Capital Community Developments Ltd

TOWN AND COUNTRY PLANNING ACT 1990

SECTION 78 APPEAL

APPEAL by **Capital Community Developments Ltd** against the refusal of planning permission dated 8th July 2019 by **East Suffolk Council** in respect of **Land North Of Gardenia Close And Garden Square, Rendlesham.**

PINS reference: APP/X3540/W/19/3242636

LPA Reference: APP/121/2019

PROOF OF EVIDENCE OF NICHOLAS SIBBETT ON BEHALF OF THE APPELLANT

Core Documents

Core Documents

1. Akester (Wightlink Ferries) case no CO/1834/2009 citation 2010 EWHC 232 (Admin) 16th February 2010

2. Shadwell Estates case, no CO/8634/2012, Neutral citation (2012) EWHI 12 (Admin) 11th January 2013

Core Document 1

Case No: CO/1834/2009

Neutral Citation Number: [2010] EWHC 232 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th February 2010

Before :

MR JUSTICE OWEN

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Between :

The Queen on the application of STEPHEN AKESTER and MARC MELANAPHY (on behalf of the Lymington River Association)	**Claimant**
-and –	
(1) DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS **(2) WIGHTLINK LIMITED**	**Defendants**
-and-	
(1)LYMINGTON HARBOUR COMMISSIONERS **(2)NATURAL ENGLAND** **(3)NEW FOREST DISTRICT COUNCIL**	**Interested Parties**

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William Norris QC & Justine Thornton (instructed by **Richard Buxton**) for the **Claimants**
Stephen Tromans QC & Colin Thomann (instructed by **DEFRA Litigation & Prosecution Department**) for the **1st Defendant.**
Richard Drabble QC & Stephen Morgan (instructed by **Bircham Dyson Bell LLP**) for the **2nd Defendants.**
Gregory Jones (instructed by **Lester Aldridge LLP**) for the **1st Interested Party.**
Gordon Nardell (instructed by **Grainne O'Rourke, Head of Legal and Democratic Services**) for the **3rd Interested Party.**

Hearing dates: 14th & 15th December 2009

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Judgment

Mr Justice Owen:

1. The claim concerns the legality of a decision made by the second defendant, Wightlink Ltd (Wightlink) which operates ferries on three routes between the mainland and the Isle of Wight, to introduce a new class of ferry, the W class, on the route between Lymington and Yarmouth, a decision implemented on 25 February 2009. The claimants, who bring the claim on behalf of the Lymington River Association (LRA), seek to challenge the decision on the basis that it was made and implemented in breach 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), and the Conservation (Natural Habitats &c) Regulations 1994, by which the Habitats Directive was implemented (the Habitats Regulations). They further contend that the first defendant, the Department for Environment, Food and Rural Affairs (DEFRA) has failed properly to implement Article 6(2) of the Habitats Directive, in that there would appear to be no, or no adequate, regulatory powers available to prevent Wightlink from introducing the W class ferries.

The Interlocutory proceedings

2. On 24 February 2009, the day before the introduction of the W class ferries, the claimants sought an injunction ex parte to restrain Wightlink from operating them on the Lymington to Yarmouth route. Beatson J refused the application, but ordered that it be brought before the court on notice as a matter requiring immediate attention. He further granted the claimants protection from the costs of the defendants and the proposed interested parties up to and including the end of the oral hearing for interim relief. On 25 February the claimants served the claim on DEFRA and Wightlink, and on the three interested parties, Lymington Harbour Commissioners, Natural England, and the New Forest District Council. On 26 February Beatson J ordered that the application for interim relief be listed as soon as possible, and on 12 March HHJ Birtles, sitting as a Deputy High Court Judge, ordered inter alia that the application for interim relief be dismissed, that with the consent of the parties that there be a 'rolled up' hearing of the permission application, and that the protective costs order be extended to 27 March.

3. On 24 April Christopher Symons QC, sitting as a Deputy High Court Judge, ordered inter alia that the protective costs order be extended until judgment in the substantive hearing, but be amended with effect from 4 pm on 27 April 2009 by the defendants' liability to the claimants being capped at a total of £120,000 inclusive of the costs incurred to date, and by the claimants' liability being capped at a total of £15,000.

The Parties

4. The LRA, on whose behalf the claim is brought, is an association, now incorporated, of local residents and users of the Lymington river, formed to

> "*ensure greater awareness of the Environmental and Safety impacts and Regulatory facts relating to the proposed new much bigger ferries*".

DEFRA is the central government department responsible for ensuring that the UK's obligations under the Habitats Directive are fulfilled.

5. Wightlink is a private company, and is the owner of and statutory harbour authority for the ferry terminal comprising Lymington Pier.

6. The Lymington Harbour Commissioners are the statutory harbour authority for the Lymington river and harbour under the Harbours Act 1964, and manage the river and harbour in accordance with the Lymington Harbour Orders of 1951-2002.

7. Natural England is the statutory nature conservation body for England. Its role, inter alia, is to provide advice to 'competent authorities' on the scope of 'appropriate assessments' required under the Habitats Directive regime. Natural England did not appear and was not represented at the hearing, but set out its position in a letter from its solicitors, Browne Jacobson, dated 11 December 2009.

8. The New Forest District Council is the local planning authority in relation to the Lymington Pier ferry terminal operated by Wightlink.

The Issues

9. The claim is summarised in the amended grounds in the following terms:

> "*5) The decision by Wightlink to introduce a new type of ferry into service on the Lymington to Yarmouth route, which passes through internationally designated nature conservation sites, is unlawful because:*
>
> *a) It is in breach of the UK Habitats Regulations; the EC Habitats Directive and perverse.*
>
> *b) In unilaterally introducing the ferries, despite the environmental concerns expressed by DEFRA, Natural England and the Lymington Harbour Commissioners, Wightlink has acted in breach of its statutory nature conservation duties.*
>
> *c) Wightlink appears to have sought to evade proper compliance with the Habitats legislative regime by narrowing the scope of its initial project to exclude physical development associated with the introduction of the ferries.*
>
> *6) The UK has failed to properly implement Article 6 (2) of the Habitats Directive. There appears to be no regulatory power available to prevent Wightlink from introducing the ferries despite the fact that the ferries are likely to have significant environmental effects on internationally designated nature conservation sites.*
>
> *7) To the extent that the Court considers it has no choice but to interpret Regulations 48 and 49 of the Habitats Directive as only applying to plans or projects which require authorisation or consent, the UK has failed to properly implement Article 6 (3) of the Habitats Directive.*
>
> *8) The UK has failed to properly implement Directive 85/337/EEC on ("the EIA Directive") in that the introduction of ferries weighing more than 1350*

tonnes, which are considered likely to have significant environmental effects, escape the requirements of an environmental assessment because they do not constitute physical development or require regulatory consent. The Claimants rely on the direct effect of the Directives in seeking a declaration that the introduction of the ferries, in the absence of an environmental assessment, was unlawful."

10. The claimants no longer seek injunctive relief. In a supplementary written submission, forshadowed by a letter to the defendant dated 29 October 2009 and a letter to the court from his instructing solicitors dated 16 November 2009, Mr William Norris QC, who appeared for the claimants, indicated that the claimants now invite the court to declare that:

    " *a. The Ferry Service is and was a 'plan or project'*

    b. The responsibility for deciding whether there should be an Appropriate Assessment and, in the light of that decision, was one for ***the*** *relevant competent authority which, in the circumstances of this case, was DEFRA or a governmental body answerable to Defra and not for Wightlink*

    c. There was no such AA or anything which qualified as such before the new service commenced

    d. As in February 2009 Wightlink acted unlawfully in commencing the new ferry service

    e. As in February 2009 DEFRA/the UK Government had not effectively transposed the Habitats Directive into domestic law

    f. The Defendants should pay the cost of the proceedings should any of those declarations be granted"

11. Both defendants dispute the claim, and furthermore both invite me to refuse permission on the basis that the application has become academic, a point to which I shall return. But in addressing the question of whether Wightlink acted unlawfully in resolving to introduce the W class ferries on the Lymington route, it is necessary to consider the following issues:

    1. Was the proposal to introduce the W class ferries a plan or project within the meaning of the Habitats Directive? If so
    2. Was there a competent authority within the meaning of the Habitats Directive? If so
    3. Was there an appropriate assessment of the effect of the introduction of the W class ferries on the protected sites?

So far as DEFRA is concerned, the issue that the claimants seek permission to argue is whether the Habitats Directive was effectively transposed into domestic law as at 25 February 2009.

The Legal Framework

The Habitats Directive

12. The Habitats Directive was adopted in 1992. Its aim is to protect the most seriously threatened habitats and species across Europe, and it complements the EC Directive on Wild Birds (79/409/EEC) (the 'Birds Directive') adopted in 1979. The Birds Directive and the Habitats Directive established the European framework for the conservation of wild birds, and of natural habitats and flora and fauna respectively, and together provide the regulatory framework for what is known as the 'Natura 2000' network of protected sites.

13. Sites designated under the Habitats Directive are labelled Special Areas of Conservation (SAC's). Article 6 both imposes general obligations with regard to the conservation of, and avoidance of deterioration to SACs, and provides a form of development regime, stipulating when and on what basis 'plans and projects' with negative effects on the site may or may not be permitted by a 'competent authority'. It is central to the issues to which this application gives rise, and is in the following terms:

> "*6.1 For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated with other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.*
>
> *6.2 Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats as well as disturbances 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.*
>
> *6.3 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.

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

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

14. Article 6 was the subject of the decision of the European Court in Case C- 127/02, *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee)* [2004] ECR-7405. The following paragraphs in which the court addressed the interpretation and application of Article 6(3), are of particular relevance to the issues to which this application gives rise.

"*23. The Habitats Directive does not define the terms 'plan' and 'project'.*

24. By contrast Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (PJ 1985 L 175, p40), the sixth recital in the preamble to which states that development consents for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines 'project' as follows in Article 1 (2)

'- the execution of construction works or other installations or schemes

- other interventions in the natural surroundings and landscape including those involving extraction of mineral resources'

25. An activity such as mechanical cockle fishing is within the concept of 'project' as defined in the second indent of Article 1 (2) of Directive 85/337.

26. Such a definition of 'project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of the impact on the environment.

…

39. According to the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but which could 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 Article 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/E EC)' - 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
...
43. It follows that the first sentence of Article 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 Article 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 Article 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 Article 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.
53. Nevertheless according to the wording of that provision (Article 6(3)), 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.
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 effect 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 criteria laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle ... and makes it possible effectively to prevent adverse effect on the integrity of protected sites as the result of the plans or project being considered. A less stringent authorisation criteria than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision."

15. The following propositions can be drawn from the directive as clarified by *Waddenzee;*

1. The Habitats Directive must be interpreted and applied by reference to the precautionary principle, which reflects the high level of protection pursued by Community policy on the environment – see Waddenzee paras 44 and 58;
2. A competent national authority may only authorise a plan or project after having determined that it will not adversely affect the integrity of the protected site in question – Article 6(3) and Waddenzee paras 56 and 57;
3. Unless the risk of significant adverse effects on the site in question can be excluded by the competent authority on the basis of objective information, the plan or project must be the subject of an appropriate assessment of its implications for the site;
4. If, following an appropriate assessment, doubt remains as to whether or not there will be significant adverse effects on the integrity of the site, the competent authority must refuse authorisation of the plan or project, unless Article 6(4) applies.
5. If in spite of a negative assessment of the implications for the site, and in the absence of alternative solutions, a plan or project must be carried out for imperative reasons overriding public interest (including those of a social or economic nature), the competent national authorities must

> "take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected",

and notify the Commission of such measures. (Article 6(4)).

The Habitats Regulations

16. The Habitats Regulations are the principal regulations by which the Habitats Directive is implemented in Great Britain. Regulation 3 imposes the following general obligations:

> "*3(2) The Secretary of State and nature conservation bodies shall exercise their functions under the enactments relating to nature conservation so as to secure compliance with the Habitats Directive…*

3(3) In relation to marine areas any competent marine authority having functions relevant to marine conservation shall exercise those functions so as to secure compliance with the requirements of the Habitats Directive…

3(4) Without prejudice to the preceding provisions, every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

Regulation 48 '*Assessment of implications for European site'* provides as follows:-

"*1. A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which;*

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

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

shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives

2. A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.

3. The competent authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority may specify.

4. They shall also, if they consider it appropriate, take the opinion of the general public; and if they do so, they shall take such steps for that purpose as they consider appropriate

5. In the light of the conclusions of the assessment, and subject to Regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site

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

Competent Authorities

17. The term "competent authority" is not defined by the Directive; but the Commission has interpreted it to encompass not only authorities within the central administration, but also regional, provincial or municipal authorities (see *Managing Natura 2000 Sites, The Provisions of the Habitats Directive 92/43/EEC (2000) at page 38).* Regulation 6 of the Habitats Regulations does provide a definition. Competent authorities are said to include:

> *"any Minister, government department, public or statutory undertaker, public body of any description or person holding public office. The expression also includes any person exercising any function of a competent authority in the United Kingdom."*

18. As is clear from regulation 48 a competent authority in this context means an authority that has the power to give any consent, permission or other authorisation for a plan or project within the meaning of the Habitats Directive, and includes an authority that itself undertakes such a plan or project. It is common ground that there may be more than one competent authority depending on the nature and/location of the activity in question.

19. The discharge of its duties under the Habitats Directive and the Habitats Regulations by a competent authority is a two stage process. First the authority must consider whether there is a risk of significant adverse effects on a protected site. It is only if satisfied that there is no such risk that it need take no further steps. But if there is such a risk, then the requirement for a appropriate assessment is triggered; and the authority must not give consent to or authorisation of the plan or project unless satisfied that the risk of significant adverse effects can be excluded (subject only to the provisions of Article 6(4) in circumstances in which the plan or project must be carried out for imperative reasons overriding the public interest). For the purposes of the appropriate assessment the competent authority shall consult the appropriate nature conservation body, in this case Natural England, and shall have regard to any representations made by it, see regulation 48(4).

Special Nature Conservation Orders

20. Regulations 22 to 27 (and Schedule 1) set out a regulatory regime under which the Secretary of State has power, inter alia, to make special conservation orders. As originally worded, regulation 22 provided (emphasis added):

> "*22 (1) The Secretary of State may, after consultation with the appropriate nature conservation body, make* ***in respect of any land within a European site*** *an order (a "special nature conservation order") specifying operations which appear to him to be likely to destroy or damage the flora, fauna, or geological or physiographical features by reason of which the land is a European site.*
>
> *(2) A special nature conservation order may be amended or revoked by a further order."*

The Conservation (Natural Habitats) (Amendment) (No 2) Regulations amended regulation 22(1) with effect from 1 October 2009 so as to extend its application to a wider range of operations. In its amended form it provides (emphasis added):

> "*The Secretary of State may, after consultation with the appropriate nature conservation body, make in respect of any land within a European site an order (a "special nature conservation order") specifying operations* ***(whether on land specified in that order or elsewhere and whether or not within the European site) which appear to the Secretary of State to be of a kind which, if carried out in certain circumstances or in a particular manner, would be*** *likely to destroy or damage the flora, fauna, or geological or physiographical features by reason of which the land is a European site."*

Regulation 23 was correspondingly amended to widen the provision for service of notices restricting the carrying out of operations, so as to include operations not carried out on land, and operations carried out outside a European site.

Planning control

21. Under the Town and Country Planning Act 1990 operational development on or over land (including land covered by water) in a local planning authority's area must be authorised either by a grant of planning permission or by permitted development rights. Part 17 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 confers certain permitted development rights on statutory undertakers; and Class B of Part 17 permits

> "*development on operational land by statutory undertakers…in respect of dock, pier, harbour…undertakings, required…(b) in connection with the embarking, disembarking. Loading, discharging or transport of passengers*".

22. The effect of regulation 48 of the Habitats Regulations in the planning context is that where planning permission is sought for a development that constitutes a plan or project which is likely to have a significant effect on a European site, the local planning authority cannot grant permission unless and until it has made an appropriate assessment of the implications of the development for the site and has ascertained that the development will not adversely affect the integrity of the site.

23. Similarly by regulation 60(1) where a proposed development under permitted development rights is likely to have such an effect, the right is subject to a condition that the development must not be begun until the developer has received written notification of the local planning authority's approval under regulation 62. By regulation 62(4) – (6) a local planning authority may not give approval until it has made an appropriate assessment and ascertained that the development will not affect the integrity of the site, and must have regard to the views of an appropriate nature conservation body.

24. Finally section 48A of the Harbours Act 1964 provides that -

> *"It shall be the duty of a harbour authority in formulating or considering any proposals relating to its functions under any enactment to have regard to –*
>
> *(a) the conservation of the natural beauty of the countryside and of flora, fauna and geological or physiographical features of special interest:*
>
> *and to take into account any effect which the proposals may have on the natural beauty of the countryside, flora, fauna or any such feature or facility."*

25. Although not relevant to the issues to which this application gives rise, it is to be noted that subsequent legislation has altered the statutory framework summarised above. Chapter 1 of Part 5 of the Marine and Coastal Access Act (sections 116 to 145), which received the Royal Assent on 12 November 2009, specifically provides for the designation of sites as falling within Marine Conservation Zones. Section 126 provides for an assessment process in respect of any proposed acts capable of affecting such zones, and by section 131 byelaws, including emergency byelaws, may be passed for their protection. These provisions will apply to Natura 2000 sites, see schedule 11, paragraph 4.

The factual background

26. The summary that follows is intended to include a factual account of events of particular relevance to the issues to which this application gives rise. It is not intended

to be a comprehensive account of events from the point at which Wightlink first indicated its intention to replace the C class ferries.

27. There has been a regular ferry service between Lymington and Yarmouth since about 1830. The route is the shortest crossing between the mainland and the Isle of Wight. The ferries depart from Lymington pier on the east bank of the river, travel down the river to its mouth, a distance of about 1.4 nautical miles, and across the western Solent to Yarmouth, a total distance of 3.4 nautical miles.

28. The service runs 24 hours a day, 365 days a year; and at peak times of the year is operated by three vessels offering a departure every 30 minutes. At off-peak times, the service is operated by two vessels offering a departure every 45 minutes. In 2008 there were a total of 21,942 trips. In a full year approximately 1,400,000 passengers, 375,000 cars and 46,000 coaches and commercial vehicles use the route.

29. For many years the ferries were owned by what became the British Railways Board. Ownership passed to Sealink UK Ltd, whose ferry service was operated by its subsidiary, Sealink British Ferries; and in 1984 when Sealink was de-nationalised, Sealink British Ferries was bought by a Bermudan-based company, Sea Containers Ltd. In 1990 the Stena line bought Sealink British Ferries; but the Isle of Wight ferries remained in the ownership of Sea Containers, and the company operating them was re-named Wightlink. Lymington Pier, and the statutory functions relating to it, were duly transferred to Wightlink by the Sealink (Transfer of Lymington Pier) Harbour Revision Order 1991. The explanatory note to the Order states that –

> "*This Order transfers the harbour undertaking at Lymington Pier from Sealink Harbours Limited to Wightlink Limited and provides that, on and after the day of transfer, the latter shall exercise jurisdiction as harbour authority and its piermaster may exercise his powers, within a small water area adjacent to the pier but subject to the overriding jurisdiction of the Lymington Harbour Commissioners and their harbour master.*"

30. In 1995 Wightlink was the subject of a management 'buy-out', and in 2005 was acquired by the Macquarie European Infrastructure Fund.

31. The river, and in consequence the ferries, pass through internationally designated conservation areas. The salt marshes and mudflats at the Lymington estuary are both part of the Solent and Southampton Water 'Special Protected Area' for birds, designated under the Birds Directive, and part of the Solent Maritime Special Area of Conservation designated under the Habitats Directive. The salt marshes and mudflats have also been designated as part of a wetland of international importance under the International Convention on Wetlands (the Ramsar Convention); and the river runs through three Sites of Special Scientific Interest (SSSIs), the Hurst Castle to Lymington River Estuary SSSI, the New Forest SSSI and the Lymington River SSSI.

32. Between 1973 and 25 February 2009 the ferry service between Lymington and Yarmouth was operated using three C class vessels which had entered service between 1973 and 1974. Planning for the introduction of a new class of ferry began soon after the sale of Wightlink to Macquarie in 2005. Wightlink contends that it had no reasonable alternative but to introduce the W class, as the C class vessels were at the end of their operative life. It is submitted on behalf of the claimants that that is difficult to reconcile with the report to Wightlink from Hart Fenton made in 2005 to the effect that the C class was fit for service until 2023. But be that as it may, a need to replace the C class was not in itself a reason to replace it with vessels the size of the W class.

33. In 2006 the specification of the proposed W class vessels was put out to tender. By December 2006 Brodogradliste Kraljevica in Croatia had been selected as the preferred bidder; and on 20 March 2007, contracts were entered into for the construction of three W class vessels. Wightlink then advertised the C class vessels for sale.

34. The W class ferries are substantially larger and more powerful than those of the C class. The very considerable difference in size was clearly illustrated in the photograph and diagrams at pages 1 and 2 of the Core Bundle. According to a report to Wightlink from ABPmer, its marine environmental consultants, the new ferries displace 1489 metric tonnes, whereas the C class displaced 868 metric tonnes. The W class have a deadweight capability of 330 tonnes as against 156 tonnes for the C class. They are 62.4 metres in length as against 55.5 metres for the C class, and have a beam of 16 metres as against 15.2 for the C class; although the difference in beam at the water level is 3 metres. Unlike ordinary vessels, neither the W class nor the C class ferries have conventional propellers and a rudder, but are controlled by Voith Schneider systems. In the case of the W class, propulsion and steering derives from, and is entirely controlled by two thrusters, fitted on the centre line, 20 cms clear of the keel-line and 1.7m below the waterline. In the earlier version of the Voith Schneider system fitted to the C class ferries, propulsion and steering were controlled by offset thrusters, on each quarter fore and aft, about 1m above the keel-line and 1.3m below the waterline. The combined horsepower of the C class thrusters was 800 hp; the combined horsepower of those fitted to the W class is 1360 hp (67% greater), see Table 1 ABPmer's report to Wightlink of May 2008.

35. In about October 2006 it had become public knowledge that Wightlink was planning to replace the C class vessels, and in January 2007 it gave presentations of its plans to the Lymington Harbour Commission and to the Royal Lymington Yacht Club (RLYC). There was a further presentation to the RLYC on 17 September 2007; and on 10 November there was a public meeting hosted by the Lymington Society and attended by Wightlink. On 14 November 2007, and again on 3 and 13 March 2008 questions as to the introduction of the new ferries were raised in the House of Commons by the local MP, Desmond Swayne.

36. Meanwhile in June 2007 Wightlink intimated to the New Forest District Council that it intended to carry out works to its Lymington Pier terminal (the 'shore works') –

> *"… to facilitate berthing of the new vessels which Wightlink have ordered for the Lymington/Yarmouth route.*

> *The works consist of the replacement of fendering and modifications to the linkspan bridge within the main ferry berth and the installation of new fender piles to provide additional standby berthing for the new vessels.*
>
> *The works constitute essential modifications to existing structures to enable the ferry service to be maintained and such is believed to be covered by Wightlink's permitted development rights."*

37. The works required consent under the Food and Environmental Protection Act 1985 (FEPA) and the Coast Protection Act 1949 (CPA). Wightlink therefore applied to DEFRA's Marine Consents and Environment Unit in July 2007, for a licence under the FEPA and consent under the CPA. Prior to submitting the applications, Wightlink consulted Natural England, which on 21 May 2007 advised that the proposed introduction of the W class ferries might be a 'plan' or 'project' within the meaning of the Habitats Directive, and might therefore trigger the requirement for an appropriate assessment under the Habitats Regulations.

38. The Marine Consents and Environment Unit also referred Wightlink's applications to Natural England. By letter dated 24 September 2007 Natural England informed the Unit that it objected to the proposed shore-side works principally on the basis of the likely effects of the W class ferries, and advised that an appropriate assessment of the effects of the W class ferries on the mudflats and salt marshes in the Lymington estuary should be carried out before the FEPA and CPA applications were determined.

39. The New Forest District Council was satisfied that the proposed shore-side works could be carried out pursuant to Wightlink's permitted development rights. But in the light of Natural England's advice that the works were "*likely to have a significant effect on a European protected site",* the council formed the view that its approval under regulation 62 of the Habitats Regulations was required. It set out its position to Wightlink's contractors, Mayhew Cullum Ltd, in a letter dated 30 November 2007 explaining in essence that the development of the Lymington terminal was a plan or project within the meaning of the Habitats Regulations, and that, applying the relevant European and domestic guidance, the ferry operations themselves, and therefore their effect on the relevant protected habitats, were to be regarded as consequences of the plan or project for the purposes of the regulations. Wightlink's proposals for the shore-side works therefore proceeded as an application for regulation 62 approval.

40. On 29 January 2008 Wightlink commissioned an expert report from ABPmer on the environmental impact of the proposed introduction of the new ferries. The first W class ferry arrived in the UK on 1 September 2008, and sea trials in the river were undertaken in the autumn.

41. On 21 September 2008 solicitors acting for the claimants wrote to the Parliamentary Under-Secretary of State within DEFRA expressing a high level of concern as to the manner in which Wightlink's proposals for the introduction of the new ferries was being dealt with, inviting intervention under regulation 4(8) of the 1999 Regulations by

which Directive 85/337/EEC was implemented, and seeking advice as to "*where exactly the regulatory process has got to*". The minister replied on 27 November 2008 saying that the Marine and Fisheries Agency was responsible for undertaking an appropriate assessment in relation to the application for a licence under the FEPA and consent under the CPA, that the New Forest District Council was obliged to undertake an assessment in relation to the shoreside works, and that

> "*two Competent Authorities are currently in the process of producing a joint assessment which will primarily focus on the impact of the larger ferries on the nearby protected European sites.*"

The letter went on to assert that -

> "*We are not aware that the introduction of the larger ferries requires the approval of the MFA (Marine and Fisheries Agency), the local planning authority or, as we understand, any other competent authority. In our view therefore, the relevant provisions of the Habitats Directive and regulations are not engaged and an appropriate assessment is not required. Consequently we can see no grounds for taking action, for example by means of an injunction, to prevent the ferries from operating in advance of an assessment being completed. Furthermore, our view is that, for the purposes of operating a ferry service, Wightlink cannot be regarded as a Statutory Undertaker and thus responsible for carrying out an appropriate assessment before the new ferries are introduced.*
>
> *Nevertheless, as I indicated in my recent statement in the House, Defra officials will explore with DfT and other regulators, including Natural England and the Harbour Commissioners, the implications of Wightlink's proposed actions. We will also consider very carefully any regulatory powers that exist and that might need to be exercised, in order to fulfil the UK's obligations under the Habitats Directive.*"

42. The claimant's solicitors replied seeking an explanation of the apparent contradiction that the letter of 27 November contained as to whether the Habitats Directive was engaged. The minister replied on 10 December referring again to the two competent authorities that he had identified in the letter of 27 November, in addition pointing to the Lymington Harbour Commissioners as having obligations under regulation 3(4) of the Habitats Regulations, and concluding –

> *"I fully accept that ultimately it is for my Department to ensure compliance with the Habitats Directive and this is a responsibility we take very seriously. However, initially, it is for the MFA, New Forest District Council and the Harbour Commissioners to examine, and if necessary take action on, the advice from Natural England. Until then it would be*

inappropriate to speculate on what other measures might need to be taken to secure compliance with the Directive."

43. At this stage Wightlink's application for approval under regulation 62 was still before the New Forest District Council; but the Marine and Fisheries Agency had decided that it did not require an environmental statement under the Marine Works Regulations. It is also to be noted that neither in his letter of 27 November nor in that of 10 December did the minister suggest that Wightlink was the relevant competent authority.

44. But in the meantime on 17 November 2008 Wightlink informed the Lymington Harbour Commission that it intended to introduce the W class ferries into service in December, and that it no longer considered it to be necessary to modify the pier/loading arrangements before introducing the new ferries. It did not therefore need to await a decision by the New Forest District Council on its regulation 62 application, a decision that was subject to an appropriate assessment by the council. On 19 November the question of the introduction of the new ferries was again raised in Parliament by Desmond Swayne MP for New Forest West, who pointed out to the minister that in the light of the decision by Wightlink to introduce the new ferries without carrying out the proposed shore-side works, the requirement for an appropriate assessment

> "*seems to have disappeared" (Hansard 19 November 2008 column 336) and inviting him to "initiate a full environmental impact assessment".*

45. In early December Wightlink and the Lymington Harbour Commission provisionally agreed an Interim Safe Operating Profile (ISOP) to regulate the operation of the new ferries so as to ensure safe navigation, and on 11 December Wightlink wrote to Natural England asking for its comments on the ISOP, and in particular seeking its view as to the effect that operating under the ISOP might have on the European conservation sites in the Lymington estuary. On 22 December Natural England issued its preliminary advice to Wightlink stating that

> "*…it cannot be ascertained that the introduction of the W class ferries will not have an adverse effect on the Natura 2000 interest".*

46. On 16 January the Lymington Harbour Commissioners wrote to DEFRA having seen a copy of the minister's letter to the claimants' solicitors of 10 December seeking clarification of DEFRA's understanding of the regulatory powers available to them. On the same day they also wrote to Wightlink's solicitors seeking an undertaking that Wightlink would not introduce the new ferries until such time as Natural England had confirmed that their introduction would not have an adverse effect on the Natura 2000 interest. Wightlink' solicitors replied on 28 January stating that -

> "*Wightlink confirms that it will not start to operate the W-class ferries until it is satisfied that it has had due regard to the*

matters set out in paragraphs 2 and 3 above (namely that it and the Commissioners had identical duties with regard to the environment under section 48A of the Harbours Act 1964, and that they were both competent authorities for the purposes of the Habitats Regulations) and until it has provided evidence of its consideration of impact and mitigation to LHC".

47. In a report dated 27 January 2009 Natural England received advice from its expert, HR Wallingford ('HRW 09') in which it was noted (page iv) that it was apparently

> "*agreed by all parties that the W Class ferry will produce greater under-keel turbulence, backflow, return currents and thrust jet speeds".*

This (per paragraph 4.6) "*will result in an enhanced loss of mudflat at MLW*" particularly at certain points in the river. As they erode (per paragraph 7), the "*role of wind waves will become increasingly more important*" and accelerate the process of erosion.

48. On 31 January 2009 DEFRA notified Desmond Swayne MP that Natural England was not satisfied with mitigation proposals that had been put forward by Wightlink, and on 1 February wrote to the Lymington Harbour Commissioners suggesting the new bye-laws or a Harbour Revision Order might furnish the means of imposing the necessary environmental controls.

49. On 12 February 2009 Natural England gave formal advice to Wightlink, Lymington Harbour Commissioners, the New Forest District Council and the Marine and Fisheries Agency on the "*effects of Wightlink's proposed W class ferry on the Natura 2000 sites in the Lymington river"*, based on the report from HR Wallingford. The summary that prefaced the advice contained the following paragraphs (emphasis as in the original):

> "*Having considered all the evidence Natural England continues to advise that current evidence suggests that the 'C' class ferry has been a factor in the ongoing deterioration in the extent of mud flats and saltmarshes at Lymington. This deterioration is over and above background changes and the influences of ferries in upstream sections appears to dominate over natural influences. The introduction of the 'W class' ferries can be expected to prolong ferry-induced impacts on inter-tidal habitats and consequently further losses are likely to be attributable to ferry operations, even when mitigated by recent reductions in speed.*
>
> *The ferry-related effects from the C class vessels since 1998 and the introduction of the W class vessels are estimated to be of the order of 0.4 ha loss of habitat per decade from the inter-tidal at Chart Datum and a detrimental habitat change*

affecting 1.3 ha per decade. These effects are predicted to continue, albeit at reducing rates, for tens of years.

During the period of ongoing effects of the ferry operation along the navigation channel, the wider designated site will continue to suffer rapid coastal squeeze habitat losses from vegetation die-back and outer wind-wave erosion of around 5-6 ha a year. These effects will substantially change the nature of the estuary over the next 40-100 years.

While habitat losses to the wider designated site are dominated by coastal squeeze rather than the ferries, it has nevertheless been shown that the previous effect of the C class ferry together with predicted effects of the W class ferry would have a further anthropogenic detrimental effect. Consequently it must be concluded that the conservation objectives for the Natura 2000 sites cannot be secured.

Natural England therefore advises that it cannot be ascertained that the introduction of the' W class' ferries will not have an adverse effect on the Natura 2000 interest."

50. The advice noted that although questioning the findings of the report from H R Wallingford, Wightlink was then in 'without prejudice' discussion with Natural England and the Lymington Harbour Commissioners with regard to mitigation of the adverse effects that H R Wallingford had identified.

51. In the light of that advice, the Lymington River Association, Lymington Harbour Commissioners, the Lymington Society and other interested groups urged Wightlink not to introduce the ferries precipitately .

52. On 20 February 2009 Wightlink's solicitors wrote to the claimant's solicitors saying that Wightlink was working closely with Natural England and the Harbour Commissioner, and their respective environmental consultants, regarding the effects of the W-class ferries, and in the final paragraph of the letter that:

> "*Once Wightlink has received ABPmer's final report in the light of Natural England's revised advice (version 3 12 February), it will decide whether the W-class ferries would adversely affect the integrity of the European sites concerned, and therefore, whether any mitigation in required. As we have said before, Wightlink will not introduce the W-class ferries unless and until it is satisfied that it would be lawful to do so.*"

53. On 23 February 2009 counsel and solicitors advised Wightlink that the introduction of the W class ferries did not amount to a plan or project within the terms of the Habitats

Regulations; but that given Wightlink's general obligations under S48 A of the Harbours Act 1964 and regulation 3(4) of the Habitats Regulations, it was advisable for the company to carry out an environmental assessment of the effect of introducing the new ferries. Wightlink were also advised that;

> "*That assessment should be equivalent in form and scope to the appropriate assessment process that would otherwise have been required had the introduction of the ferries constituted a plan or project. As part of that process, Wightlink should consult Natural England and have regard to any representations it makes. Having done so, Wightlink should only decide to introduce new ferries if it has ascertained that the ferries will not adversely affect the integrity of the Natura 2000 site*."

54. At a meeting held on the same day, 23 February the Wightlink board resolved to introduce the ferries into service two days later on 25th February. It had before it a report from ABPmer "*Replacement of Lymington to Yarmouth Ferries: Updated Information for Appropriate Assessment"* February 2009. The minutes of the board meeting record inter alia:

> "*4 Business of the Meeting*
>
> *4.1 The Chairman reported that, further to the meeting held by the Board on 23 January 2009, the meeting had been convened to consider whether to introduce the W - class ferries into service on an interim basis pending the determination of the applications relating to the proposed shore works at Lymington Pier…*
>
> …
>
> *5 Environmental Obligations*
>
> *5.1 The Chairman noted that the Company is a Harbour authority in respect of Lymington Pier and therefore has environmental duties under section 48 A of the Harbours Act 1964…*
>
> *5.2 The Chairman noted that, whilst the ferry service is not operated pursuant to the Company's statutory functions, the proposals to operate the W - class ferries on an interim basis could be regarded as being related to its functions for the purposes of section 48A…*
>
> *5.3 The Chairman noted that the Company is also a 'competent authority' for the purposes of the Conservation (Natural Habitats etc) Regulations 1994. Regulation 3 (4) of which requires that every competent authority in the exercise of*

any of their functions shall have regard to the requirements Habitats Directives have as they may be affected by the exercise of those functions…

6. Environmental Assessment

6.1 After due consideration of the legal advice note, ***IT WAS RESOLVED*** *that the introduction of the W - class ferries did not constitute a plan or project for the purposes of the Regulations and, therefore, did not trigger the requirement for an appropriate assessment under regulation 48.*

6.2 Notwithstanding this decision, ***IT WAS RESOLVED*** *that the Company should have regard (to) the environmental assessment that had been carried out by ABPmer in an equivalent way to an appropriate assessment under regulation 48, and should agree to introduce the W - class ferries only if it is satisfied in the light of that assessment that they would have no adverse effect on the integrity of the designated sites.*

6.3 IT WAS FURTHER RESOLVED *that by carrying out a process that was equivalent to an appropriate assessment under regulation 48, the Company would have satisfied its environmental obligations under section 48 A of the Harbours Act 1964 and regulation 3(4) of the Conservation (Natural Habitats etc) Regulations 1994.*

…

7 ABPmer Report

7.2 After due consideration of ABPmer's report, and having had regard to Natural England's advice, the Board assessed the impact of the new ferries. Having done so, ***IT WAS RESOLVED*** *that the interim operation of the W class ferries would not have an adverse affect on the integrity of the inter--tidal mud and salt marsh which were either designated features, or supporting features for the SPA and Ramsar birds.*

IT WAS FURTHER RESOLVED *that there was no reason to believe that the interim operation of the W class ferries would give rise to any disturbance or damage that was significant in the context of the Habitats Directive to any natural habitats or wild fauna or flora.*

9 Introduction of W Class Ferries

9.1 After due and careful consideration, ***IT WAS RESOLVED*** *that the W class ferries should be introduced into service with effect from Wednesday 25 February 2009, pending the carrying out of the shore works at Lymington Pier."*

55. Wightlink then issued a press release in which it made public the legal advice that it had received, and saying inter alia:

> "*Consultation and various detailed studies on the operation and impact of the new ferries are either not complete or nearing completion including independent trials and environmental assessments. Following the extensive research and receipt of expert scientific advice, and in compliance with its statutory obligations, Wightlink is satisfied that the new ferries are safe to operate and have no discernible impact on the environment or the surrounding habitats in the Lymington estuary.*
>
> *Wightlink acknowledges that concerns have been raised regarding the new ferries and their potential effect on the protected mud and salt marsh habitats at Lymington. Environmental consultants ABPmer have undertaken extensive studies of the effects of the ferries and have engaged in detailed discussions on environmental issues with Natural England, their consultants – HR Wallingford, Lymington Harbour Commissioners and their consultants, Black & Veatch.*
>
> *All parties have recognised that an assessment of the past and likely future environmental effects of the ferries, both old and new, is unusually difficult. It is particular hard to isolate the effects of the ferries from the natural forces that have been and continue to act upon the mud and salt marshes. Despite this difficulty, all parties have gone to great lengths to try and reach an agreement as to the most reliable data regarding the historical rates and causes of erosion of the protected sites.*
>
> *Natural England has advised Wightlink that it cannot be ascertained that the new ferries will not have an adverse effect on the protected sites. ABPmer disagrees with HR Wallingford's approach to the data and the conclusions that Natural England has drawn from it, suggesting that insufficient consideration has been given by HR Wallingford to the prospective causes of erosion, other than the ferries. On the basis of clear advice from ABPmer, Wightlink is confident that the new ferries will not have an adverse effect on the integrity of the mud and salt marshes in the Lymington estuary.*"

56. On 24 February, the Chairman of the Lymington Harbour Commissioners issued an "*Update to Stakeholders*" which contained the following passages:

> "*Wightlink have defied the will of all the regulators in deciding to introduce their new ferries before the necessary safety trials are complete and the environmental concerns have been resolved.*

> *They have taken this action despite repeated requests from the LHC and their previous undertaking not to do so. They claim that they are justified because of the needs of the Isle of Wight, but the real problem that has led to the situation is Wightlink's determination to design and build ferries in advance of meaningful consultations with all the regulators. As a result, all subsequent consultations have taken place against the commercial necessity on the part of Wightlink to introduce ferries that had already been paid for.*
>
> *We have once again requested Wightlink to desist from this action, and are contacting all the relevant Government Departments for support in preventing it…"*

57. It was also on 24 February that the claimants sought an injunction to restrain Wightlink from introducing the W class ferries on the following day, see paragraph 2 above.

58. On 25 February 2009 Wightlink discontinued the use of the C class ferries and introduced the W class, with which they have since operated the Lymington to Yarmouth service. On 31 March 2009 the three C class vessels were sold to an organisation in Denmark for breaking.

59. On 8 April 2009 the New Forest District Council's Planning Development Control Committee met to determine Wightlink's application under regulation 62 for approval of the use of its permitted development rights to carry out works at Lymington Pier. The Committee was informed by an Officer's Report which recommended that the Council adopt an appropriate assessment based on Natural England's advice, and refuse the application on the basis that it cannot be ascertained that the proposed works, and in particular the operation of the new ferries, will not adversely affect the integrity of the European site. Wightlink had written to the Committee on 6 April seeking to persuade it to defer determination of the application until the resolution of these proceedings, arguing that it "*could not properly determine Wightlink's application on the basis of an 'appropriate assessment' which effectively pre-empts the court's decision, and is based on disputed evidence and advice"*. The Committee rejected that submission, undertook an appropriate assessment concluding in accordance with the advice of Natural England, that it could not be ascertained that the introduction of the W class ferries including the proposed physical works would not have an adverse affect on the Natura 2000 interest, and therefore refused the application for approval under regulation 62.

60. On 8 April DEFRA wrote to Natural England requesting confirmation as to whether environmental damage had already occurred, or whether there was any imminent threat of environmental damage by reason of the operation of the ferries, as it wished to consider the exercise of powers under the Environmental Damage (Prevention and Remediation) Regulations 2009. By its response dated 15 April, Natural England confirmed that there was no likely threat to the integrity of the site or measurable environmental damage over the coming months.

61. On 20 April 2009 DEFRA filed its Grounds of Resistance to the claim, in which it acknowledged, contrary to the position that it had taken in November 2008, that the

introduction of the ferries was a 'project' under the Habitats regime, and furthermore asserted that Wightlink was the relevant competent authority.

62. In June 2009 DEFRA initiated a consultation on changes to the Habitats Regulations. The consultation document contained the following passage

> "*In our view this (Regulation 23(1) in its original form) means an order cannot be use to restrict or prohibit operations being carried out on water that are likely to damage a European site. Nor could the power be used to prohibit operations undertaken outside the European site, but which have a damaging effect on it. However, the Habitats Directive, which these regulations are designed to implement, does not restrict the obligation to prevent damage to sites to operations which take place on land, or within the sites themselves. We are therefore proposing minor changes to the Habitats Regulations to address these issues.*"

63. The regulations were duly amended with effect from 1 October 2009, see paragraph 20 above.

64. Discussions have continued between Wightlink and Natural England. On 12 November 2009 Natural England wrote to the claimants' solicitors stating inter alia:

> "*Natural England and Wightlink are working together to agree mitigation measures which can be taken by Wightlink to avoid the impact which Natural England considers is likely to be caused to the protected sites by the operation of the W class ferries. Such agreement is not yet in place.*
>
> *It is important to note that in so far as any agreement is reached, it will not be an agreement within the context of an Appropriate Assessment under the Habitats Regulations. Wightlink, as the competent authority, considers that there is no likely significant effect of the operation of the W class ferries and accordingly has not conducted an Appropriate Assessment. However, any agreement which is entered into will (subject to such consents as required being obtained) secure the execution of mitigation works which Natural England consider will avoid the impact which it considers are likely to be caused to the protected sites by the operation of the W class ferries. Furthermore, Natural England consider that the works which are likely to be the subject of any agreement could, if an Appropriate Assessment was ever required in the future, properly be categorised as 'mitigation' measures within the scope of Article 6.3 (as opposed to 'compensation' measures within the scope of Article 6.4).*

65. No such agreement has yet been arrived at, although I was informed in the course of the hearing that Wightlink and Natural England are close to agreement; and a Proposed Protocol for Mitigating the Effects of the W-class Ferries dated December 2009 is included in the documents put before the court. It was prepared by ABPmer, and sets out detailed mitigating and monitoring measures proposed for the operation of the ferry service. I also note that the claimants take issue as to whether the proposed measures are properly to be characterised as 'mitigation' within the scope of Article 6.3, or ought to be characterised as 'compensation' measures under Article 6.4. But that is not an issue that I have to resolve.

66. On 18 November 2009 DEFRA wrote to Natural England asking for formal advice on two issues namely –

> *"(a) whether any measurable harm or damage that would constitute an adverse effect on the integrity of the protected sites did occur in the period between 25 February and 31 October 2009; and*
>
> *(b) whether any measurable harm or damage that would constitute an adverse effect on the integrity of the protected sites is likely to arise in the period between 25 February 2009 and the date when, in your current estimation, works to mitigate any adverse effect are likely to commence (which we understand will be in the spring of 2011)."*

67. Natural England replied on 25 November 2009 advising in relation to the first question that "*no such harm or damage has taken place"*, and in relation to the second that "*any impacts…to the extent that they may occur, will be insignificant and not likely to result in any such harm or damage",* adding that

> *"…we anticipate that Wightlink's delivery of appropriate mitigation measures from the spring of 2011 onwards will avoid any adverse effect on the integrity of the protected sites that would otherwise be likely to occur due to cumulative ferry impacts over the longer term."*

Issue 1

68. Was the proposal to introduce the W class ferries a plan or project within the meaning of the Habitats Directive?

69. There is now a large measure of agreement between the parties. It is submitted on behalf of the claimants that the introduction of the W class was plainly a 'plan' or 'project' within the meaning of the directive. The Lymington Harbour Commissioners and Natural England take the same view; and DEFRA now accepts that on the specific facts a 'plan' or 'project' is involved. But Wightlink continue to maintain that the introduction of the W class ferries did not amount to a 'plan' or 'project' within the meaning of the directive.

70. Neither 'plan' nor 'project' is defined in the Habitats Directive; but the interpretation and application of the terms were considered in the *Waddenzee* case. It concerned mechanical fishing for cockles by means of trawls or dredges in the form of metal cages dragged over the seabed by a vessel. The leading edge of the cage consisted of a metal plate, 1m in width which served to scrape the upper 4-5 cms of the seabed into the cage. The metal plate was fitted with a nozzle from which a powerful jet of water emerged, and which pulverised the seabed so that a mixture of water, sand, cockles and other organisms entered the cage, the sieved contents of the cage then being sucked on board hydraulically. The court held that mechanical cockle fishing was an activity "*within the concept of 'project' as defined in the second indent of Article 1(2) of Directive 85/337",* namely an intervention in the natural surroundings and landscape, and that such a definition of project was relevant to defining the concept of plan or project as provide for in the Habitats Directive (see paragraph 26 of the judgment of the court).

71. Mr Richard Drabble QC, who appeared for Wightlink, argued that *Waddenzee* was decided on its own facts, and that the decision offers no general conclusion as to how the term 'project' is to be interpreted. I accept that the question is inevitably fact sensitive, but nevertheless consider that *Waddenzee* is of assistance in three respects. First it provides confirmation as to the breadth of approach to be adopted in interpreting Article 6(3), secondly it provides guidance as to the test to be applied in determining whether a proposal amounts to a 'plan' or 'project within the meaning of the directive; and thirdly the decision is based on an analogous factual situation.

72. As to the first, recitals in the preamble to an EC measure may be used to confirm the interpretation to be given to an operative provision, see *Case 107/80 Adorno v Commission* [1981] ECR 1469 at 1484-1485; and the 10th recital to the directive make it clear that the terms 'plan or project' should be given a wide interpretation in that it states that:

> "*… an appropriate assessment must be made of any plan or program likely to have a significant effect on the conservation objectives of a site which has been designated*."

That is also reflected in the guidance given by the Commission in *Managing Natura 2000 Sites* at paragraph 4.3:

> "*In as much as Directive 92/43/EEC does not define 'plan' or 'project', due consideration must be given to general principles of interpretation, in particular the principle that an individual provision of Community law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs".*

73. The guidance continues with the advice (at paragraphs 4.3.1, 4.3.2) that both the words 'project' and 'plan' should be given a "*very broad*" definition and meaning.

74. In *Waddenzee* the court made it clear that Article 6(3) should be interpreted in the light of its broad objective, namely a high level of protection of the environment, and in particular that the authorisation criteria laid down in its second sentence "*integrates the precautionary principle",* which it described as being one of the foundations of the high level of protection pursued by Community policy (see in particular paragraphs 44 and 58).

75. As to the second, *Waddenzee* provides guidance as to the test to be applied to determine whether a proposal amounts to a 'plan' or 'project' within the meaning of the directive. A plan or project will be caught by Article 6(3), in the sense that it will trigger the requirement for an appropriate assessment of its environmental impact, if it *"is likely to have a significant effect"* on the site. The test by reference to which the requirement of an appropriate assessment will be invoked, is expressed in a variety of ways in *Waddenzee*. The phrase used at paragraph 40 is "*being likely to have a significant effect on the site"*; at paragraph 41, and by reference to the Commission guidance *Managing Natura 2000 Sites*, *"mere probability that such an effect attaches to that plan or project"*; at paragraph 43 "*a probability or a risk that the latter (*the plan or project*) will have significant effects on the site concerned"*; and at paragraph 45 *"if it cannot be excluded ... that it will have a significant effect on that site"*. But I am satisfied, bearing in mind the requirement to interpret Article 6(3) by reference to the precautionary principle, that the proper approach is that the requirement for an appropriate assessment is triggered unless the risk of significant adverse effects can be excluded.

76. Mr Drabble submitted that it would be an incorrect approach to Article 6(3) to conclude that just because an action could potentially have an impact on the environment or on a European site, then it should be considered to be to be a 'plan or project'. But in my judgment that it precisely the effect of Article 6(3), an interpretation supported by the decision in *Waddenzee.*

77. As to the third I am satisfied that the facts in *Waddenzee* provide a very close parallel. In *Waddenzee* the intervention with the natural surroundings was the effect of the dredging operation on the seabed, both by the plate at the leading edge scraping the top 4 – 5 cms into the cage, and by the disturbance of the seabed by the powerful jet of water from the nozzle attached to the leading edge. Similarly the operation of the W class has the potential to interfere with the natural surroundings in that by their size and displacement, means of propulsion and steering, and the fact that they operate in narrow channels and at certain states of the tide in very shallow water, the vessels may disturb the bed and banks of the river and cause erosion to the mudflats and salt-marshes within the protected sites. Mr Drabble argued that *Waddenzee* is to be distinguished on the basis that the intervention in the natural surroundings was a direct effect of the dredging operations, whereas any effect of the use of the ferries is indirect. But in my judgment that is not a distinction of significance. The question is whether the activity gives rise to a risk of adverse effects on the protected sites, whether directly or indirectly.

78. In his written advice to Wightlink to which I have referred at paragraph 53 above, Mr Drabble further argued that if the claimants' contention that the introduction of the W class is a plan or project within the ambit of the Habitats Directive is accepted, then that "*would mean that every time a shipping line employed different or larger vessels in any port, there would be a requirement to consider whether an appropriate assessment had*

first to be carried out". But that argument is flawed in that it is not the introduction of the vessels that triggers the requirement to consider whether an appropriate assessment has to be carried out, but rather the possible effect of the operation of such vessels on the protected sites.

79. Mr Drabble also sought to place reliance upon the decision of the House of Lords in *Edwards v Environmenl Agency* [2008] 1 WLR 1587, which concerned a proposal to burn waste tyres as a partial substitute for the use of conventional fuel at a cement works in Rugby. He relied in particular on the following paragraphs in the speech of Lord Hoffmann:

> "*50. Mr Wolfe submitted that the adoption of tyres as a fuel fell within one or other of these paragraphs. The application was to burn 10 tonnes of tyres an hour, which indicated that the plant had a capacity exceeding 100 tonnes a day.*
>
> *51. Like my noble and learned friend Lord Hope of Craighead, whose speech I have had the opportunity of reading in draft, I have very considerable doubt as to whether this can be right. The first indent of the definition of "project"- "the execution of construction works or of other installations or schemes"- appears to contemplate the creation of something new and not merely a change in the way existing works are operated. The German version — "die Errichtung von baulichen oder sonstigen Anlagen" — makes this even clearer. "Errichtung" means erection or construction and "Anlage" means an installation or plant. (The French version is "la réalisation de travaux de construction ou d'autres installations ou ouvrages".)*
>
> *52. The second indent -"other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources"- clearly applies to activities, such as mining or quarrying, or dragging for cockles (Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Case C- 127/02) [2004] ECR-7405) which alter or destroy the natural environment. But this concept cannot easily be applied to changing the fuel in an existing installation."*

80. In support of his argument that the introduction of a new type of boat onto an existing ferry route could not amount to a plan or project within the meaning of the directive, Mr Drabble argued it was comparable to the change of fuel at the cement works the subject of *Edwards*. But again it was not the simple introduction of a new type of boat that triggered the requirement for a environmental assessment. It was the risk of significant adverse effects on the protected sites. Furthermore the passage cited above has to be treated with considerable caution. The observations made by Lord Hoffmann were obiter. As he said at paragraph 58, "*If…a decision on the point was necessary for the determination of the appeal. I would propose a reference to the Court of Justice".*

Secondly although the point seemed to him to be clear, he was not confident that the Court of Justice would hold the same opinion. Lord Walker agreed with Lord Hoffman. Lord Hope simply observed that he very much doubted whether the proposal to use shredded tyres as a fuel constituted a project within Annex I of the EIA Directive. Lord Mance took a different view saying that he "*would have regarded it as probable the change to tyre burning constituted a project within Annex I"*; and Lord Brown said that he inclined rather to the Lord Mance view.

81. I am entirely satisfied that the introduction of the W class ferries on the Lymington to Yarmouth route was a project within the ambit of Article 6(3). On 12 February 2009 Natural England gave formal advice to Wightlink, Lymington Harbour Commissioners, New Forest District Council and the Marine and Fisheries Agency (see paragraph 49 above) in which it advised in terms that "*cannot be ascertained that the introduction of the 'W class' ferries will not have an adverse effect on the Natura 2000 Interest*." In my judgment a decision maker considering at that point whether the proposed introduction of the W class ferries was a plan or project within the meaning of the Habitats Directive and the Habitats Regulations would have been bound to conclude that the risk of significant adverse effects on the protected sites could not be excluded, and that in consequence the requirement for an appropriate assessment was triggered.

82. In this context Mr Drabble sought to fall back on the argument that if Wightlink and its advisers were wrong in their view that the introduction of the W class ferries was not a project, then that was an error that could not be said to have been Wednesbury unreasonable. But if wrong in law, as I hold it to have been, the question of whether it was a reasonable error to have made is irrelevant. The challenge to the decision that the introduction of the ferries was not a project falling within the ambit of the Habitats Direction is not that it was Wednesbury unreasonable, but that it was based on an error of law.

Issue 2

Was there a competent authority within the meaning of the Habitats Directive?

83. As I have already observed, see paragraph 18 above, it is common ground that there may be more than one competent authority, in that the implementation of a plan or project may be subject to authorisation or control by a number of authorities whose 'jurisdictions' overlap; and it is necessary to consider the positions of Wightlink, DEFRA, the Lymington Harbour Commissioners and the New Forest District Council.

84. Wightlink has always accepted that if, contrary to its principal submission, the introduction of the ferries was a plan or project, then it was a competent authority. That was expressly acknowledged by its board at the meeting on 23 February 2009 at which the decision to introduce the new ferries was taken. DEFRA has changed its position with regard to Wightlink. On 27 November 2008 the minister wrote to the claimant's solicitors (see paragraph 41), saying inter alia that Wightlink could not be regarded as a statutory undertaker and therefore responsible for carrying out an appropriate assessment before introducing the new ferries. But in its Grounds of Resistance of 20 April 2009 DEFRA asserted that Wightlink was the relevant competent authority, a position it maintained at the hearing. The claimants' case, per paragraph 38 of their amended grounds, is that as the statutory harbour authority for Lymington pier,

Wightlink has environmental duties under section 48A of the Harbours Act 1964, and is a competent authority for the purposes of the Habitats Directive, but only in respect of the pier and a small area of water adjacent to it.

85. Mr Norris appeared at one point to argue that Wightlink could not be a competent authority in relation to the introduction of the class W ferries in that it is a private company responsible to its shareholders, the pursuit of whose commercial interests might conflict with the exercise of a public duty as a competent authority. But neither the Habitats Directive nor the Habitats Regulations preclude a non-governmental body from being a competent authority. As Mr Norris accepted in his reply, the fact that it is a private company does not in my judgment disqualify it from discharging its public duties as statutory harbour authority. The discharge of its public duties must override commercial considerations. If it fails in that regard, then the exercise, or failure to exercise its public functions, will be subject to supervision by the court by judicial review.

86. I am satisfied that in the discharge of its functions as statutory harbour authority for Lymington pier and ferry terminal, Wightlink was not only obliged by section 48A of the Harbours Act to have regard to conservation objectives, but was also a competent authority under an obligation under regulation 3(4) of the Habitats Regulations to have regard to the requirements of the Habitats Directive so far as they might be affected by the exercise of those functions. As harbour authority for the pier and ferry terminal, Wightlink was in a position to authorise and control the use of the W class ferries on the Lymington to Yarmouth route, and in consequence their effect on the designated sites. Its decision to introduce and operate the new ferries was a decision made in discharge of its functions as harbour authority, and had therefore to be made in compliance with its obligations under the Habitats Directive and Habitats Regulations. Its jurisdiction as harbour authority may be limited to the pier and "*a small water area adjacent to the pier"*, see the terms of the Sealink (Transfer of Lymington Pier) Harbour Revision Order 1991 (paragraph 29 above), but, as in this case, a decision made in the exercise of its statutory functions in relation to the pier, may affect a much wider area. I therefore reject the submission made on behalf of the claimants that the geographical limitation to its role as harbour authority has the consequence that it is not a competent authority with regard to the introduction of the W class ferries.

87. The New Forest District Council was a competent authority with regard to Wightlink's application for approval of the proposed works at the Lymington pier ferry terminal under regulation 62, and as such carried out the appropriate assessment upon which its decision on 8 April 2009 to refuse approval was based. But its statutory functions were limited to the proposed shore-side works. Had the introduction of the new ferries been dependant upon completion of such works, it would in effect have been subject to the council's approval. But as a result of its decision to introduce the new ferries without carrying out the shore-side works, Wightlink avoided that constraint.

88. The Lymington Harbour Commissioners are the harbour authority for the Lymington River, and as such have authority to control navigation on the river, hence its agreement with Wightlink in early December 2008 as to an Interim Safe Operating Profile (ISOP) to regulate the operation of the new ferries so as to ensure safe navigation. It is also accepted that in addition to its duties under s. 48A of the Harbours Act, it is a competent authority for the purposes of the Habitats Regulations. But it is not accepted

that it was a competent authority with regard to the introduction of the W class ferries for the reasons set out in letters from its solicitors to the solicitors acting for the claimants dated 15 January 2009 and to DEFRA dated 16 January 2009, and repeated in its written submissions filed pursuant to the order made by HHJ Birtles on 12 March 2009, namely that Wightlink had not made any application to the Commissioners for a consent, permission or other authorisation in relation to their introduction, and that in any event they do not have power to give any such consent, permission or other authorisation. That analysis is consistent with the content of DEFRA's letter to the Commissioners of 1 February 2009 suggesting the new bye-laws or a Harbour Revision Order might furnish the means of imposing the necessary environmental controls. But in any event neither the claimants, nor any other party seek a ruling that the Harbour Commissioners were a competent authority for the purposes of the introduction of the ferries. I did not hear full argument on the point; and I do not therefore propose to rule on it.

89. It is accepted on behalf of DEFRA that it carries ultimate responsibility for implementing and applying the Habitats Directive. But it is submitted that it was not a competent authority with regard to the introduction of the new ferries, and secondly that the proper implementation and application of the directive did not require that it should be.

90. Wightlink, in its private capacity, was not obliged to seek the consent, permission or other authorisation of DEFRA to introduce the W-class ferries. DEFRA has the power under regulation 22 of the Habitats Regulations to make a special nature conservation order (see paragraph 20 above). But in the original form of regulation 22, that power was limited to activities carried out on land, and could not have been exercised to prevent or control the introduction of the W-class ferries. That is of course the basis of the claimants' contention that DEFRA failed properly to transpose the Directive in the Habitats Regulations, an issue to which I shall return. But as at the date when the decision to introduce the ferries was made, DEFRA had no power to intervene, and accordingly was not in my judgment a competent authority.

91. As to the second argument, namely that the proper implementation of the Habitats Directive required that DEFRA should be a competent authority, it is submitted on behalf of the claimants that there was an obligation on the part of DEFRA to reserve to itself the power to intervene in circumstances in which a statutory authority is acting irrationally or irresponsibly or by an inadequate process. It is further submitted that this case exemplifies the requirement for the reservation of such a power, and that without it the Habitats Directive has not been effectively transposed into domestic law.

92. In my judgment that submission is misconceived for a number of reasons. First no support for such a proposition is to be found within the directive or the guidance issued at either the European or domestic level. As Mr Stephen Tromans QC observed on behalf of DEFRA, the directive does not impose an obligation to provide for such a second tier of decision making. In this context he directed my attention to the "*Commission Guidance on Assessment of Plans and Projects*" (2001) which states that under the principle of subsidiarity it is for the individual Member States to determine the procedural requirements deriving from the Directive, guidance confirmed by the decision of the European Court in Case C-201/02 *Delena Wells*, in which the court said at paragraph 65:

> "*It is for the competent authorities of a Member State to take, within their sphere of competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are subject to an impact assessment*".

The decision related to Directive 85/337 and the requirement for an environmental impact assessment, but as Mr Tromans submitted, it would appear to apply equally to appropriate assessments under the Habitats Directive.

93. Secondly regulation 22 gives the Secretary of State power to intervene by a special nature conservation order where it is necessary to do so to protect the integrity of designated sites. Thirdly as a matter of policy the imposition of such a supervisory function over the decisions of all competent authorities would be extremely onerous. Fourthly the discharge of its functions by a competent authority will be subject to the supervisory jurisdiction of the High Court.

94. It follows that the only competent authority at the material time, namely the point at which Wightlink decided to introduce the new ferries, was Wightlink itself.

95. The question then arises as to whether, in the proper discharge of its public duties as competent authority, Wightlink's decision to introduce the W class ferries was lawful. That involves consideration of whether there was an appropriate assessment of the effects of their introduction on the protected sites.

<u>Issue 3</u>

Was there an appropriate assessment of the effects of the introduction of the W class ferries on the protected sites?

96. The first point to be made is that there is no prescribed form for an appropriate assessment. As the European Court said in *Waddenzee*;

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

Such an assessment, therefore, implied 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…"

97. Secondly it is the competent authority that must make the appropriate assessment. Accordingly the question is not whether the report from ABPmer considered at the board meeting on 23 February amounted to an appropriate assessment, but whether Wightlink, in the proper discharge of its duties as a competent authority, made such an assessment at the meeting.

98. Before addressing that issue it is convenient to set the decision made by the board in its factual context. On 22 December 2008 Natural England gave preliminary advice concluding that "… *it cannot be ascertained that the introduction of the W class ferries will not have an adverse effect on the Natura 2000 interest."* There were then technical discussions between ABPmer and HR Wallingford, but as Andrew Willson, chief executive of Wightlink, said in his witness statement dated 16 April 2009 "... *by early February it was becoming clear that a consensus could not be reached as to the data regarding the historical effects of the C-class vessels and the predicted effects of the W-class ferries*" (para 59).

99. On 12 February Natural England issued its formal advice, see paragraph 49 above, in which it adhered to the conclusion at which it had arrived in its preliminary advice. On 20 February Wightlink's solicitors wrote to the claimants' solicitors saying that:

    "*Once Wightlink has received ABPmer's final report in the light of Natural England's revised advice, it will decide whether the W-class ferries would adversely affect the integrity of the European sides concerned and, therefore, whether any mitigation is required*".

100. The final report from ABPmer was signed off by Colin Scott, its Head of Environment, on the 20 February, and was apparently put before the board at its meeting on 23 February, although it is to be noted that in his witness statement dated 17 April 2009, Mr Scott asserts at paragraph 12 that "…*we produced a final 'Updated Information for Appropriate Assessment on 24 February*." Appendix D to the report contained its author's view as to why ABPmer's conclusions differed from those of HR Wallingford.

101. When the Wightlink board met on 23 February, it also had before it the advice from leading counsel and solicitors summarised at paragraph 53 above, in which they advised that although in their opinion the requirement for an appropriate assessment was not triggered as the introduction of the new ferries did not amount to a plan or project within the regulations, it would be advisable to carry out such an assessment.

102. The relevant sections of the minutes of the meeting are set out at paragraph 54 above. It is to be noted that paragraph 6.2 set out the test to be applied by the board in making its environmental assessment, namely that it

> *"...should have regard to the environmental assessment that had been carried out by ABPmer...and should agree to introduce the W-class ferries only if it is satisfied in the light of that assessment that they would have no adverse effect on the integrity of the designated sites."*

Secondly the board resolved that

> "*… the interim operation of the W-class ferries would not have an adverse affect on the integrity of the inter-tidal mud and salt marsh which were either designated features, or supporting features for the SBA and Ramsar birds."*

and that …

> "*there was no reason to believe that the interim operation of the W-class ferries would give rise to any disturbance or damage that was significant in the context of the Habitats Directive to any natural habitats or wild fauna or flora."*

Thirdly the minutes record that the board had regard to Natural England's advice.

103. It is submitted on behalf of Wightlink that it carried out an exercise equivalent to an appropriate assessment, and that in compliance with regulation 48 of the Habitats Regulations, it both sought the advice of Natural England and had regard to such advice, albeit rejecting its conclusions in favour of those at which ABPmer had arrived. The claimants contend that Wightlink neither carried out an appropriate assessment nor an equivalent exercise, a contention that is supported by the Lymington Harbour Commissioners and by Natural England.

104. It is submitted on behalf of the claimants that an appropriate assessment, or what purports to be an appropriate assessment, will be open to challenge if -

> *a. it arrives at a conclusion that is Wednesbury unreasonable,*
> *b. its conclusion is based on a partial (in both senses of the word) assessment of the evidence,*
> *c. the process is unfair in the sense that the decision maker has evidenced bias or a commercial incentive (a fortiori imperative) to reach a particular conclusion,*
> *d. no adequate account is taken of conflicting views, whether they be offered by the Government's statutory nature conservation adviser (Natural England) or members of the general public,*
> *e. there is no adequate consultation of the general public.*

The defendants do not, and could not, take issue with those propositions. The question is whether, as the claimants contend, the exercise that Wightlink undertook was flawed in each or any of those respects.

105. But before addressing that question it is illuminating to consider the views of Natural England expressed in its letter to Simon Hopkinson, of DEFRA's International Protected Area Team dated 12 April 2009. Mr Hopkinson had asked Natural England whether it considered that Wightlink had produced an appropriate assessment complying with the requirements of the Habitats Directive and Regulations, or alternatively whether Wightlink had produced a document equivalent in 'form and scope' to an appropriate assessment. After referring to the relevant parts of the directive and the regulations, Natural England replied in the following terms –

> "*Natural England does not accept that the various reports produced by ABPmer on behalf of Wightlink amounts to an Appropriate Assessment because Natural England does not consider that the various reports produced by ABPmer properly assess the implications for the site of the project in view of the site's conservation objectives, and conclude no adverse effect also without proper reference to this site's conservation objectives.*
>
> *ABPmer's final report from February 2009 sets out the site's conservation objectives at page 8 in section 3 within table 2. All of the conservation objectives there listed basically require no change to each of the features, 'subject to natural change'.*
>
> *Natural England therefore considers that a proper and lawful Appropriate Assessment for this site should assess the anthropogenic implications of this project on the site. Such implications should be properly separated from any natural changes which might occur in the same period and assessed. The assessment of adverse effect should also be assessed in the light of the conservation objectives.*
>
> *In this case, Natural England considers that this means that the decision about whether or not an adverse effect is caused should be taken without reference to the natural processes of the site (which are specifically referred to in the conservation objectives) i.e. does the project adversely affect the site notwithstanding that this is a dynamic natural site.*
>
> *ABPmer themselves seem to accept this broad principle and state at page 47 in section 8.4 of their February 2009 report, 'The judgement about the effects of a project on site integrity needs to be taken in the light of the conservation objectives for the site'. However ABP then go on ... to conclude that:*
>
> *i. "there is no evidence that the current 'C' class ferry operation is having an adverse effect in the context of natural changes"*

> *ii. "based on the predicted changes that are expected from the new vessels it is the conclusion of this assessment that the new 'W' class ferries can be operated in a manner that ensures that they have no greater impact on the designated site compared to the existing 'C' class ferries."*
>
> *ABPmer are therefore effectively concluding that the current 'C' class ferries cannot be said to have an adverse effect on the site in the context of natural changes, and that as the 'W' class ferries will (in their judgement) have no greater impact than the' C' class ferries, no adverse effect can be said to be occurring.*
>
> *In Natural England's view this approach is unlawful as it disregards the site's conservation objectives which require no change to the site "subject to natural change". Essentially, the objective is for the site to be allowed to evolve naturally, but to avoid acceleration or changes to that evolution as a result of man's interventions. By ignoring this aspect of the site's conservation objectives, and assessing the impact on the site in light of the ongoing natural change (essentially arguing that compared to the natural change the ferries impact will not be noticeable) ABPmer on behalf of Wightlink have been able to conclude that there are no adverse effects."*

Whilst Natural England's views are not determinative of the issues between the parties, they assist as to the nature and extent of the differences of opinion between Natural England and Wightlink's experts.

106. On 23 April 2009 Natural England, by then an interested party, wrote to the court confirming the views set out in the letter of 15 April as to the legality of the appropriate assessment purportedly carried out by Wightlink, and added that:

> "*If the court is minded to conclude, notwithstanding the views of Natural England, that the assessment undertaken by ABPmer on behalf of Wightlink amounts to an Appropriate Assessment in law, Natural England would like the court to be aware that it maintains its view that the Assessment does not reach a scientifically sound conclusion on the question whether the operation of the ferries will have an adverse effect on the European Site… Natural England's view has not changed following publication of ABPmer's final report, or following consideration of the evidence submitted by ABPmer in this case* "

107. I turn then to consider whether, as the claimants contend, the process undertaken by the board was so flawed as to render the decision to introduce the W class ferries unlawful.

108. In essence three arguments are advanced in support of the contention that the decision was fatally flawed. First it is submitted that Wightlink could not reasonably have arrived at the decisions that it did in the face of the formal advice from Natural England, the Wednesbury reasonableness argument; secondly that the decision was driven by a commercial imperative that overrode Wightlink's duties as competent authority, and thirdly that Wightlink failed to carry out an adequate public consultation.

109. As to the first Mr Norris submits that Wightlink could not reasonably have arrived at the conclusion that the introduction of the new ferries would not adversely affect the integrity of the designated sites. The advice given by Natural England must, at the very least, have given rise to a doubt as to whether or not there would be significant adverse effects, and accordingly Wightlink, as a competent authority, were obliged to refuse to authorise their introduction. As he puts it, no reasonable and properly informed competent authority could reasonably have been satisfied (beyond reasonable scientific doubt) on the information then available, and bearing in mind the high level of protection implicit in the protectionary principle, that there would not be any significant adverse effects.

110. In response Mr Drabble argues that the report from ABPmer before the board contained an analysis of the differences between its conclusions and those at which HR Wallingford had arrived and a reasoned explanation of why it rejected the latter. He submits that the decision was therefore based on cogent and robust material. Secondly he submits that Wightlink was entitled to give greater weight to the advice from ABPmer, provided that it took account of the views of Natural England, and was not obliged to follow the views of Natural England as the appropriate national conservation body.

111. The issue is whether a reasonable harbour authority, in the proper discharge of its public duty as a competent authority, could have concluded that no doubt remained as to whether or not there would be significant adverse effects on the integrity of the site by the introduction of the new ferries. When it met on 23 February, the Wightlink board had before it conflicting advice from Natural England and from its own experts, ABPmer. Natural England had arrived at its final conclusions after discussion between ABPmer and HR Wallingford, as a consequence of which it had modified its views to some extent. But the experts remained at odds on the critical issue. It is not necessary for present purposes to embark upon a detailed analysis of the differences between them; but the disagreement had at its root a fundamental difference in approach to the interplay between natural changes to the environment, the historical effect of the use of the C class ferries and the possible effects of the introduction of the W class ferries. That can be seen from the letter from Natural England to DEFRA of 12 April 2009, see paragraph 105 above, and appendices C and D to ABPmer's report of February 2009.

112. It is submitted on behalf of the claimants that Wightlink could not reasonably have concluded that no doubt remained as to adverse effects given the formal advice given by Natural England. The fact that Natural England had given contrary advice does not of itself render the decision Wednesbury unreasonable. In making its appropriate assessment Wightlink was not obliged to follow the advice given by Natural England;

its duty was to have regard to it. But given Natural England's role as the appropriate national conservation body, Wightlink was in my judgment bound to accord considerable weight to its advice, and there had to be cogent and compelling reasons for departing from it. Unless Wightlink was to come to the conclusion that the conclusion at which Natural England had arrived was simply wrong, it is difficult to see how it could come to the conclusion that no doubt remained as to whether there would be significant adverse effects on the protected sites.

113. In this context Mr Gregory Jones, who appeared for the Lymington Harbour Commissioners, argues that the findings of the assessment were not recorded or properly reasoned contrary to the European Commission's guidance in Managing Natura 2000 Sites, guidance that is in the following terms –

> "*In the first place, an assessment should be recorded. A corollary of the argument that the assessment should be recorded is the argument that it should be reasoned. Article 6 (3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for subsequent decision (i.e. if the record is a simple unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered 'appropriate'." (paragraph 4.5.1)*

113. Compliance with the guidance required a reasoned record of Wightlink's appropriate assessment. Such a requirement ensures that the assessment is made on proper objective grounds, which is of particular importance where, as in this case, there was a potential conflict or at the least a tension, between Wightlink's discharge of its public duty as a competent authority, and its duties to its shareholders as a commercial concern.

114. Wightlink argues that its reasons for rejecting the advice from Natural England are to be found in the report from ABPmer, and that in effect it adopted the report as its appropriate assessment. But it is necessary to test that argument by reference to the terms of the resolutions made by its board on 23 February. At paragraph 7.2 of the minutes of the meeting, the relevant resolution is recorded in the briefest terms namely that "*after due consideration of ABPmer's report and having had regard to Natural England's advice*", "*the interim operation of the W class ferries would not have an adverse effect…*". The board did not say that it was adopting ABPmer's report as its appropriate assessment. It simply gave it 'due consideration' in carrying out its own assessment. Secondly no reasons were given as to why the board was rejecting the advice given by Natural England; and in particular there was nothing to indicate that the board engaged with the issue of the difference between the experts as to the appropriate methodology.

115. In the absence of a reasoned decision by the board, I cannot be satisfied that it gave the formal advice from Natural England the weight that it deserved, and in consequence that it could properly have come to the conclusion that no doubt remained as to whether

the introduction of the new ferries would have adverse effects on the protected sites. In his witness statement dated 16 April 2009 Mr Willson, Wightlink's chief executive, asserts that on the basis of ABPmer's analysis, the board was satisfied that Natural England's conclusions were misconceived. But in *R (Young) v Oxford City Council* [2002] PLR 86 at para 20 Pill LJ identified the "*dangers in permitting a planning authority, whether by its committee chairman or a planning officer, providing an explanatory statement. The danger is that, even if acting in good faith, the witness may attempt to rationalise a decision in such a way as to meet a question which has arisen upon the effect of the decision. Moreover it will usually be impossible to assess the reasoning process of individual members and there are obvious dangers in speculating about them. It is therefore important that the decision-making process is made clear in the recorded decisions of the committee, together with the officers' report to committee and any record of the committee's decisions. Decisions recorded in the minutes should speak for themselves.*" The position of the board as competent authority was in an analogous position to a planning authority. It was important that the decision making process by which the board arrived at what it relies upon as amounting to its appropriate assessment, should have been made clear in the record of its decision. It was not.

116. Furthermore the board appears to have misled itself as to the test that it was obliged to apply as a competent authority. At paragraph 6.2 it resolved that it should have regard to the environmental assessment carried out by ABPmer and "*should agree to introduce the W – class ferries only if it is satisfied in the light of that assessment that they would have no adverse effect on the integrity of the designated sites".* In articulating the test in those terms, the board appears to have failed to recognise that it was for it to carry out the appropriate assessment, and that the question was not simply whether it was satisfied in the light of the report from ABPmer that the introduction of the new ferries would not have an adverse effect on the integrity of the sites.

117. In his oral submissions Mr Drabble also advanced what amounted to a de minimis argument, namely that the differences between Natural England and ABPmer as to adverse effects were minimal. But that was not advanced by the board as a reason for rejecting the advice of Natural England, and given the high level of protection for the environment afforded by Article 6(3) (see paragraph 73 above), is not an argument that would of itself have carried sufficient weight to remove any doubt as to a possible adverse effect.

118. But the Wednesbury challenge does not stand alone. The decision of the board has to be considered in context; and the argument advanced by Mr Norris in support of the second ground of challenge to the decision, namely that it was driven by a commercial imperative, is relevant to the Wednesbury challenge, in that if well founded, it reveals the true reason for the decision to introduce the new ferries on 25 February 2009, or at the least that the decision was tainted by the board having been influenced by factors that in the discharge of its public duty as competent authority, it ought to have disregarded.

119. Mr Norris argues that it is clear from the evidence that the decision was driven by the commercial imperative to bring the new ferries into operation, and that that in reality that overrode Wightlink's duties as a competent authority. He submits that that is a conclusion that is inevitably to be drawn from the evidence that Wightlink had

committed itself to buying the ferries in early 2007, that it did not commission a report on the environmental impact of their introduction until the end of January 2008 and did not receive it till May 2008. He submits that Wightlink had long ago made it clear that it was only a question of when, rather than whether, the new ferries would be introduced. He seeks to reinforce the argument by reference to the fact that on 17 November 2008 Wightlink informed the Lymington Harbour Commissioners that it intended to introduce the ferries into service in December, and that it no longer considered it to be necessary to modify the pier and berthing arrangements. He also relies upon the evidence that by February 2009 the old ferries were on the point of being sold and the certificates of the two remaining vessels were due to expire on 13th March 2009. As Wightlink's chief executive said in paragraph 42 of his witness statement of 16 April 2009 "*...It was neither practicable nor commercially viable to renew those certificates*" and at paragraph 82 "*...beyond the expiry of the PC's on 13 March 2009, the ferries would become a substantial liability to Wightlink.*" He also stated that in the 6 months up to February 2009, the C class ferries had experienced several instances of mechanical failure which were indicative of their age and resulted in disruption to the ferry service (paragraph 43), and that Wightlink had submitted a request to the MCA to extend the current certificates for a period of 3 months, but the response from MCA was that it would only consider such extensions following an extensive in-water survey, and that in any event a 3 month extension would have resulted in the introduction of the new ferries in June 2009, the worst time in the operational cycle to make such a change. Mr Norris submits that Wightlink evidently made a commercial judgment not to bring the old vessels up to the necessary specification to enable them to continue in service, a judgment made on the basis that the new ferries would be brought into operation before 13 March.

120. In my judgment the argument is compelling. The reality of the situation was that by early 2009 Wightlink was caught in a very difficult situation, albeit of its own making. Certificates on one of the C class vessels expired in January 2009, those on the remaining two vessels were to expire on 13 March. The only way in which Wightlink was going to be able to continue to run the ferry service between Lymington and Yarmouth was by introducing the new ferries. To have decided, as competent authority, not to permit their introduction would have had the most serious adverse consequences for the company. I am satisfied that the sequence of events compels the conclusion that the decision to bring the new ferries into operation had already been made, and that commercial considerations overrode, or at the very least influenced the discharge by Wightlink of its public duties as competent authority. I am reinforced in that conclusion by the fact that by its decision in November 2008 to introduce the W class ferries without undertaking the shore-side works to the ferry terminal at Lymington, Wightlink freed itself from the constraint imposed by the requirement of approval of the New Forest District Council, an approval that it knew to be dependant upon an appropriate assessment by the council, in relation to which the council was obliged to have regard to the views of Natural England.

121. The conclusion that the decision was influenced by commercial considerations adds further weight to my conclusion that the decision was Wednesbury unreasonable.

122. The third argument advanced by Mr Norris, an argument that also has the support of the Lymington Harbour Commissioners, is that Wightlink failed in its duty to subject the proposal to introduce the new ferries to public consultation. Article 6(3) of the Habitats

Directive provides that a competent authority shall agree a plan of project only after having ascertained that it will not adversely affect the integrity of the site and "*if appropriate, after having obtained the opinion of the general public*". In his written submissions, Mr Gregory Jones, who appeared for the Harbour Commissioners, drew attention to the relevant European Commission Guidance to be found in Managing Natura 2000 Sites –

> "*4.6.2 When is it appropriate to obtain the opinion of the general public?*
>
> *Directive 92/43/EEC does not indicate when it is appropriate to obtain the opinion of the general public. However, consultation of the public is an essential feature of Directive 85/337/EEC. Clearly therefore, where the assessment required by Article 6(3) takes the form of an assessment and the Directive 85/337/EEC, public consultation is necessary.*
>
> *In this context, it is worth mentioning the possible longer-term implications of the Aarhus Convention which emphasises the importance of public consultation in relation to environmental decision-making.*"

123. Mr Jones submits that there has been a complete failure on Wightlink's part to carry out the requisite consultation exercise. In response to this argument Mr Drabble observes that neither the Habitats Directive nor the Regulations require the competent authority to consult the general public in all circumstances. He referred to Regulation 48(4), which provides that a competent authority shall take the opinion of the general public if they consider it appropriate to do so, and if they do, shall take such steps for that purpose as they consider appropriate. He points out that the evidence demonstrates that the proposals were widely publicised, and that there were extensive discussions with stakeholders, as detailed in the witness statement filed by Wightlink's chief executive, Mr Wilson. He submits that in those circumstances it cannot be said that Wightlink failed to discharge its duty to obtain the opinion of the general public. I agree, and reject the contention that the decision was flawed in this respect.

124. But it follows from the conclusions set out at paragraphs 114 - 117 that the decision made by Wightlink as competent authority on 23 February 2009, the decision that allowed the company to introduce the W class ferries two days later, was fatally flawed and in consequence unlawful.

<u>The transposition of the Habitats Directive into domestic law</u>

125. I turn then finally to the position of DEFRA, and to the issue of whether the Habitats Directive was properly transposed by the Habitats Regulations. I have already addressed one aspect of the argument, namely that DEFRA ought to have reserved to itself the power to intervene in a case in which a competent authority is acting irrationally or irresponsibly, or by and inadequate process, see paragraphs 91-3 above. But there remains the issue of the inadequacy of regulation 22 in its original form.

126. In June 2009 DEFRA issued a "*A consultation on proposed minor amendments to the Conservation (Natural Habitats etc) Regulations 1994*". The introductory summary contained the following paragraph –

> *"Defra is considering making amendments to regulations 22 -- 27 and Schedule 1 of the Habitats Regulations (special nature conservation orders -- SNCO) to make clear that these provisions can be used to restrict operations taking place on water as well as on land, in order to protect European sites…"*

The consultation exercise was followed by a letter dated 14 September 2009 from DEFRA to consultees containing the following paragraphs –

> *"Powers to make special nature conservation orders have existed in legislation for many years. While it is accepted that extended powers to cover operations on water, and operations taking place outside the protected site, have the potential to be significant, (and it is impossible to forecast the future with any certainty), there is no evidence to suggest that the extended powers will result in large numbers of new SNCOs or the introduction of significant new controls. SNCO powers are ones of last resort, and as a result are used infrequently…*
>
> *On the other hand, a decision not to bolster the transposition of Articles 6(2) and 6(3) of the Habitats Directive, which requires us to take appropriate steps to avoid, inter alia, the deterioration of natural habitats in protected areas, would make it very difficult for us to argue that we have fully and properly transposed the obligations arising under these Articles. This could have very serious implications in the future."*

127. There can be no doubt that it was this case that exposed the lacuna in the regulations, and resulted in the amendment that followed the consultation exercise. Furthermore in the letter dated 14 September, DEFRA expressly acknowledged the difficulty that it would have in arguing that the obligations under the Habitats Directive had been fully and properly transposed in the Habitats Regulations in their original form. I have no hesitation in finding that the Habitats Directive was not fully and properly transposed. Whilst I recognise, as was urged upon me by Mr Tromans, that all eventualities may not be foreseen when regulations are drafted, the fact remains that had consideration been given to the possible adverse effects of marine operations on protected sites, many of which are coastal, there would not have been the deficiency in the regulations that this case brought to light.

128. Thus if the directive had originally been fully and properly transposed, DEFRA would have had the power to make a special nature conservation order to protect the sites from the risk of significant adverse effects, if satisfied that there was such a risk. However it is reasonable to assume that had it then had the power to intervene, and bearing in mind

that discussions were continuing between Wightlink and Natural England as to mitigating measures, it would have sought the advice of Natural England in broadly the same terms as its letter dated 8 April in which it requested confirmation as to whether environmental damage had already occurred, or whether there was any imminent threat of environmental damage by reason of the operation of the ferries. Natural England would no doubt have responded in the same terms as in its reply of 15 April, in which Natural England confirmed that there was no likely threat to the integrity of the site or measurable environmental damage over the coming months. Thus it cannot be assumed that if DEFRA had then had the powers conferred by the amendment to the regulations, it would have exercised them so as to prevent the introduction of the new ferries on 25 February 2009.

Conclusions

129. As I noted at paragraph 11 above, it was submitted on behalf of both defendants that permission to apply for judicial review should not be granted as the challenge is academic. So far as Wightlink is concerned, I recognise that the claimants no longer seek injunctive relief, and that the Lymington to Yarmouth ferry service will continue to be operated with the W class ferries, subject to agreement as to the mitigation measures currently the subject of negotiation between the company and Natural England. But the resolution of the issues of whether the introduction of the new ferries was a plan or project within the meaning of Article 6(3), and whether Wightlink acted unlawfully in introducing them on 25 February, was not in my judgment an academic exercise. The claimants were justified in pursuing their claim so as to establish where responsibility for carrying out an appropriate assessment lay, and secondly whether there had been the appropriate assessment required by law. As to DEFRA, the amendment that took effect on 1 October 2009 rectified the lacuna in the regulations. But that was not an end to the transposition challenge in that the claimants submitted that DEFRA ought to have reserved to itself the power to intervene in circumstances in which a statutory authority is acting irrationally or irresponsibly, or by an inadequate process. If successful, the argument would have resulted in a declaration that notwithstanding the amendment, there remained a failure effectively to transpose the Habitats Directive. Although I rejected that submission, it was plainly arguable. Thus in relation to both defendants the permission threshold was crossed; and permission to apply for judicial review is granted.

Note from Owen J of 18.2.10 re: paragraph 129: I confirm that I have not made any finding as to the efficacy or otherwise of the measures the subject of negotiation between Wightlink Limited and Natural England, nor as the appropriate legal label for them.

130. The claimants are therefore entitled to declarations that -

1. the decision taken by Wightlink to introduce the W class ferries on 25 February 2009 was unlawful, being in breach of its duties as competent authority under Article 6(3) of the Habitats Directive and the Habitats Regulations,
2. the Habitats Directive was not fully and properly transposed into domestic law by the Habitats Regulations in its original form.

Core Document 2

Neutral Citation Number: [2013] EWHC 12 (Admin)

Case No: CO/8634/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 11/01/2013

Before :

THE HONOURABLE MR JUSTICE BEATSON

- - - - - - - - - - - - - - - - - - - -

Between :

Shadwell Estates Ltd	**Claimant**
- and -	
Breckland District Council	**Defendant**
- and -	
Pigeon (Thetford) Ltd	**Interested Party**

(Transcript of the Handed Down Judgment of
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Timothy Straker QC and Timothy Leader (instructed by **Greenwoods Solicitors**) for the **Claimant**
John Hobson QC and Ned Helme (instructed by **Breckland District Council Legal Department**) for the **Defendant**
James Maurici (instructed by **Berwin Leighton Paisner LLP**) for the **Interested Party**

Hearing dates: 26 and 27 November 2012

- - - - - - - - - - - - - - - - - - - -

Judgment
As Approved by the Court

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Mr Justice Beatson :

I. Introduction

1. The claimant, Shadwell Estate Company Ltd ("Shadwell"), owns a large agricultural and equine estate to the south-east of Thetford. In these proceedings, brought under section 113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), it challenges the decision of the defendant, Breckland District Council ("the Council") to adopt the Thetford Area Action Plan ("the TAAP") on 5 July 2012.

2. The TAAP confirmed the designation in the Council's Core Strategy of an area to the north-east of Thetford as a strategic urban extension for the town on which 5,000 houses are to be built. The area so designated does not include the Shadwell estate but does include the Kilverstone Estate ("Kilverstone"). A planning application on land which includes Kilverstone is being promoted by Pigeon (Thetford) Ltd, a property company. Pigeon is an interested party in these proceedings. On its face, Shadwell's challenge does not concern the treatment of its own land. Its case is that there are public law deficiencies in the treatment of evidence relating to stone-curlews on the Kilverstone estate by the Council and by Mr Broyd, the Inspector at the examination in public of the TAAP on 6 and 7 March 2012.

3. Stone-curlews are a protected species under Council Directive 79/409/EEC ("the Birds Directive"), as updated by Council Directive 2009/147/EC. The Conservation of Habitats and Species Regulations 2010 SI 2010 No 490 ("the Habitats Regulations 2010"), now amended by the Habitats Regulation 2012 SI 2012 No 1927, have transposed the Birds Directive and Council Directive 92/43/EEC ("the Habitats Directive") into United Kingdom law. Stone-curlews and their habitats must be protected from the effects of development. One of the areas designated under Article 4.1 of the Birds Directive which is therefore a "European Site" because of the presence on it of stone-curlews, is the Breckland Special Protection Area ("the SPA"), an area to the south-east of Thetford. The Habitats Regulations 2010 provide, *inter alia*, for the assessment of the implications of plans or projects for European Sites. Part of Shadwell's estate is within the SPA and the remainder of the estate is no more than a few hundred metres from its boundary. The Kilverstone estate is situated to the north-east of Thetford and is not within any area designated as SPA due to stone-curlews. None of the allocation areas are within 1,500 metres of the boundary of the SPA designated due to stone-curlews, but some are within 2,500 metres of that boundary.

4. The TAAP is in what can be termed the third tier of development plan provided for by the 2004 Act. As such it is required that it be prepared in conformity with the first and second tiers, the Regional and Core Strategies, in order to provide local policy detail in relation to the strategic choices made in those development documents. The relevant Regional Strategy is the 2008 East of England Plan. The Council's Core Strategy was adopted on 17 December 2009.

5. The East of England Plan designated Thetford as a key area for development, envisaging an additional 6,000 dwellings in and on the edge of the town. In its Core Strategy the Council defined an area to the north-east of Thetford as a strategic urban extension for the town. The Council's strategy is to protect species in the Breckland SPA and in a 1,500 metre buffer-zone from the edge of those parts of the SPA that support, or are capable of supporting, stone-curlews, from development that will adversely affect the SPA. In the SPA and the buffer-zone additional tests for planning permission apply in order to seek to protect the SPA. Because of the presence of the stone-curlews in the area to the south-east of the town, including on Shadwell's land, that area was not within the area designated by the Core Strategy for the strategic urban extension. Shadwell did not challenge the Core Strategy.

6. The TAAP was preceded by two documents; in 2008, "Issues and Options" and, in March 2009, "Preferred Options", and extensive consultation. At the TAAP's examination in public, the Inspectors *inter alia* tested whether the Core Strategy provided a sufficiently robust foundation for the preparation of action plans. They concluded that it did and rejected criticisms of the evidential base for the approach in the Core Strategy.

7. Shadwell contends that the TAAP was legally defective on the ground that the underlying sustainability appraisal was flawed in that it did not include an assessment of the environmental characteristics at Kilverstone because information about stone-curlews on that estate was incomplete. During earlier stages of the planning process, Shadwell's position had been very different. It had not sought the removal of Kilverstone as a suitable location for housing development, but opposed having an urban extension entirely to the north-east of Thetford on the basis that it would be unbalanced, and opposed the 1,500 metre buffer zone as having no sound basis. Its case now is that the Council was told of the presence of stone-curlews on part of the Kilverstone estate but did not put that material before the Inspector who conducted the examination of the TAAP either in detail or (since the Council's position was that that information was provided in confidence in relation to another matter) in general terms. It maintains that, for this reason, the picture before the Inspector was not complete.

8. In these proceedings, Shadwell's case as to the flaws in the TAAP has been crystallised into three grounds. The first two relate to the underlying sustainability appraisal and the consequences for the TAAP. The third relates to the Habitats Regulations 2010. They are:

   (1) The Council failed to carry out an adequate sustainability appraisal and strategic environmental assessment in compliance with section 19(5)(b) of the 2004 Act, and various provisions of the Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004/1633 ("the EAPPR 2004").

   (2) The Inspector who conducted the examination of the TAAP erred in finding that the TAAP satisfied the requirements of section 19 of the 2004 Act and that it was "sound". Accordingly, the requirements of section 20(5) of the 2004 Act were not met.

(3) The data in the Council's Habitats Regulations assessment did not take account of the finding that built development could adversely affect the nesting density of stone-curlews up to a distance of 2,500 metres, and was incomplete in excluding the Kilverstone estate after 2000 and only including data for other land around Thetford between 1988 and 2006. The result was that the assessment breached Regulation 61 of the Habitats Regulations 2010.

Shadwell also contended (see, for example, skeleton argument, paragraphs 5 and 61) that it was deprived of a proper opportunity to test the TAAP at the examination in public and to advance alternative proposals because its objections to the soundness of the TAAP were dismissed as based on anecdotal evidence.

9. The evidence on behalf of Shadwell consists of two statements of Christopher Kennard, its Finance Director, dated 28 August and 20 November 2012, and a statement of Darryl Broom dated 17 September 2012. Mr Broom was a gamekeeper at Kilverstone until 2008. The evidence on behalf of the Council consists of the statement, dated 3 October 2012, of David Spencer, the Council's Deputy Planning Manager. The evidence on behalf of the interested party consists of the statement of Daniel Brown, dated 15 November 2012. Mr Brown is a freelance ecologist and a director of Daniel Brown Ecology, which conducted stone-curlew surveys of Kilverstone from 2007 for the estate and for the interested party.

10. The legislative framework is summarised in section II of this judgment. The factual and regulatory background and Shadwell's criticism of the sustainability appraisal is summarised in section III in some detail. The detail is necessary because Shadwell's challenge involves consideration of the fine detail of the evidence before the TAAP Inspector and the evidence that was before the Core Strategy Inspectors in 2009. Section IV contains my discussion of the submissions, my conclusion that Shadwell's application must be dismissed, and my reasons for that conclusion. The written and oral submissions on behalf of the Council and the Interested Party made much of the fact that the position taken by Shadwell in these proceedings was radically different to the position it had taken at earlier stages of the development plan process. Although not stated expressly, it was implicit that they consider this challenge is one of those (alluded to by Carnwath LJ in *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408 at [57] ff) made where the environmental grounds pursued are in fact a tactical means of pursuing a different objective. The point remained implicit and it has played no part in my decision.

II. The Legislative framework

(i) The preparation of development plan documents

11. Section 15 of the 2004 Act requires local planning authorities to maintain a "local development scheme". The local development scheme consists of development plan documents which, together with any Regional Strategy, (here the East of England Plan) comprise the "development plan" for the area: see section 38(3) of the 2004 Act. The Core Strategy and the TAAP are also development plan documents.

12. Planning decisions must generally be made in accordance with the development plan unless other material considerations indicate otherwise. In view of the potential effect

of development plans, Parliament has required that when they are prepared certain steps should be taken to ensure that they are "sound" and "capable of being carried into effect". Section 19(5) of the 2004 Act requires the local planning authority to carry out "an appraisal of the sustainability of the proposals in each development plan document"; i.e. a "sustainability appraisal" of the environment affected by a plan. It also involves (see section 20(1)) a consultation process which enables the representations to be made about the effects of the plan, including the adequacy of the "sustainability appraisal", and an independent examination in public.

13. Section 20(5) of the 2004 Act provides that the purpose of independent examination is to determine in respect of a development plan document:

> "(a) whether it satisfies the requirements of sections 19 and 24(1) [the regional strategy], regulations under section 17(7) [in relation to the form and content of local development documents] and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b) whether it is sound; and
>
> (c) whether the local planning authority complied with any duty [to co-operate in relation to planning of sustainable development] imposed on the authority by section 33A in relation to its preparation."

14. The preparation of development plan documents is governed by regulations made under section 36 of the 2004 Act. The TAAP was largely prepared under the Town and Country Planning (Local Development) (England) Regulations 2004 SI 2004 No 2204 ("the 2004 Regulations"), which were in force until 6 April 2012. Regulation 7 of the 2004 Regulations provided that core strategies and area action plans must be in the form of development plan documents. Regulation 30(1)(a) prescribed the sustainability appraisal report as one of the documents to be sent to the Secretary of State under s.20(3) of the 2004 Act before an examination in public of a development plan document.

15. The Town and Country Planning (Local Planning) (England) Regulations 2012 SI 2012 No 767 ("the 2012 Regulations") came into force on 6 April 2012. The 2004 Regulations were, subject to a saving provision which gave effect to anything done under them as if it were done under the corresponding provisions of the 2012 Regulations, revoked: see Regulations 37-38.

16. By Regulation 25 of the 2012 Regulations, a local planning authority is required to publish the recommendations of the person who conducted the independent examination of a development plan document. If the development plan document is found to be sound, the local planning authority may adopt it as part of the development plan.

(ii) Environmental assessment

17. The Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004 No 1633 ("the EAPPR 2004") govern the strategic environmental assessment of plans and programmes. The effect of Regulations 5 and 8 is that an environmental assessment of certain plans and programmes must be carried out in accordance with Part 3 of the Regulations before its adoption.

18. Regulation 12, in Part 3 of the EAPPR 2004, provides:

> **"12. — Preparation of environmental report**
>
> (1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of–
>
> (a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and
>
> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
>
> (4) Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making or through other [EU] legislation.
>
> (5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies.
>
> (6) Where a consultation body wishes to respond to a consultation under paragraph (5), it shall do so within the period of 5 weeks beginning with the date on which it receives the responsible authority's invitation to engage in the consultation."

19. The information listed in Schedule 2 which Regulation 12(3) requires to be in the report is:

> "1 An outline of the contents and main objectives of the plan or programme, and of its relationship (if any) with other relevant plans and programmes.
>
> 2 The relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme.
>
> 3 The environmental characteristics of areas likely to be significantly affected.
>
> 4 Any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Council

Directive 79/409/EEC on the conservation of wild birds and the Habitats Directive.

5 The environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation.

6 The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues including—

(a) biodiversity;

(b) population;

…

(d) fauna;

(e) flora;

(f) soil;

…

(l) landscape; and

(m) the inter-relationship between the issues referred to in sub-paragraphs (a) to (l).

7 The measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme.

8 An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties encountered in compiling the required information.

9 A description of the measures envisaged concerning monitoring in accordance with regulation 17.

10 A non-technical summary of the information provided under paragraphs 1 to 9."

(iii) The Habitats Regulations 2010

20. Article 6 of the Habitats Directive and Article 6 of the Birds Directive have been transposed into United Kingdom law by regulation 61 of the Habitats Regulations 2010. This *inter alia* provides:

> "(1) A competent authority [here the Council], before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> > (a) is likely to have a significant effect on a European site ... (either alone or in combination with other plans or projects), and

> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.
>
> (4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

Regulation 5 of the Habitats Regulations 2010 defines the appropriate nature conservation body which must be consulted under regulation 61(3). In this case, it is Natural England.

21. Development plan documents such as the Core Strategy and the TAAP may be agreed notwithstanding a negative assessment of the implications for a European Site if the plan or project must be carried out for reasons of overriding public interest: see regulations 62, 102 and 103.

(iv) Challenges to development plan documents

22. Section 113 of the 2004 Act enables a person aggrieved by, *inter alia*, a development plan document such as the Core Strategy or the TAAP, to apply to this court within six weeks of its adoption to quash or remit the document to the body responsible for its adoption. The grounds are the conventional ones for statutory judicial review, that the document is to any extent outside the "appropriate power" or that the interests of the applicant have been substantially prejudiced by a failure to comply with a "procedural requirement".

23. Section 113 of the 2004 Act was amended by section 185 of the Planning Act 2008. As amended, section 113(7A) and (7C) provide for a power to give directions in relation to the whole or part of a development plan document which has been remitted. By section 113(7B):

> "Directions under subsection (7A) may in particular—
>
> (a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;
>
> (b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;
>
> (c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);
>
> (d) require action to be taken by one person or body to depend on what action has been taken by another person or body."

III. The factual and regulatory background

(i) 2007 – 2008

24. One of the aims of designating Thetford as a key centre for development and change in the 2008 East of England Plan is to increase the number of dwellings in and on the edge of the town by 6,000. Policy TH1 of the Plan stated that this would be done "through maximising sensitive development within the urban area which respects its historic settings and features and through sustainable urban extensions which avoid harm to the Breckland Special Protection Area and/or Breckland's Special Areas of Conservation".

25. In the year before the adoption of the East of England Plan, the Council undertook a scoping report, its Core Strategy Preferred Options document and, as required by section 19(5) of the 2004 Act, a sustainability appraisal. It is also relevant to mention that Dan Brown Ecology undertook a preliminary stone-curlew survey of Kilverstone for the Landscape Partnership, which was completed in December 2007. I shall summarise the findings of this and other surveys later in this judgment.

26. During 2008, the Council produced the Thetford Area Action Plan "Issues and Options" document. Comments were invited on twelve areas identified for potential development. The document recognised the sensitivity that was the consequence of the presence of the SPA to the south-east of the town but at that stage land in and near that area was included in the areas identified for potential development. Two of the twelve areas were promoted by Shadwell.

(ii) The Habitats Regulations Assessment

27. During 2008, Footprint Ecology undertook an assessment under the Habitats Regulations for the Council. It produced two reports dated 10 November 2008. *Habitat Regulations Assessment: Breckland Council's Submission, Core Strategy and Development Control Policy Document,* ("the Habitat Regulations assessment") *inter alia* considered the effect of the proposed development in the Thetford area on relevant species. It concluded that there was evidence that stone-curlews avoided housing, and that the evidence was clear for at least a 1,000 metre distance. It also stated that, although it was difficult to give a definitive distance beyond which no

effect occurred, there would potentially be an effect at distances of between 1,000 and 2,500 metres: Report, paragraph 9.4.7.

28. The Habitat Regulations assessment concluded that "the point at which the effects are no longer adverse (i.e. at a distance somewhere between 1,000m and 2,500m) now requires further consideration" and that "based upon the evidence and taking a precautionary approach a distance must be set that prevents built development occurring within a zone whereby it is considered that adverse effects would occur": paragraph 9.4.10. It also stated that the evidence in the report should enable "Natural England and possibly other key stakeholders to set the most appropriate distance on a precautionary basis". The other report, *The Effect of Housing Development and Roads on the Distribution of Stone-Curlews in Brecks* ("Footprint Ecology's Evidence report"), contained the supporting evidence for the Habitats Regulations assessment.

29. The two Footprint Ecology reports used comprehensive bird data acquired under licence from the Royal Society for the Protection of Birds ("RSPB"). The data covered the period 1988 to 2006, excluding 2001, when the occurrence of foot-and-mouth disease resulted in an incomplete data set. The data gave the specific location of stone-curlew nests to the nearest 50 metres.

30. The areas surveyed by the RSPB in this area included Shadwell Estate, Elveden Estate and the Crown Estate. Mr Spencer's statement (paragraph 26) stated that the coverage did not include Kilverstone Estate because the RSPB had not been given access, but that that was not unusual, and indeed the Shadwell Estate had not given access to the RSPB since 2009.

31. Mr Spencer stated that one quarter of the land area of the urban extension is in the Crown Estate, which had been surveyed by the RSPB. His evidence is that the Crown Estate land is of key relevance to consideration of the Kilverstone Estate since it comprises an area of similar condition to the Kilverstone Estate, which is also bounded by the A11 and the urban edge of Thetford. He stated that "importantly, no stone-curlews have been recorded by the RSPB on Crown Estate land". In a response dated 7 November 2012 to a request for further information and disclosure by the claimant, Mr Spencer stated that, since drafting his statement, he had been informed by the RSPB that the Kilverstone Estate was surveyed by it in the period 1992 – 2001 "on a limited *ad hoc* basis", and that the RSPB did not hold records of the precise areas surveyed or the dates of the surveys, but had verified to him that no stone-curlews were found in that period.

(iii) The evidence considered for the Core Strategy

32. On 31 March 2009 the Council's Core Strategy was submitted for examination, and the TAAP "Preferred Options" document was published. The "Preferred Options" document reflected the proposed Core Strategy submission, and the Habitats Regulations assessment which had been informed by the evidence in Footprint Ecology's Evidence report. It stated (paragraph 8.2) that the work undertaken on the possible impact on protected habitats and species, especially stone-curlews, "has resulted in a bigger area than originally anticipated needing protection from development". It also stated that "the main impact of this work has been to rule out

significant development to the south-east of Thetford, but not to the north of Thetford".

33. Mr Spencer's evidence (paragraph 51) is that the environmental work "raised a question as to whether a single urban extension to the north of the town, avoiding the 1,500 metre buffer for the SPA, could deliver the [East of England Plan] housing requirements" and "work by Roger Evans Associates demonstrated that it could". Mr Spencer also stated (statement, paragraph 28) that, in preparing the Core Strategy, the Council had considered a number of alternatives, including a "two strategic directions of growth" option, one to the north-east and one to the south-east of Thetford, but had to discount the latter on environmental grounds.

34. The evidence provided in support of the Core Strategy included a Sustainability Appraisal Report (comprising the Scoping Report, and the Preferred Options' and Submission Sustainability Appraisal Reports), and Footprint Ecology's Habitats Regulations assessment, and Evidence report.

35. Natural England and the RSPB were consulted throughout the preparation of the Core Strategy. Although there was evidence of a positive relationship between nest densities and distance from settlement up to 2,500 metres, they strongly supported the Council's general approach and the use of the buffer zones.

36. Natural England stated that it was satisfied with "the data set of bird distribution in Breckland which had been analysed" and "the quality of the interpretation of this data set by Footprint Ecology". It supported "the analysis which recognises a 1,500m zone of impact around the SPA for stone-curlews", and welcomed the Council's "very strong response to the Footprint Ecology report, which [it] consider[ed] will effectively protect stone-curlews…from the adverse effects of development".

37. The RSPB described the approach of the Council to assessing potential effects and the steps taken to protect the SPA as "exemplary". It commended the Council on "the thorough manner in which the [Habitat Regulations assessment] has been undertaken, and the subsequent changes made to the Core Strategy and development control policies" reflecting the recommendations of that assessment. The RSPB also stated it considered that implementation of the changes "will avoid an adverse effect on the Breckland SPA as well as the other internationally important wildlife considered within the [Habitat Regulations assessment]", and that the Core Strategy proposed submission document "is sound" although several points of clarification were suggested.

(iv) The adopted Core Strategy

38. The examination of the Core Strategy Development Plan took place between 30 June and 17 July 2009, the Inspectors' report was published on 13 October, and the Core Strategy was adopted by the Council on 17 December 2009. I have stated (see [7]) that, at that stage, Shadwell accepted the north eastern area as an appropriate choice for an urban extension and did not seek the removal of Kilverstone as a suitable location for housing development. It considered that it was not the only appropriate location and, *inter alia* opposed the buffer zones as having no sound basis. Shadwell's

general stance was that the Council was being over-precautionary in its desire to protect stone-curlews.

39. The three policies in the Core Strategy which are of particular relevance to the present proceedings are SS1, spatial strategy; CP1, housing; and CP10, natural environment. SS1 confirmed that Thetford is to be a location for major change and sets out the specific housing requirements for Thetford, which are to be delivered by way of a greenfield strategic urban extension allocation to the north-east of the town.

40. Policy CP1 set out how the strategic housing requirements will be met. Paragraph 3.8 of the Core Strategy document stated:

> "At Thetford, mechanisms will be set out in an area action plan [this is the TAAP] for monitoring and managing the release of land to 2021 to meet RSS requirements, including phasing and any sequential release of land. The [TAAP] will also address the circumstances under which reserve land to 2026 would be released at Thetford. The broad location for the sustainable extension at Thetford will be land to the north-east of the town, within the boundary of the A11. Beyond 2021, new housing growth in Thetford will take place on identified sites within the town that may include deliverable brownfield land. The precise land areas and mix of uses will be set out in the [TAAP], utilising evidence basework undertaken in respect of the town's Growth Point Status. The town is also constrained to the east, and north of the A11, due to protected European habitats and species. The Council will require demonstration, through subsequent Habitats Regulations assessments, that proposed development to the north-east of Thetford will not result in harm to European habitats or species."

41. Policy CP10 concerned the protection of species in the Council's area. Among other things, it sought to protect the SPA from development that will adversely affect it. To this end, it prescribed two buffer zones, an "orange" zone and a "blue" zone, to protect those parts of the SPA that support, or are capable of supporting stone-curlews. The policy provided:

> "The Council will require that an appropriate assessment is undertaken of all proposals for development that are likely to have a significant effect on the Breckland Special Protection Area (SPA) and will only permit development that will not adversely affect the integrity of the SPA. In applying this policy, the Council has defined a buffer zone indicated in orange…that extends 1,500m from the edge of those parts of the SPA that support or are capable of supporting stone-curlews, within which:-
>
> …
>
> b. permission may be granted for development provided it is demonstrated by an appropriate assessment the development will not affect the integrity of the SPA.
>
> In other locations, indicated in blue…, the Council will apply the policy set out above to afford protection to other land supporting the qualifying features of the SPA… ."

42. Paragraph 3.72 of the Core Strategy document stated that, "in order to ensure that there are no significant effects on European habitats and species, new development will only be permitted within 1,500m of SPAs that are suitable for stone-curlews if it

can be demonstrated, through an appropriate assessment under the Habitats Regulations, that there will be no adverse impact on the qualifying features". This is the area described as the orange zone. This paragraph also stated that, outside the orange zone, in an area described as the blue zone, development restrictions would also operate on land suitable for stone-curlews or where they are present. It stated this to be an area within 1,500 metres of a place "where there have been five nesting attempts or more since 1995 or where other conditions are suitable, such as soil type", but "in these areas development may also be acceptable providing alternative land outside the SPA can be secured to mitigate any potential effects".

43. The "orange" and "blue" buffer zones are thus areas in which additional tests for planning permission will be applied in order to protect the SPA. They are stated in Mr Spencer's statement (paragraph 24) to represent a precautionary approach for the protection of stone-curlews in which housing allocations are not made, and in which additional tests are applied to planning applications.

44. The Inspectors who considered the Core Strategy recommended a number of changes. None of these was seen as materially altering the substance of the original plan or undermining the sustainability appraisal and participatory processes already undertaken: see paragraph 1.4. The Inspectors' report concluded that, subject to those changes, the Core Strategy Development Plan document was "sound". The three tests of soundness are set out in PPS 12. They are that the development plan is "justified", "effective" and "consistent with national policy". The Inspectors were satisfied that the document met the requirements of the 2004 Act and Regulations, and that the three tests of soundness had been met.

45. Under the heading "Environment", the Inspectors considered whether the Core Strategy and related development control policies made adequate provision for the protection of the natural environment and other environmental assets. The material headings in this section are "background", "plans and guidance", and "evidence base". The area's support of internationally important bird species, including stone-curlews, is mentioned at paragraph 3.207. The Inspectors referred to the views of some respondents that changes to policy CP10 would be beneficial because they would provide more scope for development where the impact on protected species could be shown to be minimal, or if suitable mitigation measures could be undertaken (paragraph 3.213). It was stated that, subject to the qualifications, the Inspectors "are satisfied that the broad thrust of the policy is consistent with relevant legislation and national guidance, and is supported by a robust evidence base based upon the current state of knowledge": paragraph 3.214.

46. In the section on "evidence base", it is stated that the work commissioned by the Council showed that the most significant effect on stone-curlews extended to 1,500 metres: paragraph 3.216. It is also stated that some commentators regarded that as excessive, but that Natural England and the RSPB endorsed the studies and their use by the Council (paragraph 3.217), although both bodies acknowledged "the relatively poor understanding of the bird's behaviour and admit[ted] that this hinders possible mitigation measures which might permit a less restrictive approach to development" (paragraph 3.217).

47. Paragraph 3.218 referred to advice from the European Commission that measures based on the precautionary principle should be proportionate to the chosen level of protection and only maintained as long as the scientific data is inadequate, imprecise or inconclusive. In the following paragraphs, the Inspectors expressed concern that the policy was based on information about bird populations that is not freely available and therefore not subject to scrutiny. It is stated that the buffer zones lack subtlety because it seemed likely that parts of the SPA would contain habitats unsuitable for ground nesting birds, and because anecdotal evidence from experts and landowners suggested that stone-curlews may be less susceptible to human activity than either Natural England or the RSPB believed. However, despite these misgivings, the Inspectors concluded (paragraph 3.222) that "in the absence of evidence to show that development in 'buffer zones' will not adversely affect stone-curlew populations, the precautionary principle must be followed" and that "the evidence is sufficiently robust to support the protective measures in this respect".

48. The way the Inspectors suggested their concerns might be addressed for the future was (see paragraph 3.223) by addressing the absence of evidence. This would enable the Council to seek a better balance between the future development needs of the area and maintaining the fullest possible protection for identified endangered species on the fringes of the SPAs when "carrying forward delivery of the [Core Strategy] growth agenda by way of the [TAAP] and the site allocations DPD." The Inspectors "therefore" considered that:

> "urgent work, including careful monitoring, is essential to provide a better understanding of the interactions between Stone-Curlews and human settlement, and to develop practical and effective mitigation methods to complement the modifications to the policy suggested by the Council. Without such steps we accept, as Natural England makes clear, that it will remain extremely difficult to overcome the presumption against development": paragraph 3.224.

49. After the receipt of the Inspectors' report and before the Council adopted the Core Strategy, it corresponded with Shadwell. In an email dated 14 November 2009, Shadwell's finance director, Mr Kennard, stated that its concern was that Thetford's expansion to the north-east would lead to the disintegration of the town. He also suggested that there had been more than five breeding attempts by stone-curlews on Kilverstone since 1995. In his first statement, he stated that he first told the Council of this in August 2009. In his November email, he stated that there had been more than five breeding attempts by stone-curlews on Kilverstone since 1995. He stated that he cited the Kilverstone evidence "not to preclude development there, but demonstrate quite how absurd the 1,500m requirement is, if the birds can co-exist within 400m of a 24-hour supermarket".

50. Mr Kennard stated that, although the Council would probably claim the evidence is only "anecdotal", it was more than that and had been corroborated. He was referring to information, in particular from Malcolm Kemp, a tenant farmer on the Kilverstone estate, and Darryl Broom, who, between 2000 and 2008, had been employed as a gamekeeper on Kilverstone estate. Their accounts are now contained in statutory declarations respectively dated 20 and 29 February 2012. Mr Broom stated that he was aware of stone-curlew nesting sites on areas identified on a map, and witnessed fledgling chicks in multiple locations close to Maiden's Walk, confirming that there must have been more than one nest site in the area in each of the years. Mr Kemp, who has worked on the estate for 35 years, stated that, in the years prior to 2000, he

was aware of regular nesting in the locations referred to by Mr Broom, but was unable to be specific as to exact areas or incidence.

51. Mr Kennard's evidence (first statement, paragraph 19) is that, at a meeting with the Council about this evidence on 21 January 2010, Council officials declined to consider it. His evidence also refers to stone-curlews being identified on the Kilverstone estate in the summer of 2011, and that, in 2011, the Leader of the Council told him that Lady Fisher of the Kilverstone estate had told him that she had seen stone-curlews on her land, and that on one occasion Lady Fisher had confirmed this to him (Mr Kennard).

(v) The recommended "urgent" work

52. I have referred to the fact that the amended Core Strategy, as adopted on 17 December 2009, has not been challenged. In the light of what the Inspectors had said about addressing the absence of evidence, the Council, with the support of Natural England and the RSPB, is in the process of undertaking the further work recommended. Mr Spencer's evidence is (statement, paragraph 39) that the Core Strategy Inspectors' reference to "urgent work" is to the commissioning of that work, because it would take several years to plan, commission and undertake studies of the quality and robustness required to serve as an appropriate evidence base, and to avoid the difficulty identified by the Inspectors in paragraph 3.224 of their report (as to which see [47] – [48]). Mr Spencer's evidence is that it was for that reason that the Council did not consider it appropriate to delay the preparation of the TAAP. The work now being undertaken is due to be completed in the early part of 2013, with a report due in March. Mr Spencer's evidence is that the Council's approach has the support of Natural England and the RSPB.

53. Jumping forward in the chronology, the Council's approach was criticised by Shadwell at the TAAP examination in March 2012, but successfully defended. It had previously been endorsed in the 13 December 2011 report of the Inspector who considered the site-specific development plan document. The Inspector, who had conducted that examination the previous summer, stated (paragraph 58 of his report) that he interpreted the reference to "urgent work" as meaning that "the work should start as soon as possible, not that the work should necessarily be completed quickly, as it is clear that such work may take several years".

(vi) The TAAP

54. I have referred to the fact that the purpose of the TAAP was to manage the growth and regeneration around Thetford within the Core Strategy in a more detailed way. The final draft of the TAAP was published in August 2011. It was accompanied by a Sustainability Appraisal as required by section 19(5) of the 2004 Act, and a Habitats Regulations assessment under the Habitats Regulations 2010. The Sustainability Appraisal is a document of some 200 pages. It identifies various sustainability appraisal objectives, including objective 6, the need to "protect, conserve, enhance and expand biodiversity, and promote and conserve geodiversity". One of the objectives identified is to ensure that new development does not impact upon the integrity of European sites. The Habitats Regulations assessment (dated July 2011) substantially adopted the assessment used for the Core Strategy.

55. Section 4 of the submission suitability appraisal report for the TAAP contains the sustainability appraisal framework. It poses a series of questions examining whether sustainability objectives will be met if particular sites are allocated for development, and whether an allocation will "conserve and enhance species, diversity and avoid harm to protected species". Shadwell criticised this section (skeleton argument, paragraph 15(v)) because the site specific appraisal questions listed did not include whether the land to be allocated is a suitable habitat for protected species, whether protected species have been (i) surveyed and (ii) recorded on the land, and, if they have been recorded, details as to the species, the location, and the numbers.

56. Section 5 is concerned with developing and appraising the options. The option of developing the south-east of Thetford on the claimant's land is dismissed on the ground that:

> "… no new empirical evidence presented. Infrastructure requirements not yet fully understood for south-east option. Preliminary work indicates higher costs and environmental impacts."

57. Section 6 is concerned with predicting the effects of the TAAP in order to consider the potential changes to identified baseline conditions with or without actions, and the direct and indirect effects of the policies against the baseline. The process included predicting the scale, probability and impact of such effects and of any alternative options that have been identified.

58. One of the effects predicted was the deterioration of local biodiversity habitats as a result of development. The significance of the effect is designated as high, and its evaluation is as follows:

> "There are a high number of important European designated wildlife sites around Thetford. The [TAAP] affords a high degree of protection to areas of special environmental importance. Therefore, this effect is highly significant to the DPD.
>
> …
>
> Because biodiversity is an important issue to Thetford and its surroundings, these are highly significant effects. Separate to the requirements of the SA/SEA an appropriate assessment of the DPD under the Habitats Regulations has been undertaken at all the statutory stages of document production. The outcomes of the submission HRA document are presented in the literature review and confirm that the plan in itself will not have a likely significant effect on protected European habitats and qualifying features."

59. Shadwell has criticised the sustainability appraisal as focused on European sites but not specifying what the impact might be in "any meaningful sense", and as not looking in the direction of protected birds and their habitats outside the SPA and the buffer: skeleton argument, paragraph 15(xi). A specific example is the observation (skeleton argument, paragraph 15(xii)) that the section of the sustainability appraisal dealing with the mitigation of the adverse effects of the plan did not canvass the possibility that those effects might need to be mitigated outside the SPA and the buffer zones.

60. The baseline data is set out between pages 36 and 53 of the submission sustainability appraisal report for the TAAP. As to the number of stone-curlew breeding pairs, the tables give figures for the years 2007 – 2009, which are respectively 208, 222, and 230. Section 9 contains a number of targets which had been specified to determine whether the TAAP has a positive or negative effect. They include maintaining the breeding population in Breckland at no fewer than 172 pairs, and increasing the breeding population in Norfolk and Suffolk as a whole. Another aspect of Shadwell's criticisms (see skeleton argument, paragraphs 15(xv) and 57-58) is that, although, Kilverstone "has a considerable area of suitable habitat capable of supporting stone-curlews", the sustainability appraisal did not apply those targets to Kilverstone, and that the Habitats Regulations assessment used made no reference to the fact that Footprint Ecology had no data about stone-curlews nesting in Kilverstone. In these proceedings Mr Straker submitted that the latter point was significant because Kilverstone lay within 2,500 metres of the SPA and that the consequence was that the Habitats Regulations assessment of the TAAP did not enable the Council to conclude that the plan will not adversely affect the SPA.

61. Shadwell and others commissioned a report from the Landscape Science Consultancy ("LSC"). This was circulated in draft in the spring of 2011 and subsequently submitted as part of Shadwell's representations on the TAAP at the examination by the Inspector. The LSC report was criticised by Natural England, the RSPB and the Council. Mr Spencer's evidence (paragraph 69) is that the principal problem was that the LSC report did not focus on the issue of disturbance to stone-curlews caused by development, and it did not add to the understanding of what would constitute effective mitigation from development.

62. Shadwell's submissions on the final draft of the TAAP were that the 1,500 metre buffer was excessively precautionary, and that the further work recommended by the Core Strategy Inspectors had not been completed in the two years since the adoption of the Core Strategy. The result was that planning "continue[d] to be based on a lack of evidence". It maintained that the evidence of stone-curlews to the north-east of Thetford that it had provided had been ignored. During the hearing Mr Kennard produced an email dated 1 February 2010 to Tim Cowan of the RSPB and the statutory declarations referred to at [50].

63. The RSPB responded by exhibiting an email sent to the claimant on 2 February 2010 in response to an earlier email from the claimant which stated that the land at Kilverstone allocated for the housing extension lay outside both buffers and there were no reasons under the Habitats Regulations why it could not be allocated for housing. The email stated that any developments outside the buffer zones were likely to require environmental impact assessments and also project-level Habitats Regulations assessments, which would include assessing whether stone-curlews are present and are likely to be affected at the planning application stage. The RSPB's view was that the evidence relied on by the claimant was "anecdotal survey information" which did not jeopardise or contradict the approach taken by the Council or Footprint Ecology. It stated it "fully supports the approach taken in the [Habitats Regulations assessment]". In response to a request by the Inspector, the Council later stated that it had not previously had sight of the material submitted by Shadwell, but noted that four of the nest locations were within 1,500 metres of the SPA and only two were indicated on land outside the buffer zone.

64. At the examination of the final TAAP, the Council and the RSPB provided Dr Durwyn Liley of Footprint Ecology to answer any lines of enquiry on the veracity of Footprint Ecology's report and the Habitats Regulations assessment. The RSPB provided Professor Rhys Green, who was stated to be "widely accepted as the leading UK scientific authority on stone-curlews".

65. The Inspector issued his report on the TAAP on 30 May 2012. The report specifically addressed the evidence base and the sustainability appraisal. He accepted the RSPB's characterisation of the evidence about stone-curlews on Kilverstone as "anecdotal". His report made the following points:

    (1) The LSC Report's conclusions were not "sufficiently well founded, particularly in relation to the likely impact of development on breeding protected species, to justify overriding the protection afforded by the 1,500m buffer" (paragraph 27);

    (2) The LSC Report's conclusions were not sufficiently robust to set aside the "comprehensive [Footprint Ecology Study] that has been found to be sound through examination of both the [Core Strategy] and the Site Specific DPDs" (paragraph 28);

    (3) Natural England continued to support the initiatives pursued by the Council to protect the integrity of the SPA and the precautionary approach of the Council to locate development beyond the 1,500m buffer remained justified (paragraph 28);

    (4) The single direction of growth to the north of Thetford remained justified (paragraph 29);

    (5) Contrary to SECL's case, different approaches had not been taken towards stone-curlew nesting evidence on sites to the north as compared with sites to the south (paragraph 30);

    (6) Notwithstanding Shadwell's criticisms, the Inspector stated: "I am satisfied that the SA was carried out in accordance with the Strategic Environmental Directive and the reasons for not pursuing development to the south-east of the town are explained in the SA. The SA is sound and the evidence base as a whole is proportionate and meets the requirements of the NPPF" (paragraph 30).

66. Shadwell's criticism of the sustainability appraisal is usefully summarised in paragraph 16 of its skeleton argument. Mr Straker QC submitted on its behalf that the sustainability appraisal did not: (a) set out baseline evidence on the presence or absence of stone-curlews or their habitat outside the SPA and the buffer zone; (b) predict or evaluate the effects of the plan on stone-curlews in those places; or (c) consider how those effects could be mitigated. The criticism is that the sustainability appraisal approached the matter on the basis that there would be no impact on stone-curlews in the proposed urban extension because it lies beyond the 1,500 metre

buffer. The criticism is thus that there was no assessment of individual instances of the stone-curlew on the Kilverstone land.

67. Mr Spencer's evidence is that at no point in the Habitats Regulations assessment process for the TAAP or the Core Strategy, or through other representations, has Natural England ever asked the Council to assess individual instances of the stone-curlew on the Kilverstone land. Nor did the RSPB, although the email dated 2 February 2010 referred to at [63] recognized that such work may be required in the more specific context of a planning application for the urban extension.

68. Such a planning application is currently under consideration by the Council. Mr Spencer's evidence (paragraph 66) is that, in connection with that application, Pigeon, the interested party, submitted a study by Dan Brown Ecology Ltd containing surveys of Kilverstone for the years 2007 – 2011 using a methodology which has been endorsed by the RSPB. Pigeon supplied this information to the Council in April 2012, a month after the conclusion of the examination on the TAAP, but some seven weeks before the Inspector reported.

69. Shadwell relied on the fact that the Council had not attempted to obtain any of this material earlier and, after it received it, did not inform the Inspector or Shadwell: see skeleton argument, paragraph 40. It also relied (skeleton argument, paragraph 37) on what it described as a concession by Dan Brown Ecology that its survey methodology may have under-recorded stone curlew activity because the surveys were carried out at the wrong time of the year. What Shadwell described as a "concession", however, related only to the material for 2007 when Dan Brown Ecology undertook a "preliminary scoping exercise" not a full survey. The RSPB has raised no caveat about the method Dan Brown Ecology used.

70. As to what the surveys revealed, the 2008 survey was carried out between March and October. The report stated that in fourteen visits no stone-curlew were seen within the area of the TAAP but that one territorial pair had been seen outside its area. No territorial pairs were located in 2009 or 2010, although in 2010 on two occasions stone-curlews were recorded foraging. In 2011 one territorial pair was found, but again this was outside the area of the TAAP. In summary, the surveys by Dan Brown Ecology indicated some limited stone-curlew presence on Kilverstone, but did not reveal a scale of nesting attempts by stone-curlews at a sufficient level (i.e a minimum of five) to indicate that it should be within the blue buffer for the purpose of Core Strategy policy CP10.

IV. Discussion

(i) The process and the role of the Court

71. Before turning to the three grounds upon which the TAAP is challenged, I make two observations about the process and one about the role of the court. The procedure at an independent examination in public is less formal than at a traditional planning inquiry. It generally proceeds on the basis of written documents being presented, and discussion between the parties and the Inspector based upon those documents: *Persimmon Homes (North East) Ltd v Blyth Valley BC* [2008] EWHC 1258 (Admin)

at [49] Collins J. While formal evidence can be given where the Inspector decides that is essential, this would be so only rarely.

72. Secondly, a decision-maker should give the views of statutory consultees, in this context the "appropriate nature conservation bodies", "great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons": see *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49] *per* Sullivan J, and *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin) at [112] *per* Owen J. See also *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408 *per* Dyson LJ at [54].

73. As to the role of the Court, review of the adequacy of environmental appraisals, assessments, and impact statements, is on conventional *Wednesbury* grounds: see *R v Rochdale NBC, ex p Milne* [2001] Env. L.R. 22 at [106] *per* Sullivan J (Environmental Assessment); *R (Bedford & Clare) v Islington LBC* [2002] EWHC 2044 (Admin) at [199] and [203] *per* Ouseley J (Environmental Statement); *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408 at [14] – [18] (Environmental Impact Assessment), and *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321, at [39] *per* Laws LJ (Environmental Impact Assessment and Environmental Statement).

74. What does review of environmental documents on conventional *Wednesbury* grounds mean in practice? The judgments of Ouseley J in the *Bedford & Clare* case, of Sullivan J (as he then was) in *R (Blewett) v. Derbyshire CC* [2003] EWHC 2775 (Admin) and of Weatherup J in the Northern Irish case *Seaport* of *Investments Ltd, Re Application for Judicial Review* [2007] NIQB 62 illustrate the general approach of the court.

75. Ouseley J (at [203]) distinguished deficiencies resulting from the omission of a topic or because it has been inadequately dealt with which may have force on the planning merits and deficiencies which show that there has been an error of law or mean that the document cannot reasonably be regarded as (in that case) an Environmental Statement. Only the latter can found a statutory application to quash.

76. In the *Blewett* case Sullivan J stated that:

> "41…. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ... but they are likely to be few and far between."

77. He also (see [68]) deprecated the tendency of "claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by [the Regulations] it was therefore not an environmental statement and the local planning authority had no power

to grant planning permission" He considered this to be misconceived unless, in language similar to that of Ouseley J, "the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations". Sullivan J's approach was approved by Lord Hoffmann in *R (Edwards) v. Environment Agency* [2008] UKHL 22 at [38] and [61].

78. In *Seaport Investments Ltd, Re Application for Judicial Review* [2007] NIQB 62 Weatherup J stated (at [26]) that "the responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for environmental reports". He also stated that the Court will not examine the fine detail of the contents of such a report but will seek to establish whether there has been substantial compliance with the information required. He went on to consider whether the specified matters have been addressed "rather than considering the quality of the address".

(ii) Ground 1: Did the Council's sustainability appraisal and strategic environmental assessment comply with section 19(5)(b) of the 2004 Act and the 2004 Regulations?

79. Shadwell's case on this ground is essentially that the sustainability appraisal did not include an assessment of the environmental characteristics of Kilverstone because it approached the proposed urban extension on the basis that it will have no impact on stone-curlew because it lies beyond the 1,500 metre buffer. It was argued that it therefore did not contain all relevant information relating to the current state of the environment as required by regulation 12 and Schedule 2 of the EAPPR 2004.

80. My summary of the sustainability appraisal shows that there are numerous references in it to biodiversity issues, impacts on stone-curlews, and alternatives, including developing the area to the south east of Thetford. Shadwell's criticisms of the appraisal (see [59], [60], and [69]) are of a highly detailed nature. Does the appraisal's treatment of the position of Kilverstone and the area to the north east of Thetford mean that it cannot be described as, in substance, a sustainability appraisal for the purposes of the Regulations? The answer depends on whether it was required to provide a comprehensive assessment of the entire body of evidence about stone-curlew activity, notwithstanding the quality of the evidence. I have concluded that it was not.

81. First, the sustainability appraisal was required to assess the likely significant effects on the environment of implementing the TAAP and reasonable alternatives. The Regulations make it clear that the information required is that which may "reasonably be required" taking account *inter alia* of the need "to avoid duplication of the assessment": EAPPR 2004, regulation 12(3)(d). The sustainability appraisal, strategic environmental assessment and Habitats Regulations assessment for the Core Strategy had not been challenged and were supported by Natural England and the RSPB. Those assessments led to the decision to adopt the orange and blue buffer zones in the designated areas. Shadwell's current position appears to be that the buffer zones should be altered either by including Kilverstone in the orange zone or by including it or part of it in the blue zone. But since the TAAP is required to conform to the Core Strategy, it is difficult to see how it would be possible to alter the buffer zones.

82. Secondly, there has been no challenge to the “five nesting attempts” criterion for inclusion in the blue zone. The evidence provided by Shadwell (see [49] - [51]) was considered “anecdotal” by the RSPB which stated (see [63]) that it did not “jeopardise or contradict” the approach taken by the Council and Footprint Ecology. The Dan Brown Ecology survey evidence concerning Kilverstone that has become available since the Core Strategy (see [69] - [70]) was adopted shows that it does not meet the “five nesting attempts” criterion. Shadwell’s contention that the Dan Brown Ecology surveys underestimated the presence of stone-curlew is both not sustained and, in the light of the guidance in the cases I have cited (see [75] – [78]), assumes an inappropriate standard of review to an environmental report in an application of this sort.

83. Thirdly, the Council’s approach has the strong support of Natural England, a statutory consultee whose views must (see [72]) be given “considerable weight”, and of the RSPB, an important and expert interest group. Shadwell’s case on this ground involves inviting the Court to say that it was *Wednesbury* unreasonable for the Inspector to have found the sustainability appraisal and the TAAP to be “sound” solely on the basis of the treatment of the evidence about Kilverstone and despite the support for those documents and the Council’s approach by Natural England and the RSPB. The evidence about Kilverstone, however, is nowhere near providing the “cogent and compelling” reasons that are needed in order to depart from the views of a statutory consultee.

84. Mr Straker also relied on the fact that the work which the Core Strategy Inspectors described as “urgent work” in October 2009 had not been completed. He argued (see e.g. skeleton argument, paragraph 13) that this meant that, although the buffer zones reflected in Policy CP10 possessed “utility as a tool”, the tool carried a health warning. The implication of this was that it was not possible to make progress with the TAAP until that work was completed. But, given the time needed to complete suitable ecological studies and assemble a robust body of evidence, this would have involved a considerable delay. Taking the March 2013 anticipated completion date of the work, the delay would be of some three and a half years.

85. The Core Strategy Inspectors who made the recommendation did not conclude that the plan including the buffers could not be found to be “sound” pending the completion of this work, and they found it was “sound”. The RSPB , in its email dated 2 February 2010 (see [63]) did not consider that further assessment work was needed before a decision could be made about the TAAP. Had the completion of the TAAP been deferred pending the completion of that work, planning applications would have had to be considered and determined with only the more general level of development plan control that is possible within the Core Strategy. For these reasons, it is, in my judgment, unarguable that the TAAP Inspector should have sought to delay progressing or completing the TAAP until the work was completed. I also note that the approach taken by the Council and the TAAP Inspector has (see [53]) also been endorsed by the Inspector who considered the site specific development plan document.

(iii) Ground 2: Did the Inspector breach section 20(5) of the 2004 Act in concluding that the TAAP satisfied the requirements of section 19 of the 2004 Act and was "sound"?

86. For the reasons I have given in relation to ground 1, on the material before the TAAP Inspector, his findings were open to him. He expressly referred in his report to the matters raised by Shadwell. The question is whether the non-disclosure by the Council of the Dan Brown Ecology survey work to the Inspector means there is a public law basis for challenging the Inspector's examination of the TAAP. It was (see [67]) not information which the statutory consultee and the RSPB considered was required before a decision could be made about the TAAP.

87. The Council relied on the confidential nature of the information supplied, which included site specific information about stone-curlews. It argued that it would not have been appropriate to disclose this to the Inspector at the independent examination because (skeleton argument, paragraph 69) that "would have given rise to a potential for birds and/or nests to be destroyed". It relied on regulation 12(5)(g) of the Environmental Information Regulations 2004 SI 2004 No. 3391 which entitles a public authority to refuse to disclose information to the extent that its disclosure would adversely affect … the protection of the environment to which the information relates". It also submitted that it was not required to place fine detail work submitted in support of a particular planning application before an examination directed to a more general strategic document.

88. The Council is, of course, entitled to rely on regulation 12(5)(g). But, had the information from the Dan Brown Ecology surveys been crucial to the further consideration of the TAAP, it would have been possible for the Council to disclose it with suitable safeguards. It was not, for example suggested that there was a risk of either Shadwell or the Inspector treating the information inappropriately. Indeed, given the position Shadwell has now taken, it would be against its interests to do anything which would adversely affect any stone-curlews on the Kilverstone estate.

89. That brings me to the crucial point in this context. Even if the Council was not entitled to withhold the Dan Brown Ecology survey work, in assessing whether the failure to disclose it means that the TAAP should be wholly or partly quashed, it is important to consider what impact that work might have had on the Inspector's conclusions. The information contained in it does not (see [69] - [70]) reveal a scale of nesting attempts by stone-curlews which would have put Kilverstone within the blue buffer zone and does not support the position Shadwell has taken in these proceedings. I accept the submissions of Mr Hobson QC and Mr Maurici that the disclosure of Dan Brown Ecology's surveys could have had no impact on the Inspector's conclusions. In terms of Policy CP 10 and the buffer zones, it in fact undermines Shadwell's case because the survey results are consistent with the other material considered by the Inspector which provided no evidence of sufficient breeding attempts on Kilverstone land.

(iv) Ground 3: Did the Council's Habitats Regulations assessment breach Regulation 61 of the Habitats Regulations 2010?

90. In order to succeed on ground 3, Shadwell has to produce credible evidence of a real risk to the integrity of the SPA (see *R (Boggis) and another v Natural England* [2009] EWCA Civ 1061 at [37]) as a result of the TAAP. Shadwell relied upon six matters in support of its contention that the Council breached the Habitats Regulations 2010. The first two relate to Footprint Ecology and the Council not taking account of the evidence in Footprint Ecology's reports that development could adversely affect the nesting density of stone-curlews up to a distance of 2,500 metres. Shadwell contended that, in the light of this, the assessment of Kilverstone's position could not be based on the fact that Kilverstone was more than 1,500 metres from the SPA and the land in the blue buffer zone.

91. The difficulty with this contention is that the 1,500 metre distance was not challenged when the Core Strategy was being considered. No one then argued that a more precautionary approach was necessary. Indeed Shadwell's position at that time was that a less precautionary approach would suffice. The 1,500 metre distance was endorsed by Natural England and the RSPB. It was adopted in the Core Strategy, and the Core Strategy is no longer challengeable. No new evidence has been produced which undermines the validity of the 1,500 metre distance.

92. Three of the other alleged breaches rely on the matters relied on in support of ground 1. It is argued that the data from which the two buffer zones were derived was incomplete because it excluded data concerning the Kilverstone Estate, and evidence that stone-curlews had nested there and that its land was suitable for them. The reasons for which I rejected these contentions in the context of the sustainability appraisal also apply in the context of regulation 61 and the Habitats Regulations assessment.

93. The last of the matters relied on concerns an indication given to Shadwell by Mr Cowan of the RSPB in January 2010 that land to the north-east of Thetford ought to be surveyed by an independent expert to determine whether its development would adversely affect stone-curlews. Schedule 3 to Shadwell's grounds describes the view expressed as "a personal view", and, since the position taken by the RSPB was consistently supportive of the Council's approach and did not recommend such survey work, Shadwell is not assisted by it.

94. For the above reasons, I also reject this limb of the challenge.