

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**CA-2025-001450**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**KING'S BENCH DIVISION**

**PLANNING COURT**

**The Honourable Mr Justice Dove [2025] EWHC 1248 (Admin)**

**BETWEEN:**

**THE KING**

**On the application of NORTH WARWICKSHIRE BOROUGH COUNCIL**

**Appellant**

**and**

**(1) THE SECRETARY OF STATE FOR TRANSPORT**

**(2) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND  
COMMUNITIES**

**Respondents**

**HIGH SPEED TWO (HS2) LIMITED**

**Interested Party**

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**REPLACEMENT SKELETON ARGUMENT ON BEHALF OF THE INTERESTED  
PARTY**

**13 March 2026**

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*In this skeleton argument references are made as follows*

- *Documents in the core bundle and supplementary bundle are denoted by [CB/tab] and [SB/tab/page]*
- *Paragraphs in witness statements are denoted by [Witness] §x  
Paragraphs in the Appellant's skeleton argument by ASkel §x*

## **Introduction**

1. This appeal arises out of the Respondents' decision of 14<sup>th</sup> May 2024 ("the Decision") allowing the Interested Party's appeal against the Appellant's failure to determine an application for approval of plans and specifications for a number of works at Water Orton under Schedule 17 of the High Speed Rail (London - West Midlands) Act 2017 ("the 2017 Act").
2. The works approved by the Decision comprised the Water Orton Cutting including the Bromford Tunnel East Portal and Attleboro Lane Overbridge and ancillary works ("the Application Works"). A plan showing the Application Works can be found at [SB/17/144].
3. The Appellant refused to determine the application on the grounds that the Application Works were not authorised by the 2017 Act, because they were works associated with the Bromford Tunnel Extension ("the BTE"). The BTE, as its name suggests, is an extension to a tunnel for part of the HS2 railway as it passes to the east of Birmingham and into North Warwickshire.
4. In allowing the appeal, the Respondents were satisfied that the BTE (although not forming part of the application under appeal) was authorised by and enjoyed deemed planning permission under the 2017 Act, as did the Application Works.
5. The Appellant challenged that decision by way of judicial review. The primary matters in dispute turned on the construction of the 2017 Act and its application to the BTE and Application Works. On 20<sup>th</sup> May 2025, Dove J dismissed the claim on all grounds: [2025] EWHC 1248 (Admin) [CB/5 and CB/6].
6. The Appellant now appeals against that decision on two grounds, which are essentially a reiteration of grounds one and two in its initial claim.
7. The critical issue raised by this appeal (as below) is whether the 2017 Act provides the necessary flexibility to provide for changes to the design of the railway from the reference design at the time when the Act (then Bill) was proceeding through Parliament, or whether it ties the Interested Party to delivering only that reference

design – regardless of the comparative benefits, environmentally and otherwise, of any revisions that may have been identified through the detailed design process post Royal Assent.

8. For the reasons set out in the Judgment and below, it remains the Interested Party's submission that:
  - (i) There was no error in the Respondents' interpretation (or application) of s.2 of the 2017 Act, and consequently, no error on the part of Dove J in so concluding;
  - (ii) There was no error in the Respondents' interpretation (or application) of s.20 of the 2017 Act, and, consequently, no error on the part of Dove J in so concluding; and
  - (iii) There is no justified or proper basis for the restrictive interpretation of ss.2 or 20 contended for by the Appellant which would have the effect of precluding rather than enabling the construction and operation of the railway which was the purpose of the 2017 Act, and, consequently, no error on the part of Dove J in dismissing the claim for the reasons set out in the Judgment.
  
9. The Court will therefore be invited to dismiss the Appeal.

## **Background**

### **The 2017 Act**

10. The 2017 Act authorises the construction, operation and maintenance of a new railway between Euston in London and a junction at the West Coast Main Line at Handsacre in Staffordshire, with a spur from Water Orton in Warwickshire to Curzon Street in Birmingham.
  
11. The 2017 Act is not novel. It is merely one of the most recent Acts authorising the construction and operation of a new railway (or part thereof), following numerous similar Acts dating back to the 1800s.
  
12. As will be outlined further below, there is clear precedent in that earlier legislation for enactments authorising the construction of new railways to provide the powers and

flexibility needed to ensure they could be built, and to allow for alterations identified following Royal Assent to be undertaken, even where those alterations involved a departure from what had been shown on deposited plans, or substitution of one engineering feature, such as an arch, tunnel or viaduct, for another.

13. By s.1(1) of the 2017 Act, the nominated undertaker (the Interested Party) is given the power – “may” – to construct and maintain the works specified in Schedule 1, being (a) works for the construction of Phase One of High Speed 2, and (b) works consequent on, or incidental to, such works. These are referred to as the “scheduled works” (s.1(2)).
14. S.2 of the 2017 Act makes “further provision about works”. By s.2(1), the nominated undertaker

“[...] may, for the purposes of or in connection with the scheduled works or otherwise for Phase One purposes, do any of the following within Act limits –

- (a) carry out and maintain railway electrification and signalling works;
- (b) make, provide and maintain all such approaches, bridges, subways, interchanges, roundabouts, turning places, lifts, stairs, escalators, ramps, passages, means of access, shafts, buildings, apparatus, plant and machinery as may be necessary or expedient;
- (c) construct, provide and maintain all such embankments, aprons, abutments, retaining walls, wing walls, culverts and other works as may be necessary or expedient;
- (d) demolish the whole or part of any building or structure;
- (e) alter or remove any structure erected upon any highway or adjoining land;
- (f) alter, or alter the position of, railway track and any apparatus associated with railway track;
- (g) alter, or alter the position of, other apparatus, including mains, sewers, drains and cables;
- (h) alter the course of, or otherwise interfere with, non-navigable rivers, streams or watercourses;
- (i) carry out and maintain such other works, of whatever description, as may be necessary or expedient.”

15. The word “ancillary” does not appear in s.2.
16. “Phase One purposes” is defined in s.67 as follows:
- “(a) for the purposes of or in connection with the works authorised by this Act,
  - (b) for the purposes of or in connection with trains all or part of whose journey is on Phase One of High Speed 2, or
  - (c) otherwise for the purposes of or in connection with Phase One of High Speed 2 or any high speed railway transport system of which Phase One of High Speed 2 forms or is to form part.”
17. Deemed planning permission is conferred by s.20 of the 2017 Act for the carrying out of development authorised by the 2017 Act. This includes the scheduled works and other works authorised under s.2. In respect of development which is not a scheduled work, s.20(2) makes the following proviso:
- “(2) Where development authorised by this Act consists of the carrying out of a work which is not a scheduled work, subsection (1) does not apply if—
- (a) the development is likely to have significant effects on the environment by virtue of factors such as its nature, size or location,
  - (b) the development is not exempt development within the meaning of the Environmental Impact Assessment Regulations, and
  - (c) the development is not covered by an environmental assessment in connection with the High Speed Rail (London - West Midlands) Bill.”
18. S.20(2)(c) falls to be read with s.68 (General interpretation) which provides, at subsection (4):
- “(4) For the purposes of this Act, development is covered by an environmental assessment in connection with the High Speed Rail (London - West Midlands) Bill if it is development in relation to which information contained in a deposited statement constituted, at the time of the statement's deposit or publication, an environmental statement within the meaning of the Environmental Impact Assessment Regulations.
19. S.68(5) specifies which documents constitute a “deposited statement” for the purposes of the 2017 Act.

20. Schedule 17 contains conditions on the deemed planning permission (s.20(3)), specifying matters requiring the approval of planning authorities and the possible grounds on which such authority might refuse a request for approval. In the present case, the relevant conditions are those in paragraphs 2 and 3 of Schedule 17 (condition relating to building works / condition relating to other construction works). The term “building”, for the purpose of Schedule 17, does not include tunnels (being a structure which is “underground” and not forming part of a station – Schedule 17 paragraph 30) but does include viaducts.

### **The Bromford Tunnel**

21. At the time when the Bill was passing through Parliament, it was proposed that as the railway headed eastwards from the new Birmingham Curzon Street station, it would be in tunnel for approximately 2.9km as it passed through Bromford and Castle Bromwich, with a western portal in the vicinity of Washwood Heath and an eastern tunnel portal approximately 300m east of the A452 Chester Road. It would thereafter pass onto a raised embankment, viaduct over the River Tame, and raised embankment before heading into cutting at Water Orton. This was reflected in 3 of the scheduled works:

- (i) Work No. 3/203 – A railway (2.86 kilometres in length, in tunnel) commencing by a junction with Work No.3/200 at its termination, passing westwards and terminating by a junction with Work No. 3/205 at a point 245 metres north-west of the junction of Wolsey Drive and Bromford Lane;
- (ii) Work No.3/200 – A railway (2.06 kilometres in length) commencing by a junction with Work No. 3/157 at its termination, passing generally westwards and terminating at a point 165 metres south of the junction of Cadbury Drive and Beale Close. Work No.3/200 includes a viaduct over Work No.3/202 and a bridge over Work No.3/202A;
- (iii) Work No 3/157 – A railway (1.13 kilometres in length) partly on viaduct commencing by a junction with the termination of Work Nos. 3/151, 3/152, 3/153 and 3/154 passing westwards and terminating by a junction with Work No. 3/200

at a point 317 metres north-west of the bridge carrying Water Orton Road over the M6 Motorway.

22. It was well recognised during the passage of the Bill through Parliament that substantial further work would have to be undertaken with regard to the detailed design of the Phase One railway, with the possibility of changes to the reference design which had been assessed in the Environmental Statement (“ES”). That was recognised, inter alia, in Volume 1 of the ES itself (Gilfedder §7.6 [SB/2/24]) and in the High Speed Two Phase 1 Information Paper E1: Control of Environmental Impacts (Gilfedder §§7.7-7.8 [SB/2/25]).
23. Essentially, the planning consent granted by the Act is akin to an “outline” planning permission. As was made clear throughout the Parliamentary proceedings, the design of the Phase One scheme at that time provided the level of detail necessary for the purposes of the Bill and the requirements of the EIA Directive. The level of detailed design required to enable Phase One to be constructed was to be undertaken after Royal Assent.
24. In recognition of the potential for changes to the design or construction practices as assumed for the purposes of the ES deposited with the Bill, a series of controls are provided within the 2017 Act itself, through specific requirements in the Environmental Minimum Requirements (“EMRs”), and through existing legislation, which are intended to ensure that the environmental effects of the Phase One project do not exceed those reported in the ES. These are outlined and explained in Gilfedder §§7.9 – 7.10 [SB/2/26-29]. The stated objective of the EMRs is to ensure that the Phase One project is delivered in accordance with the ES: see *R (London Borough of Hillingdon) v Secretary of State for Transport* [2019] EWHC 3574 (Admin) per Lang J at §21, and *R (Hero Granger-Taylor) v High Speed Two (HS2) Limited* [2020] EWHC 1442 (Admin) per Jay J at §12. The EMRs read with the ES set the “environmental envelope” for the Phase One project (Jay J at §13). The ES, together with the limits of deviation shown for the various scheduled works on the Plans and Sections and the limits of land to be

acquired or used<sup>1</sup>, provides the overall “envelope” within which the Phase One scheme must be construed. It does not, however, restrict the Interested Party (as the nominated undertaker under the 2017 Act) to the reference design as was assessed at that time.

25. The Interested Party is in fact under an obligation to seek to reduce the adverse environmental effects of the HS2 project beyond those reported in the ES, where reasonable to do so and where it would not add unreasonable delays to the construction programme or add unreasonable costs to the programme: see EMRs at para 1.1.5 [SB/10/97-98].
26. As part of the detailed work undertaken post Royal Assent, there have been a number of areas where the Interested Party and/or its contractors have identified changes, or improvements to the design of the Phase One railway – in accordance with the commitments in the EMRs. These include<sup>2</sup> an extension of the Bromford Tunnel to Water Orton cutting (the BTE), meaning that approximately 2.9 km of the railway described in Scheduled Works No. 3/200 and 3/157 would be in tunnel rather than on raised embankment or viaduct, giving an overall length of the BTE of 5.8km.<sup>3</sup>
27. As explained in Gilfedder §§9.1-10.5 [SB/2/31-36], the BTE would not only reduce significant costs associated with the Phase One project but would also avoid the need for significant works, such as construction of a new viaduct, diversion of the River Tame, diversion of the BB4118 Water Orton Road, and construction of a new overbridge to carry that road over the railway, and, importantly, would avoid or reduce a number of the significant environmental effects which had been reported in the ES, whilst not giving rise to any new or different significant environmental effects.

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<sup>1</sup> Under s. 67 (2), land or any other thing is within the Act limits if it is (a) within the limits of deviation for the scheduled works or (b) within the limits of land to be acquired or used.

<sup>2</sup> Another area where there has been a substantial change to the engineering design proposed to the reference design at the time of the Bill is the approach to Euston Station, which was at issue in *R (on the application of Hero Granger-Taylor) v High Speed Two (HS2) Limited* [2020] EWHC 1442 (Admin).

<sup>3</sup> The main changes between the reference design and the BTE are summarised at Gilfedder §§9.6 – 9.7 [SB/2/32-33].

28. The restrictive construction of the 2017 Act advocated by the Appellant would mean that the Interested Party would not be able to deliver a revised design of the railway which avoided the need for substantial above-ground works and which would materially lessen the environmental and ecological impacts of the railway under the 2017 Act. Rather, it would have to secure an amendment to Schedule 1 to the 2017 Act (whether by way of TWAO or otherwise) or make a separate application for planning permission, even though such tunnel activity is within the Act limits (as defined by s. 67 (2)) and along a route already provided for and even though it does not generate any likely significant effects beyond those previously assessed.

### **The TWAO application**

29. On the basis that the description of scheduled work No.3/157 refers to the railway being “partly on viaduct”, the Interested Party has made an application for an order under the Transport and Works Act 1992 (“TWAO”) to amend the description of that work to remove those words [SB/25/241].

30. The TWAO (if made) would simply amend the textual description of work no. 3/157 to remove the words “partly on viaduct”. The change to the description of work 3/157 would not authorise any development of itself, as the construction of the railway in the location of the Bromford Tunnel is already authorised by the 2017 Act. The amendment will simply put beyond doubt that this section of the tunnel would benefit from the statutory authority of the 2017 Act, ensuring that there could be no dispute as to whether that section of the railway, previously to be carried on viaduct, enjoyed full statutory authority conferring immunity from actions for nuisance at common law.<sup>4</sup>

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<sup>4</sup> See, for example, Allen v Gulf Oil Refining Ltd [1981] AC 1001, and cases cited therein, which principle also finds precedent in the earlier railways and their authorising enactments: see for example Manchester Corpn v Farnworth [1930] AC 171 at p. 183.

31. The First Respondent's Transport Infrastructure Planning Unit confirmed by letter on 4 November 2021 that there would be no statutory requirement for an EIA to be undertaken, given the purpose and effect of the proposed TWAO [SB/24/238].
32. The Interested Party had, however, previously prepared a Screening Report – “High Speed Rail (London - West Midlands) Bromford Tunnel Extension Environmental Impact Assessment Screening Report (February 2021)” (“the Screening Report”, [SB/19/157]) which compared relevant aspects of the reference design scheme with the proposed BTE. The Screening Report concluded that the BTE would not give rise to any new or different significant adverse effects that needed to be considered as the subject of additional and separate environmental impact assessment (paragraph 19.1.17, internal pg 289) [SB/19/215]. The Screening Report was also submitted to the Appellant, which confirmed, in a document described as a Screening Opinion dated 10 March 2021 [SB/20/219], that:

“In light of the above assessment, it is my overall conclusion that these matters do not give rise to the likelihood of significant environmental effects and concurs with the findings of the Screening Report that, following mitigation, there are no new or different likely adverse significant environmental effects caused by the Proposed Development, and it therefore should not be considered the subject of additional and separate environmental impact assessment”.

33. The application for the TWAO was submitted in January 2022. It remains extant.

### **The Application**

34. In September 2021, the Appellant made a request for approval under Schedule 17 in respect of the Application Works. Those works are shown indicatively on the Revised General Arrangements Drawing at Appendix 1 of the Decision, a clearer copy of which is exhibited to the Witness Statement of Paul Gilfedder at PG1/199 [SB/17/144].

35. On 8 October 2021, the Appellant declined to determine the Application on the basis that it did not consider the works to be authorised under the 2017 Act [SB/22/229]. The Interested Party appealed against that decision, treating it as a non-determination of its request for the purposes of Schedule 17 paragraph 22. The appeal was recovered for determination by the Respondents. It was considered at a hearing on 27 April 2022.
36. The Inspector reported to the Respondents on 31 March 2023 and 13 December 2023, and recommended that the appeal (1) be dismissed in respect of the BTE portal (“the BTEP”) but (2) be allowed in respect of the other Application Works [CB/14 & 15].
37. In a decision dated 14 May 2024 [CB/13], the Respondents accepted the Inspector’s recommendation with regards to the works falling under recommendation 2) but disagreed with his recommendation with regards to the BTEP. Contrary to the Inspector’s conclusions, the Respondents were satisfied that (1) the BTEP was authorised under the 2017 Act; (2) that all works forming part of the Application enjoyed the benefit of deemed planning permission under the 2017 Act; and (3) that the appeal should be allowed in full.

### **The Judgment below**

38. Three grounds of challenge were pursued in the High Court proceeding:
- (i) The Respondents erred in their interpretation of s.2(1) of the 2017 Act;
  - (ii) The Respondents erred in their interpretation of s.20 of the 2017 Act; and
  - (iii) There was a lack of reasoning, amounting to irrationality.
39. Dove J dismissed the claim on all grounds.

40. In respect of Ground One, Dove J held (inter alia) that:

- (i) The 2017 Act provides powers to undertake two kinds of work: scheduled works and works in s. 2, provided those works are for the purposes of or in connection with the scheduled works or otherwise for Phase One purposes (J§32);
- (ii) In respect of the Respondents' and Interested Party's submission that the BTE and BTEP were works which were covered by s.2(1)(i) – "*carry out and maintain such other works, of whatever description, as may be necessary or expedient*" – "*At the outset, and in principle, in my view such a construction of section 2(1) of the 2017 Act accords both with the plain meaning of the language which has been used within the section and also the purpose of the 2017 Act which has been specified in section 1*" (J§33);
- (iii) The Appellant's submission that s.2(1) was not a section which created a power to amend Schedule 1 of the 2017 Act was "*correct, but not to the point*". Ss.1 and 2 of the 2017 Act were, in a sense, "*complementary to each other and also to the purposes of the 2017 Act*" (J§34);
- (iv) "*Given the scale and nature of the project, it is clear that Parliament regarded it as unrealistic for every last detail of what would be required for the project to be successfully implemented and maintained to be specified at the outset. There is, therefore, within the structure of the 2017 Act both identified parameters and constrained flexibility to ensure that the project is delivered effectively. The provisions of section 2(1) are integral to that approach.*" (J§34);
- (v) The language used in s.2(1) "*firstly, creates the authority for the construction of a wide range of types of work, some of which may be of a significant scale or effect (such as bridges or roundabouts and buildings pursuant to section 2(1)(b)), and, secondly utilises particularly wide language within section 2(1)(i)*" (J §36);
- (vi) Such construction did not, contrary to the Appellant's submission, create a "*carte blanche*" to substitute scheduled works with tunnels in a manner not envisaged by Parliament: "*...properly understood, the provisions of section 2(1) of the 2017 Act coupled with provisions in section 20(2) do create clear limits on the powers to implement other works as part of the project*" (J§37).

41. In respect of Ground Two, Dove J held (inter alia) that:

- (i) Sections 20(2)(c) and 68(4) of the 2017 Act – in particular, the words “covered by an environmental assessment” – fell to be read within the wider framework of legislation and jurisprudence relating to EIA, including the principles established in *R v Rochdale Metropolitan BC ex p. Milne* [2001] Env. LR 22 (J §§45, 48, 49);
- (ii) Read in that context, the provisions of the 2017 Act “*provide the framework for the project of constructing and maintaining the railway proposed and the environmental statement which was deposited as part of the Bill process set out to examine the likely significant effects on the environment of that project. If the likely significant effects of a proposed work under section 2(1) would not give rise to any likely significant environmental effects beyond those which had already been the subject of information and assessment in the environmental statement, then such a work would be covered by it and within the scope of the authorisation which had been properly the subject of the Environmental Impact Assessment procedure*” (J §48);
- (iii) “*It is not necessary for an individual work within the power provided by section 2(1) to have been specified and then subject to assessment in the environmental statement. What is necessary is for that work not to give rise to likely significant effects which have not been the subject of assessment in the environmental statement process. In my view, the use of the word “covered” clearly contemplates that there would be non-scheduled works which could not be specified at the time of the Act passing but which could be brought forward pursuant to the power in section 2(1) and which could be subject of deemed planning permission provided they were within what is often referred to as the environmental envelope provided for in the environmental statement*” (J §50);
- (iv) A purposive construction of the relevant provisions, “*in particular in the context of understanding the correct approach to the legislation governing [EIA]*” was sufficient to dispose of this ground (J§52).

42. Ground three was not considered to add anything of substance to the case and was dismissed in light of Dove J's findings on Grounds one and two (J§64).

### **The Appeal**

43. The appeal proceeds on two grounds:

- (i) Dove J erred in law in his interpretation of s.2 of the 2017 Act and in dismissing Ground 1 of the claim;
- (ii) Dove J erred in his interpretation of s.20 of the 2017 Act and in dismissing Ground 2 of the claim.

### **Submissions**

#### **Ground One**

44. There was no error of law on the part of the Respondents as to the construction of s.2(1) of the 2017 Act, nor on the part of Dove J in concluding that that construction was correct.

45. As below, there appear to be three core contentions at the heart of the Appellant's case under this Ground:

- (i) The first, is that the "list" of matters in s.2 of the 2017 Act is specifically enumerated, does not encompass matters not set out within it, and is limited to matters which are "ancillary" or "incidental".
- (ii) The second, is that a tunnel is or could only be authorised under the 2017 Act if it appears as a scheduled work.
- (iii) The third, is that any changes to the reference design being considered at the time the Bill was passing through Parliament, as reflected in Schedule 1 in particular, could not be undertaken within the powers conferred by the Act, and that reliance on s.2 to undertake any such works would be to impermissibly use s.2 to "amend" Schedule 1 of the 2017 Act.

46. All three are fundamentally incorrect: for the reasons given by Dove J at J §§34-42 and as set out at §§48- below.
47. The Appellant also suggests (ASkel §54) that Dove J had effectively “subjugated” the language of the 2017 Act in favour of a purposive approach, contrary to the “unified process” articulated in *CG Fry & Sons Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 730; [2024] 2 P & CR 12. That submission is without merit: Dove J clearly and correctly identified the purpose of the 2017 Act at J§29 and, throughout his consideration of Ground One, considered both the language and purpose of the 2017 Act when considering the parties’ submissions on the proper construction of s.2.
48. With regards to the first contention, that Dove J erred in his acceptance of s.2(1) as being capable of including substantive works such as the BTE and not being limited to “ancillary” or “incidental” matters, as Dove J set out at J §36, s.2(1) is broadly drafted. The nominated undertaker may “*for the purposes of or in connection with the scheduled works or otherwise for Phase One purposes, do any of the following within the Act limits.*”. The matters listed in s.2(1)(a) – (h) are extensive: see, for example, s.2(1)(c), whereby the nominated undertaker may “*construct, provide and maintain all such embankments, aprons, abutments, retaining walls, wing walls, culverts and other works as may be necessary or expedient*”. The list concludes with s.2(1)(i): “*carry out and maintain such other works, of whatever description, as may be necessary or expedient.*” (Bold added as emphasis).
49. The definition of Phase One purposes includes at s. 67 (c) “otherwise for the purposes of or in connection with Phase One of High Speed 2...” and “Phase One of High Speed 2” is itself broadly defined in s. 1 (3). Given the broad ambit of Phase One purposes, the Appellant cannot establish that because of the ejusdem generis principle (referred to in ASkel §56) the scope of s. 2 (1) (i) is limited to ancillary works, still less to works ancillary to the scheduled works.

50. It also clear from s.2 itself that it is not limited to “minor” works but encompasses significant civil or other works. It includes bridges, embankments (many of which are substantial structures on this project) and retaining walls, and the power to “alter the course of” non-navigable rivers, streams and watercourses.
51. That does not mean it is without restrictions or limitations: these were properly identified by Dove J at J §37. One such restriction is the requirement that the works be done “for the purposes of or in connection with the scheduled works or otherwise for Phase One purposes”. That does not, however, compel the restrictive (and somewhat circular) construction that the Appellant now advocates for that provision at ASkel §40. Rather, as Dove J held at J §38, s.67, which defines “Phase One purposes” is, itself, deliberately broadly worded.
52. The Respondents’ – and Dove J’s – interpretation of s.2 is also supported by reference to the earlier railway legislation, which forms part of the background to the 2017 Act and some provisions of which are expressly incorporated into the 2017 Act itself. The Railways Clauses Consolidation Act 1845 (“the 1845 Act”) and Railways Clauses Act 1863 (“the 1863 Act”) are of particular relevance in that regard. Those Acts are described, respectively, as “An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the making of Railways” and “An Act for consolidating in One Act certain Provisions frequently inserted in Acts relating to Railways”, and apply to railways authorised to be constructed by a special Act passed thereafter. Each is incorporated into the 2017 Act to the extent and with the modifications provided for in Schedule 29.
53. S.16 of the 1845 Act – which is incorporated into the 2017 Act, without modification – makes provision for the execution of works, including the following provision:
- “They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper;*
- [...]*
- They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway:*

*Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers.”*

54. Part 1 of the 1863 Act makes further provision in respect of construction of railways. It includes limits on deviations of certain works, and, in s.4 a power to alter engineering works. S.4 is incorporated into the 2017 Act, with modification.<sup>5</sup>
55. In dismissing Ground one, Dove J did not need to rely on either s.16 of the 1845 Act or s.4 of the ~~2017~~ 1863 Act, but did reject the Appellant’s submissions that they could not apply in the present case because they were inconsistent with the express provisions of the 2017 Act (J§§41-2). In the Interested Party’s submission, however, that clear precedent in the earlier legislation for such enactments to include broadly drawn powers for the construction of works and for changes to be made to those assumed during the passage of the relevant legislation through Parliament lends further support to the construction adopted by the Respondents and endorsed by Dove J.
56. The Interested Party also reiterates that the word “ancillary” does not itself appear in s.2. Whilst that term does appear in the Explanatory Memorandum, it is well established that whilst an Explanatory Memorandum may be used to “shed light” on the “contextual scene” of a statute or mischief at which it is directed, it cannot supplant the language of the Act itself: Bennion “Statutory Interpretation” (8<sup>th</sup> Edn) pg 752 and cases cited therein.

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<sup>5</sup> S.4, as incorporated and modified by paragraph 5 of Schedule 29 to the 2017 Act appears at J§22. At ASkel footnote 5, the Appellant suggests that s.4 states that the nature of the work described “must not be altered”. That phrase appears in the part of s.4 relating to deviations from the line or level of arches, tunnels or viaducts described on deposited plans or sections. S.4 goes on to make provision for the substitution of engineering features not shown on deposited plans for those which are.

57. With regard to the second contention, that s.2 cannot be capable of authorising construction of a tunnel because tunnels have to be scheduled works, to begin with, it is clear, as set out at paragraph 50 of this skeleton argument, that s. 2 is not limited to “minor” works but encompasses significant works including bridges, embankments and retaining walls and the power to alter the course of rivers, streams and watercourses. In that context, s.2 can also encompass tunnels.
58. The purpose of the 2017 Act, including Schedule 1, is the construction of the railway that is Phase One of High Speed 2. The key work for the purposes of s.1 (and Schedule 1) is the railway itself. The written description of a scheduled work does not preclude the construction of other works within the limits of deviation for that scheduled work, or other works within Act limits.
59. In response to the submission at ASkel §29, it is clear from the earlier railway legislation (e.g. s. 16 of the 1845 Act) that the fact that features such as tunnels may be shown on deposited plans does not of itself preclude that feature subsequently being altered and replaced with a different engineering solution.
60. The fact that a structure such as a tunnel or bridge is not included in a description of a scheduled work listed in Schedule 1 does not, therefore, mean that it cannot be constructed under the 2017 Act. It merely means that it would be necessary to rely on the general authorisation of works provided by s.2 (and be subject to the limitations with regards to deemed planning permission for such development in s.20(2)) rather than on s.1 and s.20(1) *per se*.
61. At ASkel §§ 37 and 48 the Appellant draws attention to the exclusion of tunnels from the definition of “building” in paragraph 30 of schedule 17. However, the word used in s. 2 (1) (i) is “works”, not “building”, and in any case the definition of “building” in paragraph 30 of schedule 17 is solely for the purpose of that schedule, and not for the Act as a whole.
62. As regards to the third contention, that s.2 cannot be read as authorising changes such as an extension to the BTE, the 2017 Act is not analogous to a grant of full planning permission. Essentially, and as Dove J implicitly recognised at J §49 the planning

consent (and authorisation more generally) granted by the 2017 Act is akin to an “outline” planning permission. As was made clear throughout the Parliamentary proceedings, the design of the Phase One scheme at that time provided the level of detail necessary for the purposes of the Bill and the requirements of the EIA Directive: see, for example, paragraph 1.3.6 of Vol 1 of the ES [SB/4/48]; paragraph 3.5 of Information Paper B21<sup>6</sup> [SB/13/127]; and paras 2.1 to 2.4 of Information Paper E1 [SB/14/133]. The level of detailed design required to enable the Phase One scheme to be constructed was to be undertaken after Royal Assent. The 2017 Act provided the flexibility for that to be delivered.

63. The continued reference in the Appellant’s skeleton at ASkel §61 to it making “no sense” to interpret s.2(1) a “enabling an amendment of the scheme” is premised on failure to understand the fundamental nature of the 2017 Act. Neither the Interested Party nor the Respondents have ever contended that works under s.2 can amend Schedule 1 and the scheduled works. The Interested Party’s case is, instead, that the Phase One scheme as defined in the 2017 Act and as subject to EIA (as reported in the ES) can encompass work which does not give rise to new or significantly different environmental effects from those reported in the ES.

64. Nor does reliance on the Statutory Guidance assist the Appellant. The Statutory Guidance is directed to consideration of applications for approval under Schedule 17 of the 2017 Act, and serves to highlight the parameters which apply to such approvals (in contrast, for example, to the matters which would ordinarily fall for consideration on an application for planning permission or reserved matters approvals under Part 3 of the Town and Country Planning Act 1990). It does not, and does not purport to, go to the logically prior question as to the interpretation of s.2 and/or s.20 of the 2017 Act.

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<sup>6</sup> “The design shown on the Bill drawings is a preliminary design. The powers within the Bill must therefore be sufficiently flexible to allow for adjustments once detailed design has been carried out. This is achieved by including powers to deviate from the position of the works shown on the Parliamentary plans by a small amount; this deviation is restricted by the LOD marked on the plans.”

65. As with the submissions advanced before Dove J, the logical conclusion of the Appellant's construction of the 2017 Act would be that the nominated undertaker could not make any changes to the design of the railway which meant that it was not built wholly in accordance with all of the works specified in Schedule 1, that being the "approved scheme" which Parliament "devoted years to considering" (ASkel §49-50).
66. Contrary to the Appellant's submission at ASkel §51, far from it being "bizarre" for the 2017 Act to be construed as providing the flexibility to deliver a better scheme, it would be bizarre if it were to be construed as requiring the Interested Party to deliver the "preliminary design" envisaged at the time the Bill was passing through Parliament, regardless of any improvements, including key environmental improvements, which had to be foregone thereby.
67. Against that background it is clear that there was no error in the Respondents' construction of s.2 of the 2017 Act, nor on the part of Dove J in upholding their decision.

## **Ground Two**

68. Similarly, there was no error of law on the part of the Respondents as to the construction of s.20 of the 2017 Act, nor on the part of Dove J in concluding that that construction was correct.
69. With regards to the construction of s.20, as set out above, it was recognised during the passage of the Bill that there would likely be changes to the railway as detailed design was progressed following Royal Assent. The ES assessed a "reference design", not the final design for the railway. That was expressly recognised in s.20(2) itself. The control provided for by s.20(2) must be understood in that context.
70. Also, given the breadth of the power in s. 2 (1), it would be absurd if s. 68(4) were interpreted so as to require non-scheduled works themselves to have been identified in the ES published with the Bill. S. 2 (1) clearly allows works for works which were not anticipated when the Bill was published and the 2017 Act enacted. The s. 68(4) expression "development in relation to which information contained in a deposited

statement constituted....an [ES]..”must therefore refer to development whose effects were within the environmental envelope considered in the ES.

71. Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2017 requires that an Environmental Statement include a description of the development including in particular the matters set out in paragraphs 1(a)-(b), which include a description of the location of the development, and of the physical characteristics of the whole development. The development required to be the subject of the EIA was the Phase One railway. It is the likely significant effects of the construction and operation of the Phase One railway which are assessed in the ES. It does not contain a description of, nor individually assess the impacts, of each and every work that might be required in order to deliver that railway.
72. That is necessarily a product of the fact that, at the time of the Bill, the Phase One project was not a fully developed project, but rather a project of the sort which “require[s] environmental assessment but which are not fixed in every detail”, as identified at J§46. As Dove J thus correctly held, the principles established in R v Rochdale Borough Council ex parte Milne [2001] Env. LR 22 apply, and the Appellant’s attempt in ASkel § 83 to distinguish Milne fails.
73. Once that principle is accepted (as it must be), then there can be no question that Dove J properly construed s.20 as requiring consideration of whether the effects of a particular proposed set of works fell within the effects which had been assessed in the ES: not whether the ES had itself assessed those specific works.
74. That analysis applies equally to the proposed BTE as it does to any other works.
75. That the Interested Party acknowledged at appeal that the ES does not expressly consider the BTE as now proposed (ASkel §69) adds nothing to the point. That “concession” clearly needs to be read in its context, which was that the ES whilst including a reference to an extension to the tunnel which had been briefly considered had not gone on to assess it further. It was *not* a concession that the BTE was not covered by the ES. The Interested Party’s case was explicitly that the BTE was covered by the ES and therefore benefits from deemed planning permission because it did not give rise to any new or different significant environmental effects as compared to those

reported in the ES. This contention of the Interested Party was recorded at IR/28 [CB/14] and the Respondents accepted it.

76. Nor do the submissions advanced at ASkel §74-5 assist its case. There can be no suggestion that Dove J placed any undue reliance on the EMRs, or other documents, highlighted by the Respondents and Interested Party, in support of their submissions. At J§53, Dove J accepted the Appellant's submissions that those documents were not "dispositive" of the question before him, but noted that they were nonetheless consistent with the approach he had concluded was correct – a finding it was entirely open to him to make.
77. The Interested Party also highlights that Dove J's construction of s.20 accords with the appraisal of s.20, and how it applies to changes to the reference design for the Phase One railway, set out by Jay J in *R (on the application of Hero Granger-Taylor) v High Speed Two (HS2) Limited* [2020] EWHC 1442 (Admin) at §§8-13.
78. As Dove J said at J§59, once the conclusion is reached that the Respondents correctly directed themselves as a matter of law, the issue of whether there were new or different likely significant effects as a result of the BTE and BTEP were matters for the evaluative judgment of the Respondents based on the evidence before them. In ASkel §§86-89 the Appellant impermissibly challenges that evaluative judgment.
79. The Appellant asserts at ASkel § 87 that "on the facts of this case, the work in question would indeed give rise to" likely significant effects beyond those which had already been the subject of information and assessment in the ES; but that was a matter for the Respondents to assess, not the Appellant.
80. Furthermore, insofar as the Appellant relies on the evidence of its development control manager Erica Levy (SB/1/4 onwards and SB/3/42 onwards), her evidence is ex post facto: it was written after the decision challenged and once work had begun. In any event, the contention that the work to implement BTE and BTEP would give rise to likely significant effects beyond those previously assessed is directly contrary to the Appellant's own Screening Opinion of 10 March 2021, referred to at §32 of this skeleton argument. Moreover, as stated at §32 of the Interested Party's Detailed Grounds of Defence [CB/12], at the time of the appeal hearing it was common ground

between the Appellant and the Interested Party that the proposed BTE, and the works included within the Application, would not give rise to any new or different significant environmental effects from those which were assessed in the ES.

81. As to the TWAO correspondence, this was correctly understood and considered by Dove J at J §62. The Appellant's continued attempt to draw conclusions from that correspondence which it simply does not support further demonstrates its continued misunderstanding of the purpose and effect of the TWAO application and how the question being considered by the First Respondent's Transport Infrastructure Planning Unit in March 2021 differed from the question before the Respondents on the present application.

82. The Interested Party maintains that there has been no error on the part of the Respondents in their interpretation of s.20 (or application to the present application) nor on the part of Dove J.

### **Conclusion**

83. For the reasons set out in this skeleton argument, the Interested Party submits that the judgment of Dove J was correct and that this appeal should be dismissed.

~~30 December 2025~~

**13 March 2026**

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