanced signage. Overall, notwithstanding that the Exe Estuary SPA and the Dawlish Warren SAC are estuarine habitats as opposed to heathlands, I consider the JIA and its outcomes to be an acceptable way of achieving the required mitigation.

33 In arriving at this conclusion I am aware that the JIA is an interim measure that tends towards a ‘one size fits all approach’. I consider, however, particularly in view of the housing shortage in the district, that it would be inappropriate

for planning permission for residential development to be consistently refused until such time as a final mitigation package is produced.

34 The AA undertaken by the Council further noted that the extent to which the on-site public open space would attract every day recreational use away from the SPA and SAC would be dependent on its quality and continuing management, and recommended a variety of landscape features and the division of the area into several small visually contained areas. The AA also noted that full details of the sustainable drainage scheme (SUD) would be needed before the commencement of development. If I ultimately conclude in favour of the appellants, then I consider that it is perfectly acceptable from a legal and planning perspective for the details of the SUD and the landscape features to be approved through a suitable planning condition. This would enable the Council to ensure that no harmful discharges would occur to the SPA and SAC and to have control over the design of the public open space.

35 Evidence produced by the appellants makes the point that the SPA and SAC are not designated on account of breeding birds, but on account of their passage and over-wintering bird populations. The appellants also point to the fact that the Exminster Marshes Nature Reserve is accessible from the appeal site. This reserve has been designed to alleviate pressure from visitors on the SPA site. There are also large expanses of accessible forest about 8km from the appeal site, which may well be preferable for dog walkers. The appellants also point to the fact that much of the SPA is not well suited to public access, comprising mud flats and saltmarsh.

36 Rule 6 parties considered that as the appeal site is within 400m of a European site then mitigation is not possible. However, from the evidence that is available to me it would seem that this approach stems from the delivery plan and guidance associated with the Thames Basin Heaths, and is not strictly applicable to the case before me. The types of habitats involved here differ from a heath, as do the types of species involved and the accessibility, and consequently I am not persuaded that a 400m rule applies.

37 It is acknowledged by both main parties that the on-site public open space (POS) will be smaller than that required to fully mitigate the impact on the SPA and SAC, and will to an extent be compromised by the provision of the SUD. However, this POS is over and above the primary mitigation measure, the contributions under the JIA, and this is not therefore an issue that can be afforded significant weight.

> 38 Overall, taking into consideration the conservation objectives of the SPA and the SAC, and the proposed mitigation measures and other factors that I have outlined above, I conclude that the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on either the SPA or the SAC. There would therefore be no conflict with the requirements of paragraph 118 of the Framework. This makes clear, amongst other things, that if significant harm resulting from a development cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.
>
> 39 My attention has been drawn to paragraph 119 of the Framework, which makes clear that the presumption in favour of sustainable development does not apply where development requiring appropriate assessment under the Birds or Habitats Directive is being considered, planned or determined. Whilst an Appropriate Assessment was undertaken by the Council at application stage, in light of my findings above, I have found no necessity for repeating this process. Consequently, the presumption in favour of sustainable development applies to this determination."

54. The Inspector granted planning permission for the development, subject to a number of conditions. These included that the developer should enter into an agreement under section 106 of the 1990 Act to pay the Conservation Contribution and a condition that no development should take place until details of the design, layout, equipment and future maintenance of the POS had been approved by the Council (condition 6). This was directed to ensuring that the POS on the development site would be of sufficient quality, and so likely to "soak up" recreational pressure away from the SPA (as Natural England had put it, in its email of 29 June 2011).

Discussion

The Habitats Directive Ground

55. Although it might be said that the Appellant appears to have an uphill struggle in relation to this Ground, since the Council in its appropriate assessment, Footprint Ecology in its Interim Report, Natural England and the only expert ecologist witness at the inquiry, Mr Goodwin, as well as the Inspector, all considered that the development proposal would not be likely to or would not have any significant adverse effect on the SPA and the SAC, once mitigation measures were taken into account, Mr Jones rightly reminded us that the test under both limbs of Article 6(3) is a stringent one in law. If all those bodies and persons have not applied the correct legal approach, then this Ground of challenge and appeal would be made out.

(i) A strict precautionary approach

56. The *Waddenzee* judgment is the leading judgment of the ECJ on the interpretation of the Habitats Directive. The case concerned authorisations given for mechanical cockle

fishing in respect of a protected site in the Netherlands. In view of their significance for the present case, I set out certain important passages in both the Advocate General's Opinion and the judgment of the Court in full.

57. AG Kokott set out her view that the circumstances in which a screening opinion under the first limb of Article 6(3) may be found to exclude the need for an appropriate assessment are very limited, as follows (footnotes are omitted in the quotations below):

> "69. As regards the degree of probability of significant adverse effect, the wording of various language versions is not unequivocal. The German version appears to be the broadest since it uses the subjunctive "*könnte*" (could). This indicates that the relevant criterion is the mere possibility of an adverse effect. On the other hand, the English version uses what is probably the narrowest term, namely "likely", which would suggest a strong possibility. The other language versions appear to lie somewhere between these two poles. Therefore, according to the wording it is not necessary that an adverse effect will certainly occur but that the necessary degree of probability remains unclear.
>
> 70. Since the normal authorisation procedure is intended to prevent protection areas being affected by plans or projects, the requirements relating to the probability of an adverse effect cannot be too strict. If the possibility of an appropriate assessment were ruled out in respect of plans and projects which had only a 10 per cent likelihood of having a significant adverse effect, statistically speaking one in ten measures precisely under this limit would have significant effects. However, all such measures could be authorised without further restrictions. Consequently, such a specific probability standard would give rise to fears that Natura 2000 would slowly deteriorate. Furthermore, the appropriate assessment is also precisely intended to help establish the likelihood of adverse effects. If the likelihood of certain adverse effects is unclear, this militates more in favour than against an appropriate assessment.
>
> 71. In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment.
>
> 72. On the other hand, it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment. Adverse effects, which are not obvious in view of the site's conservation objectives, may be disregarded. However, this can be assessed and decided on only on a case-by-case basis.

> 73. In that regard the criterion must be whether or not reasonable doubt exists as to the absence of significant adverse effects. In assessing doubt, account will have to be taken, on the one hand, of the likelihood of harm and, on the other, also of the extent and nature of such harm. Therefore, in principle greater weight is to be attached to doubts as to the absence of irreversible effects or effects on particularly rare habitats or species than to doubts as to the absence of reversible or temporary effects or the absence of effects on relatively common species or habitats.
>
> 74. Therefore, an appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects."

58. Later, at paras. 85 and 86 of her Opinion, AG Kokott said this:

> "85. Thus, in principle any adverse effect on the conservation objectives must be regarded as a significant adverse effect on the integrity of the site concerned. Only effects which have no impact on the conservation objectives are relevant for the purposes of Art.6(3) of the habitats directive.
>
> 86. The answer to this part of the third question must therefore be that any effect on the conservation objectives has a significant effect on the site concerned."

59. At paras. 95 to 111 of her Opinion, AG Kokott again emphasised the strictness of the tests in Article 6(3) to safeguard a protected site, as follows:

> "*i) Appropriate assessment*
>
> 95. It should first be noted that the habitats directive does not lay down any methods for carrying out an appropriate assessment. In this respect it may be helpful to refer to the relevant documents of the Commission, even though they are not legally binding. The Court can in no way draw up, in abstract terms, a particular method for carrying out an appropriate assessment. However, it is possible to derive certain framework conditions from the directive.
>
> 96. Most languages versions, and also the 10th recital in the preamble to the German version, expressly require an *appropriate* assessment. As the Commission in particular correctly states, it is also clear from the wording of Art.6(3) of the habitats directive that an appropriate assessment must precede agreement to a plan or project and that it must take account of cumulative effects which arise from combination with other plans or projects.

97. This assessment must, of necessity, compare all the adverse effects arising from the plan or project with the site's conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified. The conservation objectives can be deduced from the numbers within the site. However, it will often be difficult to encompass all adverse effects in an exhaustive manner. In many areas there is considerable scientific uncertainty as to cause and effect. If no certainty can be established even having exhausted all scientific means and sources, it will consequently be necessary also to work with probabilities and estimates. They must be identified and reasoned.

98. Following an appropriate assessment, a reasoned judgment must be made as to whether or not the integrity of the site concerned will be adversely affected. In that respect it is necessary to list the areas in which the occurrence or absence of adverse effects cannot be established with certainty and also the conclusions drawn therefrom.

ii) Taking account of the precautionary principle and permissible doubts as regards the authorisation of plans and projects

99. As regards the decision on authorisation, the second sentence of the German version of the second sentence of Art.6(3) of the habitats directive provides that such decision is to be taken only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities have ascertained that it will not adversely affect the integrity of the site concerned. As the Commission correctly emphasises, the other language versions go further than a mere "ascertainment" in that they require that the competent authorities establish certainty in this respect. Therefore, it must be concluded that the ascertainment required for agreement in the German version can be made only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities are certain that it will not adversely affect the integrity of the site concerned. Therefore, as regards the decision the decisive factor is not whether such adverse effect can be proven but—conversely—that the authorising authorities ascertain that there are no such effects.

100. This rule gives concrete expression to the precautionary principle laid down in Art.174(2) EC in relation to a protection area covered by Natura 2000. The precautionary principle is not defined in Community law. It is examined in case law primarily in so far as protective measures may be taken, where there is uncertainty as to the existence or extent of risks, without having to wait until the reality and seriousness of those risks become fully apparent. Therefore, the decisive factor is the element of

scientific uncertainty as to the risks involved. However, in each particular case the action associated with the protective measures must be proportionate to the assumed risk. In that regard the Commission stated in its communication on the precautionary principle that judging what is an "acceptable" level of risk for society is an eminently political responsibility. Such responsibility can be met only where the scientific uncertainty is minimised before a decision is taken by using the best available scientific means.

101. Accordingly, the rulings of the Court did not concern a "failure to observe" the precautionary principle in abstract terms, but the application of provisions which give expression to the precautionary principle in relation to certain areas. On the one hand, these provisions normally provide for a comprehensive scientific assessment and, on the other, specify the acceptable level of risk which remains after this assessment in each case or the margin of discretion of the relevant authorities.

102. Article 6(3) of the habitats directive constitutes such a rule. In order to avoid adverse effects on the integrity of Natura 2000 sites as a result of plans and projects, provision is first made for the use of the best available scientific means. This is done by means of a preliminary assessment of whether there are likely to be significant effects and then, where necessary, an appropriate assessment is carried out. The level of risk to the site which is still acceptable after this examination is set out in the second sentence of Art.6(3) . According to that provision, the authorising authority can grant authorisation only when it is certain that the integrity of the site concerned will not be adversely affected. Consequently, remaining risks may not undermine this certainty.

103. However, it could be contrary to the principle of proportionality, which is cited by PO Kokkelvisserij, to require certainty as to the absence of adverse effects on the integrity of the site concerned before an authority may agree to a plan or project.

104. It is settled case law that the principle of proportionality is one of the general principles of Community law. A measure is proportionate only where it is both appropriate and necessary and not disproportionate to the objective pursued. This principle is to be taken into account in interpreting Community law.

105. The authorisation threshold laid down in the second sentence of Art.6(3) of the habitats directive is capable of preventing adverse effects on sites. No less stringent means of attaining this objective with comparable certainty is evident.

There could be doubts only as regards the relationship between the authorisation threshold and the protection of the site which can be achieved thereby.

106. However, disproportionate results are to be avoided in connection with the derogating authorisation provided for in Art.6(4) of the habitats directive. Under this provision, plans or projects may be authorised, by way of derogation, in spite of a negative assessment of the implications for the site where there are imperative reasons of overriding public interest, there are no alternative solutions and all compensatory measures necessary to ensure that the overall coherence of Natura 2000 have been taken. Thus, in Art.6(3) and (4) of the habitats directive the Community legislature itself set out the relationship between nature conservation and other interests. Consequently, no failure to observe the principle of proportionality can be established.

107. However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of Art.6(3) of the habitats directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.

108. Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned. As in the case of a preliminary assessment—provided for in the first sentence of Art.6(3) of the habitats directive—to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm. Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly.

109. In any event, the decisive considerations must be set out in the authorisation. They may be reviewed at least in so far as the authorising authorities' margin of discretion is exceeded. This would appear to be the case in particular where the findings of an appropriate assessment on possible adverse effects are contested without cogent factual arguments.

> 110. It is uncertain whether the Netherlands rule on the need for obvious doubt complies with the level of acceptable risk thus defined. It classifies as acceptable a risk of adverse effects which can still give rise to doubts which are reasonable but not obvious. However, such reasonable doubts would preclude the certainty that the integrity of the site concerned will not be adversely affected which is necessary under Community law. The Raad van State's comments on the available scientific knowledge confirms this assessment. It refers to an expert report which concludes that there are gaps in knowledge and that the majority of the available research findings which are cited do not point unequivocally to serious adverse (irreversible) effects on the ecosystem. However, this finding merely means that serious adverse effects cannot be ascertained with certainty, not that they certainly do not exist.
>
> 111. In summary, the answer to the fourth question—in so far as it relates to Art.6(3) of the habitats directive—must be that an appropriate assessment must:
>
> — precede agreement to a plan or project;
>
> — take account of cumulative effects; and
>
> — document all adverse effects on conservation objectives.
>
> The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects."

60. The Court of Justice adopted the Advocate General's approach, in substance, in the following passages of its judgment:

> "39. According to the first sentence of Art.6(3) of the Habitats Directive, 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, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.
>
> 40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.
>
> 41. Therefore, the triggering of the environmental protection mechanism provided for in Art.6(3) of the Habitats Directive

does not presume—as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled "Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive (92/43/EEC) " —that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.

42. As regards Art.2(1) of Directive 85/337 , the text of which, essentially similar to Art.6(3) of the Habitats Directive, provides that "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment … are made subject to an assessment with regard to their effects", the Court has held that these are projects which are likely to have significant effects on the environment.

43. It follows that the first sentence of Art.6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Art.174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Art.2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on

that site, either individually or in combination with other plans or projects.

…

46. As is clear from the first sentence of Art.6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives.

47. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

48. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, *inter alia*, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

…

52. As regards the concept of "appropriate assessment" within the meaning of Art.6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Arts 3 and 4 of the Habitats Directive, in particular Art.4(4), be established on the basis, *inter alia*, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence

of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

55. As regards the conditions under which an activity such as mechanical cockle fishing may be authorised, given Art.6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site.

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.

57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Art.6(3) of the Habitats Directive integrates the precautionary principle and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.

59. Therefore, pursuant to Art.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.

60. Otherwise, mechanical cockle fishing could, where appropriate, be authorised under Art.6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.

61. In view of the foregoing, the answer to the fourth question must be that, under Art.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. The competent national authorities, taking account 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 an 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. The strict precautionary approach in the *Waddenzee* case was followed and again emphasised in Case C-258/11, *Sweetman v An Bord Pleanala* [2014] PTSR 1092. AG Sharpston explained the "very low" threshold under the first limb of Article 6(3): paras. 45-49 of her Opinion. "In case of doubt" whether there may be significant effects on a protected site, an appropriate assessment is required (para. 47). The CJEU (Third Chamber) in its judgment did not indicate any doubt as to the correctness of this approach. Like the Advocate General, it emphasised that Article 6 should be construed as a coherent whole (para. 32 of the judgment); that the competent national authorities should only authorise a plan or project pursuant to Article 6(3) where - "once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field" - they are "certain" that the plan or project will not have lasting adverse effects on the protected site, i.e. "where no reasonable scientific doubt remains as to the absence of such effects" (para. 40 of the judgment); and that the assessment under Article 6(3) "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" (para. 44 of the judgment). See also, among a number of other authorities to similar effect, Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias* [2013] Env LR 21, paras. [109]-[117].

62. The importance of applying a precautionary approach under Article 6(3), to ensure that appropriate protection for a protected site will be in place *before* any significant harmful effects occur in relation to the site, was again emphasised in Case C-418/04, *Commission v Ireland* [2007] ECR I-10947, at para. 208. There, the ECJ emphasised that an ability on the part of a relevant public authority to take steps to obtain injunctive relief after any deterioration had occurred in respect of the protected site would not constitute adequate protection for the purposes of the Habitats Directive, since the protection under the Directive "requires that individuals be prevented in advance from engaging in potentially harmful activities."

63. Below, I assess the present case in the light of this guidance, after consideration of certain other issues which arose on Mr Jones's submissions.

(ii) Mitigation measures and compensation measures

64. Issues have arisen in the authorities (a) whether any measures designed to mitigate or eliminate possible adverse effects on a protected site from a plan or project may be taken into account within Article 6(3) of the Habitats Directive, as distinct from being relevant under Article 6(4), and, if so, (b) whether such measures may be taken into account in applying the test in the first limb of Article 6(3), or may only be brought

into account as part of an "appropriate assessment" under the second limb of Article 6(3).

65. As to (a), in my judgment it is clear that preventive safeguarding measures which have the effect of eliminating completely or mitigating to some degree possible harmful effects of a plan or project on a protected site (in the sense that they prevent such effects from arising at all or to some degree) may be taken into account under Article 6(3), and a competent authority is not confined to bringing them into account under Article 6(4). If preventive safeguarding measures have the effect of preventing harmful effects from arising, or reduce them to a level where they are not significant, then the conservation objectives of Article 6(3) of the Habitats Directive will have been fulfilled to the requisite standard stipulated by the Directive, as interpreted by the Court of Justice, and there would be no further discernible or proportionate justification for preventing the plan or project from proceeding or for imposing the stricter requirements involved in satisfying Article 6(4) before authorising it. As the CJEU has said (see para. 23 of the judgment in *Sweetman*), "article 6 … must be construed as a coherent whole in light of the conservation objectives pursued by the Directive": this approach points firmly in favour of this interpretation of Article 6(3).

66. There is sometimes reference in cases and guidance to a distinction between mitigation measures and compensation measures: see e.g. the European Commission's Guidance Document on Article 6(4) of the Habitats Directive (2007/2012), referred to in the Opinion of AG Sharpston in Case C-521/12, *Briels v Minister van Infrastructuur en Milieu* [2014] PTSR 1120, at paras. 8-10. One needs to be careful here, because although the concept of "compensatory measures" is used in Article 6(4), no definition is given; and, further, the concept of mitigation is not used in the Habitats Directive itself, and the idea of mitigation is not always a precise one. However, I think that the basic distinction which is relevant for purposes of the application of the Habitats Directive is clear enough. If a preventive safeguarding measure of the kind I have described is under consideration, which eliminates or reduces the harmful effects which a plan or project would have upon the protected site in question so that those harmful effects either never arise or never arise to a significant degree, then it is directly relevant to the question which arises at the Article 6(3) stage and may properly be taken into account at that stage. This view is supported by para. 108 of AG Kokott's Opinion in the *Waddenzee* case, where, in relation to what may be brought into account as part of an "appropriate assessment" under the second limb of Article 6(3), she says in terms: "Measures to minimise and avoid harm can also be of relevance." The part of the judgment of the Court which corresponds with this part of her Opinion indicates no dissent from her approach. Rather, the wide language used by the Court to indicate what should be brought into account for the purposes of an "appropriate assessment" under Article 6(3) supports it: an appropriate assessment requires "*all aspects* of the plan or project which *can*, either individually or in combination with other plans or projects, *affect [the objectives of the Directive]*" to be taken in to account (emphasis supplied), and preventive safeguarding measures which would prevent harm from occurring meet this description.

67. The approach of AG Kokott, to treat preventive safeguarding measures as relevant at the Article 6(3) stage, is also supported by other authority: see Case C-239/04, *Commission of the European Communities v Portuguese Republic* [2006] ECR I-

10183, para. 35 of the Opinion of AG Kokott; paras. 31-33 and 36-38 in the Opinion of AG Sharpston in *Briels*; and para. 28 of the judgment in *Briels*, where the ECJ said this:

> "… the application of the precautionary principle in the context of the implementation of article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for [the protected site] concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site".

68. On the other hand, where measures are proposed which would not prevent harm from occurring, but which would (once harm to a protected site has occurred) provide some form of off-setting compensation so that the harm to the site is compensated by new environmental enhancing measures elsewhere, then it cannot be said that those off-setting measures prevent harm from occurring so as to meet the preventive and precautionary objectives of Article 6(3). In the case of off-setting measures, the competent authority is asked to allow harm to a protected site to occur, on the basis that this harm will be counter-balanced and offset by other measures to enhance the environment elsewhere or in other ways. In order to allow the harm to a protected site which Article 6(3) is supposed to ensure does not occur, a competent authority will have to be satisfied that such harm can be justified under Article 6(4), taking account of the off-setting compensation measures at the stage of analysis under Article 6(4). Such measures would not be capable of bearing on the application of the tests under Article 6(3), and so could not be relevant at the Article 6(3) stage.

69. The *Briels* case was concerned with measures to create new meadow areas for a protected species to compensate for harm to protected meadow areas within a protected site, associated with the construction of a new road. It is thus an example of a case concerned with off-setting compensation measures of the kind I have described, rather than preventive safeguarding measures. AG Sharpston reasoned that since compensatory measures are required by Article 6(4) "where (i) there has been a negative assessment under Article 6(3), (ii) there are no alternative solutions and (iii) the plan or project must go ahead for imperative reasons of overriding public interest", it would be illogical to say that they could be brought into account at the prior, Article 6(3) stage: see para. 28 of her Opinion, and the further discussion at paras. 29-33. The ECJ came to the same conclusion: see paras. 29-32 of the judgment. The measures at issue in that case were "not aimed either at avoiding or reducing the significant adverse effects" for the protected site, and so could not be brought into account at the Article 6(3) stage: para. 31 of the judgment.

70. As regards issue (b) in para. [64] above, there is domestic authority that it is legitimate for a competent authority at the screening opinion stage under the first limb of Article 6(3) to have regard to proposed preventive safeguarding measures which are to be incorporated as a condition or requirement for authorisation of a plan or project, as well as at the "appropriate assessment" stage under the second limb of Article 6(3): *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P&CR 16, a judgment of

Sullivan J, as he then was. This was the authority to which Mr Goodwin's proof of evidence called the Inspector's attention.

71. Like the present case, *Hart* concerned potential harmful effects on an SPA (created to protect bird species) associated with increased recreational pressure on the protected site from a project for new residential development, in relation to which mitigation measures including the creation of SANGs were proposed. Sullivan J specifically considered issue (b) in detail at paras. [54]-[76], by reference to the *Waddenzee* judgment and domestic authority. He referred to a passage at para. 71 in AG Kokott's Opinion in the *Waddenzee* case which the claimants in the *Hart* case relied upon (as did Mr Jones in the present case) as precluding reference to "the possibility or avoiding or minimising adverse effects" at the first stage under Article 6(3), and explained that it had not been reflected in the ECJ's judgment, not least because the issue of preventive mitigation measures had not been in issue in that case; Sullivan J also explained that para. 71 was phrased as it was because of the particular form of the question which had been posed by the national court: see [57]-[59]. This paragraph in the Opinion, on proper analysis, did not constitute authority contrary to Sullivan J's view that preventive mitigation measures could be taken into account under the first limb of Article 6(3). As he said (para. [61]):

> "if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects [on a protected site], and have incorporated appropriate mitigation measures into the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary."

72. Sullivan J observed at para. [72] that if, on the basis of all information put forward at the screening stage under the first limb of Article 6(3), including preventive mitigation measures, the competent authority was satisfied that the package put forward would avoid any net increase in recreational visits to the SPA in question:

> "it would have been 'ludicrous' for her to disaggregate the difference elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGs, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment."

73. Sullivan J's conclusion at para. [76] was as follows:

> "… I am satisfied that there is no legal requirement that a screening assessment under Regulation 48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of

> 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 a significant effect on the basis of objective information (see *Waddenzee* above)."

74. Mr Jones submitted that this part of the reasoning in *Hart* was wrong, or that the position under EU law was uncertain and that a reference to the CJEU should be ordered to obtain its view. I do not accept either submission. In my judgment, the reasoning of Sullivan J is compelling and is clearly correct, to the *acte clair* standard.

75. The CJEU has emphasised that Article 6 is to be read as a coherent whole in the light of the conservation objectives pursued by the Habitats Directive (see *Sweetman*, judgment, para. 32; *Briels*, judgment, para. 19). The first, screening opinion limb of Article 6(3) is intended to operate as a preliminary check whether there is a possibility of significant adverse effects on a protected site, in which case an "appropriate assessment" is required under the second limb of Article 6(3) to consider in detail whether and what adverse effects might arise. Both limbs are directed to the same conservation objectives under the Directive, which explains why the threshold under the first limb has been interpreted as being so low (see para. 49 of AG Sharpston's Opinion in *Sweetman*). Since it is clear from the relevant case-law that preventive safeguarding measures are relevant matters to be taken into account under an "appropriate assessment" under the second limb (see the discussion above), there is in my view a compelling logic to say that they are relevant and may properly be taken into account in an appropriate case under the first limb of Article 6(3) as well. In accordance with this logic, on a straightforward reading of para. 108 in AG Kokott's Opinion in the *Waddenzee* case, set out above, she treats preventive safeguarding measures as relevant to both limbs of Article 6(3).

76. If the competent authority can be sure from the information available at the preliminary screening stage (including information about preventive safeguarding measures) that there will be no significant harmful effects on the relevant protected site, there would be no point in proceeding to carry out an "appropriate assessment" to check the same thing. It would be disproportionate and unduly burdensome in such a case to require the national competent authority and the proposer of a project to undergo the delay, effort and expense of going through an entirely unnecessary additional stage (and see in that regard paras. 72-73 of AG Kokott's Opinion in *Waddenzee*, where she explains that "it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment").

77. In my judgment, these are all powerful indicators that the proper interpretation of Article 6(3) is as set out by Sullivan J. Accordingly, I do not accept Mr Jones's submission that the Inspector erred in law in the present case in following the approach in *Hart.* The Inspector was lawfully entitled to take into account the proposed preventive safeguarding measures in respect of the SPA and SAC under the first limb of Article 6(3), for the purposes of giving a screening opinion to the effect that no "appropriate assessment" would be required under the second limb of Article 6(3), in the course of his consideration whether to grant planning permission.

(iii) Standard of review

78. A further issue arising from Mr Jones's submissions concerns the standard of review by a national court supervising the compliance by a relevant competent authority with the legal requirements in Article 6(3) of the Habitats Directive. Although the legal test under each limb of Article 6(3) is a demanding one, requiring a strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations. As AG Kokott explained in para. 107 of her Opinion in *Waddenzee*, the conclusion to be reached under an "appropriate assessment" under the second limb of Article 6(3) cannot realistically require the attainment of absolute certainty that there will be no adverse effects; the assessment required "is, of necessity, subjective in nature". The same is equally true of the assessment at the screening stage under the first limb of Article 6(3). Under the scheme of the Habitats Directive, the assessment under each limb is primarily one for the relevant competent authority to carry out.

79. Mr Jones submitted that Patterson J erred in treating the assessment by the Inspector of compliance of the proposed development with the requirements of Article 6(3) as being a matter for judicial review according to the *Wednesbury* rationality standard. He said that in applying EU law under the Habitats Directive the national court is required to apply a more intensive standard of review which means, in effect, that they should make their own assessment afresh, as a primary decision-maker.

80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant 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 *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA CIv 114; [2013] JPL 1027, [32]-[43], in which particular reference is made to Case C-508/03, *Commission of the European Communities v United Kingdom* [2006] QB 764, at paras. [88]-[92] of the judgment, as well as to the *Waddenzee* case. Although the requirements of Article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this Court in the *Evans* case (see para. [43]), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue.

81. In his submissions, Mr Jones sought to rely on a different *Evans* case: *R (Evans) v Attorney General* [2014] EWCA Civ 254; [2014] QB 855. That case concerned a different directive (Parliament and Council Directive 2003/4/EC regarding access to environmental information), which is drafted in materially different terms from the Habitats Directive (since the Environmental Information Directive requires "access to a review procedure before a court of law" whereby the court of law can review and make final decisions of its own: see Article 6, set out at para. [12] of the judgment) and requiring a materially different scheme of decision-making processes to be followed (see paras. [42]-[47], [52] and [54]-[68]). By reason of the different context

and terms of the directive in issue in that case, I consider that Mr Jones's attempt to pray in aid *R (Evans) v Attorney General* as the relevant analogy for present purposes fails.

(iv) Reliance on expert evidence

82. Mr Jones correctly emphasised passages in the authorities regarding Article 6(3) of the Habitats Directive which refer to the need for a national competent authority to make its assessments (whether at the screening opinion stage or the "appropriate assessment" stage) on the basis of "objective information" regarding the level of risk of harm to a protected site which may be associated with a plan or project and "in the light of the best scientific knowledge in the field": see e.g. paras. 44 and 45 of the judgment in the *Waddenzee* case and paras. 54 and 61 of that judgment, respectively; and para. 40 of the judgment in *Sweetman*. He submitted that the material available to the Inspector, and in particular the expert evidence of Mr Goodwin, did not meet these standards. Mr Jones submitted that Mr Goodwin's evidence amounted to no more than bald assertion.

83. I agree with Mr Jones's submission, to the extent that he argued that it would not comply with the relevant standards of evidence indicated by the ECJ/CJEU for a national competent authority simply to rely for its screening opinion or "appropriate assessment" under Article 6(3) on a mere assertion by an expert, unsupported by consideration of any background facts and without reasoning to explain the assertion made. If such a case arose, evidence of that character could fairly be described as merely subjective, and as material which failed to qualify as something which could be regarded as "the best scientific knowledge in the field". However, such a case will be rare. Expert witnesses know that it is incumbent on them to refer to relevant underlying evidence and to explain their opinions, and typically do so.

84. I do not accept Mr Jones's further contention that the present case falls within the objectionable category, where the only evidence available is mere assertion by an expert. On the contrary, a considerable amount of careful survey and scientific work had been done regarding the underlying factual position (in particular, for the Footprint Ecology Interim Report and Disturbance Study), and Natural England (the expert national agency) and Mr Goodwin (an expert ecologist) were entitled to draw on that in forming their views. Mr Goodwin's evidence set out careful reasoning by him, with reference back as appropriate to underlying facts, to explain his opinion and expressions of view. It was expert evidence in conventional form and of good quality. Mr Goodwin was entitled to draw on his own experience and expertise as well, in forming his opinion: see paras. [46]-[48] above.

85. Moreover, the authorities confirm that in a context such as this a 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): *Hart*, supra, [49]; *R (Akester) v DEFRA* [2010] Env LR 33, [112]; *R (Morge) v Hampshire County Council* [2011] UKSC 2; [2011] 1 WLR 268, [45] (Baroness Hale); *R (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin); [2013] Env LR 32, [116]. The Judge could not be faulted in giving weight to this consideration in the present case, at para. [165] of her judgment.

86. In my judgment, therefore, the Appellant's complaint that the Inspector did not have information before him which he could rationally and lawfully regard as "objective information" and "the best scientific knowledge in the field" for the purposes of proceeding under Article 6(3) should be rejected.

(v) Application of the strict precautionary approach in this case

87. I turn, then, to consider the application of the law to the facts of this case. In my view, the most impressive of the various grounds of appeal pressed on behalf of the Appellant concerns the question whether the Inspector satisfied the requirements of Article 6(3) in making the decision he did that - having regard to the proposed mitigation measures - the proposed development, even when combined with other plans or projects, would not be likely to give rise to any significant effects on either the SPA or the SAC. This was a decision under the first limb of Article 6(3), that no further "appropriate assessment" was required: see paras. 38-39 of the Inspector's Report, set out above.

88. Mr Jones submitted that the Inspector failed properly to comply with the strict precautionary approach to avoid harm to protected sites required under Article 6(3), as interpreted in the *Waddennzee* case and other authorities referred to above, in that he could not be certain to the requisite standard in advance of the development taking place that there would be no possibility of adverse effects upon the SPA or the SAC. Mr Jones relied in this regard on paras. 81-92 in the Opinion of AG Kokott in Case C-209/04 *Commission v Austria* [2006] ECR I-02755. Mr Maurici correctly pointed out that this passage in AG Kokott's Opinion was concerned with the implementation of compensation measures under Article 6(4), not with mitigation or what I have called preventive safeguarding measures under Article 6(3), and also that the ECJ did not have to review the passage in its judgment, by reason of the way it ultimately disposed of the case. Nonetheless, I consider that this passage in AG Kokott's Opinion is broadly illustrative, once again, of the strict precautionary approach which a competent authority is required to adopt under Article 6 generally, including Article 6(3).

89. Mr Jones argued that the mitigation measures on which the Inspector relied were too vague and uncertain. They were proposed to be implemented in the future, but there could be no guarantee whether and when they would be put in place. In particular, the funding to purchase the land for the three strategic SANGs might only be forthcoming under the JIA arrangements after a lot of further residential development had occurred, when sufficient further contributions under the JIA had been forthcoming. Also, there might not be sufficient funding, if land prices went up. Even after allowing for all these uncertainties, the land would probably have to be acquired pursuant to compulsory purchase orders, and there could be no guarantee that such orders would be made. Generally, both in relation to the strategic SANGs and the other mitigation measures to be funded under the JIA arrangements (referred to in para. 32 of the Inspector's Report), Mr Jones said that there was no sufficient objective evidence that they would be effective to avoid significant harm to the SPA and the SAC.

90. I consider that there is force in these submissions, but ultimately, in my view, they cannot be accepted in relation to the specific circumstances which the Inspector was required to address.

91. Two preliminary points should be made. First, it appeared from the Council's screening opinion and "appropriate assessment", endorsed by Natural England, that it was only by reason of the potential in-combination effects of the proposed development at the site together with other very substantial residential developments contemplated under the three developing LDFs of the local planning authorities in the vicinity of the SPA that the proposed development was (subject to mitigation measures) likely to have a significant effect on the SPA. In other words, the development at the Sentry's Farm site on its own was not assessed to create any risk of significant harm to the SPA or the SAC. Mr Goodwin's evidence at the inquiry was explicitly to the same effect, i.e. that any adverse effects associated with the development itself were *de minimis*.

92. These were legitimate and sustainable assessments, and the Inspector was entitled to proceed on the basis of them. The proposed development itself was small and involved only a very limited increase of population (associated with building 65 dwellings) in an area which was already reasonably well populated. Moreover, the POS on the development site would be capable of absorbing a significant amount of recreational pressures associated with the development, and it was proposed that there should be a planning condition to ensure that it was of good quality (see para. 34 of the Inspector's Report). The relevant assessments available to the Inspector (by the Council, Natural England and Mr Goodwin) were in agreement on the question of absence of significant impact from the development taken on its own, and the Inspector accepted their assessments, as he was entitled to do.

93. The Appellant argued before the Judge that the Inspector should have found that there would be significant impact from the development taken by itself, but the Judge rejected that submission at para. [170] of her judgment. In my view, she was right to do so.

94. The critical question for the Inspector, therefore, was whether there was sufficient assurance from the JIA, and the approach to mitigation and the taking of what I have called preventive safeguarding measures which it contemplated, to allow him to be sure, to the requisite standard under the first limb of Article 6(3), that there would be no significant in-combination adverse effects on the SPA and the SAC if he granted planning permission for the development.

95. This leads to the second preliminary point. In this case the relevant competent authority (the Inspector) was conducting an inquiry for the purposes of Article 6(3) which to a significant degree was informed by work done for a different body (the Council) at the stage when the Council was the relevant competent authority to consider matters, as the local planning authority considering at the earlier stage whether it should grant planning permission. Also, by the time of his inquiry, the Inspector had more evidence available to him, particularly in the form of the evidence from Mr Goodwin. Accordingly, when the Inspector considered the relevant question at the screening opinion stage under the first limb of Article 6(3), he had a good deal more information, and more focused information, than will often be the case for a competent authority at the screening stage under Article 6(3).

96. This meant that the Inspector was particularly well placed to consider the position at the screening assessment stage under the first limb of Article 6(3). In truth, there was very little difference between his position and that of the Council itself, which had

carried out an "appropriate assessment", other than that the Inspector had available to him in addition the Footprint Ecology reports and the very full and detailed evidence of Mr Goodwin. The Inspector was as well-informed about the risks to the SPA and the SAC as most competent authorities in relation to decisions of this nature would be after conducting an "appropriate assessment". As observed above, by reference to the *Hart* case, the Inspector was entitled to take account of proposed preventive safeguarding measures in relation to the SPA and the SAC in conducting his screening assessment under the first limb of Article 6(3). If the very full information available to the Inspector properly enabled him to make the screening assessment which he did, he was not obliged to go on nonetheless and require a further "appropriate assessment" to be carried out under the second limb of Article 6(3).

97. The Inspector was specifically briefed by Mr Goodwin in his evidence that the relevant test to be applied was the strict precautionary one, as explained in the *Waddenzee* case (see also Footprint Ecology's Interim Report). The Inspector adequately summarised the effect of that case in para. 38 of his Report. He clearly directed himself correctly regarding the test to be applied.

98. In my judgment, the Inspector was entitled to make the assessment he did in para. 38 of his Report, that "the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on either the SPA or the SAC". The development on its own would not give rise to any significant effects, and the in-combination effects were future effects when allocations of specific sites for the very substantial residential development under the three LDFs which were being developed were eventually brought forward, planning permission was obtained for them and then the new housing was built. Mr Goodwin had emphasised in his evidence (see para. [50] above) that there was an important safeguard associated with the JIA arrangements, in that as each new proposed site was brought forward and planning permission sought in future, the relevant local planning authority, in consultation with Natural England, would have to make a further assessment under Article 6(3) before permission was granted for the development of that site (i.e. a further screening assessment and, as necessary, an "appropriate assessment", pursuant to the first and second limbs of Article 6(3), respectively; and see para. 8.5 of the Interim Report). Accordingly, the potential in-combination effects identified by the Council and by Mr Goodwin could not occur without further screening and appropriate assessments by a relevant competent authority, advised by Natural England.

99. In my view, this feature of the JIA arrangements meant that the Inspector was entitled to be satisfied, as he was, that those arrangements provided adequate protection for the SPA and the SAC on the appropriate strict precautionary approach identified in *Waddenzee*. There was no possibility of irreversible harmful effects on the SPA and the SAC arising from implementation of the development on the site at once, and there was sufficient scope to ensure that appropriate preventive safeguarding measures would be implemented before any other major residential developments gave rise to possible in-combination effects. The Inspector was entitled to be satisfied on the information he had about the viability and suitability of the JIA arrangements (from, in particular, Footprint Ecology in the Interim Report, Natural England and Mr Goodwin) that they provided assurance that future adequate preventive safeguarding measures would be put in place in proper time before any contemplated in-

combination adverse effects might arise. That assessment was underpinned by the fact that before any further relevant development could take place which might give rise to in-combination effects, the relevant competent authority and Natural England would first have checked that adequate preventive safeguarding measures were indeed in place at that time to meet in full any in-combination effects (including those associated with the development at the Sentry's Farm site).

100. The implications of this can be spelled out as follows. If (for example) planning permission were sought in future for a substantial new residential development in the vicinity of the SPA and the Sentry's Farm site, the relevant competent authority would be obliged to subject it to screening and, as necessary, an "appropriate assessment" under Article 6(3); and if the in-combination adverse effects of that new site plus the Sentry's Farm site were not clearly going to be avoided by the preventive safeguarding measures which would be in place before the new housing was built and occupied, permission would have to be refused at that stage for the new development. If, say, those in-combination effects could only be satisfactorily avoided by the creation of a strategic SANG, there might have to be a delay before any permission was granted for the new development until the competent authority could be satisfied that sufficient funding and other arrangements would be forthcoming to ensure that the SANG would be in place before the dwellings in the new development were built and occupied. But the possibility that there might have to be pause in future development in this way does not indicate that planning permission could not properly be granted by the Inspector for the Sentry's Farm site.

101. To put it another way: the Inspector was entitled to find that the uncertainties regarding possible future in-combination effects relevant to the Sentry's Farm site were adequately catered for by the JIA arrangements and the safeguards associated with them, in that those arrangements meant there was sufficient assurance that future preventive safeguarding measures would have to be in place, to the satisfaction of relevant competent authorities and Natural England, before any future in-combination effects could actually arise. This evaluative judgment did not involve any compromise of the strict precautionary approach under Article 6(3) explained in *Waddenzee* and the other authorities referred to above.

102. In that regard, it should be observed that in *Waddenzee* itself AG Kokott noted the problems which can arise under the Habitats Directive "where the possible effects cannot be assessed with sufficient accuracy at the time of the initial authorisation but instead depend on variable circumstances" (para. 35 of her Opinion). In such cases, in the context of an activity like cockle fishing such as was under review there, her view was that "Temporary authorisations which have to be reviewed on a regular basis are particularly appropriate", since that allows up to date informed assessments to be made which take account of developing circumstances at the appropriate times (ibid. and para. 36). This is a sensible pragmatic approach which gives appropriate effect to the strict precautionary approach to be adopted under Article 6(3), and there is nothing in the judgment of the ECJ which casts doubt on her view. I consider that this supports the conclusion that the way of addressing future uncertain effects adopted in this case (by way of the JIA and the requirement for future assessments under Article 6(3) when future residential projects are brought forward), where plainly a temporary authorisation would not have been appropriate, is lawful and in compliance with Article 6(3).

(vi) Miscellaneous additional points under the Habitats Directive Ground

103. In addition to, or in support of, this main contention for the Appellant, Mr Jones made a number of other criticisms of the Inspector's decision and reasoning and of the judgment below, where the Judge declined to accept that these criticisms were valid. In my view, there was no merit in any of these further points, and the Judge was right to reject them. It suffices here to deal with the main points which Mr Jones made, in so far as not already covered in the discussion above.

104. Mr Jones referred to para. 35 of the Inspector's Report, and sought to suggest that it showed that the Inspector made a fundamental error of fact, in thinking that the Exminster Marshes Nature Reserve is an area which is not part of the SPA. The Judge rejected this contention at paras. [174]-[175] of the judgment. She was right to do so. On a fair reading of what the Inspector said, in the context of the wealth of information he had about the SPA and the fact that it included Exminster Marshes, he cannot be taken to be saying that Exminster Marshes was not part of the SPA. In fact, in para. 36 of his Report, he noted that the appeal site was within 400m of the SPA, and this meant the Exminster Marshes part of the SPA. His reference in para. 35 of the Report to Exminster Marshes Nature Reserve being designed to alleviate pressure from visitors on the SPA was factually accurate (he had evidence before him in the form of a booklet issued by the RSPB which made that abundantly clear), and did not imply that he thought that it was not part of the SPA. The Nature Reserve was part of the SPA which had been laid out and was managed as an area to alleviate pressure on the SPA generally, and in particular in relation to other, more sensitive parts of the SPA.

105. Mr Jones referred to the last sentence of para. 30 of the Inspector's Report in order to suggest that the Inspector was in error in his understanding of the factual position regarding the SPA, since (Mr Jones claimed) the Inspector appeared to think that the sensitive areas were some distance away from the development site, whereas the whole of the SPA was a sensitive area. However, in my view, in context, it is clear that the Inspector appreciated that the whole of the SPA was a sensitive area in one sense (it was only by virtue of it being sensitive that it was designated as a protected site), and what he was referring to in para. 30 of his Report was the fact (supported by the evidence from Footprint Ecology and Mr Goodwin, on which he was rationally entitled to rely), that the most sensitive areas of the SPA in terms of the need to protect bird species were at some distance from the development site. This was a proper relevant consideration which the Inspector was entitled to take into account.

106. Mr Jones was also critical of the Inspector's reasoning in para. 36 of his Report to discount the need for a 400m development exclusion zone, such as had been employed in relation to the Thames Basin Heaths. However, again, the Inspector had a proper basis for thinking that the situations of the two protected sites were so materially different, in terms of habitat (a heath as distinct from an estuary and wetlands) and the species types requiring protection (ground nesting birds as distinct from birds in passage, as explained in paras. 10.4 and 10.5 of Mr Goodwin's proof of evidence), that the analogy urged by the Appellant was not an apt one.

107. Of somewhat greater force, in my opinion, was Mr Jones's criticism of para. 33 of the Inspector's Report, which Mr Jones said indicated that the Inspector had allowed himself to be influenced by an extraneous factor ("the housing shortage in the

district") which could only properly be taken into account, if at all, under Article 6(4) of the Habitats Directive, with the result that he had unlawfully departed from the strict precautionary approach required under Article 6(3). However, in my view, on a fair reading of the Report, para. 33 does not bear the weight which Mr Jones sought to place on it.

108. I have already noted that the Inspector correctly directed himself as to the proper test under Article 6(3): see, in particular, para. 38 of his Report. I do not think that what he says at para. 33 can be taken to imply a misdirection to himself contrary to the central thrust of his reasoning. An Inspector's Report is not to be construed like a statute, but is to be read in a sensible way having regard to its overall coherence and reasoning. The better interpretation of para. 33 is that the Inspector was simply noting that the general safeguarding measures to be provided under the JIA were interim measures, rather than the final strategic measures which would ultimately be provided under the local authority LDFs when they came to be adopted and implemented, and in that context was noting that the interim nature of the measures (i.e. that they were something short of the final implementation of the full package of strategic preventive safeguarding measures which it was hoped would ultimately be put in place) was not a reason why he should decline to grant planning permission. That is something which is entirely consistent with the Inspector also recognising, as he did, that he had to be fully satisfied under the strict precautionary approach under Article 6(3) that there would be no significant risk of harm to the SPA if he granted permission for this particular development.

109. Mr Jones's further suggestion that para. 29 of the Inspector's Report - where the Inspector noted that reliance was being placed on the JIA, "In the absence of a robust mitigation package specific to [the SPA and SAC] …" - indicated that he thought the JIA arrangements were not "robust", and hence further indicated that he had failed correctly to follow the strict precautionary approach required by Article 6(3) when he granted planning permission, is answered in the same way, in my view. The Inspector's noting the fact that the full package of strategic preventive measures would ultimately provide the best (i.e. "robust") strategic solution to the need to protect the SPA and SAC in relation to the strategic, in-combination pressures they would eventually face from the substantial additional residential development in the vicinity contemplated in the developing LDFs, does not imply that he failed to apply the correct strict precautionary approach in respect of the particular planning application before him.

110. Similarly, it is clear, in my view, on reading para. 37 of the Inspector's Report in context, that the full mitigation of the impact on the SPA and the SAC to which he refers there is that in relation to the in-combination effects from the development site plus other, future sites which might be developed. Bellway, of course, in particular by Mr Goodwin's evidence, had made it plain that its position was that there was no likelihood or risk of significant impact on the SPA and the SAC arising from the Sentry's Farm development taken by itself; so when the Inspector says at the start of para. 37 that there was acknowledgement "by both main parties" that the POS would not "fully mitigate the impact on the SPA and the SAC", it was the in-combination adverse effects which was the focus of his comment.

111. In his oral submissions in reply, Mr Jones advanced a new argument. He suggested that there were in-combination effects on the SPA and the SAC arising from the

existing consents (see para. [36] above) taken in conjunction with the development site, and that there should have been an "appropriate assessment" of those effects.

112. In my view, this new argument was raised far too late in the hearing. It would not be fair to the Secretary of State or the owners of the development site, who participated in the proceedings as Interested Parties, to allow it to be taken. Mr Jones did not set this distinct argument out in his skeleton argument nor did he open the appeal by referring to this argument. For the Secretary of State and Bellway to be able to deal with it adequately would have called for significant further argument and court time, and quite possibly further evidence, to explain the position. The Council's screening opinion and appropriate assessment did not identify possible in-combination effects amounting to a "likely significant impact" for the purposes of Article 6(3) by reason of the existing consents, but referred instead to the in-combination effects associated with the developing LDFs of the three local planning authorities. We were not taken to information about the locations of the sites for the existing consents, or about the terms on which the consents had been granted, and were not in any position to assess this new argument. Nor were we taken to any material to suggest that this had been raised as an argument before the Inspector. Moreover, from other reading in the case, it appears that a conservation contribution had been raised in association with the development at Secmaton Lane in Dawlish, and it may well be the case in fact that adequate preventive safeguarding measures had been put in place in relation to that development and the other existing consents which meant that they would not, by themselves (and ignoring the much bigger projected residential developments under the developing LDFs), have any significant likely impact on the SPA and SAC in combination with the Sentry's Farm Development.

113. For all the reasons set out above, I would dismiss the Appellant's appeal on the Habitats Directive Ground. There is no aspect of the legal issues raised on the appeal which merits the making of a reference to the CJEU.

The Policy Ground

114. The Policy Ground of appeal is parasitic on the Habitats Directive Ground of appeal, and likewise falls to be dismissed.

115. Paragraph 119 of the NPPF states:

> "The presumption in favour of sustainable development (paragraph 14 [of the NPPF]) does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined."

116. For reasons set out above, the Inspector was entitled to find that the proposed development did not require "appropriate assessment" under the Habitats Directive. Therefore, he was entitled to have regard as he did (para. 39 of his Report) to the presumption in favour of sustainable development.

The CIL Grounds

117. In my judgment, the appeal based on both aspects of the CIL Grounds should also be dismissed. The Appellant's case on this can be dealt with quite shortly, because I agree with the Judge and the reasons she gave in her judgment (paras. [178]-[197]).

118. As to the aspect based on regulation 122 of the CIL Regulations, I consider that the Inspector was fully entitled to find that the condition that Bellway agree to provide the Conservation Contribution pursuant to section 106 of the 1990 Act met the requirements of the regulation. He directed himself correctly as to the relevant test under regulation 122 (para. 42 of his Report) and was entitled to make his assessment (at paras. 42 to 44 of his Report), as a matter of rational planning judgment, that the Conservation Contribution required from the developer (i) was necessary to make the development acceptable in planning terms (i.e. to ensure that the developer makes a fair contribution to the strategic measures required to mitigate the general in-combination impacts to be expected), (ii) was directly related to the development (i.e. because the development was expected to make a contribution to the general in-combination impacts which were expected in relation to the SPA and the SAC), and (iii) was reasonably related in scale and kind to the development (i.e. it is properly calibrated by reference to the likely contribution to the in-combination impacts which might be expected, having regard to the likely number of people who would come to live in the new houses on the development site and based on considered estimates of costs with which the Council and Natural England were happy). I do not think it is necessary to say more.

119. Turning to the aspect of this Ground based on regulation 123 of the CIL Regulations, again I consider that the Judge was right for the reasons she gave. Regulation 123 was not yet applicable at the time of the Inspector's decision, but it was contemplated that it would become applicable at some time in the not far distant future. The Inspector was not obliged to give consideration to the impact it might have when it did, however, for the reasons given by the Judge at para. [196] of the judgment. Quite simply, there was no reason to think that regulation 123 would make any material difference to the operation of the JIA, which is what the Inspector was concerned to assess. Although when regulation 123 came to be applied it would prevent contributions for the JIA being made by way of section 106 agreements, the relevant local planning authorities would be able to impose a levy in exercise of their powers under the CIL Regulations which would have the same practical effect. Indeed, Footprint Ecology observed in its Interim Report that use of a levy under the CIL Regulations, once the levy-raising power under that those Regulations became available, would be a preferable method of raising the funding for the JIA arrangement which it considered should be put in place.

The Reasons Ground

120. The Reasons Ground of appeal is largely parasitic on the other grounds of appeal already considered above, and likewise falls to be dismissed for similar reasons. Again, I agree with the reasons given by the Judge, at paras. [218]-[221] of her judgment. I do not consider that there was any failure on the part of the Inspector to explain his reasons in dealing with the principal points in issue between the parties on the planning appeal to him. He complied with the familiar standards laid down in

South Buckinghamshire District Council v Porter (No. 2) [2004] UKHL 33; [2004] 1 WLR 1953, at [36].

121. As regards the specific points made by Mr Jones in his skeleton argument under this head: (i) on a fair reading of the Inspector's Report, he did not disclose any failure to appreciate that the Exminster Marshes are an integral and sensitive part of the SPA; (ii) it could not be said that he had misunderstood the meaning of the word "likely" as used in the Habitats Directive (both because everyone participating in the inquiry knew he had been correctly briefed about the particular meaning given that term in the *Waddenzee* case and by reference to para. 38 of the Report); (iii) the Inspector sufficiently explained (especially for anyone who had participated in the inquiry) the different context of the SPA from the Thames Basin Heaths, and why a 400m exclusion zone was not required; (iv) the Inspector sufficiently explained (especially for anyone who had participated in the inquiry and hence was aware of the way in which the JIA was intended to operate, including review site by site by Natural England in relation to future residential developments) why he was satisfied that there would not be significant harm to the SPA and SAC; and (v) the Inspector sufficiently explained (again, especially for anyone who had participated in the inquiry) why the Conservation Contribution was fairly and reasonably related to the scale of the proposed development.

Conclusion

122. For the reasons set out above, I would dismiss this appeal. There is no good basis for making a reference to the CJEU.

LORD JUSTICE KITCHIN:

123. I agree

LORD JUSTICE RICHARDS:

124. I also agree.