

Neutral Citation Number: [2009] EWCA Civ 1061

Case No: C1/2009/0041/QBACF

**IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH
DIVISION ADMINISTRATIVE COURT
The Hon Mr Justice Blair
C0/7831/2006**

Royal Courts of Justice
Strand, London, WC2A 2LL

20 October 2009

Before :

**LORD JUSTICE MUMMERY
LORD JUSTICE LONGMORE
and
LORD JUSTICE SULLIVAN**

Between:

PETER CHARLES BOGGIS	
EASTON BAVENTS CONSERVATION	Respondents/Claimants
- and -	
NATURAL ENGLAND	Appellant/Defendant
- and-	
WAVENEY DISTRICT COUNCIL	Interested Party

**Gregory Jones and James Neill (instructed by Parkinson Wright) for the Defendant
Christopher Balogh (instructed by Waveney District Council) for the Interested Party**

Hearing dates : 6th/7th October 2009

Lord Justice Sullivan :

Introduction

1. This is an appeal against the Order of Blair J. quashing the Appellant's confirmation of the Pakefield to Easton Bavents Site of Special Scientific Interest ("the SSSI") insofar as it related to the areas to the east, and to the west, of the Easton Bavents cliffs shown on a plan annexed to the Order. Blair J's Order left within the SSSI a thin strip of land comprising the Easton Bavents cliffs ("the cliffs") as they stood at the date of his judgment on 5th December 2008, and the remainder of the area included within the SSSI to the north of the cliffs.

2. Before Blair J. the Respondents challenged the lawfulness of the confirmation of the SSSI on two grounds, referred to as Ground A and Ground G in the judgment. Blair J. rejected Ground A, but granted the claim for judicial review on Ground G. The Appellant contends that Blair J. erred in granting the claim on Ground G. In a Respondent's Notice, the Respondents contend that Blair J. erred in rejecting Ground A.

Statutory Provisions

3. The SSSI was confirmed by the Appellant's predecessor, English Nature, on 28th June 2006 under section 28 of the *Wildlife and Countryside Act 1981* as amended (the 1981 Act), the relevant provisions of which were, as at the date of confirmation, as follows:

"(1) Where [English Nature] are of the opinion that any area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features, it shall be the duty of [English Nature] to notify that fact –

(a) to every local planning authority in whose area the land is situated;

(b) to every owner and occupier of any of that land; and

(c) to the Secretary of State.

(3) A notification under subsection (1) shall specify the time (not being less than three months from the date of giving the notification) within which, and the manner in which, representations or objections with respect to it may be made; and [English Nature] shall consider any representation or objection duly made.

(4) A notification under subsection (1)(b) shall also specify –

(a) The flora, fauna, or geological or physiographical features by reason of which the land is of special interest, and

(b) Any operations appearing to [English Nature] to be likely to damage that flora or fauna or those features,

And shall contain a statement of [English Nature's] views about the management of the land (including any views [English Nature] may have about the conservation and enhancement of that flora or fauna or those features).

(5) Where a notification under subsection (1) has been given, [English Nature] may within the period of nine months beginning with the date on which the notification was served on the Secretary of State either –

(a) give notice to the persons mentioned in subsection (1) withdrawing the notification; or

(b) give notice to those persons confirming the notification (with or without modifications)."

Since the date of confirmation these statutory provisions have been amended and these functions which were exercised by English Nature, have been transferred to Natural England.

4. To the north of the cliffs, at Easton Marshes, there is within the SSSI the southern most part of the Benacre to Easton Bavents Special Protection Area ("the SPA") classified under Council Directive 79/409/EEC on the conservation of wild birds ("the Birds Directive"). The SPA is protected by Article 6 of Council Directive 92/43/EC ("the Habitats Directive"), as is the Benacre to Easton Bavents Lagoons Special Area of Conservation ("the SAC") which was adopted as a

site of community importance under the latter Directive. So far as material, Article 6 of the Habitats Directive provides:

“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.”

Background

5. The background to the confirmation of the SSSI and the Respondents’ claim for judicial review is set out in some detail in paragraphs 1-33 of the judgment of Blair J. [2008] EWHC 2954 (Admin) and a brief summary will suffice for the purposes of this appeal.
6. The SSSI is located along, and inland from, the Suffolk coast between Southwold and Lowestoft. The cliffs are at the southernmost end of the SSSI. Over the centuries the cliffs have been eroded by the sea, and that erosion continues. The First Respondent lives in Easton Bavents. The boundary of his property is now 80m from the cliff edge. His house “The Warren” is 92m from the cliff edge. When the SSSI was notified on 8th December 2005 these figures were 82m and 94m, respectively. Other properties are much closer to the cliff edge. We were told the boundary of the closest property, “Thursley” was approximately 2m from the cliff edge in 2005; by 2009 about 1m of the garden had been lost to the sea.
7. The First Respondent and other residents formed a group called Easton Bavents Conservation, the Second Respondent. Since 2003 the Second Respondent has constructed a “sacrificial sea defence” approximately one kilometre long, 8m high and 20m wide on the seaward side of the cliffs. The bank is called a “sacrificial sea defence” because it is constructed of “soft” materials such as soil, and it is intended that it shall erode at its seawards edge so as to maintain the coarse sediment inputs to the shoreline. The material lost by erosion was to be replenished each year as part of an ongoing programme. The initial construction, and the continuous replenishment, of such a large bank could not sensibly be described as the deposit of waste, as was suggested to Blair J. (para.5 Judgment). It was a continuing engineering operation, and a substantial one at that, which required both planning permission and a consent under section 16 of the Coast Protection Act 1949. Neither a planning permission nor a consent was obtained. Since 2005 there has been no replenishment of the bank and much of it has been eroded by the sea.
8. The cliffs were originally included in an SSSI in 1962 and the site was re-notified in 1989 under the new provisions of the 1981 Act. By December 2005 a large proportion of the original SSSI, including the cliffs, had been lost to the sea as a result of coastal erosion. Thus, the notification of the SSSI on 8th December 2005 was not, at least in the case of the cliffs, the result of the discovery of some new feature of special scientific interest; the boundary of the SSSI was adjusted to reflect the new position of the cliffs and English Nature’s assessment of the pace of coastal erosion over the next 50 years. As a result, the new SSSI boundary included an area of up to 225m on the landward side of the cliff face as it stood in 2005. This area included the First Respondent’s house and he, together with other affected residents, was notified in accordance with the provisions of section 28(1)(b) of the 1981 Act.

9. They objected to the notification of the SSSI because they feared that if confirmed it would prevent them from continuing to replenish the sacrificial sea defence. They particularly objected to one of the operations specified under subsection 28(4)(b) [OLDs] listed in Annex 3 to the notification, number 19 which required them to obtain consent under the 1981 Act for the:

“Erection, maintenance, and repair of sea defences or coast protection works, including cliff or landslip drainage or stabilisation measures.”

All of the objections to the notification of the SSSI were considered in a Report (“the Report”) prepared by Officers for the Council of English Nature meeting on 28th June 2006. Having considered the Report the Council confirmed the designation. The Respondents’ judicial review proceedings challenging that decision were commenced on 21st September 2006. Against this background, I will consider the two grounds of challenge.

Ground A

10. Blair J. rejected this ground of challenge. In my judgment, he was clearly right to do so since the Respondents’ submissions, which were supported by the Interested Party, were founded firstly on a misconception as to what was the geological feature that was, in English Nature’s opinion, of special interest; and secondly upon the proposition that “conservation” is synonymous with “preservation”.
11. Mr Jones submitted that English Nature had approached both the notification and the confirmation of the SSSI on the basis that “the process of exposure” of the cliffs was a geological feature of special interest. He submitted that English Nature was wrong to do so because “the act of exposure was not a geological feature”. Had English Nature approached the notification and confirmation of the SSSI on that basis it would have been in error, but when Mr Jones was asked to identify those passages in the Notification, the Supporting Information Supplementing the Notification Package, and the Report (“the documents”) on which he relied in support of this submission, he was unable to identify any passage which might have suggested that English Nature thought that the act, or process, of exposure of the cliffs was a geological feature.
12. The documents understandably refer to the fact that exposure of the cliffs was taking place, and would continue to take place, as a result of “continuing coastal processes”, not least because English Nature was concerned to take coastal erosion into account when drawing the boundary of the SSSI. However, the geological features of special interest were said to be: the “Pleistocene vertebrate palaeontology and Pleistocene/Quaternary of East Anglia at Easton Bavents”, referred to for convenience during the hearing as “the fossils” and “the sediments” respectively. The Report said that the sediments were “of national importance for the stratigraphical and palaeo-environmental study of the Lower Pleistocene in Britain”, and continued:
- “These geological features include exposures of the three major elements of the Norwich Crag Formation; the Crag itself (Chillesford Church Member), the Baventian Clay (Easton Bavents Member) and the Westleton Beds (Westleton Member).” (Report para. 1.3.1) (emphasis added)
13. Thus, English Nature was not saying that the act or process of exposure was a geological feature, it was saying that the geological features of special interest were not confined to the sediments behind the cliff face, but included the exposure. A geological exposure, as in the case of an exposed cliff or quarry face, is a geological feature. At the risk of stating the obvious, it is readily understandable that among the reasons why such a geological feature might be of special interest would be the fact that it is exposed. As the Report explained:

“As the cliff face has eroded geologists have been able to study the new sections in order to gather valuable scientific data, identify how the geological sequence is changing and use this environmental information to correlate the site more widely with other sites in the GCR and those outside of Great Britain. A three-dimensional picture of the landscape and associated depositional

environments can then also be developed. Palaeo-environmental information derived from the site contributes to our understanding of how the environment responded to changes in climate.”

14. Recognition that the geological features of special interest were not confined to the sediments, but included the exposure at the cliffs (not the act or process of the cliffs’ exposure) disposes of the alternative submission advanced by Mr Jones: that if the act of exposure of the cliffs is not the geological feature of special interest, that feature must be the sediments and the fossils, and allowing nature to take its course will result in their destruction, not their conservation. In this respect, reliance was placed by both the Respondents and the Interested Party on the duty imposed by section 28G (2) of the 1981 Act on all public bodies, including English Nature, when the exercise of their functions is likely to affect the flora, fauna etc. in any SSSI:

“to take reasonable steps, consistent with the proper exercise of [their] functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which [the SSSI] is of special scientific interest.”

15. In his submissions on behalf of the Interested Party, Mr Balogh also referred to the definition of “nature conservation” in section 131(6) of the *Environmental Protection Act 1990* (the 1990 Act):

“In this part “nature conservation” means the conservation of flora, fauna or geological or physiographical features.”

In my view, the definition of “nature conservation” in section 131(6) of the 1990 Act does not, for the purposes of this appeal, add anything of substance to the duty under section 28G(2) of the 1981 Act to further the conservation and enhancement of the geological features by reason of which this SSSI was designated.

16. The submission that English Nature’s approach, to allow natural processes (in this case coastal erosion) to proceed freely, would result in the destruction rather than the conservation of those geological features is based upon two misconceptions:

i) that the geological features in question are confined to the sediments and did not include the exposure; and

ii) that “conservation” in this context means preservation of the status quo.

17. The Report explained why allowing natural processes to take their course would conserve the exposure:

“The key management principle for coastal geological sites is to maintain exposure of the geological interest by allowing natural processes to proceed freely. Inappropriate construction of coastal defences can conceal rock exposures and result in the effective loss of the geological interest. In addition, any development which prevents or slows natural erosion can have a damaging effect. Erosion is necessary to maintain fresh geological outcrops. Reducing the rate of erosion usually results in rock exposures becoming obscured by vegetation and rock debris.....

Conserving the geological exposures and the geomorphological features is not about preventing erosion but allowing their continued evolution.”

18. Even if it is assumed that “conservation” in section 28G(2) means “preservation”, allowing nature to take its course will “preserve” the exposure, while hindering those processes would harm it because that which is obscured will cease to be exposed. It is therefore, unnecessary to consider in any detail the meaning of “conservation” in section 28G(2), but since the Interested party has sought guidance on this aspect of the appeal, I will deal with the issue. There is no definition of “conservation” in the 1981 Act, and the parties were not able to point to a definition

in any other enactment. Mr Balogh referred to the Convention Concerning the Protection of the World Cultural and National Heritage adopted by the General Conference of UNESCO on 16th November 1972, and to dictionary definitions. The former is, understandably, expressed in such general terms as to be of no material assistance, and the latter are of no assistance because we are not concerned with the meaning of “conservation” in isolation or in the abstract, but with the meaning of “conservation” in a particular statutory context: nature conservation. Whatever may be the meaning of conservation in other contexts, one would have thought that allowing natural processes to take their course, and not preventing or impeding them by artificial means from doing so, would be a well recognised conservation technique in the field of nature conservation. “Conservation” is not necessarily the same as “preservation”, although in some, perhaps many, circumstances preservation may be the best way to conserve. Whether that is so in any particular case will be a matter, not for the lawyers, but for the professional judgement of the person whose statutory duty it is to conserve.

Ground G

19. Blair J. concluded that insofar as the notification and confirmation of the SSSI applied to “the authorisation of the maintenance of the Easton Bavents’ sea defence” (but in that respect only) it was a “plan” within the meaning of Article 6(3) of the Habitats Directive (para. 106 judgment). He did not accept the Respondents’ submission that the notification and confirmation of the SSSI was in that respect a “project” within the meaning of Article 6(3). In my judgement, he was correct to reject that submission. In the leading authority on the effect of Article 6(3), *Landelijke Vereniging tot Behoud van de Waddenzee and another v Staatssecretaris van Landbouw, Natuurbeheer en Visserij C – 127/02 ECR 2004 I-07405 (“Waddenzee”)*, the ECJ, having noted that the Habitats Directive does not define the terms plan or project, referred to the definition of “project” in Article 1(2) of Directive 85/337/EEC (“the EIA Directive”):

“ the execution of constructions works or of other installations or schemes,

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

and said that it was relevant to defining the concept of plan or project in the Habitats Directive.

20. By no stretch of the imagination could the notification or confirmation of an SSSI, whether or not it included the “erection, maintenance and repair of sea defences or coast protection works....” among the list of OLDs under subsection 28(4)(b), be described as an “intervention” in the natural surroundings and landscape...” The notification and confirmation (to simplify matters I will refer only to notification when dealing with this issue) of an SSSI is not an intervention at all, it is a means of ensuring that any such intervention takes proper account of the features that are of special interest in the SSSI. Moreover, even if notification could sensibly be described as an “intervention”, paragraph 19 of the OLDS, which prohibits the erection etc., without consent of artificial sea defences, could not possibly be described as an intervention in the “natural” surroundings. Any “intervention” would be the prevention (without consent) of man’s attempts to intervene in the natural surroundings.
21. When pressed on this point Mr Jones referred to paragraph 26 of the ECJ’s judgment in *Waddenzee* in which it said that the Habitats Directive:

“seeks to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.”

When asked what was the “activity” upon which he relied, he replied that it was the making of the OLDs, which was an “activity [by English Nature] that prevents an activity”. A process which ensures that activities which are likely to damage the environment are not authorised

without prior assessment of their impact on environmental features of special interest is not itself an “activity”, much less is it an activity which might be capable of damaging the environment.

22. Is notification of an SSSI a “plan” for the purposes of Article 6.3? Blair J. held that normally it was not (para.101 judgment). He was right to do so. I will consider below whether the qualification “normally” was justified. This case is concerned with the notification of SSSIs, but when considering whether such a notification amounts to a plan for the purposes of Article 6.3 it is important to bear in mind that SSSIs are only one among many areas or features that may be designated because of their special environmental qualities. By way of example, the Secretary of State lists buildings that are of special architectural or historic interest, schedules ancient monuments that are of national importance, and designates areas of archaeological importance that appear to him to merit treatment as such. Local planning authorities designate as Conservation Areas those parts of their area that are of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance. Natural England has power to designate Areas of Outstanding Natural Beauty (AONBs) and, subject to confirmation by the Secretary of State, National Parks.
23. The common thread running through all of these provisions is that they “flag up” the special interest of the feature, and impose, or enable the imposition, of more stringent controls than would otherwise be imposed by the “normal” planning process over any activities which might harm it, thereby ensuring that before any plan or project that is likely to have an adverse impact upon it is authorised, full account will have been taken of that which is of special interest. Mr Jones submitted, consistently with his submission that notification of an SSSI was a plan, that some, at least, of these other designations would also be plans for the purposes of Article 6.3. I do not accept that submission: such notifications are not themselves plans, they are a means of ensuring that land use and other plans take proper account of environmental features of special interest.
24. Mr Jones referred us to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (“the Strategic Environmental Assessment (or SEA) Directive”). The SEA Directive does not define “plan or programme”. The Commission’s Guidance as to the implementation of the SEA Directive advises member states to adopt a similar approach to that adopted by the ECJ in respect of the EIA Directive, and states that:

“The kind of document which in some Member States is thought of as a **plan** is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development. Waste management plans, water resources plans, etc, would also count as plans for the purposes of the Directive if they fall within the definition in Article 2(a) and meet the criteria in Article 3. (para 3.5).”

The Office of the Deputy Prime Minister (“ODPM”) published “A Practical Guide to the Strategic Environmental Assessment Directive” in September 2005. The Guide is instructive for two reasons. First, it contains in Appendix 1 an “Indicative list of plans and programmes subject to the SEA Directive”. A lengthy list of plans of various kinds is set out. The notification of SSSIs is not included in the list. The list is only indicative, not determinative, as to what amounts to a plan for the purposes of the SEA Directive, but the second reason why the Guide is instructive is the fact that the characteristics of the plans in the list are very different from those of the notification of an SSSI. The list does not include any of the designations of other environmental features of special interest referred to in paragraph 22 above. Thus, the designation of an AONB or a National Park is not, of itself, a plan; whereas Areas of Outstanding Natural Beauty Management Plans and National Park Management Plans are, in the ODPM’s view, plans for the purposes of the SEA Directive.

25. The particular characteristics of Development Plans in the United Kingdom's Town and Country Planning regime were highlighted by the ECJ in *Commission v UK* C-6/04, 20th October 2005, ECR 2005 I-09017. In paragraphs 55 and 56 of its judgment the ECJ said:

"55. As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.

56. It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard."

Section 54A of the 1990 Act has been replaced by section 38(6) of the Planning and Compensation Act 2004 which provides that:

"If regard is to be had for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

26. The Development Plan does not define those activities for which planning permission must be obtained – that is the function of Part III of the 1990 Act and the General and Special Development Orders made under the Act – it describes the circumstances in which planning permission is likely to be permitted or refused for those activities which do require planning permission. Sites are allocated for housing and other forms of development, and there are policies to the effect that "permission will normally be granted/refused for..." Thus, Development Plans effectively create a powerful statutory presumption in favour of, or against, permitting certain types of development in particular locations.

27. The list of OLDs in a notification of an SSSI, setting out those operations which must not be carried out unless one of the conditions in section 28E(3) is fulfilled, or planning permission is granted (section 28P(4)(a)), is no more a "plan" than is the requirement to obtain Conservation Area Consent for certain operations in a Conservation Area. Mr Jones placed great emphasis on the totality of the notification "package" which, by virtue of subsection 28(4) included the:

"Statement of [English Nature's] views about the management of the land (including any views [English Nature] may have about the conservation and enhancement of that flora or fauna or those features)."

28. However, the statement of English Nature's views was just that, a statement of its views with no further statutory significance. The statement made it clear that it did not constitute consent for any of the OLDs. For those OLDs requiring planning permission, including the erection etc. of sea defences, the views of English Nature could not in any event be determinative of the question whether the operation would be able to be lawfully carried out. While a grant of planning permission would obviate the need for a consent under section 28E(3)(a), the converse is not the case. The views of English Nature, whether expressed in the statement or otherwise, would be one, but only one, of the material considerations to be considered by the local planning authority, or on appeal the Secretary of State. The lack of any "bite" in a statement of views under subsection 28(4) is confirmed by the other provisions in the 1981 Act relating to the management of the SSSIs: section 28J which enables English Nature to formulate "Management Schemes"; and section 28K which enables English Nature to serve "Management Notices" if owners or occupiers do not give effect to Management Schemes.

29. For all these reasons I consider that a notification “package” under section 28 of the 1981 Act is most certainly not a plan for the purposes of Article 6.3 of the Habitats Directive, and would delete the qualification “normally” in paragraph 101 of Blair J’s judgment. In paragraph 104 of the judgment Blair J. set out a passage in the Report which, in his view, predetermined the question whether the operations in paragraph 19 of the OLDs (the erection etc. of sea defences) would be permitted. In my judgment, the Report did not purport to, and could not in any event, predetermine whether such operations would be permitted. The Report contained the Officers’ professional advice to the Council Members of English Nature. It no more predetermined the issue of whether permission would be granted than any report of a Planning Officer to the council members of a Local Planning Authority. The passage cited is not in a part of the Report which purports to set out policies or proposals for future action, it is part of the Officers’ response to the objections from Easton Bavents Ltd.

30. The passage cited by Blair J. is immediately followed by this paragraph dealing with “Development issues”:

“Any proposal for the construction of coastal defences should be subject to the Town and Country Planning legislation, in respect of which English Nature is a statutory consultee where development is proposed within an SSSI, and decisions are made by the Local Planning Authority. This provides a process whereby all material considerations, including the special interest of the site and the case for protecting property and homes can be fully considered.”

This passage makes it clear beyond any doubt that, far from predetermining the question, the Officers of English Nature were advising the Council of English Nature that whether permission should be granted for the construction of sea defences would have to be determined by the Local Planning Authority through the planning process, wherein the site’s special scientific interest would be one, but not the only, material consideration.

31. Since the notification of the SSSI did not amount to a “plan or project” for the purposes of Article 6.3 the issue of likelihood of significant effect on the SPA does not arise, but out of deference to the parties’ submissions on the point I will deal with it, albeit briefly. The ECJ’s decision in *Waddenzee* makes it clear that “the significant effect” referred to in Article 6.3 is a significant effect on the site’s conservation objectives. It is not suggested by the Respondents that there is likely to be a significant effect on the SAC. Nor did they, or anyone else, suggest prior to the confirmation of the SSSI that an appropriate assessment was required in respect of the SPA.

32. When the matter was raised, in the Grounds for Judicial Review, the Appellant instructed Dr Lee, an Engineering Geomorphologist, to advise as to the predicted physical effects of maintaining the Respondents’ sacrificial sea defences. In the light of Dr Lee’s conclusions as to these physical effects a Joint Report (“the Joint Report”) was prepared by two of Natural England’s employees: Mr Reach, a Senior Specialist in Marine Ecology and Mr Robinson, a member of the East Suffolk Land and Sea Management Team. The Joint Report considered the implications of the physical effects found by Dr Lee for the SPA’s conservation objectives. In summary, the Joint Report concluded that there would be no significant effect.

33. The Respondents then produced a report from Professor Vincent, a Physical Oceanographer with particular interests in coastal and near shore processes. He was asked to advise whether it was possible that not maintaining the sacrificial sea defences and permitting the erosion of the cliffs could result in significant likely physical effects on the SPA. In his Report dated 17th October 2008, Professor Vincent said:

“I do not comment on the implications for nature conservation interests of significant physical effects on Easton Broad, as this is not within my area of expertise.”

In summary, Professor Vincent concluded that:

“the risk of significant likely physical effects on the barrier beach in front of Easton Broad, part of the SPA and SAC, by 2050 cannot be discounted.”

34. Dr Lee was asked to consider Professor Vincent’s conclusions. He pointed out that Professor Vincent had not described what he meant by “significant physical effects on the barrier beach”; and said that:

“The absence of justification of [Professor Vincent’s] assumptions and their questionable validity casts significant doubt on the reliability of Professor Vincent’s conclusions about the extent of beach build up north of the [sacrificial sea defences].”

Dr Lee said that his conclusions were not altered by anything in the Vincent Report. Having considered both the Vincent Report and Dr Lee’s response Messrs Reach and Robinson confirmed that the views expressed in their Joint Report remained unchanged.

35. Mr Jones submitted that this was not sufficient to avoid a breach of Article 6.3. He contended that the mere fact that English Nature had not, when confirming the notification, considered the question whether there might be a significant effect on the SPA by reason of preventing the maintenance of the Respondents’ sea defences was sufficient to amount to a breach of Article 6.3. I do not accept that submission. The ECJ’s decision in *Waddenzee* makes it clear that the requirement for an appropriate assessment is conditional on there being:

“a probability or a risk that the [plan or project] will have significant effects on the site concerned.” (para. 43)

36. Notwithstanding the word “likely” in Article 6.3 the precondition before there can be a requirement to carry out an appropriate assessment is not that significant effects are probable, a risk is sufficient. The nature of that risk is explained in para. 44 of the ECJ’s judgment:

“44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.”

37. In my judgement, a breach of Article 6.3 is not established merely because, some time after the “plan or project” has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been “excluded on the basis of objective information that the plan or project will have significant effects on the site concerned”. Whether a breach of Article 6.3 is alleged in infraction proceedings before the ECJ by the European Commission (see *Commission of the European Communities v Italian Republic* Case C-179/06, para. 39), or in domestic proceedings before the courts in member states, a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be “excluded on the basis of objective information”, must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered.

38. In the present case there was no such evidence prior to confirmation. It simply did not occur to anyone, including the Respondents, that there was a risk to the SPA which required an assessment under Article 6.3. Nor was there such evidence after confirmation. The question was not whether there might be physical effects on Easton Broad if the Respondents' sea defences to the south were not maintained, but whether such physical effects were "likely to undermine the conservation objectives" of the SPA" (see paras.47 and 48 of *Waddenzee*, which must be read together with the approach to likelihood in paras.43 and 44 of the judgment). Professor Vincent very properly disclaimed any expertise in nature conservation. It follows that, even if the notification/confirmation of the SSSI was a plan or project for the purposes of Article 6.3, there was no breach of that Article.

Discretion

39. Since the question of discretion does not arise, I would merely say that I doubt that it was appropriate for Blair J. to apply Lord Hoffmann's reasoning on that issue in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 to this case. *Berkeley* was concerned with the EIA Directive and the opportunity for public debate about the possible environmental impact of projects subject to that Directive prior to their authorisation is a vital part of the EIA process: see Lord Hoffmann's speech at page 615. By contrast, Article 6 of the Habitats Directive does not require the involvement of the public in the "appropriate assessment". It was for English Nature to decide whether an appropriate assessment was required. If it had decided that such an assessment was required, the opinion of the general public would have been obtained as part of the assessment process only if English Nature had considered that it was "appropriate" to do so: see Article 6.3. As Lord Hoffmann said in the later case of *R. (on the application of Edwards) v The Environment Agency* [2008] UKHL 22 at para.63, the speeches in *Berkeley* need to be read in context, and both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered.
40. I am not persuaded, therefore, that had there been a breach of the Habitats Directive it would have been inappropriate on the very unusual facts of this particular case, for the court to exercise its discretion not to quash the confirmation of the SSSI. In this context, I would draw particular attention to three matters:
- (a) The lack of any evidence to contradict the conclusions in the Joint Report.
 - (b) The real purpose of these proceedings is not to secure the protection of the SPA, but to enable the continued replenishment of the Respondents' sacrificial sea defences.
 - (c) The construction of the sacrificial sea defences was not lawful, and their continued replenishment would be lawful only if carried out with both planning permission and a consent under section 16 of the Coast Protection Act 1949.
41. No application has been made for either a planning permission or a consent under section 16, and in my view the court should be slow to grant relief which is, in reality, intended to facilitate the retention of works that are unlawful. I am not unsympathetic to the plight of the First Respondent and the other residents who can see the cliff face remorselessly approaching the boundaries of their properties. But they are, with respect, aiming at the wrong target in challenging the confirmation of the SSSI. Their only lawful course is to apply for planning permission and a section 16 consent for the sacrificial sea defence. On such an application the Interested Party, or on appeal, or if the application is called in, the Secretary of State, will be able to look at the problem in the round, giving due weight both to their rights under Article 8 of the ECHR, and to the special scientific interest of the SSSI, as two, among what are likely to be many other, material considerations.

Conclusion

42. I would allow the Appellant's appeal on Ground G, dismiss the Respondents' cross-appeal on Ground A, and set aside the Order of Blair J quashing the confirmation of part of the SSSI.

Lord Justice Longmore:

43. I agree.

Lord Justice Mummery:

44. I also agree.