Neutral Citation Number: [2020] EWCA Civ 1005

Case No: C1/2020/0152

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE LANG DBE
[2019] EWHC 3574 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2020

Before:

Lord Justice Lindblom
Lord Justice Haddon-Cave
and
Lord Justice Green

- -

Between:

R. (on the application of London Borough of Hillingdon Council)	**Appellant**
- and -	
(1) Secretary of State for Transport **(2) Secretary of State for Housing, Communities and Local Government**	**Respondents**
- and -	
High Speed Two (HS2) Limited	**Interested Party**

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- -

Mr Craig Howell Williams Q.C. and Ms Melissa Murphy (instructed by **London Borough of Hillingdon Legal Services**) for the **Appellant**
Mr Timothy Mould Q.C. (instructed by **the Government Legal Department**) for the **Respondents**
The Interested Party did not appear and was not represented.

Hearing date: 9 July 2020

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Judgment Approved by the court for handing down

Lord Justice Lindblom, Lord Justice Haddon-Cave and Lord Justice Green

A. The issue in context

The appeal

1. This is the judgment of the Court.

2. This is the second of two cases that this Court heard on consecutive days concerning the HS2 high speed railway line to be built between London and the West Midlands ("*HS2*" or the "*HS2 project*"). The first case (*R. (on the application of Christopher Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004) amounted to a full-scale challenge to the scheme itself, and to the decision of the Cabinet to approve it. The present appeal arises within a far narrower compass and concerns the respective duties and obligations imposed by Parliament upon High Speed Two (HS2) Limited ("*HS2 Ltd*") and local authorities in relation to the actual implementation of HS2 as it affects localised planning concerns. In neither case is the Court engaged with the political debate that surrounds the HS2 project; the task of the Court in both cases is to rule upon points of law.

3. This appeal concerns the judgment ("*the Judgment*") of Mrs Justice Lang in which she upheld the decision, dated 4th March 2019, of the Secretary of State for Transport and the Secretary of State for Housing, Communities and Local Government ("*the Decision*"). This overturned a decision of the Appellant, the London Borough of Hillingdon Council, whose planning committee had, on 20th March 2018, decided to refuse to grant approval to a request made by HS2 Ltd for approval of plans and specifications for proposed works associated with the creation of the Colne Valley Viaduct South Embankment wetland habitat ecological mitigation ("*the Council Decision*").

4. The Decision was taken following the rejection by the Secretaries of State of recommendations made to them by the planning Inspector who had been appointed by them to report and who recommended that the Council Decision be upheld ("*the Inspector's Recommendations*").

The site

5. The land to which the request for approval related and on which the works were proposed, a site of about 0.5 ha., lies to the west of Harvil Road, about 90 metres to the south-west of the route of the Phase One railway where it would pass on to the Colne Valley Viaduct, near the settlement of South Harefield. It is within the Colne Valley Archaeological Protection Zone ("*APZ*"). Part of it is within the Mid-Colne Valley Site of Importance for Nature Conservation (Metropolitan Grade). The proposed earthworks would provide a mitigation pond, a reptile basking bank and two hibernacula for a community of great crested newts whose present habitat would be affected by the Colne Valley Viaduct South Embankment Works. The new habitat would be enclosed by a permanent fence. The Decision, upheld in the Judgment, concerns the impact of the development upon both ecological and archaeological interests. The appeal, however, concerns only the impact of the development on archaeological interests and we confine our description of the facts accordingly.

The issue

6. This appeal focuses upon the division of powers and responsibility for the evaluation of local planning concerns as between local authorities and HS2 Ltd. That allocation of responsibility is determined by Schedule 17 of the High Speed Rail (London–West Midlands) Act 2017 ("*the Act*" or "*Schedule 17*", as appropriate). The Act, which received the Royal Assent on 23 February 2017, authorises Phase One of HS2, comprising a high-speed railway between London and the West Midlands. HS2 Ltd is the nominated undertaker charged with the creation of the rail link.

7. The dispute relates to the failure on the part of HS2 Ltd to submit any information or evidence, as part of its formal request for approval, to the Appellant which would enable it to conduct what it says are its statutory duties to evaluate the plans and specifications for their impact upon relevant planning interests – here potential archaeological remains. The nub of the reasoning of the Council Decision, refusing approval to the request, was that HS2 Ltd had failed to furnish the Council with adequate information and evidence. HS2 Ltd however has argued throughout that it is under no obligation to furnish such information and evidence. It says that this is because it will, in due course, conduct relevant investigations *itself* into the potential impact of the development upon any archaeological remains and take all necessary mitigation and modification steps. HS2 Ltd says that it will do this under a guidance document which forms part of its contract with the Secretary of State for Transport which sets out its obligations as the nominated undertaker for the HS2 Project. In these circumstances, HS2 Ltd argues that it was wrong for the Appellant to refuse to grant it approval for its plans and specifications. The Secretaries of State agreed with this reasoning and set aside the Council Decision. The Judge agreed with the Secretaries of State.

8. The central legal issue arising concerns the proper construction of the Act and Schedule 17 thereof and the status of guidance documents and material prepared by the Secretary of State for Transport which form part of the matrix of documentation comprising the agreement between the Secretary of State and the nominated undertaker, HS2 Ltd. The documents at the core of the issue are the *Environmental Minimum Requirements* or "*EMRs*" and *Statutory Guidance* which the Judge, agreeing with the Secretaries of State, concluded elevated the status of the EMRs in a way which curtailed, very substantially, the powers of local authorities under the Act.

9. The Appellant advances its arguments under a number of related headings. We would summarise the issues as follows: whether on a proper construction of Schedule 17 a "*qualifying*" authority (such as the Appellant) is required in law to approve upon the basis that –

    (i) the investigation that would otherwise be necessary as to impact, to enable the authority to take a decision on approval or refusal, is to be carried out by HS2 Ltd under the EMRs, and not the authority; and
    (ii) there is (accordingly) no need for HS2 Ltd to provide the information and evidence necessary to enable the authority to perform *any* assessment of impact or related mitigation or modification measures; and that
    (iii) the planning authority has, commensurately, no lawful right to call for information relevant to that evaluation from HS2 Ltd and must approve

submitted plans and specifications without itself conducting such an evaluation.

Summary

10. For the reasons we set out below we have allowed the appeal. The key to this case lies in a careful reading of Schedule 17 and the powers and obligations it imposes upon local authorities and upon HS2 Ltd. In our judgment, the duty to perform an assessment of impact, and possible mitigation and modification measures under Schedule 17, has been imposed by Parliament squarely and exclusively upon the local authority. It cannot be circumvented by the contractor taking it upon itself to conduct some non-statutory investigation into impact. We also conclude that the authority is under no duty to process a request for approval from HS2 Ltd unless it is accompanied by evidence and information adequate and sufficient to enable the authority to perform its statutory duty.

Context

11. The context to this judgment is, however, important. A central tenet of Schedule 17, the surrounding Statutory Guidance and the other relevant guidance, planning materials and memoranda, is that authorities and HS2 Ltd should work in a proportionate, effective and collaborative way which balances important local interests with the much broader national interest in the delivery of the HS2 project, which Government and Parliament has approved. The object of this cooperation is to prevent the planning process creating an undue hindrance to the delivery of that broader national interest whilst giving proper weight to local concerns. We are clear that our judgment is consistent with that important aim.

12. On the facts of this case, for whatever reason, the system did not work as it should have: HS2 Ltd did not submit the information necessary for the local authority to perform its statutory duty to evaluate the proposed building works for their potential impact upon relevant planning interests. The reasons for this were said to be due to a temporary inability on the part of HS2 Ltd experts to gain access to the site for the purpose of conducting investigations. But that was some two years back and during the appeal we were given no information as to the present position. Schedule 17, the Statutory Guidance and the EMRs, however, set out what should occur when there are delays in the submission of evidence. They include the holding of fruitful discussions to determine the best way in which the relevant information can be provided and, if needs be, extending the time for completion of the approval process.

13. Nothing in this judgment detracts from the importance which Parliament and the Government have attached to the efficient and expeditious resolution of planning issues at the local level. The system is designed to prevent undue delays and hindrances and is more than sufficient to prevent the sorts of problems arising in this case from occurring again.

B. Qualifying authorities and the nominated undertaker (HS2 Ltd)

14. It is relevant to an understanding of the issues to set out the status of the Appellant as the relevant "*qualifying authority*", and HS2 Ltd as the "*nominated undertaker*".

15. Under Schedule 17 the Appellant is designated a "*qualifying authority*". It is accorded this special status under paragraph 13. To so qualify, an authority had to provide an "*undertaking*" to the Secretary of State. Any planning authority which submitted an undertaking to the Secretary of State had a right to become a qualifying authority (paragraph 13(1)). There is power for the Secretary of State to specify that an authority ceases to be a qualifying authority (paragraph 13(3)). The terms of the undertaking are set out in "*EMR General Principles Annex 2: Planning Memorandum*. This undertaking binds the authority and shall be "*taken into account*" in the determination of matters submitted by HS2 Ltd for approval under Schedule 17 (Planning Memorandum paragraph 2.1.2).

16. The role and responsibility of a qualifying authority under the Planning Memorandum can be summarised as follows:
    - Qualifying authorities participate in a Planning Forum ("*the Forum"*) along with the nominated undertaker (HS2 Ltd). This is an important body enabling qualifying authorities to discuss with HS2 Ltd a wide range of relevant matters all with the aim of facilitating the approval process. The Forum "*will*" draw up guidance (or "*notes*") on a wide variety of technical matters relating to the evaluation required under the Planning Conditions Schedule which qualifying authorities are then required to have regard to (section 4).
    - Qualifying authorities should assist in securing expeditious processing of applications for approval (sections 4 and 7).
    - Qualifying authorities should determine requests for approval (section 5) expeditiously (section 7) and having regard to Statutory Guidance (sections 4 and 9.3).
    - When determining requests for approval the qualifying authority should "*take into account*" assessments in the environmental statement and other documents and memorandum which form part of the contractual relationship between HS2 Ltd and the Secretary of State:

      > "9.1.1. In determining requests for approval, the qualifying authority shall take into account the assessments in the Environmental Statement, the arrangements in the CoCP, the Heritage Memorandum, the Environmental Memorandum, and any relevant undertakings and assurances concerning the project specified in the Register of Undertakings and Assurances."

    - Where an authority fails to act expeditiously or refuses to make a determination then the Secretary of State can withdraw qualifying status (section 7.6).
    - Where approval is refused the qualifying authority must "*state clearly and precisely the full reasons for its decision*" (paragraph 7.7.1).

17. In accordance with the Act, HS2 Ltd is the "*nominated undertaker*". It is an entity established by the Secretary of State for Transport as an executive non-departmental public body to develop and deliver the "*Core Programme*" as defined in the Agreement concluded between the Secretary of State for Transport and High Speed Two (HS2) Limited dated 8th December 2014 and amended on 17th July 2017 *("the Development Agreement"*). Under the Development Agreement (clause 8.1) HS2 Ltd is under an

obligation to "*manage, develop and deliver"* the Core Programme, *inter alia*, "*to satisfy the Sponsor's Requirements*" (the Sponsor is the Secretary of State for Transport). The Planning Memorandum describes the role of HS2 Ltd under the approval process:

- To participate in the Forum to assist in the "*effective implementation*" of Schedule 17 in order to "*help coordinate and secure the expeditious implementation of*" the Schedule 17 process and to work with qualifying authorities to develop planning notes and consider common designs (paragraph 4.1.3).
- To participate in pre-submission discussions with qualifying authorities (paragraph 7.1.1).
- To "*respond quickly*" to requests from qualifying authorities to requests for information or clarification to assist the authority in the timely processing of requests (paragraph 7.3.1).
- Where the "*content*" of a request for approval is not provided, to work with the qualifying authority to agree an "*extended determination period*" under paragraph 22(4) of Schedule 17 (paragraph 7.3.2).

18. It is worth setting out section 7.5 in full:

> "7.5 Nominated undertaker
>
> 7.5.1 To facilitate effective consultation and ensure that requests for approval are determined within the timetable referred to above, the nominated undertaker shall engage in proportionate forward discussions about prospective requests for approval with the qualifying authority and statutory consultees. Forward discussions will, as relevant, include design development, submission dates and planning committee cycles.
>
> 7.5.2 When designs of HS2 works are submitted for approval, the nominated undertaker shall, where reasonably necessary for the proper consideration of the design proposed, provide an indication or outline of the appropriate mitigation measures (if any) which it intends to submit subsequently under paragraphs 9 or 12 of the Planning Conditions Schedule. Where the works for approval will have a mitigating effect in relation to operational noise from the railway or new roads, the nominated undertaker will provide information to show, so far as is reasonably practicable at that stage in the design process, how the noise mitigation performs and the expected conditions. While not material to approvals under paragraph 2 or 3, this information will provide reassurance in advance of the request for approval under paragraph 9 that the mitigation is appropriate, and will present an opportunity to raise concerns.
>
> 7.5.3 In order to assist qualifying authorities with their resource planning, the nominated undertaker will, every quarter,

provide a forward plan of requests for approval anticipated in the next six months. The nominated undertaker will notify the relevant qualifying authority if there is a significant change to the forward plan. The nominated undertaker will provide information to the Planning Forum, prior to Royal Assent, on the programming of submissions, so far as reasonably practicable.

7.5.4. The nominated undertaker will use reasonable endeavours to submit a site restoration scheme, for the agreement of the qualifying authority, prior to the discontinuation of the use of any site for carrying out operations ancillary to the construction of any of the scheduled works.

7.5.5. In order to assist with the expeditious handling of submissions, where a request for approval is made by the nominated undertaker under the Planning Conditions Schedule, then for information purposes:

- if the site to which the request relates is on or close to an authority boundary, and is likely to impact upon it, a copy will be sent to the adjacent authority;
- if the request relates to lorry routes which pass through the areas of adjoining authorities, a copy will be sent to those adjoining authorities;
- in non-unitary areas, a copy will be sent to the non-determining authority; and
- in the areas subject to Opportunity Area Planning Frameworks, a copy will be sent to the Greater London Authority."

C. The legislative scheme

The High Speed Rail (London-West Midlands) Act 2017 / Schedule 17

19. We turn now to the statutory regime set out in Schedule 17. References in the text below to paragraphs are to paragraphs of Schedule 17. We refer throughout to HS2 Ltd in its capacity as the "*nominated undertaker*" under the Act. We refer to a qualifying authority (which includes the Appellant) as "*the/an authority*".

20. The requirements in paragraphs 2 to 12 are conditions of the deemed planning permission under section 20(1) of the Act. This grants a deemed planning permission under Part 3 of the Town and Country Planning Act 1990 ("*TCPA 1990*") for the carrying out of the development, but (under section 20(3)) this is subject to, *inter alia*, Schedule 17 which "*imposes conditions on deemed planning permission under subsection (1)*".

21. An authority may only grant approval under Part 1 of Schedule 17 at the request of the nominated undertaker (paragraph 15). It is evident from the legislative scheme that HS2

Ltd decides at what point in time it submits a request for approval. Paragraph 3(1) imposes an implicit duty on HS2 Ltd to seek and obtain approval where the development involves "*construction works*" (as defined) since it is precluded from carrying out those works without approval from the authority:

> "If the relevant planning authority is a qualifying authority, development to which this paragraph applies must be carried out in accordance with plans and specifications for the time being approved by that authority."

22. Paragraph 16 governs the documents to be submitted to the authority. The authority can refuse to consider a request unless the specified documentation is furnished:

> "16(1) A planning authority need not consider a request for approval under Part 1 of this Schedule unless –
>
> (a) the nominated undertaker has deposited with the authority a document setting out its proposed programme with respect to the making of requests under that Part to the authority, and
> (b) the request is accompanied by a document explaining how the matters to which the request relates fit into the overall scheme of the works authorised by this Act."

23. The decision of the authority on the request for approval must be taken within eight weeks of receipt of such a request, but this period can be extended by agreement as between HS2 Ltd and the authority (paragraph 22(4)-(8)). A failure on the part of an authority to notify HS2 Ltd within the eight-week period of its decision, is deemed a refusal of the request (paragraph 22(3)). HS2 Ltd can appeal such a failure to the Secretary of State under the general provisions for appeals under paragraph 22(1). As we explain below (see paragraph [77]), it was accepted (correctly in our judgment) in argument by Counsel for the Secretaries of State that it was implicit in the duty on the nominated undertaker under this paragraph to deposit documentation, and that such documentation must be "*adequate"*, i.e. by reference to the task the authority had to perform under Schedule 17.

24. Schedule 17 governs the circumstances in which the authority may both grant and refuse approval. Paragraph 2 concerns conditions relating to building works as defined. It is common ground that in this appeal we are not concerned with "*building works*". Paragraph 3 concerns conditions relating to "*other construction works*" and these include "*earthworks*" (paragraph 3(2)(b)) and "*fences*" (paragraph 3(2)(e)), which are the subject matter of this appeal. The grounds upon which an authority can refuse an application are identified in paragraph 3(6) and the accompanying table ("*the Table*"). The phrases "*only*" and "*a ground specified*" in that paragraph make clear that the discretion of the authority to refuse approval is constrained by the matters set out in the Table; there is no broader, free-standing, basis upon which approval can be declined:

> "(6) The relevant planning authority may only refuse to approve plans or specifications for the purposes of this paragraph on a

ground specified in relation to the work in question in the following table."

25. In relation to earthworks and fencing, paragraphs 2 and 5 of the Table are in the following form:

"**Development**	**Possible grounds for refusal of approval**
…	
2. Earthworks.	That the design or external appearance of the works ought to, and could reasonably, be modified – … (c) to preserve a site of archaeological or historic interest or nature conservation value. If the development does not form part of a scheduled work, that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.
…	
5. Fences and walls (except for sight, noise and dust screens).	That the development ought to and could reasonably, be carried out elsewhere within the development's permitted limits."

26. The present case concerns a site of possible archaeological interest. The development does not form part of a "*scheduled work*". Applying the Table the authority must, in very broad terms, address itself to the following matters: (i) the design or external appearance of the development described in the plans and specifications; (ii) whether that design ought to, and could reasonably, be modified to preserve a site of archaeological or historic interest; and (iii) if the development does not form part of a scheduled work, whether the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits.

27. To perform this evaluation requires an exercise of planning judgment whereby the design is measured against the risk to the archaeology and this, in turn, informs an assessment of the need for reasonable mitigation or modification measures.

28. Paragraph 18 imposes a duty of consultation on an authority under which it must consult the "*appropriate body*" on requests for approval within five days of receipt of the request (paragraph 18(2)). The threshold for the triggering of the duty to consult is low and arises if a request "… *relates to matters which may affect*" any one or more of the matters listed in paragraph 18(1)(a)-(f). These include at subparagraph (1)(f) "*a site of archaeological or historic interest*". The appropriate body for such matters is the Historic Buildings and Monuments Commission for England (paragraph 18(3)(c)). The Greater London Archaeological Advisory Service ("*GLAAS*"), which provided representations in this case, is part of Historic England's London regional office.

29. The authority is barred from taking a decision pending receipt of representations from the appropriate consultee unless it has been informed that no such representations are to be forthcoming, or 21 days have elapsed since the date of the invitation (paragraph 18(4)).

30. Under paragraph 20 the "*appropriate Ministers*" may by directions require a planning authority to refer any request for approval under Part 1 to them. In determining a request referred to them, the appropriate Ministers have the same powers as the authority making the reference (paragraph 20(2)).

31. Where the nominated undertaker (HS2 Ltd) is aggrieved by a decision of an authority in relation to a request for approval under Part 1 (which includes a decision to require additional details), it may appeal to the appropriate Ministers (paragraph 22(1)). On an appeal under this paragraph, the appropriate Ministers may allow or dismiss the appeal or vary the decision of the authority but may only make a refusal or approval determination "*…on a ground open to that authority"* (paragraph 22(2)). In other words the powers of the Minster are coextensive with those of the authority.

Statutory Guidance

32. Under paragraph 26(1) the Secretary of State may give guidance to planning authorities in relation to the exercise of their functions under Schedule 17. An authority must have regard to the guidance (paragraph 26(2)). In February 2017 the Secretary of State published the "*Schedule 17 Statutory Guidance*" ("*the Statutory Guidance*"); this was updated in May 2020.

33. The Introduction to the Statutory Guidance makes an obvious and important point:

> "The Guidance is not legislation and where there appear to be differences between the Guidance and the Act, the provisions of the Act will take precedence. Where the Guidance says that something must be done, this means that it is a requirement in either primary or secondary legislation, and a footnote gives the appropriate provision. In all other instances, paragraph 26(2) of Schedule 17 to the Act stipulates that planning authorities must have regard to the information contained in this Guidance."

34. Paragraph 1.2 describes the purpose of Schedule 17 as being "*to ensure there is an appropriate level of local planning control over the HS2 Phase One construction works while not unduly delaying or adding cost to the project*".

35. Paragraph 3.2 emphasises the difference between an outline planning permission granted under the TCPA 1990 and the more constrained scope for approving further details and for applying conditions contemplated by the deemed planning permission granted under section 20 of the Act.

36. Paragraph 4.2 distinguishes between the powers of a qualifying and non-qualifying authority under Schedule 17. Paragraph 4.4 concerns what is described as an "*appropriate level of local planning control"*. The scope and effect of this paragraph and

in particular the phrase "*modify or replicate controls already in place*" is of importance to this appeal. It provides:

> "4.4 These approvals have been carefully defined to provide an appropriate level of local planning control over the works while not unduly delaying or adding cost to the project. Planning authorities should not through the exercise of the Schedule seek to:
>
> - revisit matters settled through the parliamentary process;
> - seek to extend or alter the scope of the project; or
> - modify or replicate controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways."

37. Under the heading "*Grounds for determination*", paragraphs 7.1 and 7.2 indicate that, in determining requests for approval, an authority "*must*" consider "*only*" relevant grounds. They state:

> "7.1 For all approvals under Schedule 17, the Schedule specifies the grounds that are relevant. When determining a request for approval a planning authority must only consider the grounds relevant to that approval. Therefore requests may only be refused, conditions be imposed, and modifications to submissions or additional information requested, where they relate to the grounds specified for determining the request for approval.
>
> 7.2 Careful consideration of the grounds is therefore needed when determining a request for approval as these set out the matters a planning authority can take into account when making a decision. …"

38. Paragraphs 7.6 and 7.7 state:

> "7.6 When considering requests for approval for which the grounds include the preservation of a site of archaeological or historic interest this ground should be taken to include the preservation of the setting of listed buildings. This ground should be applied in conjunction with other material considerations.
>
> 7.7 Planning policy and other considerations material to planning applications under the Town and Country Planning Act 1990 are only material to the determination of a request for approval under Schedule 17, insofar as they relate to a matter for approval … and the grounds specified for determining the request for approval."

39. Paragraph 10.3 provides that, when it is determining any request for approval under Schedule 17, an authority should not impose conditions conflicting with controls or commitments contained in the EMRs.

The EMRs

40. The Environmental Minimum Requirements or EMRs are defined within the 26th November 2018 version of the Development Agreement:

> ""Environmental Minimum Requirements" means, in respect of each Phase, the requirements set out in the "Environmental Minimum Requirements" document relating to that Phase and such other environmental minimum requirements as may be notified by the SoS to the HS2 Ltd;"

41. As is explained in the EMRs General Principles document of February 2017 (at paragraph 1.1), the objective of the EMRs is to ensure that Phase One of the HS2 project is delivered in accordance with the environmental statement for the project that was produced when the Bill was passing through Parliament. Under the Development Agreement between HS2 Ltd and the Secretary of State, HS2 Ltd is contractually obliged to comply with the EMRs.

42. The EMRs include the Code of Construction Practice (Annex 1), the Planning Memorandum (Annex 2), the Heritage Memorandum (Annex 3), and the Environmental Memorandum (Annex 4). Their relevant content is helpfully set out by the Judge in paragraphs 23 to 38 of the Judgment and we do not repeat it here.

43. As with the Statutory Guidance, nothing in an EMR is capable of mandating or authorising something not permitted under, or inconsistent with, the Act, including its Schedules. For instance in EMR Annex 3, the Heritage Memorandum, paragraph 1.2.2. states:

> "It is intended that the Heritage Memorandum is entirely consistent with the High Speed Rail (London-West Midlands) Act and does not duplicate provisions therein (for example Schedules 18, 19 and 20). Should there be any perceived conflicts between this Memorandum and the Act, the Act will take precedence."

D. <u>The relevant decisions</u>

44. The issues arising in this appeal have now been addressed at four levels: the Planning Committee of the Appellant as qualifying authority, the Inspector, the Secretaries of State, and the High Court. It is necessary to place this appeal into context to summarise the salient points which have arisen at each level.

The Council Decision

45. The Council Decision was taken upon the basis that HS2 Ltd had failed to provide to it sufficient evidence and information to enable it to perform its statutory duty to evaluate

the request for approval from HS2 Ltd against ecological and archaeological considerations. It is common ground in this appeal that HS2 Ltd did not provide that evidence and information.

46. The report of the Head of Planning and Enforcement to the Council's HS2 Planning Committee pointed out that the site was located within the Colne Valley APZ which was an area of acknowledged archaeological potential. Under the EMRs (in this case the Heritage Memorandum) the Council expected that, prior to the commencement of development, the following would be completed: (i) an archaeological field evaluation (to inform location-specific investigation and recording) together with a statement provided to the Local Planning Authority; (ii) location-specific investigation and recording with the appropriate reporting as necessary; and (iii) archaeological and built heritage post excavation (assessment, analysis, reporting and archiving). These were necessary to ensure that the archaeological importance of the site was recorded and to guide further investigations.

47. The report sets out the submissions of HS2 Ltd who argued that it could, in effect, require the authority to grant an approval to the plans and specifications submitted upon the basis that at some point in the future HS2 Ltd would *itself* conduct the necessary investigations and then form its own view as to whether there were planning concerns needing to be addressed through mitigation or modification. This would be undertaken in accordance with the EMRs which formed a part of its contractual obligations to the Secretary of State. This sufficed to satisfy the requirement in the legislation for an evaluation of the impact of a proposed development on matters such as ecology or archaeology. Under the Statutory Guidance an authority had no right to seek to "*modify or replicate controls*" already in place under the EMRs (see paragraph [36] above).

48. The report sets out that GLAAS had been consulted and noted that the works involved the construction of ponds and other ecological works in fields which could contain significant archaeological remains which had already been identified by HS2 Ltd as requiring archaeological evaluation and potentially mitigation measures. GLAAS stated that the application was premature and had been submitted *before* archaeological evaluation had been carried out and without reference to it. The lack of an appraisal effectively precluded the authority from exercising its obligations under Schedule 17 paragraph 9(5)(b) so as to enable it to refuse the scheme as submitted and require its modification to preserve a site of archaeological interest.

49. The report notes that the Council's Sustainability Officer shared these concerns and advised that additional information was required to demonstrate how the design had assessed and mitigated the archaeological impact *before* the application was determined.

50. The Head of Planning and Enforcement observed in the report that the suggestion by HS2 Ltd that "*controls of the Act should not be duplicated*" was:

> "… entirely at odds with what the Act says. If the intention was to defer archaeological investigations to alternative processes and not form part of Schedule 17 considerations, then the Act should have been written to obviate the ability to consider archaeology in Schedule 17 submission."

The conclusion was that HS2 Ltd had "*not engaged with the substantive points and focused solely on process*". The Council's HS2 Planning Committee agreed. In its decision, it recorded the failure of HS2 Ltd to submit "*adequate*" evidence to enable the necessary assessments to be undertaken. Nonetheless, the Committee encapsulated its reasoning in the decision to refuse approval in the formal language of the legislation which suggested that a merits evaluation had in fact been carried out. The Council Decision thus read:

> "The design or external appearance of the works ought to, and could reasonably, be modified to preserve a site of archaeological or historic interest or nature conservation value.
>
> The development does not form part of a scheduled work, within the meaning of Schedule 1 of the HS2 Act, and that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits."

51. As we explain below, it was, technically, wrong of the Council to formulate its refusal decision in this way because to have been in a position to form the conclusions expressed, the Council would have had to form judgments about the planning issues arising and, of course, the essential complaint of the Council was that HS2 Ltd had failed to enable it to do this. It should have simply refused to rule upon the merits of the request for approval until such time as the relevant information had been supplied.

The Inspector's Recommendations

52. HS2 Ltd appealed the Council Decision to the Secretaries of State who appointed Dr Alan Novitsky, as Inspector, to make recommendations to them in relation to the appeal. Before the Inspector, HS2 Ltd argued, again, that the authority had erred in its understanding of the legislative regime and that it was under no obligation to provide the evidence in question. The Inspector convened a public hearing on 3rd July 2018. He communicated his recommendations to the Secretaries of State on 25th July 2018.

53. In his report, he recorded the submissions of HS2 Ltd (paragraphs 8-23) which largely reflect the summary set out above at paragraph [47]. Paragraphs 9-11, however, set out a particular submission of HS2 Ltd that the authority had indefensibly failed to provide proper *reasons* for its adverse conclusion about the specified grounds in paragraph 3(6):

> "9. The Environmental Minimum Requirements (EMRs) ensure that the HS2 development is delivered appropriately, with due regard to planning, heritage, and environmental matters, in accordance with a code of construction practice. The EMRs and associated documents ensure that the Council receives the necessary information and documentation at appropriate stages in the process. They also provide for a collaborative approach between HS2 Ltd, local planning authorities, and other relevant expert bodies. The EMRs contractually bind HS2 Ltd to deliver the works in the appropriate manner.

> 10. The additional controls and information sought by the Council are already present in the EMRs. The Council should not attempt to replicate these controls, nor should they refuse an application on a perceived lack of information when the Applicant is contractually obliged to follow the EMRs.
>
> 11. The Council's reasons for refusal are indefensible. They have not demonstrated:
>
> • how or why the design or external appearance of the works ought to, and could reasonably, be modified to preserve a site of archaeological or historic interest or nature conservation value; or
> • that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits."

54. The Inspector summarised the submissions of the Council (paragraphs 24-30) and those of GLAAS (paragraphs 36-42).

55. He made certain findings of fact which were that: (i) the site had archaeological interest and it satisfied the NPPF Glossary definition since it held, or potentially held, evidence of past human activity worthy of expert investigation (paragraph 65); (ii) the potential derived from its APZ designation, HS2 Ltd's Detailed Desk Based Assessment, and evidence of material discovered so far, including that from trenches excavated as part of the Gas Works (paragraph 65); (iii) whether that potential materialised could only be discovered through investigation and archaeological evaluation – there has been no challenge to these conclusions by the Secretaries of State (paragraph 65); and (iv) HS2 Ltd had failed to provide information or evidence adequate or necessary to enable the authority to perform the statutory evaluation (paragraph 78).

56. The Inspector set out his analysis of the obligations on HS2 Ltd as follows by differentiating between the *form* of documents that were required to be submitted and the *depth* of the evidence and analysis which was also required. An application had to both be in proper form but also furnish the requisite "*depth*" of evidence and information:

> "*Information Provided with the Application*
>
> 67. The application satisfies Planning Forum Notes 1, 2, and 3 with regard to the form of the items submitted for a plans and specification approval such as this … . The depth of information to be carried by each item is not made explicit in the Notes. However, within the supporting material, in this case the Written Statement, scope exists for the supply of information reasonably necessary to allow an informed decision to be made.
>
> 68. In this case, however, the written statement largely describes actions which are expected to be taken in the future to assemble this information, rather than conveying the substantive

> information itself. It is important to note that, contrary to HS2 Ltd's assertion, the necessary archaeological evidence will not arise from the trenching involved in the Gas Works, because the location of the proposed pond is not covered … .
>
> *Archaeology*
>
> 69. The Appellant tells us that geophysical surveying of the site was planned for August 2017, but frustrated by access and land ownership difficulties, and notes that this delay has resulted in the apparent lack of archaeological evidence to support the Schedule 17 submission … . We are assured that the survey, with trial trench evaluation, will be completed before the mitigation site works begin, and the results fed into the EMR process. Should redesign be necessary, a further Schedule 17 application would be made … .
>
> 70. The statement goes some way to conceding shortcomings in the archaeological evidence accompanying this application. It also raises the question of why, if a further Schedule 17 application may be contemplated, the present application was not postponed until full archaeological evidence became available, allowing the Council to exercise the control provided in the Act.
>
> 71. The Planning Memorandum, at paragraph 1.1.2, seeks to ensure that the process of obtaining approvals does not unduly hinder construction. Programme concerns may have prompted the Appellant to submit the Schedule 17 application prematurely, relying on the EMRs and GWSI:HERDS processes to achieve an appropriate outcome. However, in these processes, although the Council should be engaged and consulted, the control available to the Council in relation to a Schedule 17 application no longer applies.
>
> 72. Moreover, should a further Schedule 17 application prove necessary immediately before the works begin, the duplication of resources and the programme disruption involved in redesigning the site and delaying the works may well be significant."

57. At paragraphs 78 and 79 the Inspector set out his "*overall conclusions*":

> "78. With regard to archaeology, I find that the information available to the Council was not adequate. The design of the works ought to, and could reasonably, be modified to preserve a site of archaeological interest, if found necessary once adequate information becomes available.

> 79. Moreover, if found necessary once adequate information becomes available, the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits. I find it unreasonable to expect the Council to approve an application, or to show how the works ought to be, and could reasonably, be modified or carried out elsewhere, on the basis of inadequate information."

The Decision: Secretary of State for Transport / Secretary of State for Housing, Communities and Local Government

58. We turn to the Decision which was the subject of the claim for judicial review. We start by recording that none of the facts found by the Inspector (summarised at paragraph [55] above) were challenged in the Decision. The premise underlying the Decision was not that HS2 Ltd had supplied the necessary information and evidence, but that there was no obligation upon HS2 Ltd to submit such information and evidence. This was a conclusion of law concerning the interpretation of Schedule 17.

59. The nub of the Decision is its endorsement of the submissions of HS2 Ltd that, by virtue of the Statutory Guidance, the EMRs ousted the duty of the authority under Schedule 17. It necessarily followed that there was no legal obligation on HS2 Ltd to provide information relevant to such a task.

60. The essential reasoning in the Decision is found in paragraphs 34, 35, 39, 40, 49 and 50. These provide as follows:

> "34. The Secretaries of State consider that the information required to be submitted as part of a Schedule 17 application is that prescribed by the statutory requirement set out in paragraph 16 of Schedule 17 and further such information that has been agreed and is set out in the *Planning Forum Notes* 1, 2 and 3. They note the statement in paragraph 4 of *Planning Forum Note* 3 that the scope of the content of the Written Statement will reflect the scope of the matters for approval. They further consider that the scope of the matters for approval must be viewed in the context of the bespoke HS2 consent and controls regime described in paragraphs 7-14 of this letter, which includes the processes contained in the EMRs as a means to ensure archaeological and ecological protections are in place. In particular, the Secretaries of State note paragraph 9.1.1 of the *Planning Memorandum* which forms part of the EMRs. This paragraph requires a qualifying authority (of which the Council is such an authority), in determining requests for approval, to take into account the assessments in the *Environmental Statement*, the arrangements in the *Code of Construction Practice*, the *Heritage Memorandum* and the *Environmental Memorandum*.
>
> 35. Given this context, the Secretaries of State conclude that it was in accordance with the controls established by the EMRs for

> HS2 Ltd to base the Written Statement upon the programme of site investigation to be carried out at the site, as summarised in IR14-17. Further the Secretaries of State consider that the concerns raised by the Inspector at IR68 (about the lack of necessary archaeological evidence concerning the location of the proposed pond) is not a matter of concern because the EMRs will ensure that the necessary investigations will be carried out prior to the earthworks being undertaken.

…

39. In this case, trial pit investigation of the site, including that part which is of most concern to the Council (the mitigation pond) will be undertaken in accordance with the EMRs (the *Heritage Memorandum* and GWSI:HERDS) as explained in the Written Statement. In the event that the results of this investigation show the plans and other documents for the proposed works require modification, HS2 Ltd will be required to do so and, if necessary, make a further submission under Schedule 17. The Secretaries of State note, that in such circumstances, the Council's concerns at IR24 and IR32 (that the control provided by the Act would be frustrated) would be unfounded. It is not the purpose of the Schedule 17 procedure to replicate or police the process of investigation set out in the EMRs, but rather to complement it.

40. The Secretaries of State conclude that the correct approach here, therefore, was for the Council to determine the application on the basis of the controls already in place under the EMRs. The Secretaries of State consider that the Council, by refusing the application, and the Inspector in accepting the Council's arguments on this point (IR71 and 79), have incorrectly sought to replicate those controls through the Schedule 17 process.

…

49. Having regard to the factors described above, the Secretaries of State disagree with the Inspector that the information available to the Council was not adequate (IR78). They therefore disagree with the Inspector at IR79 that it was unreasonable to expect the Council to approve an application. The Secretaries of State agree with HS2 Ltd that no grounds within the framework of Schedule 17 to the HS2 Act have been substantiated for refusing approval of the application and the Council is required by both the HS2 Act and the *Planning Memorandum* to provide justification for their reasons for refusal (IR22); that the required information had been supplied with the Schedule 17 application (IR8); that the information requested by the Council is required to be provided through the EMRs which HS2 Ltd is

> contractually bound to comply with in delivering the HS2 project (IR9).
>
> 50. The Secretaries of State consider that the Schedule 17 regime should not duplicate the controls in the EMRs and are satisfied in this case that the EMR processes, which were approved by Parliament alongside the HS2 Act, will ensure that the appropriate surveys will be conducted at the appropriate time and that appropriate action will be taken in accordance with their findings, including a further Schedule 17 application should that be required (IR17)."

61. The reasoning in the Decision can be summarised as follows: (i) the information required is that set out in paragraph 16 of Schedule 17 (paragraph 34); (ii) the scope of the matters for approval must be considered in the context of the EMRs which are a means of ensuring archaeological and ecological protection (paragraph 34); (iii) a qualifying authority must "*take into account*" the EMRs (paragraph 34); (iv) it was therefore "…*in accordance with the controls established by the EMRs*" for HS2 Ltd to base its written submissions in support of approval on a "*programme of site investigation to be carried out at the site*" (i.e. a programme of future works) (paragraph 35); (v) if the results of these future investigations showed that modifications to the (now definitively) approved plans and specifications were required then HS2 Ltd would be required to make those modifications and "*if necessary*" make a further Schedule 17 application (paragraph 39); (vi) the local authority was thus required to determine the application on the basis of the control system put in place under the EMRs (paragraph 40); (vii) by refusing approval upon the basis of a lack of information the authority erred because it sanctioned a system which incorrectly replicated controls set out in the EMRs (paragraph 40); (viii) it follows that the information provided was adequate and it was unreasonable for the authority to refuse definitive approval to the plans and specifications (paragraph 49); (ix) the investigations to be conducted by HS2 Ltd would ensure that "*appropriate surveys will be conducted at the appropriate time and that appropriate action will be taken in accordance with their findings*" (paragraph 50); and (x), a "*further*" Schedule 17 request for approval would be made if the approved plans and specifications were modified but only "*should that be required*" (paragraph 50).

62. The form in which the final decision was taken is significant. In their final decision the Secretaries of State found that there was "*no legitimate basis for refusing to approve the Schedule 17 application*" (Decision paragraph 51) and allowed the appeal of HS2 Ltd "*in accordance with*" its application (Decision paragraph 52).

63. The Decision has the effect of stripping local control from qualifying authorities. It does not, for example, make approval under Schedule 17 conditional upon: (i) HS2 Ltd carrying out the works it says it will carry out under the EMRs; and/or (ii) the results of any such works which are carried out demonstrating that no mitigation or other modifications is required; and/or (iii) if such mitigation or modification is required, HS2 Ltd then being compelled to carry out that work; and/or (iv) HS2 Ltd reverting to the authority for any further approval of the plans and specifications that were the subject of the initial request in the light of the investigations carried out; and/or (v) HS2 Ltd consulting the appropriate statutory consultee on the results of any investigations that are

carried out and then taking into account any representations that might be made by such consultee.

The Judgment

64. The authority challenged the Decision. In her Judgment dated 20th December 2019 Mrs Justice Lang dismissed the claim. She held whilst there was no express power in Schedule 17 entitling an authority to seek further information, such a power could "*readily*" be implied into the statutory scheme and she also held that HS2 was under an "*implied obligation*" to cooperate with reasonable requests for information (Judgment paragraph 84). She also held (Judgment paragraphs 75-77) that the well-known common law principle that a decision maker must be provided with sufficient information before making his decision was undisputable, *but* that its application necessarily depended "*upon the statutory context in which the decision is made*". The powers of local authorities were substantially constrained under Schedule 17 and the information that an authority needed in order to perform this constrained role was commensurately very limited.

65. As to the complaint made by the authority that the effect of the construction placed upon Schedule 17 law by the Secretaries of State was to strip the authority of "*meaningful control*", the Judge essentially agreed; but this was a consequence of the language of Schedule 17 which served to constrain and render "*unusually restrictive*" the decision-making functions of the local authority:

> "77. … In my judgment, this case turns on the proper construction of schedule 17 to the HS2 Act. I consider that the HS2 Act has expressly constrained the decision-making function of an approved local planning authority, in a way which is unusually restrictive, in comparison with the determination of other types of planning applications, and that is the reason why the Claimant considers it has no meaningful control over the Works at the Site."

66. Bearing in mind its "*limited role under the statutory scheme and guidance*", the Judge held that the authority had sufficient information:

> "85. In my judgment, the information which the Claimant received from the IP, taken as a whole, was sufficient to enable it to approve the application, having regard to the Claimant's limited role under the statutory scheme and guidance. The IP accepted that the Site was of archaeological importance, and that the guidance and procedures in the Heritage Memorandum, the relevant provisions of the CoCP, and GWSI: HERDS were all engaged. The IP's contractors intended to carry out a geophysical survey and trial trench evaluation; and then to conduct a critical review of the results, to see if it was necessary to move the pond or implement archaeological mitigation works. If it was necessary to make changes to the specification or plans, a further application to the Claimant would be made under schedule 17 of the HS2 Act.

86. The statutory guidance (paragraph 4.4) warns local planning authorities that they should not seek to modify or replicate the controls in the EMRs. As the Defendants said, at DL39, it was not the purpose of the schedule 17 procedure to replicate or police the process of investigation set out in the EMRs. In my view, it follows that it was not appropriate for the Claimant to seek to commission its own experts to carry out investigations and assessments. It should make its decision on the basis of the material provided by the IP. The Claimant has misunderstood the purport of DL28 in that regard. As a qualifying authority, and in accordance with its undertakings, the correct approach was for the Claimant to determine the application on the basis that the scheme of archaeological investigation, study and conservation created under the EMRs would be applied by the IP, as nominated undertaker, in accordance with the EMRs General Principles and its contractual obligations under the HS2 Development Agreement. If a change to the specifications or plans was required, a further application under schedule 17 would be made. It was not the Claimant's role to seek to enforce the controls in the EMRs by withholding approval.

87. Whilst the Claimant and the Inspector understandably took the view that the application should have been postponed until after the further archaeological investigations were concluded, ultimately it was not their decision to make. The IP was well aware of the position at this Site and could have chosen to postpone if it thought it appropriate to do so. The Defendants considered that the IP was best placed to oversee the programme of applications (DL41). It would have been a misuse of the Claimant's powers under paragraph 3(6) of schedule 17 to withhold approval because it believed that the application was premature, as this is not a permissible ground for refusal."

E. Discussion and Conclusions

67. We turn now to our discussion and conclusions. We start by considering the scope and effect of the powers and obligations imposed upon authorities by Schedule 17 and the implications of this for the right of authorities to decline to determine approvals absent adequate information. We then turn to consider the duty on HS2 Ltd to furnish the authority with sufficient information and whether documents such as the Statutory Guidance and the EMRs can serve to oust or modify the allocation of powers and duties set out in Schedule 17. We finally turn to a particular issue which arose during the hearing relating to the jurisdiction to make conditional approvals.

The scope of the statutory powers and obligations upon qualifying authorities under Schedule 17

68. In our judgment, Schedule 17 operates upon the clear premise that an authority is under a duty to perform an evaluation of the impact of submitted plans and specifications on the identified planning interests. The Schedule reflects a deliberate decision by Parliament in the apportionment of democratic responsibility and accountability so that decisions on matters of local concern are determined by local planning authorities who are accountable to their council tax payers. There is no basis in the Schedule for the duty that is imposed upon an authority to be delegated or sub-contracted to any third party, including of course HS2 Ltd, or for that duty to be abrogated by any other instrument (save for primary legislation) and in particular non-legislative guidance material. Nothing in the Statutory Guidance or the EMRs can, in law, oust the statutory duty or in any way modify or limit it; and indeed nothing in those instruments even purports so to do (see paragraphs [33] and [43] above). At their highest, they contain matters which, in the performance of its statutory duty an authority should take into account.

69. With respect, in our judgment, both the Judge and the Secretaries of State erred in concluding that the references in the Statutory Guidance which urged planning authorities to avoid modifying or replicating "*controls already in place*" (see paragraph [36] above) served to limit the power and duties of an authority. Such Guidance simply cannot in law have the effect of stripping from an authority the powers and duties it has imposed upon it under statute in relation to "*control*". If the Guidance is, fairly read, to be construed otherwise then, as the Guidance itself expressly acknowledges the Act, including Schedule 17, take precedence. The same inevitably goes for the EMRs.

70. It follows from the statutory scheme that, if HS2 Ltd fails to furnish an authority with information and evidence sufficient to enable the authority to perform its duty, then the authority is under no obligation to determine the request. It is also evident from the statutory scheme (see paragraph [21] above) that, since HS2 Ltd cannot proceed to carry out works without an approval, it has a concomitant duty to furnish an authority with such evidence and information as is necessary and adequate to enable the authority to perform its allotted statutory task. If, for some reason, HS2 Ltd does not do this then the correct approach is not to refuse the request for approval (as occurred in this case) but instead to decline to process the request until such time as adequate evidence and information has been furnished. The eight-week period for consulting and then deciding upon the request will not start to run until adequate information has been provided.

71. We now set out our more detailed reasoning.

The duty on a local planning authority to conduct the relevant evaluation of impact

72. Under Schedule 17 an obligation is imposed upon an authority to process applications and either approve or refuse them. The grounds upon which an application can be refused are specified in paragraph 3(6) and they are limited (see paragraphs [24] and [25] above). The Judge concluded that the scope of the exercise of discretion by the authority was highly constrained and limited and essentially endorsed the submission of HS2 Ltd that because of the Statutory Guidance the authority had "*no meaningful control*" (see Judgment paragraph 77 cited at paragraph [65] above). In our view this is a misunderstanding of Schedule 17. It is true that the powers of the authority are

constrained, but this is only because the grounds for the refusal of a request for approval are curtailed as explicitly set out in paragraph 3(6). The Table identifies the specified grounds but each such ground has its own proper scope and it remains the duty of the authority to address these particular grounds fully and objectively, taking into account the information and evidence relevant to the evaluation that Parliament has said must be undertaken. Put another way – within the bounds of paragraph 3(6) the authority must address relevant considerations, ignore irrelevant considerations, and must perform its evaluation fairly and objectively on the basis of evidence. It has, in this exercise, a certain margin of discretion or judgment, albeit one circumscribed by the limited specified grounds for refusal. We have set out in broad terms the sorts of matters that any authority would have to consider under paragraph 3(6) at paragraph [26] above; and we have recorded the view of the Appellant on the evidence actually considered necessary in relation to the site in question at paragraph [46] above.

73. It also follows from the statutory scheme that the duty imposed upon the authority to take a decision on the merits is non-delegable and must be taken by the authority itself. It is not, in fact, argued by the Secretaries of State or by HS2 Ltd that the actual decision on approval or rejection can be taken by anyone other than the authority; their argument is that the decision of the authority simply has no evaluative content to it. In our view, this cannot be correct given that under paragraph 3(6) the decision on refusal must be on specified grounds only, which indicates that the authority must have addressed itself to those very grounds which, plainly, refer to matters of fact and evidence. The same goes for a decision by an authority to impose conditions on an approval under paragraph 3(7) which can only be exercised "*on a ground specified in the table*", which again presupposes that the authority will evaluate the evidence and facts relevant to the matters in the Table.

74. In this regard there is a stark inconsistency in the analysis of the case of HS2 Ltd and the Secretaries of State. We have set out above (paragraph [50]) that because it considered that it did not have sufficient evidence the authority refused approval and couched its decision in the language of the statutory refusal criteria in paragraph 3(6). We have also pointed out (paragraph [51] above) that logically the authority should simply have refused to commence the review process pending receipt of sufficient information.

75. In the Decision, however, at the same time as they concluded that HS2 Ltd was not obliged to provide evidence to the authority, the Secretaries of State also concluded that when an authority refuses a request for approval it is required to address itself to the specified grounds in paragraph 3(6) (Decision paragraph 29) and that a failure to provide fully evidence-based reasoning was wrong in law and principle. The logic of the Decision is that in a refusal decision authorities must address whether the proposed works ought to be, or could reasonably be, constructed in some other way to preserve the site; or that the development ought to be and could reasonably be carried out elsewhere. The Secretaries of State criticise the Appellant for failing to provide "*explanations*" or "*evidence*" to "*substantiate*" its conclusions on these matters (Decision paragraph 28) and they say that the burden of proof lay with the Council "*to demonstrate*" that the design or appearance of the proposed works should reasonably be altered (Decision paragraph 30). It was, accordingly, a premise of the Decision that authorities were required to consider fully the evidence. Yet simultaneously with criticising the Council for demanding the evidence it needed to provide the reasons and explanations, the Secretaries of State: (i) condoned the refusal of HS2 Ltd to provide that self-same

information; and (ii) did not challenge the conclusion of the Appellant, of Historic England and the Inspector, that HS2 Ltd had not provided evidence relevant and adequate to the task. Nowhere do the Secretaries of State explain *how* any local authority could address the evidential matters that HS2 Ltd and the Secretaries of State demand *should* be addressed in a refusal decision, without evidence.

76. The reference in the Statutory Guidance to an authority not replicating or modifying "*controls*" set out in the EMRs, relied upon in the Decision, does not alter the analysis. There are many reasons for this. First, nothing in the Statutory Guidance or the EMRs is capable in law of altering the system of statutory "*control*" set out in Schedule 17. Secondly, as the Statutory Guidance and EMRs themselves make clear, they are, at best, matters for authorities to take into account but they do not bind authorities. Thirdly, nothing in the EMRs indicate that HS2 Ltd can decline to furnish the authority with the relevant and necessary information in order for the authority to perform its statutory duty; but, to the contrary, the thrust of the EMRs is to set in place a system whereby HS2 Ltd and authorities cooperate to avoid just a problem as has arisen in the present case. Whilst ultimately it is for the authority to determine what information it needs (and it has a relevant margin of discretion in this regard), nonetheless the duty of mutual cooperation encompasses liaison over the nature and depth of information and evidence that the authority needs to make its assessment. Fourthly, the reference in the Statutory Guidance to the need to avoid replication and modification of control must be seen in this light and cannot amount to a reference that the entire system of statutory "*control*" set out in the Act is to be stripped from the authority simply because HS2 Ltd declines to submit relevant evidence and promises to perform the evaluation itself in accordance with somewhat loose contractual obligations in its agreement with the Secretary of State. And the same goes for the Secretary of State who has defined roles under Schedule 17 (concerning appeals and in some cases a power to call in the initial decision) but who cannot, through the secondary instruments of a contract with HS2 Ltd and a power to extract undertakings, create a new system of non-statutory "*control*" differing from that which Parliament has mandated.

The duty to furnish adequate information

77. We turn now to the terms of Schedule 17 concerned with the provision of information. We have already referred to the duty on HS2 Ltd under paragraph 16 to provide "*adequate*" information (see paragraph [23] above). Mr Mould QC, for the Respondents, was correct to accept that the counterfactual was not arguable, viz. that HS2 Ltd had a right to submit inadequate information. We are in no doubt that the scheme contemplated by Schedule 17 – characterised as it is by duties of mutual cooperation on the parts of HS2 Ltd and the authority – must be construed to imply a duty of adequacy. We do not see how the system, which Parliament has carefully designed, can work absent HS2 Ltd being under an obligation to enable the authority to perform its task. We agree with the Judge on this point that the duty on HS2 Ltd to furnish information is commensurate with the task the authority must perform (see paragraph [64] above). Since we consider that the authority must perform the evaluative assessment implicit in paragraph 3(6) it follows that HS2 Ltd must provide information necessary to enable that duty to be performed. We also take the view that the Statutory Guidance and the EMRs, properly read, operate upon this premise. It is important to note the common ground in this case that HS2 Ltd did not provide such information and evidence.

78. What if HS2 Ltd does not furnish adequate information? Paragraph 16 provides that the authority need not "*consider a request*" "*unless*" HS2 Ltd has deposited a document setting out the proposed programme and the request is accompanied by a document explaining how the matter to which the request relates fits into the overall scheme of the works authorised by the Act (see paragraph [22] above). We have also set out above (see paragraphs [21]-[23]) that HS2 Ltd has a discretion as to the point in time at which it submits a request for approval and that the eight-week period for the evaluation starts to run from receipt by the authority of the request. The situation that arose in this case is the very antithesis of what should have occurred. Here HS2 Ltd submitted its request for approval prematurely and then used that prematurity to argue that it was under no obligation to furnish the necessary evidence. The scheme set up under Schedule 17 contemplates that a request will be submitted only when it contains adequate information. There may always be some leeway and room for debate as to what is adequate and under the cooperative procedure which has been instituted there will often be scope for discussion between HS2 Ltd and the authority as to what is required, but that does not alter the underlying point which is that the request *as deposited"* should be "*adequate*" to meet the statutory task to be performed by the authority.

Consultation

79. The eight-week period for evaluation has been calibrated by reference to the amount of time that Parliament considered an authority needed to perform its evaluation under paragraph 3(6) and this includes the time needed to enable a fair consultation to occur (see paragraph [28] above). In the present case, the statutory consultee complained (see paragraph [48] above) that absent HS2 Ltd submitting relevant evidence it was unable to make representations. In our judgment, Parliament did not intend to create a hollow consultation process but, on the contrary, assumed that the consultee would be able to make fully informed representations which, under the scheme of Schedule 17, would address in a meaningful way the exercise that the authority was in due course (being in receipt of the representations) to perform under paragraph 3(6). The fact that Parliament included a consultation mechanism in Schedule 17 supports our conclusion that HS2 Ltd is required to provide information and evidence which is adequate to enable the authority to consult and, once properly informed, conduct the paragraph 3(6) evaluation. There would have been no point in including such a consultation process otherwise. Parliament did not intend that the consultation and approval process should merely be an exercise in window-dressing.

Parliamentary purpose

80. We are in this appeal concerned with an issue of statutory interpretation and it is relevant to have regard to the intention of Parliament in enacting the measures in dispute. Our conclusion on the construction to be placed upon Schedule 17 is supported by the Parliamentary purpose behind the Act and Schedule 17 which, in our view, is clear. We have made reference to this in paragraph [68] above. Parliament was prepared to grant deemed planning approval to the overall HS2 scheme, given its importance to the public interest. But it was recognised at the time that implementation could have multiple potential impacts at the local level along the proposed route which were unforeseeable (and hence could not be resolved) at the point of Royal Assent. A balance thus had to be struck: as the HS2 project unfolded, the nominated undertaker – HS2 Ltd – would submit requests for approval to the relevant authorities who would have a relatively constrained

power of rejection. Local authorities would also be encouraged to participate in a scheme (the qualifying authority undertakings scheme) whereby the planning approval process was expedited, and this would be achieved by close and mutual cooperation between the nominated undertaker and the authority. As we have emphasised, this scheme balances the important public interest in the timely execution of a major infrastructure project of national importance with the democratic need to ensure that local environmental and planning concerns and interests are protected.

81. In striking this balance, it is hardly conceivable that Parliament intended to place the evaluation of local interests into the hands of the nominated undertaker, HS2 Ltd. This would have undermined the entire scheme. No admissible Parliamentary material has been placed before us which would support such a view. Indeed, on our reading of the Statutory Guidance and the EMRs, it is assumed that HS2 Ltd will liaise closely with local planning authorities to enable *the latter*, efficiently and expeditiously, to perform the necessary evaluation of impact.

82. Standing back we ask (rhetorically) whether Parliament intended Schedule 17 to be construed to lead to the situation whereby the state nominated undertaker could circumvent local planning control over impact by declining to furnish the authority with information on such matters and abrogate to itself the task of carrying out any required investigation, free from independent control by the local authority. Such a system would create the appearance of an acute conflict of interest on the part of the nominated undertaker who, on the one hand, is under a contractual obligation (under the Development Agreement) to deliver the project and, on the other hand, is under a duty to protect local planning interests which could hinder or undermine the obligation of the undertaker to meet its contractual delivery objective. Parliament did not, in our view, intend to set up a scheme which gave the appearance that HS2 Ltd was judge in its own cause.

The scope of controls under the relevant EMR

83. Mr Howell Williams QC for the Appellant raised another point, namely that, in any event, when the contents of the relevant EMR (the HERDS Memorandum) are considered, they focus not upon the evaluative, balancing, exercise of "*control*" that an authority is required to perform under Schedule 17, but on the more technical aspects of how investigations are to be carried out. It was argued that as a document the EMRs did not therefore modify or replicate the "*control*" allocated to the authority. We were taken through the relevant document to demonstrate the point. It is unnecessary to go into detail. We see the force in this argument but it follows from our analysis above that, even if the EMRs had modified or fully replicated the control systems under Schedule 17 (which it does not), that could still not serve to oust the statutory duty of control imposed by the Act upon the authority to conduct the impact evaluation.

84. Mr Howell Williams QC also pointed out in relation to control that the EMRs had no in-built system of formal enforcement whereas there was such a system under the Act and Schedule 17 so that, come what may, the EMRs did not replicate or modify key enforcement controls. Again, we see the force in this. Under section 20 of the Act, planning permission is deemed to have been granted under Part 3 TCPA 1990. Section 336 TCPA 1990 defines planning permission as "*permission under Part III*." Under section 171A, a mechanism of enforcement of planning control is provided for where, for

example, development is carried out without planning permission, or where there is permission in place, but there has been a failure to comply with any condition or limitation subject to which permission was granted. Section 172(1) provides that an enforcement notice may be issued by a local planning authority "*where it appears to them … that there has been a breach of planning control*" and it is "*expedient*" to issue the notice. Section 187A provides a mechanism for the enforcement of conditions subject to which planning permission has been granted. It follows from the operation of section 20 of the Act that these provisions of the TCPA 1990 relating to enforcement action are effective in respect of deemed planning permission granted by section 20 of the Act, and a breach of condition subject to which planning permission is deemed to have been granted by section 20 of the Act may be enforced against under the provisions of the TCPA 1990. On the basis of the logic of the Decision, the authority must approve a request absent any evaluation of any matter which might be made the subject of a condition which could later be enforced. In contrast, the complete absence of any conditions (see paragraph [63] above) in the Decision is a reflection of how the Secretaries of State envisage the EMRs operating. On this basis the Appellant argues that the system of control under Schedule 17 is not replicated by the EMRs. Once again, we observe that even if the EMRs had fully replicated the enforcement system under the Act we would *still* have come to the conclusion that a non-legislative instrument such as the EMRs could not, *constitutionally*, supplant the legislative enforcement control system laid down by Parliament.

Conditional or deferred decisions: Grampian conditions

85. We turn to one final matter. In the present case, as explained fully above, the Secretaries of State granted approval, but this was not subject to any condition that HS2 Ltd complete the work which would otherwise have been required to enable adequate information to be submitted as part of the request for approval. The approval was granted unconditionally such that HS2 Ltd was entitled to proceed with the approval plans and specifications regardless.

86. We address now an issue arising at the hearing as to whether (even if the position adopted in the Decision was wrong) it would have been lawful for the Secretaries of State to grant approval subject to a condition subsequent that the approval was valid only after investigations as to the archaeological impact of the works on the site were undertaken (as HS2 Ltd stated that it would to do under the EMRs) and if those investigations did not discover anything of archaeological significance.

87. Such conditions are referred to as "*Grampian*" conditions after the decision of the House of Lords in *Grampian Regional Council v City of Aberdeen District Council* (1984) 47 P.&C.R. 633 where the approval provided that the development should not be commenced until a specified event (in that case the closure of a section of public road) had taken place. It was held that a planning condition was not invalid simply because it prevented development proceeding pending completion of the conditional event which was not wholly within the power of the applicant to bring about. In *British Railways Board v Secretary of State for the Environment and Others* [1993] 3 P.L.R. 125 Lord Keith of Kinkel explained that the test was one of rationality. He stated (at page [134]):

> "If the condition is of a negative character and appropriate in the light of sound planning principles the fact that it appears to

> have no reasonable prospects of being implemented does not mean that the grant of planning permission subject to it would be irrational in the *Wednesbury* sense so that it would be unlawful to grant it. If it is irrational to grant planning permission subject to a condition which has no reasonable prospects of being implemented then it must be no less irrational to refuse planning permission on the ground that a desirable condition has no reasonable prospects of implementation and therefore cannot be imposed. In truth, neither course is irrational. What is appropriate depends on the circumstances and is to be determined in the exercise of the discretion of the planning authority. But the mere fact that a desirable condition appears to have no reasonable prospects of fulfilment does not mean that planning permission must necessarily be refused. Something more is required before that can be the correct result."

88. More recently in *Alison Hook v Secretary of State for Housing, Communities and Local Government and Surrey Heath Borough Council* [2020] EWCA Civ 486 the Court was concerned with the validity of a planning condition within the context of Section 70 TCPA 1990 and whether a condition restricting occupancy of a building under a planning permission to an agricultural worker was consistent with the principle that a planning condition must fairly and reasonably relate to the development permitted. The Court helpfully summarised the law on planning conditions more generally (in paragraph 33):

> "It is settled law that, to be valid, a planning condition must satisfy three basic requirements. First, it must be imposed for a "planning" purpose and not for any ulterior purpose. Secondly, it must fairly and reasonably relate to the development permitted by the planning permission. Thirdly, it should not be so unreasonable that no reasonable planning authority could have imposed it (see the speeches in the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] 1 A.C. 578; the judgment of Lord Hodge in *Elsick Development Company Ltd. v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UKSC 66; [2017] P.T.S.R. 1413, at paragraphs 43 to 46; and the judgment of Lord Sales in *R. (on the application of Wright) v Resilient Energy Severndale Ltd. and Forest of Dean District Council* [2019] UKSC 53, at paragraphs 32 to 42)."

89. In our judgment, applying the test set out above, such a condition would fall foul of the second and third basic requirements: (i) the condition is integral to the validity of the approval which is intended to confer a permit to conduct the development works, but at the time the condition is imposed the authority does not know whether the development works are to be "*permitted*" and therefore it cannot fairly and reasonably relate to it (second basic requirement); and (ii) it is irrational and unreasonable for an authority to be compelled to give what is intended to be a definitive approval to a request but also

subject it to a condition that requires the authority to consider *later* whether the approval should have been granted in the first place (third basic requirement).

90. The Statutory Guidance confirms our conclusion when it states (in paragraph 10.2) that: *"Conditions should not be imposed which reserve for future approval matters which are integral to the approval being sought*". Section 10 makes plain that the satisfaction of the condition imposed under Schedule 17 must precede the decision of the authority on grant or refusal of approval. Paragraph 10.2 states:

> "Where a planning authority considers it necessary to impose a condition on an approval of matters ancillary to development or approval of road transport under the provisions of Schedule 17, it may only do so with the agreement of the nominated undertaker [paragraphs 4(7) and 6(6) of Schedule 17]. The purpose of this is to allow the nominated undertaker and the planning authority the opportunity to agree whether the condition is necessary and appropriate, and would not unreasonably impede the building and operation of the railway, prior to the planning authority issuing its decision. It also avoids the potential for delay that would result from decisions being issued with inappropriate conditions. In the event that the nominated undertaker and the planning authority cannot agree on the inclusion of a condition, the planning authority may choose to refuse the request for approval.
>
> Conditions should not be imposed which reserve for future approval matters which are integral to the approval being sought."

91. The Secretary of State did not, in the final analysis, urge upon us that it would be consistent with the statutory regime for an authority or a Secretary of State to impose such a conditional approval. The latter of course says that there would be no such need because the decision on the merits of the request for approval is not to be determined by the authority, but is ceded to HS2 Ltd, which does away with the need for any Grampian style condition. We have already explained why this is wrong in law.

E. Result of the appeal

92. For the reasons set out above we allow the appeal.

93. We quash the Decision of the Secretaries of State and we remit the matter to them for reconsideration in the light of this judgment.

94. Finally, we record out gratitude to the parties for their helpful written submissions and to Counsel for their thoughtful oral submissions and for responding with patience and care to the multitude of questions posed by the Court during the hearing.