Stephen Hargreaves v Secretary of State for Communities and Local Government, Wyre Borough Council, Cornwall Light and Power Company Limited

Case No: CO/692/2011

High Court of Justice Queen's Bench Division Manchester District Registry

2 August 2011

[2011] EWHC 1999 (Admin)

2011 WL 2748044

Before: His Honour Judge Pelling QC Sitting as a Judge of the High Court

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Representation

Mr Robert McCracken QC (instructed by Richard Buxton Solicitors) for the Claimant.

Mr Martin Carter (instructed by the Treasury Solicitor) for the First Defendant.

The Second Defendant did not appear and was not represented.

Mr Vincent Fraser QC (instructed by Eversheds) for the Third Defendant.

Judgment

HH Judge Pelling QC:

Introduction

1 This is a challenge brought by the Claimant pursuant to s.288 of the Town and Country Planning Act 1990 ("TCPA") by which he challenges the validity of the decision of the First Defendant's Inspector Mr David Pinner ("the Inspector") to allow the appeal by the Third Defendant ("CLP") against the refusal by the Second Defendant ("the LPA") of planning permission to erect two 2MW wind turbines (each with a hub height of 80 metres and a blade tip height of 125 metres) and ancillary development on land at Orchard End Farm, South of New Lane, Eagland Hill, Lancashire ("the Development Site"). The Claimant is a local resident who lives in close proximity to the Development Site and is a member of the local residents' group – the Eagland Hill Action Group ("EHAG") – that is opposed to the development.

Factual Background

2 Eagland Hill is located approximately 5 Km from the Morecambe Bay SPA ("the SPA"), Lune Valley SSSI and Wyre Estuary SSSI. The SPA hosts a range of bird species including pink-footed geese. It is common ground that this species commute inland for up to 10 Km from their roosting sites on the coast to feed on grain and winter cereal crops and that such geese feed on fields adjacent to the proposed development site. It is also common ground that there is a risk that up to 50 geese a year will collide with the wind turbines that it is proposed should be built on the Development Site if the development proceeds.

3 The proposed development was the subject of an application for permission by CLP in 2008 that was refused in essence because of the potential impact on the pink-footed geese population and also because of adverse visual impacts. The application was resubmitted in April 2009 and refused again on 3rd December 2009. The reasons given for the second refusal were first that the proposed turbines would be visually obtrusive and out of character with the countryside and secondly that the development would have *"…an unacceptable detrimental impact on the pink-footed geese population of the Morecambe Bay SPA and RAMSAR site contrary to Policy ENVT7 of the Wyre Borough Local Plan 2001–2016 (first deposit draft)"* ("the Habitat Issue"). CLP appealed from that refusal on 28th May 2010. The appeal succeeded and this challenge is brought in relation to that outcome.

4 The Habitat Issue was one that remained under consideration throughout the period both before and after the refusal of the 2009 application. In October 2009, Lancashire County Council ("LCC") conducted an Appropriate Assessment under the Council Directive On The Conservation Of Natural Habitats And Wild Fauna and Flora ("the Habitats Directive") and the then applicable Regulations that carried the Directive into Law in England on behalf of the LPA and had concluded that *"…in the absence of mitigation, the proposals are predicted to have an adverse impact (mortality due to collision) on pink footed goose population associated with …"* the SPA and that in consequence LCC was *"…unable to conclude that the project will not adversely affect the integrity of …"* the SPA.

5 On 16th October 2009, Natural England ("NE") wrote to the LPA agreeing with LCC's conclusions. However, it did so in narrow terms because it said *"…following discussions with the Applicant, NE was initially satisfied with compensation pink-footed goose feeding area proposed but had not picked up the existence of an adjacent footpath. The presence of a public footpath along three margins of the field may result in frequent disturbance to feeding geese from footpath users, particularly dog walkers and on this basis the conclusion of the AA was that the mitigation proposed was not adequate. However, from Natural England's perspective this is the single outstanding area of concern, which we believe is easily surmountable."* NE added that assuming this issue could be overcome " *…NE believe it critical that any consent (should it be granted) must contain a condition that ensures that the full detail of the mitigation plan, and its monitoring is agreed with Wyre Borough Council, Natural England and RSPB prior to the commencement of construction or on site preparatory works"* . NE maintained their objection pending the resolution of these issues.

6 On 1st March 2010, the consultants retained by CLP issued a second version of what is called the "Goose Mitigation Agreement". The document recorded at Paragraph 11 an adjustment to the mitigation scheme that was designed to meet the qualitative objections previously raised by NE. In essence it involved maximising goose feeding areas with some fencing along the footpath to minimise disturbance mainly from dogs being walked along the path concerned. NE concluded that *"…the outline mitigation plan … is acceptable …"* but added that NE " *…would need to see the final plan tied into a legal agreement with the local planning authority before we are able to remove our holding objection …"* . RSPB also agreed *"…with the principles on size and location of the two mitigation areas …"* . It is clear that RSPB anticipated a more detailed plan would be produced at a later date. LCC's position was that it was only retained by the LPA to assist it during the planning application process and not with any appeal and thus had no continuing role to play. However, LCC's ecologist confirmed that providing *"…Natural England is satisfied with the proposals we would have no further comment to make …"* .

7 On 28th May 2010, the appeal was launched. The appeal was made by way of written submissions – see the second paragraph of the letter from Eversheds to the Planning Inspectorate dated 28th May 2010 [2/554]. The Habitat Issue was addressed in Paragraphs 5.7.6 and 5.7.8 of CLP's appeal submissions in these terms:

> "5.7.6 … the Appellant's Environmental Appraisal concluded that, in the absence of suitable mitigation, the proposal may have an adverse impact on the pink-footed geese population and, therefore, Morecambe Bay SPA …
>
> 5.7.8 Two mitigation areas, measuring a combined total of 12.1 hectares in size have been identified. Both areas are capable of being managed in such a way as to provide food for geese. Accordingly, by reference to these two areas, an outline mitigation proposal has been produced which both Natural England and the RSPB agree

> constitutes adequate compensation for the precautionary 50 casualties per annum predicted by the collision risk model. Work towards the production of a detailed mitigation proposal is now in train. ”

In the concluding section of CLP's appeal submissions it was said:

> “Although there may be some significant effects from a visual perspective occasioned by the proposal, they will be highly localised and have been judged to be acceptable in impact terms. As regards the ecological impact of the proposal, it is acknowledged that due to collision risk there will be an adverse impact on the pink-footed geese population which roosts within the Morecambe Bay SPA and RAMSAR site. However, Natural England and the RSPB agree that the outline mitigation proposal drawn up on behalf of the Appellant is acceptable and that it constitutes adequate compensation for the number of collisions and resulting casualties predicted, thereby addressing the significant adverse impact which has been identified. …”

Full written representations concerning the avian issues were supplied with the written submissions in support of the appeal [2/421 and following]. The mitigation scheme is fully described at paragraphs 63-69 and all the relevant background material was appended to that document – see [2/436]. At the same time the detailed mitigation plan document was produced by CLP's consultants. That document provided for a plan that was to last throughout the 30 year predicted lifespan of the wind farm (Paragraph 6) and provided for the scheme to be funded throughout by CLP or its successors in title (Paragraphs 10 -12).

8 The letter from Eversheds to the Planning Inspectorate of 28th May 2010 referred to the fact that the LPA had previously decided in relation to the first planning application that an EIA was not required and had adopted a negative screening opinion. The letter explained that in consequence the application that was the subject of the appeal had not been screened and a request was made on behalf of CLP for a screening direction pursuant to Regulation 9(1) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the EIA Regulations”). In support of that application Eversheds said:

> “3. We confirm that the Development has the potential to give rise to environmental effects relating to matters such as noise, landscape and visual impacts, shadow flicker and ecological impacts. However, we would draw the Secretary of State's attention to the screening opinion adopted by the Council in respect of the First Application … which concluded that such effects are likely to be localised and would not, of themselves, warrant the submission of an EIA.”

The SoS's decision in relation to this request was arrived at on 25th August 2010 as I describe in more detail below.

9 The LPA filed a statement in response to CLP's appeal. In relation to the Habitat Issue, the LPA was content to adopt the submissions of Natural England – see Paragraph 2.1 of the submissions [2/566]. However the appeal was opposed by the LPA on the basis that the proposed development was *“…detrimental to the visual amenity of the surrounding area …”* by reason of the height scale and appearance of what was proposed.

10 On 15th July 2010 EHAG submitted their written representations in relation to the appeal. That document was signed by Mrs Pilling and identified the Claimant as being one of the members of the committee of EHAG – see [2/577]. Representations were made concerning visual impact [573–4] but it would be fair to say that the representations focus primarily on the Habitat Issue. They note [2/574] that NE and RSPB “ *…have agreed with [CLP] that, in principle, mitigation of the adverse effect on the population of pink footed geese in Morecambe Bay is possible”* . They maintained the submission that such was not possible. There follows at [2/575] a detailed critique of the mitigation plan. Particular reference is made to Paragraphs 13, 14 and 21 of the plan. The detailed plan ran to 32 paragraphs but the earlier outline plan ran only to 18 paragraphs – see [2/391]. Read in context the comments clearly refer to the detailed proposal put forward by CLP's consultants dated 28th May 2010. The final part of EHAG's response addresses issues of noise and shadow flicker before concluding that “ *…we are of the opinion that if the appeal were to be allowed, the development would result in an unacceptable detriment*

to the residential amenity of the occupants of nearby properties and a severe threat to Pink Footed Geese." .

11 On 20th July 2010, NE filed its response to the appeal. They referred to the scheme as being acceptable in principle but noted four issues that remained of concern of which one was the need to identify a funding mechanism. NE said that the mitigation scheme, once adjusted to take account of the factors identified, would result in a reduction of risk for pink footed geese " *…such that it no longer constitutes a significant risk to the designated site."* – that is the SPA. NE noted however that the plan had yet to be secured by a s.106 agreement " *…or similar"* but then added that with "…the formation of a s.106 agreement Natural England are of the opinion that the development would no longer pose a likely significant threat to the integrity of Morecambe Bay SPA. If the s.106 is set up there would be no further need for a revised "Appropriate Assessment" in accordance with the Habitats Regulations ".

12 CLP's consultants responded to these points in a response document dated 16th August 2010. The four points mentioned by NE are addressed at Paragraph 6 of that document. The first three are said to be minor and can be addressed in the final agreed version of the mitigation plan. In relation to funding it was said that the issue had been addressed in the detailed plan to which I have referred above by confirming that CLP (or its successors in title) would be responsible for funding the scheme during the thirty-year lifespan of the proposed development. That is so as is apparent from my summary of that document referred to above.

13 Finally I return to the application by CLP for a negative screening direction. The screening was carried out by reference to a document entitled " *The Screening Checklist* ". It runs to three pages and approaches the issue by reference to twenty seven questions. The significant point from the Claimant's perspective is that in answer to a number of questions that asked whether identified facets of the development were " *…likely to result in a significant effect"* it was said that the effect would be significant but local – see in particular the answers to questions 1, 6, 11, 13, 15 and 24.

14 The conclusions of the decision maker are set out under the heading " *Summary of features of project and its location indicating the need for EIA"* . The substance of the screener's view was that " *…I would not consider likely impacts of such significance in wider terms as to warrant an ES"* . The screener added that the Inspector would assess environmental information and evidence as material considerations as part of the normal planning processes in determining the appeal. On 25th August the formal decision letter was issued [2/608] by which it was recorded that the opinion of the SoS having taken into account the criteria set out in schedule 3 of the EIA Regulations was that the proposed development " *…would not be likely to have significant effect on the environment …"* and for that reason a direction was given that the proposed development was not EIA development. The screener's view concerning the role of the Inspector was also expressly referred to.

The Appeal Decision

15 The Appeal Decision ran to 14 pages and contained 50 main paragraphs. The result of the appeal was that it was allowed and permission was granted subject to various conditions set out in the Appeal Decision. The document has to be read as a whole if it is to be fully understood. However the Claimant maintains that Paragraph 3 contains a decision that is of importance to his case. In so far as is material, it reads:

> "The appellants have prepared an environmental appraisal of the scheme which comprehensively covers the likely significant environmental impacts and areas of concern …"

The Claimant submits that this sentence amounts to an acknowledgment by the Inspector that the proposed scheme would have significant environmental effects, it being submitted that there are no differences for present purposes between effects and impacts. It is submitted by the Claimant that having reached this conclusion, the Inspector acted unlawfully or irrationally in then either failing to remit the negative screening direction for reconsideration or in granting planning permission.

16 The Inspector addressed the Habitats Issue at Paragraphs 23-28 of the Appeal Decision. He

summarised the effect that it was thought the proposed scheme might have on the pink footed geese population at the SPA and the mitigation measures proposed to ameliorate that feared effect, he recorded the combined position of NE, RSPB and LCC as being that the mitigation proposal was acceptable in principle. The Inspector addressed the noise issue at Paragraphs 36-39 of the Appeal Decision. His conclusion was that subject to appropriate conditions, operation of the proposed turbines was unlikely to harm the living conditions of nearby residents as a result of unacceptable noise emissions.

17 The conditions that the Inspector imposed on the planning permission that he granted included the following:

> "3. If either of the wind turbines hereby permitted fails to produce any electricity to the grid for a continuous period of 12 months, and if so instructed by the LPA, the wind turbine and its associated equipment shall be removed from the site within 12 months after the end of that 12 month period in accordance with a decommissioning and restoration scheme including a time table for its implementation which shall have been submitted to the LPA for approval not later than 3 months after the date of the LPA's instruction to remove the turbine;
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> …
>
> 12. No development shall take place until the developer's outline mitigation scheme for compensatory feeding grounds for pink-footed geese has been worked up into a fully detailed mitigation scheme. The detailed scheme shall include arrangements for its implementation, management and maintenance for the lifetime of the proposed wind turbines. No development shall take place until the detailed scheme has been submitted to and approved in writing by the LPA. The turbines hereby approved shall not be brought into use until the approved mitigation scheme has been implemented in accordance with the approved details. If at any time during the lifetime of the wind turbines the mitigation scheme ceases to be maintained in accordance with the approved details the turbines shall not be operated until an alternative package of mitigation measures has been implemented in accordance with details that shall first have been submitted to and approved in writing by the LPA. The turbines shall not be operated during any period when any continuing requirements of the mitigation measures fail to be adhered to;
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> …
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> 17. When measured at any complaint location, noise from the proposed wind turbines (combined) shall not exceed the following limits:
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> (i) between 23:00 and 07:00 – 43dB … or 5dB(A) above background noise level whichever is greater;
>
> (ii) between 07:00 and 23:00 – 37.5dB … or 5dB(A) above background noise level, whichever is greater".
>
> Neither turbine shall be operated in breach of these noise limits.
>
> 18. No development shall be undertaken until a scheme has been submitted to or approved in writing by the LPA for the handling by the operator of the wind turbines of any complaints relating to noise emissions. Such a scheme shall include contact details for a person who shall have been nominated and engaged to receive and deal with such complaints, details of the method to be used for the monitoring and measurement of noise from the proposed turbines at any complaint location and, where non-compliance with condition 17 is detected, details of the mitigation measures to be undertaken, including a timetable for their implementation. Any such mitigating measures shall be implemented in accordance with the approved details."

The Claimant's Case

18 As set out in the Claim Form there are three grounds by reference to which this challenge is

being advanced:

i) An assertion that the Inspector erred in law by " *…failing to reconsider whether this was a development likely to have significant environmental effect and thus require EIA"* ;

ii) The Inspector erred in law in failing to conduct an Appropriate Assessment in accordance with the Habitats Directive and/or the Wild Birds Directive and/or the Conservation of Habitats and Species Regulations 2010 ("the Habitat Regulations"); and

iii) The Inspector acted in a manner that was procedurally unfair because he failed to invite the Claimant or EHAG " *…to participate in discussion of the same and/or make representations about…"* the proposed mitigation.

In paragraph 25 of his skeleton, Mr McCracken sought permission to amend the grounds by adding a further ground to the effect that the grant of planning permission was unlawful for the reasons set out in the skeleton argument lodged on behalf of the Claimant. This was not objected to by either of the Defendants who were represented before me and I give permission accordingly. The SoS and CLP dispute each of the grounds relied on.

Ground 1

The Framework

19 By TCPA s.288 any person aggrieved by any order or action of the SoS to which the section applies may apply to the High Court for an Order quashing the order or decision challenged. By Regulation 30 of the EIA Regulations the reference in s.288 to actions by the SoS extends to the grant of planning permission by the SoS in contravention of Regulation 3 of the EIA Regulations . The decision of the Inspector to grant permission is to be treated as that of the SoS for present purposes. Thus if it could be demonstrated that the planning permission granted by the Inspector had been granted in contravention of Regulation 3 , then the Claimant would be entitled to seek an order under TCPA s.288 quashing that decision. It is not open to the Court on an application of this sort to quash the decision of the SoS to grant a negative screening declaration. If such relief was to be sought it could and should have been sought in judicial review proceedings. I accept however, that if it could be demonstrated on the facts that (a) the Inspector had jurisdiction to remit the negative screening direction for further consideration and (b) the Inspector acted unlawfully or irrationally in failing to exercise that jurisdiction then the decision to grant planning permission ought to be quashed.

20 Regulation 3 prohibits the SoS from granting planning permission unless he first takes into account the " *environmental information* ". However, Regulation 3 applies only to development that is " *EIA development* " within the meaning of the EIA Regulations . It is common ground that the proposed development in this case is development to which Annex 2 of the EIAD and Schedule 2 of the EIA Regulations applies. In consequence the proposed development is to be treated as EIA development only if it "… *would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location* " – see Regulation 2(1) of the EIA Regulations . Whether it would be likely to have such effects is a matter for decision by the SoS, taking into account such of the criteria identified in Schedule 3 as are relevant to the development – see Regulation 4(5) of the EIA Regulations .

21 The effect of Regulation 4(3) of the EIA Regulations is that a direction of the SoS is determinative unless the SoS changes his mind – see Evans v. First Secretary of State [2003] EWCA Civ 1523 [2004] Env. L.R. 17 *per* Simon Brown LJ (as he then was) at paragraph 20. Any such decision is amenable to judicial review but only on Wednesbury grounds. It follows that where the SoS has made a screening direction, an Inspector is not required to address the question of whether development is EIA development. His task is to consider the planning merits of the appeal – see Evans v. First Secretary of State (ante) *per* Simon Brown LJ at paragraph 19. Thus Ground 1 must fail *in limine* unless it can be demonstrated that in the events that had happened the Inspector had jurisdiction to remit the negative screening direction for further consideration and had acted unlawfully or irrationally in failing to exercise that jurisdiction.

22 In Evans v. First Secretary of State (ante), Simon Brown LJ recognised the jurisdiction of an Inspector to remit a case for reconsideration of the EIA development question. However, he suggested that mere disagreement is not enough to engage this jurisdiction. Only if it is discovered that the SoS had proceeded under an important misapprehension or if other material facts had come to light that appeared to invalidate the basis of the SoS's direction would a remission be potentially appropriate and even then the jurisdiction should be exercised only if the Inspector thought there was a realistic prospect of the SoS changing his or her mind – see Evans v. First Secretary of State (ante) *per* Simon Brown LJ (as he then was) at paragraph 24.

23 Although Mr McCracken was minded to challenge this approach as out-dated and contrary to the approach that ought to be derived from the authorities referred to in Paragraph 9 of his skeleton submissions, I am not able to accept that submission. The Court of Appeal reiterated the approach set out in Evans less than a month ago in R (Mageean) v. SSCLG and others [2011] EWCA Civ 863 . The judgment as supplied to me is in draft but I understand that the Court of Appeal has given permission for the draft to be relied on in these proceedings. In relation to the point that Simon Brown LJ's comments were *obiter* (a point relied on by Mr McCracken) Sullivan LJ said that they nevertheless represented " *…eminently sensible guidance as to the circumstances in which an Inspector not merely may but should invite the SoS to reconsider a screening direction …"* . In relation to the circumstances when an Inspector came under an obligation to invite the SoS to reconsider his screening direction, Sullivan LJ said that such an obligation arose only " *…if the Inspector considers that because for example of a change of circumstances … there is "at the very least a realistic prospect" of the Secretary of State coming to a different screening conclusion"* . As to challenges to Inspectors who decline to refer screening directions back to the SoS, Sullivan LJ said this:

> "Whether there is a "realistic prospect" of the Secretary of State changing his or her opinion as to the likely environmental effects of the development is pre-eminently a matter of planning judgment for the Inspector. The Inspector's judgment on that issue can be challenged on rationality grounds. … It is not for the court to decide for itself whether there was or was not a "realistic prospect" of the Secretary of State making a different screening direction. …

Sullivan LJ recognised that because a decision by an Inspector on this issue was capable of being quashed on irrationality grounds such an Order was possible even where none of the parties before the Inspector had asked him or her to remit the screening direction concerned for reconsideration. However, in relation to that possibility he said:

> "However, an applicant under section 288, which is of course concerned with an error of law on the part of the Inspector determining the appeal will face a formidable task in such a case … [which] … will succeed only if the court is satisfied that any rational Inspector would on the facts before the Inspector on that appeal have concluded that they should exercise the power to refer the matter back notwithstanding the fact that they had not been asked to do so by any party to the appeal"

24 In those circumstances, I conclude that for the Claimant to succeed under this Ground, he must be able to identify a fact or circumstances that created the realistic prospect of the SoS changing his or her mind and also demonstrate in relation to that fact or circumstance that any rational Inspector would have concluded that he or she ought to exercise the power to remit. It goes without saying that these are substantial hurdles for the Claimant and are designed to be so in the interests of avoiding time consuming, cost expending, and ultimately pointless, circularity of decision making.

Discussion

25 The Claimant's case that the Inspector ought to have exercised the jurisdiction to remit is advanced on the basis that in the circumstances the SoS acted unlawfully in giving a negative screening direction. He does not assert that there were circumstances that became apparent only after the direction was made that if known at the time would have led to a different conclusion being reached. Thus what is being submitted is that the Inspector ought of his own motion to have remitted the Direction for reconsideration on the basis of erroneous

decision-making by or on behalf of the SoS. If this is to form the basis of a credible challenge then the errors are likely to have to be fundamental and obvious. I question whether this is a realistic approach in the absence of a submission by at least one party to the Inspector that this course ought to be adopted, where primary legislation makes the direction determinative and where judicial review of the decision of the SoS is in any event available to a party affected by it.

26 The Claimant asserts that the decision to make a negative screening direction was unlawful or irrational, and that the Inspector ought of his own volition to have realised that it was unlawful or irrational because it was arrived at by:

> i) Failing to apply the Waddenzee [2005] Env. L.R. 14 at 43–44 test as to the meaning of " *likely* " in Regulation 2(1) of the EIA Regulations ;
>
> ii) Failing to treat identified environmental effects as " *significant* " because they were judged to be of local effect only;
>
> iii) Wrongly treating the existence of a voluntary environmental appraisal as relevant to the question whether the proposed development would have a significant environmental effect; and
>
> iv) Failing to apply the Guidance published by the Commission of the EU ("the Commission") as to what constituted significant effect.

The assertion that the Inspector acted unlawfully or irrationally in failing either to remit the negative screening direction for further consideration is supported by the assertion that the Inspector recognised in Paragraph 3 of the Appeal Decision that what was proposed would be likely to have significant environmental impacts. Finally it was alleged that neither the SoS nor the Inspector could rationally have concluded that the proposed development would have anything other than a significant impact on the SPA given that LCC had concluded that the proposed development would have such an effect and either the proposed mitigatory steps could not be taken into account when assessing whether the proposal would have significant environmental effects or the scheme was so rudimentary that it ought not to have been taken into account.

27 In my judgment none of these points either individually or collectively lead to the conclusion that the SoS acted unlawfully or irrationally in making the negative screening direction much less that the Inspector acted either unlawfully or irrationally in failing to remit the direction for further consideration by the SoS. My reasons for reaching these conclusions are as follows.

28 I reject the assertion made by reference to Paragraph 3 of the Appeal Decision that the Inspector was thereby reaching a conclusion that EIA was in the circumstances required. Paragraph 3 has to be read as a whole and in its context. The sentence that is relied on by the Claimant that I have set out above appears under the sub-heading " *Other Issues* " and follows on from a paragraph with the sub-heading " *Main Issues* ". When the whole of the paragraph is read, and when that paragraph is read in the context of the Decision as a whole, and in particular by reference to the paragraphs that appear before Paragraph 3, it is entirely clear that the Inspector was doing no more than introduce the material that he would have to consider in the following sections of the Decision for the purpose of deciding whether as a matter of planning judgment planning permission ought to be granted. I accept the submission made on behalf of the SoS therefore that the Inspector was merely identifying the existence of the environmental appraisal as part of the material that he would have to consider for the purpose of reaching a planning judgment on the merits of the proposal. I consider any other approach to be unreal.

29 I now turn to the challenges advanced against the Screening Direction. It is said first that the SoS's screening exercise was flawed in law because the screener failed to apply the correct test identified in the ECJ case of Waddenzee [2005] Env L.R. 14 at Paragraph 44 of the Judgment of the Grand Chamber. That paragraph defines the meaning of " *likely* " for present purposes as meaning a risk of significant effect that cannot be excluded on the basis of objective information. This point is advanced by reference to the following sentence in the concluding summary of the

screening checklist that led to the screening direction:

> "While there are considered [sic] significant potential impacts visually in terms of the two turbines, taking account of location and number of turbines and environmental information submitted I would not consider likely impacts of such significance in wider terms as to warrant ES"

It was submitted that " *potential"* meant " *possible"* and that a possible impact was one that plainly satisfied the Waddenzee test and any other view was irrational or unlawful. Two questions arise therefore – first, whether Mr McCracken is correct in submitting that "likely" is to be equated with "possible" in this context and secondly whether the word "potential" meant or was intended by the screener to mean "possible".

30 Although Mr McCracken relied on the decision of the Court of Appeal in R (Bateman) v. South Cambridgeshire DC [2011] EWCA Civ 157 as supporting his submission that a " *possible* " effect was to be treated as a an effect that was " *likely* ", I do not read the judgments as having that effect. Moore-Bick LJ gave the lead judgment. He concluded that it was not necessary to express any concluded view on the point (see Paragraph 19 of his judgment) and neither of the other Lords Justices commented on the point at all although by implication at least Jackson LJ adopted a similar approach. That being so, I do not consider that Bateman assists on the issue now under consideration. The language used by the ECJ in Waddenzee does not support the submission either. Rather it appears to be concerned with emphasising the entitlement of the decision maker to take account of "objective information" in reaching a conclusion.

31 However, even if the effect of Waddensee is that "likely" is to be construed as meaning "possible" where that word is used in Regulation 2(1) of the EIA Regulations , that does not lead to the conclusion that the SoS's decision to make a negative Direction was either wrong in law or irrational. I do not accept that it is a fair construction of what was being said in the sentence set out above that the word "potential" was intended to be equated with "possible" in the sense for which Mr McCracken contends. All that the screener was attempting to do was to say (correctly) that there were impacts that could be identified that needed to be considered for the purpose of deciding whether or not to make a negative Direction. The attempt to construe the language of an official used in a document such as that I am now considering as if it were a statute and then to apply to that language a literalist rather than a purposive construction is one that I regard as unhelpful and inappropriate. A similar approach in relation to paragraph 3 of the Appeal Decision was adopted by the Claimant and is unhelpful and inappropriate for similar reasons. Read in its context and purposively it is entirely clear at any rate to me what the official was attempting to say. The suggestion that an error of law can be discerned from this language much less a fundamental one is unsustainable. The suggestion that the Inspector acted irrationally in failing to remit by reference to these points is not arguable.

32 The next issue that arises at this stage is whether it was an error of law or irrational to dismiss an effect as not significant because it was judged to be of local effect only. I am not able to accept either of these propositions. As Sullivan J (as he then was) said in R (Malster) v. Ipswich Borough Council [2001] EWHC 711 (Admin) [2002] PLCR 14 at paragraphs 73 and 79:

> "The 1999 Regulations are concerned to protect the environment in the public interest. Whilst this may have the effect of avoiding harm to residential amenity, the purpose of the 1999 Regulations is not to protect the amenity of individual dwelling-houses. There may be "significant" impact upon a particular dwelling or dwellings without there being likely "significant effect on the environment" for the purposes of the regulations.
>
> …
>
> In reality, there is a severe, but highly localised, shadowing effect upon a relatively few properties … that does not, in the context of the Regulations, amount to a likely significant effect on the environment such as to warrant an EIA"

This approach is reflected in both Paragraph 3 of Annex 3 to the EIAD, where potential significant impacts are required to be considered specifically having regard to " *the extent of their impact* ", and Paragraph 3 of Schedule 3 to the EIA Regulations , which is to similar effect. Indeed the Guidance issued by the EU Commission relied on by the Claimant for other purposes also

supports this approach. I discuss this further when considering that Guidance below.

33 It is true to say that in answer to a number of the questions set out in the screening checklist, the screener has identified significant but local effects. An example concerns flicker effect which is identified as having a potential effect by reference to question 6 but which is rejected as likely to result in significant effect because the impact concerned was assessed as having " *…significant local effects immediate area, no wider issues …"* . This is precisely the sort of analysis that was held in Malster to be one that it was appropriate for decision maker to adopt. The notion that it represents an error of law or is a judgment that was irrational is plainly unsupportable. This is so also in relation to the various other impacts that were assessed to be of local effect only. This is precisely the sort of planning judgment that the EIAD and the EIA Regulations require decision makers to take. I accept of course that there may come a point where the combination of local effects may lead to a different result when those effects are considered cumulatively rather than individually. However, the circumstances will be truly exceptional where a court would conclude that a judgment reached by reference to such a point was irrational.

34 I now turn to the assertion that the SoS wrongly treated the existence of a voluntary appraisal prepared on behalf of CLP as a relevant consideration. This was said to be apparent from the final paragraph of the screening checklist. As counsel for the First Defendant puts it in his skeleton submissions, all that sentence does is to set out the need for correspondence to be sent to the Planning Inspectorate. It is entirely clear when the documents referred to by the Claimant are read as a whole and in context that the determination whether EIA was required was contained in the previous paragraphs. The documents relied on by the Claimant simply do not carry the meaning alleged. I consider this point to be yet another attempt to construe a document prepared by an official in order to aid decision taking as if it was a statute and then to apply to it a literalist rather than purposive construction. This is objectionable for the reasons that I have already given but here is simply wrong as well. The point is without substance and I reject it.

35 Next it is alleged that the screening direction is flawed because the SoS failed to apply the EC's Guidance which it is alleged is that " *…any effect which ought to influence the decision should be regarded as significant"* . The Guidance there being referred to is that contained in the Instructions for Screening set out at the start of the Checklist of criteria for evaluating the significance of environmental effects contained in " *Guidance on EIA Screening* " published in June 2001. In my judgment this provides no assistance in the circumstances of this case. First, there is no obligation to follow this guidance, which as far as I can discern has no legal standing. Secondly the Guidence is at best meant to assist in deciding whether an effect ought to be taken into account as part of the process. Thus the Guidance is not concerned with the issues of likely effect or the degree to which if at all local effect should be regarded as significant. Indeed, in relation to the local effect issue, question 4 implies that where an effect is of local effect only, that question will be answered "no". Whilst no single answer is determinative, the Guidance suggests that the effect of a "no" answer will " *…generally point towards … EIA not being required"* . No effects have been identified by the Claimant that have not been taken into account at all that should have been. Thus the Guidance to which reference is made takes matters no further.

36 The final issue that arises at this stage concerns a point made at paragraph 11(iii) and (iv) of the Claimant's skeleton. The points made in summary are that (a) it was irrational or otherwise unlawful for the SoS to have failed to conclude that the proposed development would have significant environmental effects having regard to what LCC and NE had said concerning the effect of the wind farm on pink footed geese and, therefore, on the SPA and (b) that the proposed mitigation scheme should have been ignored for the purpose of considering whether there would be a significant environmental impact (that issue being relevant only once it had been decided that an EIA was necessary) or because it was not sufficiently detailed or because it was not protected by legally binding mechanisms. It is said that these points were so fundamental that they ought to have led a rational inspector to remit the screening direction for further consideration.

37 The responses by the screener to question 13 of the screening checklist show that the SoS recognised the potential impact on the SPA as an issue that had to be considered in deciding what screening direction ought to be given. The reasons for concluding that the development was not likely to have a significant effect on the SPA was that following consultations with NE and RSPB an appropriate outline mitigation scheme had been identified.

38 Since it is clear that the SoS concluded that there would not be a significant impact because of the mitigation scheme that had been devised, it is convenient to consider first the submission that the issue of significant impact ought to have been considered without reference to the mitigatory elements of the scheme that had been proposed and about which a large measure of agreement had been reached.

39 It is first worth making the point that even if the impact on the SPA had not been considered to be a significant effect for screening purposes, that did not prevent the Inspector from considering it as a factor relevant to the planning judgment to be reached concerning the scheme. It is clear from the Appeal Decision that this is what the Inpector did. There was nothing to prevent planning permission being refused even though a negative screening direction had been given. This was a point that was stated expressly in the body of the screening direction and in the summary at the end of the screening checklist prepared by the screening official. It is a point that has been made on more than one occasion in the authorities.

40 The question whether mitigation schemes ought to be considered as part of the screening process was considered in R (Hart DC) v. SSCLG [2008] EWHC 1204 (Admin [2008] 2 P&CR 16 (Sullivan J) where it was held to be lawful to take account of a mitigation scheme when reaching a screening decision. Although the point was conceded in that case, the Judge nevertheless considered whether the concession was rightly made at paragraphs 55-75 of the Judgment specifically because the point was one of general importance – see paragraph 54 of the Judgment. The Judge concluded that the concession was rightly made. As he said, at paragraph 76 of the Judgment, " *…there is no legal requirement that a screening assessment … must be carried out in the absence of any mitigation measures that form part of the plan or project. On the contrary, the competent authority is required to consider whether the project as a whole including such measures, if they are part of the project, is likely to have a significant effect on the SPA."* This approach, and in particular the emphasis on the artificiality of considering a scheme without considering the mitigation elements that were part of that scheme, reflected the approach adopted by the Court of Appeal in the earlier case of R (Catt) v. Brighton & Hove CC [2007] EWCA Civ 298 [2007] Env L.R. 32 . In that case Pill LJ giving the lead judgment draws a distinction between cases such Bellway Urban Renewal Southern v. Gillespie [2003] 2 P & CR 16 , where the need for extensive future site investigation was crucial to the decision whether an EIA was required, and cases where the likely effectiveness of conditions or proposed remedial measures could be predicted with confidence. In my judgment this case falls far short of the Gillespie type of case. As Pill LJ observed in Bellway , at paragraph 38 of his judgment, *".. it is not sufficient for a party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment and a planning judgment made."* . In relation to the remedial measures that were part of the planning proposal, Pill LJ said at Paragraph 37 of his Judgment:

> "When forming a screening opinion, the council were not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures. The consequences of providing the additional seating, and other changes, could not be predicted with certainty but as Collins J noted, the Council had extensive knowledge and experience, supported by surveys, of the impact of existing football league and cup matches on the environment. On the basis of that, and the studies as to future impact, they were entitled to assess the likely impact of the additional capacity proposed in the context of the continuing ameliorative measures also proposed and form the screening opinion that they did."

41 The Claimant argued that I should not adopt the approach reflected in these authorities to which I have referred above but that I should instead refer the issue to the ECJ. This approach was said to be appropriate in light of a letter from Mr Buxton, the Claimant's solicitor, to the EC Commission dated 4th September 2007 and a short response from an official at the Commission dated 30th January 2008. The EC official maintained that the Commission's view was that mitigation measures should be considered only once the requirement for an EIA had been established. I do not consider this to be a sound basis for inviting me to refer the issues I am now considering to the ECJ. At best this letter reflects the view of the Commission in January 2008. There is no authority cited for the view expressed by the Commission's official and there is

nothing in the EIAD that would appear to justify it. It ignores the logic of the reasoning set out in the authorities to which I have referred and does not appear to have been followed up with any administrative action. Given these factors, and that the domestic authorities clearly establish the approach to be adopted as a matter of English law, in my judgment the appropriate course for me to adopt is to follow the domestic authorities to which I have referred, one of which is binding upon me and with both of which I respectfully agree.

42 In my judgment this case is one of those that falls squarely within the parameters identified by Pill LJ as being one where the decision maker (here the SoS) was entitled to consider the effect of the proposed scheme together with the mitigation proposed for the purpose of arriving at a judgment as to whether there was a significant effect. This is plainly what the SoS did – see the question and answer referred to above. There is thus no basis for concluding that taking account of the effect of the mitigation elements of the scheme rendered the decision of the SoS either unlawful or irrational or that the Inspector acted unlawfully or irrationally in failing to remit the screening decision for further consideration by reference to this point. Whether the mitigation elements of the scheme were sufficient to overcome the objections raised by reference to the Habitats Issue to enable planning permission to be granted or granted subject to conditions was a matter for the planning judgment of the Inspector.

43 Finally in relation to this part of the case, it was submitted that the mitigation elements of the proposal could not rationally be treated as eliminating the likelihood of significant adverse environmental effect because of the qualifications contained in the NE letter of 20th July 2010. I am not able to accept this submission. First, it ignores the essential effect of that letter which is that (a) the scope of the mitigation elements of the scheme had been agreed between CLP, NE and RSPB and (b) that the effect of the mitigatory elements of the scheme was that the development no longer posed a likely significant threat to the integrity of the SPA. Secondly, the first three reservations on the second page of the letter were all drafting points not points of substance as is apparent from the acknowledgement that the scope of mitigation elements had been agreed. The remaining issue was that of funding and that was provided for under the terms of the detailed plan that had been produced. All that remained was to secure compliance. NE's suggestion was that compliance ought to be secured by s.106 agreement. If and to the extent the Claimant relied on these points as justifying an unlawfulness or irrationality attack on the SoS's decision to give a negative screening direction that is unarguable. The scheme taken as a whole was not likely to have a significant effect. The ways and means in which the scheme was to be carried into effect depended first on whether planning permission was granted at all and if so on what terms all of which were matters of planning judgment for the Inspector. If and to the extent that it is asserted that the Inspector ought to have remitted the proposal to the Secretary of State for him to reconsider his negative screening direction by reference to the issue I am now considering that is not arguable for similar reasons. If and to the extent it is argued that the Inspector's decision to grant permission on appeal ought to be quashed by reference to the point I am now considering that is also unarguable because whether compliance was to be secured by s.106 agreement or by conditions was a matter of planning judgment as well. Condition 12 provides a comprehensive means of ensuring that the mitigation scheme is fully detailed, and is implemented, managed and maintained throughout the life of the turbines. No development can commence until a scheme has been approved by the LPA; the turbines cannot be used unless the mitigation scheme is first implemented and if the scheme ceases to be maintained then operation of the turbines has to cease. If they remain out of operation for a year then the LPA can require their removal. In this regard, the wording of Condition 12 makes it clear that the starting point for the detailed scheme that was to be worked out was the outline scheme that had led NE and RSPB to conclude that significant risk to the SPA had been eliminated. There is no basis on which it could credibly be said that the Inspector was intending the local authority to depart from the constraints of the scheme that had been agreed and approved as eliminating any significant relevant risk. It could not credibly be contended that the LPA could in effect reconsider the impact on the environment and depart from the essential elements of the mitigation elements of the scheme. For these reasons, I consider that this case falls within the parameters for conditions identified by the Court of Appeal in Smith v. SSETR [2003] EWCA Civ 262 [2003] Env.L.R. 693

44 In those circumstances, I am not able to conclude that the screening Decision or the Appeal Decision is tainted by either unlawfulness or irrationality in the ways relied on. Thus I reject the suggestion that the Inspector acted either unlawfully or irrationally in refusing to remit the decision to make a negative screening direction. To the extent that it is submitted that the Inspector acted unlawfully or irrationally by granting planning permission and not dismissing the

appeal by reference to the Habitats Issue or other environmental issues that were relied on, I reject that submission as well. These were classically issues for the planning judgment of the Inspector. He was entitled to weigh the issues relied on in relation to the impact on the environment against the other factors he considered and to come to the conclusion that he came to. In relation to the Habitats Issue he was entitled to conclude that permission ought to be granted subject to a condition that left the fine detail of the mitigation elements of the proposal to be agreed with the local authority. Ground 1 whether of itself or in combination with the additional ground identified by Mr McCracken in the penultimate paragraph of his submissions does not justify quashing the Appeal decision.

Ground 2

45 The challenge as set out in the Claim Form is that the Inspector erred in failing to conduct an Appropriate Assessment under Article 6(3) of the Habitats Directive. This refers to the need for such an assessment in relation to any plan or project " *…not directly connected with or necessary to the management of the site but likely to have a significant effect thereon …"* . The word "site" in this context applies to sites such as the SPA. The sole question that arises is whether the SoS acted unlawfully in failing to carry out an Appropriate Assessment. That involves determining whether it was either unlawful or irrational to conclude that the project was not likely to have a significant adverse effect on the SPA. It is common ground that the reasoning that I have set out above in relation to the EIAD and the EIA Regulations concerning the meaning of "likely" and the approach to be taken in relation to mitigation is the same under both Directives and the applicable domestic Regulations.

46 The first question that has to be resolved on the Claimant's case is whether the ameliorating scheme is mitigation or compensation. It is submitted that if it is compensation then it must be ignored for the purpose of assessing whether the proposed project is likely to have a significant effect on the SPA. This distinction appears to be derived from the provisions respectively of Article 6(4) of the Habitats Directive and Regulation 66 of the Habitats Regulations , the Regulations by which the Habitats Directive is given effect domestically. The Claimant argues that the ameliorating elements of the project are not mitigation but are compensation and therefore cannot be taken into account irrespective of the ability of the court to consider mitigation provisions by reference to the authorities already considered in relation to the EIA Regulations and EIAD.

47 The only material that impacts upon this distinction is contained Section 5.4 of " *Managing Natura 2000 Sites* " published by the European Commission. This suggests that mitigation aims to minimise or cancel negative impacts whereas compensatory measures are measures independent of the project that are intended to compensate for the effects on a habitat affected negatively by a plan or project.

48 There is material concerned with the ameliorating elements of the project that appears to confuse two separate aims. The first suggested that the aim was to deflect geese that would otherwise be killed from coming into contact with the wind turbines if constructed, whereas the other aim was the provision of additional feeding grounds for geese so that mortality due to collisions could be offset against other geese that in other circumstances would not survive the winter due to lack of food surviving the winter as the result of additional feeding grounds being provided so that the net effect on the SPA of mortality resulting from collisions would be neutralised. In one sense the former could be described as mitigation and the other as compensatory using the definitions referred to in *Managing Natura 2000 Sites* . In my judgment that would not be a correct analysis however. The Habitats Directive and Regulations are concerned with likely significant impacts on the site – that is the SPA — not the species – that is pink-footed geese. Once this is understood it becomes clear in my judgment that whichever way the ameliorating elements of the scheme are understood they are in substance mitigatory in nature applying the Managing Natura 2000 Sites definitions because the adverse effect being addressed is the possible reduction of the total number of pink-footed geese over-wintering at the SPA.

49 The next issue that then has to be considered is whether taking into account the mitigating elements of the scheme it was unlawful or irrational to conclude that the proposed development would not have a likely significant effect upon the SPA. In my judgment framed in that way the proposition is not arguable. As I have said already the mitigation elements were integral parts of

the proposal and the Inspector was not merely entitled but bound to take them into consideration when considering the appeal – see paragraph 37 above. The issue for consideration was not what if any effect the proposals would have on pink-footed geese but rather what the effect of the proposal on the geese would have on the SPA. By the time the matter came to be considered by the Inspector the opinion of NE that was concurred with by both RSPB and LCC was that subject to the three minor points and the funding issue mentioned in the factual narrative above, and subject to the formation of a s.106 agreement, " *…the development would no longer pose a likely significant threat to the integrity of the … SPA …* ". As I have said already, the reliance placed by Mr McCracken on the apparent confusion in the minds of officials considering the ameliorating elements of the scheme as to the aim of the scheme is immaterial once it is understood that what was being addressed was effect on the SPA. Either aim would achieve the same objective namely neutralising a reduction in the total numbers of geese that over wintered at the SPA successfully.

50 Any reliance on the negative outcome of the Appropriate Assessment carried out by LCC on behalf of the LPA was misplaced as well. As is apparent from the part of the Assessment quoted in paragraph 5 above, LCC's conclusion was premised on " *…the absence of mitigation …* ". It was this element that distinguishes the position as it was at that stage from the position as it became.

51 Mr McCracken submitted that such an approach leads to absurdity in effect. I don't agree. If a proposal is made that will have a likely significant effect, and in respect of which no adequate mitigatory proposals are made, then there will have to be an Appropriate Assessment. If such an assessment concludes that the proposal will adversely affect the site concerned then it will be permitted to proceed only provided that Article 6(4) and Regulation 62 are satisfied. If the proposal is not likely to have an adverse effect on a relevant site because it incorporates appropriate mitigatory measures at the screening stage, then there is no need to embark upon an Appropriate Assessment and, subject to planning permission being granted, there will be no need to satisfy Article 6(4) and Regulation 62. I do not regard this as irrational. All issues concerning enforcement of the mitigatory steps can safely be left to be covered by conditions and / or a s. 106 agreement or undertaking.

52 To the extent that it is contended that the Inspector acted unlawfully or irrationally in granting planning permission subject to conditions rather than dismissing the appeal before him by reference to the Habitat Issue, I reject that submission for the reasons already given in Paragraph 40 and 41 above.

Ground 3

53 The final ground concerns unfairness. In my judgment these points are without substance. The procedure adopted was the written representations procedure. It was followed correctly and no failure to comply with any particular procedural requirement has been identified. Rather the challenge proceeds by reference to various consequences that flowed from the use of the written representations procedure. Thus the Claimant complains that he did not have the opportunity to cross-examine. However, that is a consequence of the written representations procedure being adopted.

54 It is alleged that the Claimant did not have the opportunity to challenge the mitigation scheme. I do not accept that to be so. As is apparent from what I say in Paragraph 11 above, it is clear that not merely did the Claimant have the opportunity to comment on the most recent version of the Mitigation Scheme but that he took advantage of that opportunity.

55 There is a complaint that the Claimant did not have an opportunity to comment on the final representations made by NE. However, aside from the fact that NE was a statutory consultee, not a party, the real point is that its position never altered. The issues relevant to what NE had to say could and were all addressed by reference to the merits of the mitigation scheme.

56 The only other point identified by Mr McCracken was the apparent confusion as to the aim of the mitigation scheme – that is whether it was designed to prevent mortality or compensate for its effects. I have already commented on this point in relation to the other Grounds already considered. Whether or not the Claimant had the opportunity to comment on this point is immaterial because the point is itself an immaterial one. As I have said already, it is not the effect on Pink Footed geese that had to be considered but the likely effect on the integrity of the SPA.

Once that is understood and it is understood that this issue concerns the total number of geese that successfully over winter at the SPA it becomes clear that this point is an immaterial consideration.

57 There is a complaint by the Claimant that he did not have the opportunity to comment upon the failure to require a s.106 agreement or the terms of Condition 12. However the decision in relation to the s.106 agreement and the terms of Condition 12 did not result from any submission on the part of any of the Defendants and surfaced for the first time in the decision of the Inspector. Thus there would have been no opportunity to comment on these issues by any of the parties irrespective of whether an Inquiry had been held or the written submission procedure adopted. In any event it is difficult to see on what basis the Inspector could have been persuaded to adopt a course that was different from that which he adopted which was conventional and which ensures that the detail necessary to secure the mitigatory aspects of the scheme must be agreed with the LPA before any work can commence. Thus in the absence of a challenge to the lawfulness of the decision to determine the appeal by means of written submission (and there is none) this challenge is without substance.

58 Finally I should mention the reference to Article 8 of the ECHR . This was not developed n the course of the oral submissions and has not been advanced by reference to any of the relevant European or domestic case law. In those circumstances it is unnecessary and undesirable that I comment further on the point.

Conclusion

59 This challenge is dismissed.