Neutral Citation Number: [2024] EWCA Civ 730

Case No: CA-2023-001742

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Sir Ross Cranston (sitting as a High Court Judge)
[2023] EWHC 1622 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 June 2024

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE SINGH
and
LORD JUSTICE ARNOLD

- -

Between:

C. G. FRY & SON LIMITED	**Claimant/ Appellant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendants/**
(2) SOMERSET COUNCIL	**Respondents**
- and -	
(1) THE HOME BUILDERS FEDERATION	
(2) THE LAND, PLANNING AND DEVELOPMENT FEDERATION	**Interveners**

- -
- -

Lord Banner K.C. and Ashley Bowes (instructed by **Clarke Willmott LLP**) for the **Appellant**
Richard Moules K.C. and Nick Grant (instructed by the **Treasury Solicitor**) for the **First Respondent**
Luke Wilcox (instructed by **Shape Partnership Services, Law & Governance**) for the **Second Respondent**
Zack Simons and Isabella Buono (instructed by **Shoosmiths LLP**) for the **Interveners**

Hearing dates: 19 and 20 March 2024

Further written submissions: 10 and 17 June 2024

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Approved Judgment

This judgment was handed down remotely at 4:20pm on 28 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals, Lord Justice Singh and Lord Justice Arnold:

Introduction

1. The central question in this case is whether the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"), properly interpreted, required an "appropriate assessment" before a local planning authority decided whether to discharge conditions on the approval of reserved matters, having previously granted outline planning permission, without such an assessment, for a major development of housing on land close to a protected site.

2. The appellant, C.G. Fry & Son Ltd. ("C.G. Fry"), appeals against the order of Sir Ross Cranston sitting as a judge of the High Court, dated 20 July 2023, dismissing its application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") for an order to quash the decision of an inspector appointed by the first respondent, the Secretary of State for Levelling Up, Housing and Communities ("the Secretary of State"). The inspector had dismissed C.G. Fry's appeal against the failure of the second respondent, Somerset West and Taunton Council, now Somerset Council ("the council"), to discharge conditions attached to a planning permission for a mixed use development including 650 dwellings and commercial and community uses, a primary school and associated infrastructure on land at Jurston Farm, near Wellington.

3. The site of the proposed development is in the catchment area of the River Tone, where there is a risk that new development will generate phosphates in waste water and surface water entering the river, with consequent effects on the Somerset Levels and Moors Ramsar Site. In the absence of an "appropriate assessment" under the Habitats Regulations, the council, and on appeal the inspector, refused to discharge several conditions on an approval of reserved matters in view of the effects the development was likely to have on the Ramsar site.

4. If the conditions in question were discharged, the construction of Phase 3 of the development would become lawful. No appropriate assessment under regulation 63 had been undertaken when outline planning permission was granted, or subsequently at the reserved matters stage. After reserved matters had been approved for Phase 3, subject to conditions including pre-commencement conditions, Natural England issued an advice note identifying the potential adverse effects of development upon the integrity of the Ramsar site. C.G. Fry does not dispute that if the project had been subject to an appropriate assessment the assessment would have confirmed the likelihood of such effects, but maintains that the council should nevertheless have discharged the outstanding conditions because the question of harm to the Ramsar site had arisen too late in the course of decision-making on the project for an appropriate assessment to be required. The Secretary of State and the council contend that the scheme of the habitats legislation was designed to avoid such harm, and, properly interpreted, the relevant provisions of the Habitats Regulations required an appropriate assessment at this stage.

5. The judge rejected the challenge to the inspector's decision on all three grounds. However, he granted permission to appeal to this court, and also a "leapfrog" certificate to apply to the Supreme Court for permission to appeal directly to that court. That application was refused on 29 August 2023.

6. By an order dated 20 October 2023, Dingemans L.J. permitted the Home Builders Federation ("the HBF") and the Land, Planning and Development Federation ("the LPDF") to intervene in the appeal, by written submissions.

7. In his counsel's skeleton argument for this appeal (at paragraph 3(1)) the Secretary of State acknowledges that "nutrient neutrality is causing difficulties in housing delivery", and that in his view "the law as it stands is a problem – in effect holding up the supply of new housing". This, he says, is "the result of EU-derived law, and … will take legislation to fix". He confirms that "[the] Government remains committed to addressing the problem of nutrient neutrality", but says he is "nonetheless under an obligation as a Minister of the Crown to ensure that the law as it stands is interpreted and applied correctly".

8. As the judge in the court below reminded himself (in paragraph 4 of his judgment), "[it] is on legal grounds that the case was argued and must be decided", and "[it] is for others to resolve the significant public policy issues underlying this claim". We agree. In a democracy governed by the rule of law the courts exceed their proper role if they venture into the realms of politics and policy. Our task is simply to uphold the law as it is.

The main issues in the appeal

9. Three main issues arise in the appeal. They correspond to the grounds in the section 288 application. The first issue is whether the judge was wrong to hold that regulation 63 of the Habitats Regulations applied at the discharge of conditions stage (ground 1 in the appellant's notice). The second is whether he erred in holding that the policy in paragraph 181 of the National Planning Policy Framework ("the NPPF"), which has the effect of applying equivalent protection to Ramsar sites, was a material consideration (ground 2). And the third is whether in any event he was wrong to hold that the scope of an appropriate assessment in these circumstances was limited to the matters affected by the conditions for discharge, rather than the development itself (ground 3). The first and third issues are best dealt with together, and before the second.

Ramsar sites

10. Ramsar sites are designated under paragraph 1 of Article 2 of the Convention of Wetlands of International Importance especially as Waterfowl Habitat ("the Ramsar Convention") of 2 February 1971, and in England, under section 37A of the Wildlife and Countryside Act 1981. They are not protected by the Habitats Regulations, but under national planning policy in the NPPF they have, since March 2012, enjoyed equivalent protection to sites designated under the habitats legislation. In the NPPF issued in July 2021 and current at the time of the challenged decision, paragraph 181 stated:

> "181. The following should be given the same protection as habitats sites [defined in the "Glossary" to the NPPF as "[any] site which would be included within the definition at regulation 8 of [the Habitats Regulations] for the purposes of those regulations, including candidate Special Areas of

> Conservation, Sites of Community Importance, Special Areas of Conservation, Special Protection Areas and any relevant Marine Sites"]:
>
> …
>
> (b) Listed or proposed Ramsar sites …"

The outline planning permission and reserved matters approval

11. The council granted outline planning permission for the proposed development, subject to 19 conditions, on 22 December 2015. It was envisaged that the development would come forward in eight phases. Condition 4, which required that before any reserved matters approval "details of a site-wide surface water strategy" must be agreed by the council, was discharged on 5 December 2016. In June 2020 reserved matters approval was granted for Phase 3, comprising 190 dwellings. Ten conditions were imposed on that approval, relating, among other things, to tree protection (condition 3); "details of the surface water drainage scheme based on sustainable drainage principles" (condition 4); a Construction Environment Management Plan (condition 5); infrastructure details (condition 6); a cycleway and footpath network (condition 7); and details of the material to be used at damp-proof course level (condition 10). Conditions 3, 4 and 5 were pre-commencement conditions.

Natural England's advice note of 17 August 2020

12. On 17 August 2020 Natural England published an advice note for development with possible effects on the Somerset Levels and Moors Ramsar Site. The advice note confirmed that in the light of the judgment of the Court of Justice of the European Union ("the CJEU") in *Cooperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limberg* (C-293/17) [2019] Env. L.R. ("*Dutch Nitrogen*"), given in November 2018, plans and projects resulting in increased nutrient loads that might have an effect on Special Areas of Conservation and Special Protection Areas designated under the Habitats Regulations, and sites designated under the Ramsar Convention, should be given greater scrutiny. Natural England acknowledged that the Somerset Levels and Moors Ramsar Site was at risk from eutrophication caused by phosphates arising from the development of new housing and other forms of development. It therefore advised that "before determining a planning application that may give rise to additional phosphates within the catchment, competent authorities should undertake a Habitats Regulations Assessment". Planning permission should only be granted if the assessment enabled the authority to conclude that the development "will not have an adverse effect on the integrity of the site". A "nutrient neutrality" approach was likely to be a "lawfully robust solution".

The application for discharge of conditions and subsequent appeal

13. On 9 June 2021 C.G. Fry applied to the council for the discharge of conditions 3, 4, 5, 6, 7 and 10 on the reserved matters approval. The council withheld its approval, contending that an appropriate assessment under the Habitats Regulations was required

before a decision could be made on the discharge of those conditions. On 5 April 2022 C.G. Fry appealed to the Secretary of State against the council's failure to give notice of its decision within the prescribed period. The council resisted the appeal on the basis that, in view of Natural England's advice, it was necessary for an appropriate assessment under the Habitats Regulations to be undertaken. On 15 July 2022 it published a "Shadow Appropriate Assessment" of the proposed development, which stated that the development would increase phosphate loading within the hydrological catchment of the Ramsar site, both by the "production of wastewater" and by the "production of increased surface flows over urban land", and continued:

> "It cannot be concluded that the project will not adversely affect the integrity of the Somerset Levels and Moors Ramsar Site, either alone or in combination with other plans or projects.
>
> Based on the information available, the phosphorus loading of the proposed project has been calculated to 41.19 kg/year under the AMP programme and no mitigation has been provided to offset this impact."

The written ministerial statement of 20 July 2022

14. On 20 July 2022 the Secretary of State for Environment, Food and Rural Affairs issued a written ministerial statement, entitled "Statement on improving water quality and tackling nutrient pollution", in which he said:

> "The Habitats Regulations Assessment provisions apply to any consent, permission or other authorisation[. This] may include post-permission approvals, reserved matters or discharges of conditions. It may be that Habitats Regulations Assessment is required in situations including but not limited to where the environmental circumstances have materially changed as a matter of fact and degree (including where nutrient load or the conservation status of the habitats site is now unfavourable) so that development that previously was lawfully screened out at the permission stage cannot now be screened out."

The inspector's decision

15. The inspector held an inquiry into the appeal on 15 August 2022. His decision letter is dated 24 November 2022. He observed that the policy in paragraph 181 of the NPPF was relevant in this case, and that "[considering] the overarching nature of paragraph 181, this applies regardless of the specific subject matter of the Conditions themselves" (paragraph 26). The scope of the appropriate assessment required was not limited by the fact that this was a decision on the discharge of conditions, as that would be inconsistent with the Habitats Regulations and the "precautionary principle" (paragraph 40). An appropriate assessment was required under regulation 63 because the discharge of conditions was an "other authorisation" within regulation 63(1) (paragraph 45). The position was not affected by the United Kingdom's withdrawal from the European Union (paragraph 56). The inspector concluded that an appropriate assessment was "necessary in order to agree the Conditions attached to the Reserved Matters Approval",

that "the scope of any such [assessment] is not limited" (paragraph 69), and that he was unable to carry out the necessary appropriate assessment to discharge the conditions (paragraph 71).

The habitats legislation and relevant case law

16. Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Flora and Fauna ("the Habitats Directive") states:

> "…
>
> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> …"

17. It is well settled in both European Union and domestic law that article 6(3) represents a strict "precautionary approach". The case law was drawn together in *R. (on the application of Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983 (in paragraph 9 of the leading judgment). The following points are relevant here:

> "9. …
>
> (6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the "precautionary principle, and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered" (see the judgment of [the CJEU] in [Case C-127/02] *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* … [2005] 2 C.M.L.R. 31 ("*Waddenzee*"), at paragraph 58). … The "precautionary principle" requires a high standard of investigation (see the judgment in *Waddenzee*, at paragraphs 44, 58, 59 and 61).

> (7) … [The] competent authority must be "satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the protected site concerned" (paragraphs 44, 58, 59 and 61 of the CJEU's judgment in … *Waddenzee* …) …
>
> …
>
> (10) … If an appropriate assessment is to comply with article 6(3) of the Habitats Directive it "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned" (see the judgment of the CJEU in *Sweetman v An Bord Pleanála* (C258/11) [2014] P.T.S.R. 1092, at paragraph 44, and its judgment in *People Over Wind and Sweetman v Coillte Teoranta* (C-323/17) [2018] P.T.S.R. 1668, at paragraph 38)."

18. In *Holohan v An Bord Pleanála* (C-461/17) [2019] P.T.S.R. 1954 the CJEU emphasised the rigour required in applying the provisions for "appropriate assessment" (in paragraph 33 of its judgment):

> "33. Under article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no scientific doubt as to the absence of such effects. …"

19. The precautionary principle was amplified by the CJEU in *Dutch Nitrogen* (in paragraphs 99 and 100 of its judgment):

> "99. … [The] second stage of the assessment procedure, which is envisaged in the second sentence of art.6(3) of the Habitats Directive and occurs following the appropriate assessment of the implications of the plan or project for the site concerned, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned …
>
> 100. Article 6(3) of the Habitats Directive thus integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects envisaged. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision … "

20. The meaning of the expression "agree to" in the second sentence of article 6(3) was considered by the CJEU in *Inter-Environnement Wallonie ASBL v Conseil des Ministres* (C-411/17) EU:C:2019:622, where it said (in paragraphs 140 to 143 of its judgment):

> "140. The second sentence of art.6(3) of the Habitats Directive specifies that following an appropriate assessment, the competent national authorities are to "agree" to the project only after having ascertained that it will not adversely affect the integrity of the site concerned … .
>
> 141. It follows that the assessment must be conducted before agreement is given.
>
> 142. Furthermore, while the Habitats Directive does not define the conditions governing how the authorities "agree" to a given project under art.6(3) of that directive, the definition of "development consent" is art.1(2)(c) of the EIA Directive is relevant in defining that term.
>
> 143. Accordingly, by analogy with the Court's findings on the EIA Directive, if national law provides for a number of steps in the consent procedure, the assessment under art.6(3) of the Habitats Directive should, in principle, be carried out as soon as the effects which the project in question is likely to have on a protected site are sufficiently identifiable … "

21. In *Friends of the Irish Environment Ltd. v An Bord Pleanála* (C254/19) EU:C:2020:680; [2021] Env. L.R. 16, the CJEU repeated what it had said in *Inter-Environnement Wallonie* (at paragraph 142) on the relevance of the term "development consent" as defined in article 1(2)(c) of the EIA Directive, namely "the decision of the competent authority or authorities which entitles the developer to proceed with the project" (paragraphs 42 and 43).

22. Under article 2(1) of the EIA Directive an environmental impact assessment is required before development consent is given. In *Commission v United Kingdom* (C-508/03) [2007] Env. L.R. 1 and *R. (on the application of Barker) v Bromley London Borough Council* (C-290/03) [2006] Q.B. 764 the CJEU accepted that an environmental impact assessment may be required at reserved matters stage, even though such an assessment had not been undertaken when outline planning permission was applied for and granted.

23. The Habitats Directive was transposed into domestic law by the Habitats Regulations. The Habitats Regulations were amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019. The Explanatory Memorandum to those regulations made it clear that they were not intended to introduce any change in policy (paragraph 2.4).

24. Regulation 3A of the Habitats Regulations states that where the Habitats Directive is referred to it should be construed as if the United Kingdom were still a member state of the European Union.

25. Regulation 9(1) requires "the appropriate authority" to "exercise [its] functions which are relevant to nature conservation … so as to secure compliance with the requirements of the Directives". And regulation 9(3) requires the "competent authority … in exercising any of its functions," to "have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions".

26. Part 6 of the Habitats Regulations contains provisions for the "Assessment of plans and projects". Regulations 61 to 64 are in Chapter 1 of Part 6. Regulations 63 and 64 are defined in regulation 61 as "the assessment provisions".

27. Regulation 62(1) states:

> "(1) The requirements of the assessment provisions … apply –
>
> > (a) subject to and in accordance with the provisions of Chapters 2 to 7, in relation to the matters specified in those provisions …
> >
> > …"

28. Regulation 63, "Assessment of implications for European Sites and European offshore marine sites", provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –
>
> > (a) is likely to have a significant effect on a European site … (either alone or in combination with other plans or projects), and
> >
> > (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> …
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64 [which provides for "Considerations of overriding public interest"], the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site …
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.
>
> …"

29. Regulation 70, "Grant of planning permission", which is in Chapter 2 of Part 6, provides:

> "(1) The assessment provisions apply in relation to –
>
> (a) granting planning permission on an application under Part 3 of [the 1990 Act] (control over development);
>
> …
>
> (c) granting planning permission, or upholding a decision of the local planning authority to grant planning permission (whether or not subject to the same conditions and limitations as those imposed by the local planning authority), on determining an appeal under section 78 of that Act … in respect of such an application;
>
> …
>
> (3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site … could be carried out under the permission, whether before or after obtaining approval of any reserved matters.
>
> (4) In paragraph (3), "outline planning permission" and "reserved matters" have the same meanings as in section 92 of the TCPA 1990 (outline planning permission).
>
> …"

30. Section 92(1) of the 1990 Act provides that "[in] this section … "outline planning permission" means planning permission granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority … or the Secretary of State of matters not particularised in the application ("reserved matters")". In section 336(1) of the 1990 Act "planning permission" was at the relevant time defined as meaning "permission under Part III or section 293A" but not including "permission in principle".

31. Whether, in the absence of an appropriate assessment at the outline planning permission stage, such an assessment can later be required was considered by Lang J. in *R. (on the application of Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin), and by Holgate J. in *R. (on the application of Swire) v Canterbury City Council* [2022] EWHC 390 (Admin). Both drew upon the speech of Lord Hope of Craighead in *R. (on the application of Barker) v Bromley London Borough Council* [2007] 1 A.C. 470, where he acknowledged (in paragraph 5) that it was "possible to conceive of cases where [the likely significant effects on the environment] only become apparent when consideration is being given to the reserved matters or where further consideration is

necessary due to a material change in circumstances". Lord Hope went on to say (in paragraph 24):

> "24. As the European Court … said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier."

and (in paragraph 29):

> "29. … If it is likely that there will be significant effects on the environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development."

32. Having in mind those conclusions of Lord Hope, Lang J. said in her judgment in *Wingfield* (at paragraph 69) that "it was wrong to suggest that the only [circumstance] in which an EIA might be required at reserved matters stage was if the environmental effects of the development were not identifiable at the outline permission stage", and that an "EIA may also be required at reserved matters stage where the need for EIA was overlooked at the outline stage: see *Cooper v Attorney General* [2011] Q.B. 976 at [20-21] and [92]". She concluded (in paragraph 70) that "the need for an appropriate assessment under the Habitats Directive was "overlooked" at outline permission stage in this case", and (in paragraphs 71 and 72):

> "71. In my judgment, the Council could lawfully conduct an appropriate assessment at reserved matters stage, in the circumstances of this case.
>
> 72. Unlike the EIA Directive, the Habitats Directive has no stated objective that appropriate assessment is expected at the "earliest possible stage". The distinction is that the EIA regime seeks to ensure consideration of relevant information at the first decision-making stage, whereas the HRA regime is focussed on ensuring the avoidance of harm to the integrity of protected sites."

33. Lang J. referred (in paragraph 73) to the decision of the Court of Appeal in *No Adastral New Town Limited v Suffolk Coastal DC* [2015] EWCA Civ 88:

> "73. In considering a challenge to a core strategy, the Court of Appeal in *No Adastral New Town Limited* … found that there was no requirement for an HRA "screening assessment" to be carried out "at an early stage", on the basis that article 6 of the Habitats Directive "focuses on the end result of avoiding damage to an SPA", and it was therefore sufficient for any appropriate assessment to be completed "before the plan is given effect", per Richards LJ at [61] to [69]."

34. She went on to consider (in paragraph 74) the circumstances in which a competent national authority "agrees" to the plan or project under article 6(3) of the Habitats Directive, and concluded:

> "74. … The relevant date is "the date of adoption of the decision authorising implementation of the project": see *Commission v Germany* [2017] EUECJ C-142/16 at [42]. In a "multi-stage consent", there is no "agreement to the … project" until reserved matters consent has been granted; indeed the CJEU described the reserved matters approval as "the implementing decision" in *Wells* at [52] and *Commission v UK* [2006] QB 764 at [101], [104]. By regulations 63(1) and 63(5), reserved matters consent cannot be granted unless it has been established that the integrity of the European site will not be adversely affected. So an HRA was required."

35. The relevant conclusions of Holgate J. in *Swire* (in paragraphs 94 and 95 of his judgment) were similar:

> "94. In [*Wingfield*] it was held at [72]-[77] that for the purposes of the Habitats Regulations, there is no decision authorising the implementation of the project in the case of a multi-stage consent until reserved matters are approved. Reserved matters approval is the "implementing decision". Unlike the EIA Regulations, there is no legislative objective requiring HRA to be carried out at the earliest possible stage. Accordingly, HRA may lawfully be completed at the reserved matters stage, even if not carried out prior to the grant of outline planning permission. The various attempts by the claimant in *Wingfield* to challenge the decision by Lang J were rejected by the Court of Appeal (as recorded in [2021] 1 W.L.R. 2863).
>
> 95. CCC and RHL are entirely correct to submit that *Wingfield* and the decision upon which it is based [*No Adastral New Town Limited*], provide a complete answer to this second limb of ground 2. The claimant's argument is hopeless."

36. Regulation 85A, inserted by section 169 of and Schedule 15 to the Levelling Up and Regeneration Act 2023, with effect from 26 December 2023, now requires authorities to assume that nutrient pollution standards set under the amendments introduced to the Water Industry Act 1991 by section 168 will be met after a specified date. Consequential amendments were made to regulations 70, 79, 80, 81, 82 and 83 of the Habitats Regulations, but not to regulation 63.

The continuing relevance of EU law

37. The Habitats Regulations are domestic legislation which was enacted in order to give effect to the Habitats Directive. They are, in the terminology of the European Union (Withdrawal) Act 2018 ("the Withdrawal Act"), "EU-derived domestic legislation". By virtue of section 2(1) of the Withdrawal Act, EU-derived domestic legislation, "as it has effect in domestic law immediately before IP [i.e. "implementation period"] completion day, continues to have effect in domestic law on and after IP completion day". IP completion day was 11pm on 31 December 2020.

38. By virtue of section 2(3) this is subject to section 5 and Schedule 1 to the Withdrawal Act.

39. Section 5(1) of the Withdrawal Act, at the material time, provided that the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day: see subsection (1). Subsection (2) provided that, accordingly, the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day. This would therefore apply to the Habitats Regulations.

40. Section 4 of the Withdrawal Act, so far as material at the relevant date, provided as follows:

> "Saving for rights etc. under section 2(1) of the ECA
>
> (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day –
>
> (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
>
> (b) are enforced, allowed and followed accordingly,
>
> continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
>
> (2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they –
>
> (a) form part of domestic law by virtue of section 3,
>
> (aa) are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B, or
>
> (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case).

> (3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary)."

41. It is important to note that the subject-matter of section 4 is the doctrine of direct effect in EU law. Accordingly, it does not apply to the *interpretation* of domestic legislation in the light of EU law. We will return to this important distinction below.

42. It is section 6 of the Withdrawal Act that governs the interpretation of retained EU law. Section 6(3) provides that any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it –

> "(a) in accordance with any retained case law and any retained general principles of EU law, and
>
> (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences."

43. Section 6(7) provides that "retained EU law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of (so far as relevant) section 2: this includes the Habitats Regulations. It also provides that "retained case law" means (a) retained domestic case law, and (b) retained EU case law.

44. Paragraph 111 of the Explanatory Notes to the Withdrawal Act makes it clear (correctly) that section 6(3) provides that any question as to the meaning of unmodified retained EU law will be determined in UK courts in accordance with relevant pre-exit CJEU case law and general principles of EU law. "This means, for example, taking a purposive approach to interpretation where the meaning of the measure is unclear …".

45. The Retained EU Law (Revocation and Reform) Act 2023 ("the 2023 Act") has made important changes to the Withdrawal Act but was not in force at the material date for the purposes of this appeal. Section 2 repeals section 4 of the Withdrawal Act after the end of 2023. Section 3 amends section 5 of the Withdrawal Act to make it clear that the principle of the supremacy of EU law is not part of domestic law but again this applies only after the end of 2023, in relation to any enactment or rule of law (whenever passed or made). Similarly, section 4 of the 2023 Act abolishes the general principles of EU law as a part of domestic law but again this only applies after the end of 2023. Finally, so far as relevant here, section 5 of the 2023 Act changes the phrase "retained EU law" to "assimilated law" but only with effect after the end of 2023.

The distinction between interpretation and the doctrine of direct effect in EU law

46. Article 288 of the Treaty on the Functioning of the European Union ("TFEU") sets out the different types of legal measure that can be enacted by the EU, in particular regulations and directives. The definition of each is in the following terms:

> "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

47. It will be seen that a regulation does not need any act of a Member State to transpose it into domestic law and is "directly applicable" without more. This is not the same thing as "direct effect", which is a doctrine of EU law developed in the case law of the CJEU to refer to the concept that there are certain provisions in EU law which can be relied on directly by an individual in domestic courts. This doctrine was first established in the context of provisions of the founding Treaty and also regulations but in due course it came to be accepted even in the case of directives.

48. On the face of article 288, it is not self-evident that a directive could have direct effect because the manner of its implementation in domestic law is left to Member States. However, in *Van Duyn v Home Office* (C-41/74) [1975] Ch 358, the ECJ first held that a clear and precise provision of a directive was capable of having direct effect once the period for transposing it into domestic law had elapsed and the Member State had failed to transpose it or had failed to do so correctly or fully. In *Pubblico Ministero v Ratti* (C-148/79) [1979] ECR 1629 the ECJ developed the basis of the vertical direct effect of directives in what came to be known as the "estoppel" argument. At paragraphs 21 and 22 the ECJ explained that directives impose duties on Member States to adopt a certain course of action:

> "Consequently a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails."

49. Even where provisions of a directive are not sufficiently clear and precise to have direct effect, there is always an interpretive obligation to construe national law in light of the wording and purpose of a directive. The ECJ set out the principled reason why directives have such a strong indirect effect in *Von Colson and Kaman v Land Nordrhein Westfalen* (C-14/83) [1984] ECR 1891, at paragraph 26, where it explained that in order to ensure the "binding" effect of directives referred to in Article 189 EEC (now Art 288 TFEU), "... in applying national law and in particular the provisions of a national law specifically introduced in order to implement [a directive], national courts are required to interpret their national law in light of the wording and the purpose of the directive …".

50. The ECJ confirmed the strength of the interpretive obligation in *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] ECR I-4135 at paragraph 7. This is a strong form of interpretation and may require a domestic court to give a strained interpretation to legislation, so long as it is possible to do so. This is therefore different from the conventional approach to interpretation, but it is important

to note that the *Marleasing* approach is not the same as a purposive approach, which is part of the conventional approach to interpretation in domestic law.

51. The distinction between the obligation of interpretation and the doctrine of direct effect was helpfully summarised by the Grand Chamber of the CJEU in *Dansk Industri (DI) v Rasmussen* (Case-441/14) [2016] 3 CMLR 27, at paragraphs 31 and 32:

> "31. It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of art.288 TFEU (see, inter alia, judgments in *Pfeiffer* [2005] 1 C.M.L.R. 44 at [113] and [114], and *Kücükdeveci* [2010] 2 C.M.L.R. 33 at [48]).
>
> 32. It is true that the Court has stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (see judgments in *Impact v Minister for Agriculture and Food* (C-268/06) [2008] E.C.R. I-2483; [2008] 2 C.M.L.R. 47 at [100]; *Dominguez v Centre Informatique du Centre Ouest Atlantique* (C-282/10) EU:C:2012:33; [2012] 2 C.M.L.R. 14 at [25]; and *Association de mediation sociale v Union locale des syndicats CGT* (C-176/12) EU:C:2014:2 at [39])."

52. As the CJEU explained at paras 35-37, if it is impossible to interpret legislation in a way which conforms to EU law in that way, then the doctrine of direct effect means that the national court must disapply that provision.

53. See also in this regard the Opinion of Bot AG at paragraphs AG67-AG68:

> "AG67 In this connection, it is important to circumscribe the situations in which a consistent interpretation is impossible and, more specifically, to define what *contra legem* interpretation actually means.
>
> AG68 The Latin expression '*contra legem*' literally means 'against the law'. A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that *contra legem* interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority."

The judge's conclusions on the first and third grounds of challenge

54. On the first ground in the section 288 application the judge accepted that "on the face of it the assessment provisions of regulation [63] are confined in their application to the planning permission stage and do not extend to the discharge of conditions", and "[on] its face regulation 70 does not encompass reserved matters or the discharge of conditions as in this case" (paragraph 47 of the judgment). But he went on to say that "[while] on a strict reading of the Habitats Regulations … the assessment provisions of regulation 63 do not cover the discharge of conditions, … they do apply as a result of firstly, article 6(3) of the Habitats Directive, secondly, a purposive interpretation of their provisions and thirdly, case law binding on [the court]" (paragraph 48).

55. One of the reasons which the judge gave for interpreting the Habitats Regulations as he did was so as to give effect to article 6(3) of the Habitats Directive, which he considered to have direct effect in domestic law after the Withdrawal Act. He said (in paragraph 51):

> "51. In my view article 6(3) of the Habitats Directive continues to have effect in domestic law as a result of section 4(2)(b) [of the Withdrawal Act]. Johnson J explained in [*Harris and another v Environment Agency* [2022] EWHC 2264 (Admin)], that the requirements of article 6(3) were accepted as binding by the CJEU in *Waddenzee*: [90]. Article 6(2) and 6(3) of the Habitats Directive are closely related, so as to be 'of a kind' with one another for the purposes of section 4: [91]. The demands of section 4(2)(b) are therefore met. The section is explicit that the recognition in the case law does not have to be by way of the *ratio* of a case '(whether or not as an essential part of the decision in the case)'."

56. "Consequently", said the judge, "the requirements of article 6(3) … remain part of UK law". Under article 6(3) an appropriate assessment was required before a competent authority agrees to a project likely to have a significant effect on a protected site. A "planning consent" was "part of agreeing a project when it is necessary to implement a development". In this case the inspector's determination that he could not discharge the conditions until an appropriate assessment had been undertaken was "consistent with article 6(3)" (paragraph 52).

57. The judge then addressed the interpretation of the Habitats Regulations. He said that the Habitats Regulations "demand a purposive interpretation so that the appropriate assessment provisions of regulation 63 apply to a subsequent consent stage including reserved matters applications and the discharge of conditions" (paragraph 53). Adopting the submissions for C.G. Fry "would", he said, "open up a lacuna in habitats assessment leading to the possibility that, as here, development would proceed without an assessment being undertaken … when negative environmental effects were only ascertained only [sic] after the first stage in a multi-stage consent process" (paragraph 55). He continued (in paragraphs 56 and 57):

> "56. A purposive interpretation of the Habitats Regulations … enables regulation 70 to be read in light of ("in accordance with") regulation 63, so that a competent authority must conduct an appropriate assessment before, as regulation 63(1) provides, any consent, permission or other authorisation is

> given for a project. In a multi-stage consent, consent amounts to taking the implementing decision, as Lang J put it in *R (Wingfield) v Canterbury City Council* [2029] EWHC 1974 (Admin). In that case and in *R (Swire) v Canterbury City Council* [2022] EWHC 390 (Admin) it was said that there is no agreement until reserved matters are granted: [74] and [94] respectively … . I accept the submission of the Secretary of State that the same applies to the discharge of conditions, in circumstances where commencing development in breach of them results in that development not being development authorised by that permission.
>
> 57. Mr Banner cited [*R. (on the application of Fulford Parish Council) v City of York Council* [2019] EWCA Civ 1359] to the effect that reserved matters approval is not a planning permission, and that would include the discharge of a condition on a reserved matters approval. However, a close reading of Lewison LJ's judgment reveals that his conclusion in this regard was the product of the statutory context. …"

58. This did not amount, in the judge's view, to the revocation of the planning permission without compensation. The Habitats Directive and the Habitats Regulations were now "given effect by sections 2 and 4 [of the Withdrawal Act], and the principle of supremacy still [applied] by virtue of section 5(2)" (paragraph 62). The refusal of consent for the discharge of conditions did not invalidate the outline permission that had been granted. The position here was different from *Medina Borough Council v Proberun Ltd.* (1991) 61 P. & C.R. 77 and *R. (on the application of Noble Organisation Ltd.) v Thanet District Council* [2005] EWCA Civ 782; [2006] Env L.R.. C.G. Fry had "obtained outline planning permission subject to the law which at the time provided (on a correct interpretation) that until there was an appropriate assessment, implementing consent would not be granted" (paragraph 63).

59. The judge's conclusion on the first ground, therefore, was this (in paragraph 64):

> "64. … [The] Habitats Directive and Habitats Regulations … mandate that an appropriate assessment be undertaken before a project is consented … irrespective of whatever stage the process has reached … . The basal fact in this case is at neither at the permission, reserved matters, or conditions discharge stage has there been an appropriate assessment. Application of the Habitats Directive and a purposive approach to the interpretation of the Habitats Regulations … require the application of the assessment provisions to the discharge of conditions. The strict precautionary approach required would be undermined if they were limited to the initial – the permission stage of a multi-stage process."

60. On the third ground he concluded (in paragraph 69):

> "69. Regulation 63 requires an appropriate assessment to consider the implications of the project, not the implications of the part of the project to which the consent relates. … [In] *Barker* [2006] UKHL 52 the House of Lords

> recognised that it was the environmental effects of the development which were to be assessed, not the effects of the reserved matters. And to return to *Wingfield* it was the integrity of the site as a whole which was of concern, so that reserved matters approval could not be given when it was that which authorised implementation of the development. … [The] thing which is to be the subject of the appropriate assessment is the thing which will be permitted by the authorisation for a development, it is the development which is to be assessed."

Grounds 1 and 3 of the appeal – regulation 63 of the Habitats Regulations

61. On ground 1 of the appeal Lord Banner K.C., for C.G. Fry, with the support of the HBF and the LPDF, submitted that the judge rightly held that C.G. Fry's understanding of the Habitats Regulations was correct on their "natural and ordinary meaning" and that he was wrong then to reach a different interpretation on a "purposive" approach. On their true interpretation, regulations 62, 63 and 70 confined the assessment provisions to the stage at which outline planning permission was granted and were not engaged at the discharge of conditions stage. The situations to which they applied were specified by regulation 70(1), which does not include the discharge of conditions. To read that category of decision-making into regulation 70(1) would be to re-write both that provision and regulation 62(1). This would be a "contra legem" interpretation. Regulation 63(6) distinguishes between "conditions or restrictions" and "consent, permission or other authorisation". Under the statutory scheme in the 1990 Act conditions merely regulate the development being permitted. Their discharge is not itself the grant of planning permission. Lord Banner submitted that his interpretation reflects the precautionary principle – "front-loading" the appropriate assessment (see *Inter-Environnement Wallonie*, at paragraph 143).

62. Contrary to the judge's conclusion, Lord Banner argued, article 6(3) of the Habitats Directive did not require the carrying-out of an appropriate assessment at the discharge of conditions stage. Under section 4(2)(b) of the Withdrawal Act, the crucial question was not whether, as a generality, the direct effect of article 6(3) had been recognised, but whether the duty to undertake an appropriate assessment at the discharge of conditions stage was an obligation "of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day". None of the relevant cases suggested it was. Honouring the basic principle under European Union law that Directives are binding as to their outcome but leave the means of securing that outcome to individual Member States, article 6(3) required national law to provide for appropriate assessment but left the stage at which this was to be done to the procedural autonomy of Member States, subject to the principles of effectiveness and equivalence.

63. As for the principle of effectiveness, Lord Banner relied on the decision of the Court of Appeal in *Noble*, holding that even in cases concerning the environment it was consistent with European Union law to strike the balance in favour of certainty after the time for challenging a decision had expired (see the judgment of Auld L.J., at paragraphs 57 to 61). That an unchallenged administrative decision should have legal effect, secure against later attack, did not leave a lacuna in the habitats legislation. None of the case law on the formal validity of unchallenged administrative acts was disapproved by the House of Lords in *Barker*. Parliament had provided the power to

revoke planning permission and pay compensation in extreme cases, under sections 97 to 99 and 107 of the 1990 Act. Those provisions struck an appropriate balance between the protection of environmental interests and the legitimate expectation of the landowner or developer.

64. In written submissions after the hearing Lord Banner argued that in choosing not to amend regulation 63 when it introduced regulation 85A of the Habitats Regulations, the legislature must have taken the view that Chapter 2 of Part 6 was a complete codification of the application of the "assessment provisions" for planning projects, and that regulation 63 does not have "free-standing effect". Where the interpretation of a statutory provision is ambiguous, subsequent legislation on the same subject may be relied upon as persuasive authority on meaning (see "Bennion and Norbury on Statutory Interpretation" (eighth edition), at paragraph 24.19, approved by this court in *DSG Retail Ltd. v Dixons Retail Group Ltd.* [2020] EWCA Civ 671, at paragraph 57).

65. Mr Richard Moules K.C., on behalf of the Secretary of State, and Mr Luke Wilcox, for the council, submitted that the judge was right on the issues now in grounds 1 and 3 of the appeal, for the reasons he gave.

66. We cannot accept Lord Banner's argument on ground 1. As Mr Moules and Mr Wilcox submitted, the inspector was right to conclude, and the judge to accept, that on their true interpretation regulations 63 and 70 of the Habitats Regulations could require an appropriate assessment to be undertaken at the stage when the discharge of conditions was being considered. This conclusion not only reflects the proper construction of the Habitats Regulations but also accords with the case law, both European and domestic, bearing on this question.

67. On the interpretation of the domestic legislation, we see two flaws in Lord Banner's submissions. First, the judge did not agree with his interpretation of the "natural and ordinary meaning" of the provisions in issue. In our view, this is a misreading of what the judge said but, in any event, is based on a mistaken understanding of the correct approach to statutory interpretation in domestic law. In his judgment (at paragraph 47) the judge said that it was correct that "on the face of it" the assessment provisions of the Habitats Regulations are confined in their application to the planning permission stage and do not extend to the discharge of conditions. We would observe that he did not say that was the "natural and ordinary meaning" of the Habitats Regulations. What he said (in paragraph 48) was that although "on a strict reading" of the Habitats Regulations the assessment provisions did not apply to the discharge of conditions, those provisions did apply "as a result of … a purposive interpretation" of them.

68. Secondly, in our view, Lord Banner's submissions are founded on a misunderstanding of ordinary principles of statutory interpretation in domestic law, even leaving aside any issue of retained EU law. In particular, the suggested dichotomy between the "natural and ordinary meaning" of legislation and a "purposive approach" is a false one. The correct approach is that legislation must be construed having regard to context and in the light of its purpose. That is how one arrives at the true interpretation of legislation. It is a unified process, not one in which a linguistic exercise is to be performed first and in isolation from context and purpose. This is fundamentally because a legal norm is intended to have some effect in the real world. It must therefore always be construed in the light of its purpose.

69. The Supreme Court has confirmed this in a number of recent decisions, only some of which need be cited here by way of example.

70. In *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13; [2016] 1 W.L.R. 1005 (at paragraph 62) Lord Reed JSC described "the purposive approach to statutory construction" as being "orthodox".

71. This was cited by Lord Leggatt JSC in *Uber BV and Others v Aslam and Others* [2021] UKSC 5; [2021] ICR 657 (at paragraph 70):

> "The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In *UBS AG v Revenue and Customs Comrs* [2016] 1 WLR 1005, paras 61-68, Lord Reed JSC (with whom the other justices of the Supreme Court agreed) explained how this approach requires the facts to be analysed in the light of the statutory provision being applied so that if, for example, a fact is of no relevance to the application of the statute construed in the light of its purpose, it can be disregarded. Lord Reed JSC cited the pithy statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454, para 35: 'The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'" (Emphasis added)

72. The relevant principles and authorities were summarised by Lord Sales JSC in *R (PACCAR Inc and Others) v Competition Appeal Tribunal and Others* [2023] UKSC 28; [2023] 1 W.L.R. 2594 (at paragraphs 40 and 41):

> "40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme* [2001] 2 AC 349, 396, 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> 41. As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt JJSC), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):
>
> 'Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

In the second, Lord Mance JSC said (para 10):

> 'In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.'
>
> The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it." (Emphasis added)

73. Although Lady Rose JSC dissented in *PACCAR*, she did not disagree with Lord Sales as to the correct approach to statutory interpretation (at paragraphs 185 to 188). As she observed (at paragraph 188), a literal interpretation has its dangers in, for example, encouraging prolixity in drafting.

74. What, then, is the correct interpretation of the provisions of the Habitats Regulations with which we are concerned? We must begin with the domestic legislation as it is drafted. Applying normal principles of statutory interpretation, there is nothing in the relevant provisions to exclude the requirement for an appropriate assessment to be undertaken either when reserved matters are being approved or when conditions are being discharged, if the "authorisation" in question is necessary to enable the project to be lawfully implemented.

75. Given their natural and ordinary meaning, the words of regulation 63 clearly admit that possibility. The obligation imposed on a competent authority by regulation 63 is framed in broad terms. It makes necessary the carrying-out of an "appropriate assessment" before the authority decides to give "any consent, permission or other authorisation" for a plan or project. This formulation is clearly designed to capture a wide range of "authorisations", of differing kinds; hence the use of the expression "or other authorisation". It displays the essential purpose of the assessment provisions, which is to avoid any risk of harm to the integrity of a protected site. On a straightforward reading of the language used, having regard to that legislative purpose and to the underlying precautionary principle, the range of authorisations embraced in the provision extends, in our view, beyond the initial stage in the relevant process of decision-making. Any other interpretation would, we think, be incompatible with the words of the provision, inconsistent with the legislative purpose, and inimical to the precautionary principle.

76. Understood in this way, regulation 63 allows an appropriate assessment to be undertaken when the authority is making the final decision in a sequence authorising the development to proceed. Where that process involves the granting of outline planning permission for the proposed development and the subsequent submission and approval of reserved matters or the discharge of conditions, regulation 63 does not prevent the appropriate assessment of the project being carried out at that later stage as an exercise required before the decision is taken. In principle, it is not too late for such an assessment to be undertaken either when an approval of reserved matters is applied for or when the authority is called upon to discharge "pre-commencement" conditions,

whose effect is that development carried out in breach would not be authorised by the planning permission (see the judgment of Lord Woolf C.J. in *F.G. Whitley & Sons v Secretary of State for Wales* (1992) 64 P. & C.R. 296, at p. 302, and the judgment of Richards L.J. in *Greyfort Properties Ltd. v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908, at paragraphs 15 and 19).

77. Such decisions fall within the scope of "any consent, permission or other authorisation". Their effect is to continue and complete the process of authorising the development, a process begun by the grant of outline planning permission. They can be, and frequently are, the final step in the authority's "agreement" to the project going ahead, corresponding in kind and effect to the decisions considered by the CJEU in *Inter-Environnement Wallonie* and *Friends of the Irish Environment*; as Holgate J. described the approval of reserved matters in *Swire*, "the implementing decision". Like the approval of reserved matters, the discharge of pre-commencement conditions is an imperative step before lawful implementation can take place, being "the decision … which entitles the developer to proceed with the project" (see paragraph 21 above).

78. As the first instance judgments in *Swire* and *Wingfield* have recognised, the latter reflecting the relevant conclusion in Richards L.J.'s judgment in this court in *No Adastral New Town Limited*, in a case where the local planning authority has granted an outline planning permission for the proposed development the project will not have been agreed to until the necessary reserved matters approvals have been given. This was the force of Lang J.'s statement in paragraph 74 of her judgment in *Wingfield*, that "[in] a "multi-stage consent", there is no "agreement to the … project" until reserved matters consent has been granted" and that "[by] regulations 63(1) and 63(5), reserved matters consent cannot be granted unless it has been established that the integrity of the European site will not be adversely affected". It was also the thrust of Holgate J.'s conclusions, in paragraph 94 of his judgment in *Swire*, that in these circumstances "[reserved] matters approval is the "implementing decision"" and an "… HRA may lawfully be completed at the reserved matters stage, even if not carried out prior to the grant of outline permission". We endorse the relevant reasoning in those two cases, and we think the judge in the court below was right to base his conclusions upon it (in paragraphs 58 and 59 of his judgment).

79. Lord Banner suggested that even if regulation 63 allows the carrying-out of an appropriate assessment at the discharge of conditions stage, it does not actually require this to be done before such a decision is made, and that the conclusions reached by Lang J. in *Wingfield* and Holgate J. in *Swire* should not be seen as supporting that conclusion. We disagree. In *Wingfield* Lang J. concluded that under regulation 63(1) and (5) reserved matters approval "cannot be granted unless it has been established that the integrity of the European site will not be adversely affected", and "[so] an HRA was required". Holgate J.'s reasoning in *Swire*, including his acknowledgment that "[reserved] matters approval is the "implementing decision"", is to the same effect. And this understanding is in line with the approach of the CJEU in *Inter-Environnement Wallonie* (at paragraphs 140 to 143) and *Holohan* (at paragraph 33). The weight of relevant authority, both domestic and European, stands behind the proposition that under the assessment provisions of the Habitats Regulations, an appropriate assessment can be required at the reserved matters approval or discharge of conditions stage, where that reserved matters approval or discharge of conditions is the "implementing decision".

80. This understanding of regulation 63 is consistent with the proper interpretation of regulation 70. These two regulations are clearly intended to operate together, and they must be read together.

81. Regulation 63 effectively transposes article 6(3) of the Habitats Directive. It expresses the basic objective of the legislature in the assessment provisions, which is that in the relevant circumstances no decision may be made by a competent authority to grant "any consent, permission or other authorisation" for a plan or project unless an appropriate assessment has first been undertaken and has shown that the development "will not adversely affect the integrity" of the protected site.

82. Chapters 2 to 7 of Part 6 of the Habitats Regulations give effect to the basic obligation in article 6(3), in specific contexts. Regulation 70 makes provision for the planning context. Regulation 70(1) provides, among other things, for the "assessment provisions" to apply "in relation to … granting planning permission …". Regulation 70(3) confirms that the application of those provisions extends to the "outline planning permission" stage. However, it does not restrict their application to that part of the process alone. Properly construed in its context, it does not mean that the assessment provisions are excluded at subsequent stages. And in our view to add such a limitation, by inferring it, would not be justified. As Mr Moules submitted, regulation 70, when read in the light of regulation 63, is not to be understood as excluding the authorisations required subsequent to the outline permission itself. It contains no provision with that effect.

83. While regulation 70(1)(a) and (c) provide that the assessment provisions apply "in relation to … granting planning permission", it does not state, or imply, that those provisions are inapplicable to any particular types of "consent, permission or … authorisation" within the reach of regulation 63 and relating to a grant of planning permission, such as reserved matters approvals or decisions to discharge conditions.

84. Regulation 70(3) refers specifically to "outline planning permission" and states what is to happen before such permission is granted. It provides that where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied that "no development likely adversely to affect the integrity of a European site … could be carried out under the permission, whether before or after obtaining approval of any reserved matters". This provision, in our view, is another manifestation of the precautionary principle. In effect, it stipulates the appropriate assessment of a project when an application for outline planning permission is being determined if there is a possibility of its authorising development likely to harm the integrity of a European site, regardless of whether such harm might occur before or after any reserved matters are approved. It does not, however, exclude the requirement for an appropriate assessment to be undertaken either at the reserved matters stage or when a decision is being made on the discharge of conditions if this has not already been done, as it should have been, at the outline permission stage.

85. Taken together therefore, regulations 63 and 70, both as applied directly to European sites under the habitats legislation itself and when given equivalent practical effect for Ramsar sites under national planning policy in paragraph 181 of the NPPF, allow for appropriate assessment to be undertaken at the final stage in a multi-stage consent process. Indeed, where the provisions for appropriate assessment are engaged, these two regulations have the effect of requiring such an assessment to be carried out before

development is authorised to proceed by the "implementing decision". If this were not so, there would be a gap in the regime for assessment, which would enable development to proceed with potentially harmful effects on a protected site, for lack of an assessment at the initial stage, when outline planning permission is granted.

86. Of course, in a perfect world an appropriate assessment might always be undertaken when the opportunity first arises. But it would be a false logic to suggest for this reason that in a multi-stage consent process the failure to undertake an assessment at the outset makes it impossible or unnecessary to do so when the "implementing decision" is taken. To construe these provisions in that way would be incompatible with the legislative purpose of preventing harm to a protected site, to which regard must be had in arriving at their true interpretation (see paragraph 68 above).

87. The interpretation contended for by Lord Banner would in some cases leave the authority powerless to prevent a project going ahead even though it was clear that if the final authorisation were given for it the development was going to cause the kind of harm the Habitats Regulations are designed to prevent, and simply because the prospect of such harm was not recognised when outline planning permission was granted, or despite a change in circumstances such as occurred here when Natural England published its advice note in August 2020. While an appropriate assessment ought to be undertaken before outline permission is granted, as regulation 70(3) requires, the legislative regime does not insist on its only being done – or, as in *Swire*, completed – at that particular stage.

88. There is, in our view, no legislative ambiguity here, to engage the principle of statutory interpretation relied upon by Lord Banner in his further written submissions. But in any event the amendments required to accommodate the introduction of regulation 85A did not make necessary any change to the provisions of regulation 63 if those provisions are interpreted as we think they should be. Appropriate assessments required under regulations 63 and 70 at the reserved matters or discharge of conditions stage will be subject to the assumption created by regulation 85A.

89. Our analysis does not involve the taking away of any private rights, or any clash with the principle of "validity". There is no offence here to the reasoning in cases such as *Noble*, *Proberun* and *R. (on the application of Harvey) v Mendip District Council* [2017] EWCA Civ 1784. On this point we agree with the conclusions of the judge (in paragraphs 62 to 63 of his judgment). If the project should fail at the final stage in the decision-making process, either because there had been no appropriate assessment or because the assessment carried out had identified likely harm to the integrity of the protected site, the outline planning permission itself would remain valid.

90. There is, in our opinion, nothing in the suggestion that in circumstances such as these the question arises of an outline planning permission being revoked and compensation paid to the developer under the provisions in sections 97 to 99 and 107 of the 1990 Act. The habitats legislation does not entail any consequence of that kind. What it does is to ensure, in accordance with the precautionary principle, that where the assessment provisions are in play an "implementing decision", which can be a reserved matters approval or the discharge of conditions, must not be made before an appropriate assessment has been undertaken and it has been demonstrated that there will be no adverse effect on the integrity of a protected site. The statutory provisions for

revocation and compensation do not afford an alternative to the proper functioning of this protective scheme.

91. These conclusions on the meaning and effect of regulations 63 and 70 of the Habitats Regulations are consistent with authority, both European and domestic, on the legislative regime for environmental impact assessment and its parallels with the assessment provisions in the Habitats Directive. The relevant case law on environmental impact assessment has consistently recognised the principle that, in a multi-stage consent process, such an assessment may be required in the stages subsequent to the initial consent. The provisions for assessment in the two legislative regimes are analogous in this respect (see *Commission v United Kingdom*, *Barker* and *R. v Bromley London Borough Council, ex p. Barker* [2007] 1 A.C. 470).

92. The fact that, as Lord Banner emphasised, the *Barker* litigation specifically concerned the legislative regime for environmental impact assessment and, in that context, the approval of reserved matters rather than the discharge of conditions does not, in our view, indicate a different analysis. As for the first point, in *Inter-Environnement Wallonie* and *Friends of the Irish Environment* the CJEU saw no difficulty in applying the principle acknowledged in *Barker* to the habitats legislation. And in doing so, it did not limit the principle to cases where there has been a material change in circumstances after the initial grant of consent. Secondly, as Mr Moules submitted, there is no distinction here, in substance, between one kind of "implementing decision" and the other. Their practical effect can be the same. Both can be a decision that "entitles the developer to proceed with the project". Both can demand the same approach as was approved in *Barker*. And this conclusion is reinforced by the fact that the legislative regime for environmental impact assessment is essentially procedural in nature, while that for habitats is directed to the substantive safeguarding of protected sites. The relevant provisions in the Habitats Regulations prohibit the authorisation of a project unless an appropriate assessment has been carried out and has shown that there will be no adverse effect on the integrity of a protected site. If anything, this greater level of protection under the habitats regime only strengthens the need for an assessment to be carried out in accordance with it before the "implementing decision" is made.

93. We do not accept that there is any conflict between the domestic legislation for planning control and the legislation for the protection of habitats, comprising the Habitats Directive and the Habitats Regulations. If there were any such conflict, it would have to be resolved in favour of the habitats legislation, which forms a complete scheme of protection for sites within its scope, originally given effect under the European Communities Act 1972. Following the United Kingdom's exit from the European Union, the Habitats Directive and the Habitats Regulations are given effect by sections 2 and 4 of the Withdrawal Act. This reflects the principle of supremacy, retained under section 5(2) of the Withdrawal Act – which, though now repealed by section 3(3) of the 2023 Act, applied at the relevant time.

94. Before coming to ground 3, we must consider the relevance of article 6(3) of the Habitats Directive to the interpretation of the Habitats Regulations. The judge appears to have been under the impression, first, that article 6(3) of the Habitats Directive was "part of UK law" and, secondly, that this was important to the correct interpretation of the Habitats Regulations. In our view, neither proposition is strictly accurate nor was this a necessary approach to the critical issue of interpretation of those regulations.

95. The fact that the provision of a directive is "binding" (as the judge noted at paragraph 51) does not address the critical question. Although a directive is binding as to its *result*, the *manner* of its implementation is left by the EU to Member States.

96. Before us extensive reliance was placed by all parties on the decision of this court in *Hughes v Secretary of State for Work and Pensions* [2021] EWCA Civ 1093; [2022] ICR 215 (in particular paragraphs 15 and 117 to 125 of the judgment of the court). We do not consider it helpful to refer to that decision in the present context because it concerned the doctrine of direct effect and its continuing application by virtue of section 4(2)(b) of the Withdrawal Act. As we have said, that provision does not concern the proper approach to the interpretation of domestic legislation in the light of EU law, which continues to be governed by section 6 of the Withdrawal Act. The same can be said, in our view, about the decision of Johnson J. in *Harris*, which influenced the reasoning of the judge.

97. In summary, we have reached the conclusion that it was unnecessary for the judge to refer to the doctrine of direct effect to resolve the issue of interpretation which arises in the present case. Indeed it was unnecessary even to refer to the principles of interpretation in EU law, because, in our view, the Habitats Regulations have the meaning which the judge gave them, simply applying the conventional approach to statutory interpretation in domestic law, which includes the purposive approach.

98. On ground 3, Lord Banner submitted, in the alternative to his argument on each of the other two grounds, that at the stage of discharging conditions on a reserved matters approval the decision-maker should be considering only the subject-matter of the conditions themselves. The scope of an appropriate assessment at that stage would be limited to the scope of the decision-making itself, and would therefore be confined to the matters for consideration under the conditions being discharged.

99. For the same reasons as were given by the judge, we reject this argument too. It finds no support in the habitats legislation. None of the relevant provisions of the Habitats Directive or of the Habitats Regulations qualifies the scope or content of the requisite appropriate assessment according to the stage of the decision-making process at which it is carried out. It cannot be reconciled with the requirement in regulation 63(1)(b) of the Habitats Regulations that the "implications of the … project" are assessed, rather than the effects of any individual part or parts of it. This is consistent with the language of article 6(3) of the Habitats Directive, which speaks of a "project" being subject to appropriate assessment of "its" implications for the protected site, and its being agreed to only after the authority has ascertained that "it" will not adversely affect the integrity of the site concerned.

100. Lord Banner's argument is, in our view, inconsistent with the fundamental objective of the habitats legislation to avoid any harmful effects on the integrity of the protected site itself. The legislation is framed as a comprehensive scheme for the protection of important habitats. To read a qualification of the kind suggested into the relevant provisions would defeat the aim of assessing in full the effects of the whole development upon the protected site. It would depart from the precautionary approach incorporated in the legislation, which has been consistently acknowledged in relevant case law. Where the courts have considered the proper scope of an assessment undertaken at the reserved matters stage, they have supported the principle that it is the effects of the "project" that must be assessed, not merely the effects resulting from the

reserved matters in question (see, for example, *Barker*, *Wingfield* and *Friends of the Irish Environment*).

101. We conclude, therefore, that where an appropriate assessment is required before an "implementing decision" is made, the assessment must be of the whole development whose implementation is authorised by that decision. In this case that was Phase 3 of C.G. Fry's proposed development.

The judge's conclusions on the second ground of challenge

102. On the second ground the judge concluded (in paragraph 67):

> "67. In my view the situation in this case is not the situation in *Elsick*. The impacts on the Somerset Levels and Moors Ramsar Site and paragraph 181 of the NPPF cannot be said to be irrelevant considerations in this development. The issue is the read-across of the Habitats Regulations … to Ramsar sites as provided by the NPPF in circumstances where the Council's shadow appropriate assessment shows that if the project is permitted it will cause harm to the Ramsar site. … [To] understand the scope of the discharge of conditions it is necessary to consider the legal consequences, and in this case one of these would be that a development with a potential impact on a Ramsar site protected by national policy would be authorised by the planning system. That creates the nexus to the NPPF's policy on the protection of Ramsar sites. It is open to the Secretary of State to introduce such a consideration as a matter of national planning policy."

Ground 2 of the appeal – paragraph 181 of the NPPF

103. On ground 2, Lord Banner argued, again with the support of the HBF and the LPDF, that even if the judge understood the habitats legislation correctly he was wrong to think that for Ramsar sites, which are not protected by that legislation, the policy in paragraph 181 of the NPPF could make the provisions for appropriate assessment a relevant consideration in his decision. But for that policy, Lord Banner submitted, the Habitats Regulations would have had no relevance to the Ramsar site. And in any event the effects on the Ramsar site of phosphates generated by the proposed development were not a legally relevant consideration for the discharge of the conditions being considered. This was not a decision to which the statutory obligations in section 70(2) of the 1990 Act and section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") applied. These conditions, in their own terms, fixed the scope of relevant considerations for that exercise. They did not call for the effects of phosphates upon the Ramsar site to be addressed. So the question for the inspector was whether policy in paragraph 181 of the NPPF could make those effects legally relevant in this context when otherwise they would be legally irrelevant. National planning policy was not capable of doing this. To think that it was would offend the separation of powers between legislature and executive.

104. Lord Banner relied on the decision of the Supreme Court in *Aberdeen City and Shire Development Planning Authority v Elsick Development Co. Ltd.* [2017] P.T.S.R. 1413.

There it was held to be unlawful for a local planning authority to make its grant of planning permission for a development with no effects on the capacity of the local road network depend on the developer complying with supplementary planning guidance requiring a financial contribution to highway improvements. This was tantamount to the buying or selling of planning permission, and an irrelevant consideration (see the judgment of Lord Hodge, at paragraphs 42 to 51). As Lord Hodge said (at paragraph 51), planning policy could not "make relevant what would otherwise be irrelevant". Lord Banner argued that the same principle applied here. He also pointed to the decision of the Supreme Court in *R. (on the application of Wright) v Resilient Energy Severndale Ltd.* [2019] 1 W.L.R. 6562, where Lord Sales (in paragraphs 49 to 57 of his judgment) rejected the suggestion that "the statutory concept of a "material consideration" varies according to the content of planning policy documents".

105. Mr Moules and Mr Wilcox again submitted that the judge's conclusions were right, for the reasons he gave.

106. In our view the judge did not fall into error on this issue. The policy in paragraph 181 was engaged because of the connection between the consequence of discharging the conditions – to authorise Phase 3 of the development – and the object of the policy, which was to prevent harm to relevant protected sites, including Ramsar sites. And it is not in dispute that such harm was likely in this case (see paragraphs 12 and 13 above).

107. We take as a starting-point our conclusions on grounds 1 and 3. In a multi-stage consent process, where the proposed development is likely to affect a protected site and the provisions for the appropriate assessment of projects in the Habitats Directive and the Habitats Regulations apply, such an assessment can be required at the final stage, including the approval of reserved matters and the discharge of conditions.

108. In promulgating the policy in paragraph 181 of the NPPF, the Government was not usurping the role of the legislature. It was exercising its own proper and accustomed role in producing national planning policy, which may then be a material consideration in decision-making. The relevant intent and effect of the policy in paragraph 181 was to extend to Ramsar sites, as a matter of policy and not as if it were legislation, the safeguards already given by the Habitats Directive and the Habitats Regulations to Special Areas of Conservation and Special Protection Areas. Under that policy the Government explicitly required "the same protection" to be given to Ramsar sites as is provided for "habitats sites" by the habitats legislation itself. This was not to displace or override the provisions of the habitats legislation, which NPPF policy could not lawfully have done, but simply to establish as a matter of national planning policy that Ramsar sites were to have the same practical level of protection in planning decision-making as Special Areas of Conservation and Special Protection Areas had been given by that legislation. There was nothing unlawful in this. It was perfectly legitimate, and in constitutional terms unobjectionable.

109. Once it is accepted – and Lord Banner did not suggest otherwise – that harmful effects on the Ramsar site were, and were known to be, a likely result of the generation of phosphates by C.G. Fry's proposed development, and that the prospect of such effects coming about depended ultimately on the decision whether to discharge the outstanding conditions, one can see that the policy in paragraph 181 of the NPPF was a material consideration in that decision. And the consequences of such a decision were relevant to the materiality of the consideration itself.

110. This was acknowledged by the inspector in paragraph 26 of his decision letter. As he understood, the decision he was taking was the "implementing decision". If the outstanding pre-commencement conditions were discharged, development with a potentially harmful impact on the Ramsar site, protected by the paragraph 181 policy, would be authorised to proceed, and this would be so regardless of the subject-matter of the conditions themselves. That decision would make possible the ecological harm that the proposed development would likely cause. This was the connection to the policy in paragraph 181.

111. As the judge held, the policy was relevant to the Phase 3 development as a whole. It was the effects of the development that had to be assessed, not merely the matters affected by the conditions to be discharged. The discharge of the conditions would effectively authorise the progress of Phase 3 in its entirety. And the assessment required by regulation 63 of the Habitats Regulations was "an appropriate assessment of the implications of the … project" for the protected site.

112. These are quite different circumstances from those of *Elsick*. In that case the requirement in the authority's supplementary planning guidance for financial contributions towards highway improvements that lacked any connection to the development in question was an immaterial consideration. Such policies or guidance would be liable to be held unlawful irrespective of the stage of the decision-making process at which they were intended to apply. Here, by contrast, the Government had a policy untainted by any unlawful or improper consideration. This was not a case of policy being used to make relevant what would otherwise be irrelevant. As Mr Moules submitted, there was nothing amiss in the Government producing a policy to safeguard wetlands protected under international law, and to apply the precautionary principle in European Union and domestic legislation protecting other internationally important habitats. It was lawful for an inspector to take into account such policy when deciding whether to discharge conditions on a reserved matters approval, for development likely to cause ecological harm to a Ramsar site.

113. Nor does the decision in *Wright* point to a different outcome here. That case concerned the concept of material considerations under section 38(6) of the 2004 Act. The conclusion that in the circumstances of this case the policy in paragraph 181 of the NPPF was a material consideration in the decision on the discharge of the outstanding conditions, and that the possible effects on the Ramsar site of phosphates generated by the Phase 3 development was within the ambit of that consideration, is not at odds with the reasoning of the Supreme Court in *Wright*. There was no attempt here to vary the statutory concept of a "material consideration" according to the content of policy. That is a misconception.

Conclusion

114. For the reasons we have given, the appeal is dismissed.