

Neutral Citation Number: [2013] EWCA Civ 1657

Case Nos: C1/2013/1418 & C1/2013/1410

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
James Dingemans QC
[2013] EWHC 1065 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

18/12/2013

B e f o r e :

**LORD JUSTICE RICHARDS
LORD JUSTICE LEWISON
and
MR JUSTICE COLERIDGE**

Between:

**The Queen on the application of
Matthew Champion
- and -
North Norfolk District Council**

**Claimant/
Respondent**

**and
Crisp Malting Group Limited
and
Natural England**

**Defendant/First
Appellant**

**Interested
Party/Second
Appellant**

Interested Party

**Christopher Lockhart-Mummery QC (instructed by Howes Percival) for the Appellants
Richard Harwood QC (instructed by Richard Buxton Environmental & Public Law)
for the Respondent
Hearing date : 26 November 2013**

Lord Justice Richards :

1. This is an appeal against an order made by Mr James Dingemans QC (as he then was), sitting as a deputy High Court Judge, by which he allowed a claim for judicial review and quashed a planning permission granted by North Norfolk District Council to Crisp Malting Group Limited (“CMGL”) for a proposed development at their Great Ryburgh plant in Norfolk. In fact, separate appeals were lodged by the Council and CMGL, but the appellants made common cause and were jointly represented before us by Mr Christopher Lockhart-Mummery QC. The claim for judicial review was brought by Mr Matthew Champion, a member of the Ryburgh Village Action Group. He is the respondent to the appeal and was represented before us by Mr Richard Harwood QC. There was a linked claim against Natural England which the judge dismissed; and although Natural England was also an interested party in the claim which is the subject of the present appeal, it has played no part in the appeal.
2. The proposed development consisted of the erection of two silos and the construction of a lorry park with wash bay and ancillary facilities, associated surface water balancing pond, access and landscaping, on a site close to the River Wensum, which is a Site of Special Scientific Interest (“SSSI”) and a Special Area of Conservation (“SAC”). The issues of concern relate to the risk of pollutants from the site entering the river and damaging the SSSI and the SAC.
3. The Council’s Development Control Committee decided that the development was not such as to require either an Environmental Impact Assessment (“EIA”) under the regulations implementing Council Directive 85/337/EEC (“the EIA Directive”) or an Appropriate Assessment under the regulations implementing Council Directive 92/43/EEC (“the Habitats Directive”). It also decided that the grant of planning permission should be subject to conditions relating to the monitoring and, if necessary, restoration of water quality in the drainage network between the development site and the River Wensum, so as to avoid harm to the SSSI and the SAC. The judge held, in short, that the Committee could not rationally adopt both positions at once: the first decision suggested that the Committee thought that there was no relevant risk of pollutants entering the river, whereas the second decision suggested that it considered that there was such a risk. For that reason he exercised his discretion to quash the planning permission.
4. The appellants take issue with the judge’s reasoning and conclusion. The respondent seeks to uphold the judge’s reasoning but also, by way of a respondent’s notice, puts forward additional reasons in support of his conclusion.

The legal framework

The EIA Directive

5. The EIA Directive requires Member States to make certain projects subject to an EIA. The implementing regulations in force at the relevant time were the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the EIA Regulations”). They have since been replaced by regulations made in 2011 which are in materially similar terms, but the references I shall give are to the 1999 version.
6. The EIA Regulations provide that planning permission must not be granted for “EIA development” unless environmental information including an environmental statement (or EIA) has been taken into account: regulation 3(2). “EIA development” includes “Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location”: regulation 2(1). It is common ground in this case that the proposed development is Schedule 2 development. In deciding whether Schedule 2 development is EIA development, account has to be taken of such of the selection criteria in Schedule 3 as are relevant to the development: regulation 4(5).

7. The guidance in Circular 02/99, *Environmental Impact Assessment*, says this about the decision-making process:

“33. As a starting point, authorities should study Schedule 3 to the Regulations ... which sets out the ‘selection criteria’ which must be taken into account in determining whether a development is likely to have significant effects on the environment. Not all of the criteria will be relevant in every case. It identifies three broad criteria which should be considered: the characteristics of the development (e.g. its size, use of natural resources, quantities of pollution and waste generated); the environmental sensitivity of the location; and the characteristics of the potential impact (e.g. its magnitude and duration). In the light of these, the Secretary of State’s view is that, in general, EIA will be needed for Schedule 2 developments in three main types of case: ... (b) for developments which are proposed for particularly environmentally sensitive or vulnerable locations”

Later, in paragraph 37, the guidance states that in practice the likely environmental effects of Schedule 2 development “will often be such as to require EIA if it is to be located in or close to” an SSSI or SAC. It advises that in a case of uncertainty, Natural England should be consulted.

8. In *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, at para 17, Moore-Bick LJ expressed the view that “any serious possibility” would suffice to satisfy the test of “likely” significant effects in the context of the EIA Directive.

9. In determining the likelihood of significant effects, it is open to the decision-maker to have regard to proposed remedial measures. In *Gillespie v First Secretary of State* [2003] EWCA Civ 400, [2003] Env LR 30, Pill LJ put the matter in this way:

“37. The Secretary of State has to make a practical judgement as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects

41. ... There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached”

10. In similar vein, Laws LJ said this:

“46. ... Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and plainly uncontroversial, then as it seems to me the case calls for an EIA”

11. This was picked up in *R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408, [2004] Env LR 21, at para 38, where Dyson LJ stated:

 "... It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply *because* all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgement. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*)"
12. The only other point I should mention in relation to the EIA Regulations is that they make provision for a local planning authority to adopt an early "screening opinion" as to whether a proposed development requires an EIA. A defective screening opinion does not, however, invalidate the entire decision-making process. The ultimate question is whether planning permission has been granted without an EIA in circumstances where an EIA was required: see *R (Berky) v Newport City Council* [2012] EWCA Civ 378, [2012] Env LR 35, per Carnwath LJ at para 22.

The Habitats Directive

13. The Habitats Directive requires Member States to make certain plans or projects subject to an Appropriate Assessment. The relevant implementing regulations are the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"). Regulation 61 provides that:

 "(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 for the management of that site,

 must make an appropriate assessment of the implications 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 62 (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 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 they propose that the consent, permission or other authorisation should be given."
14. That the threshold for "likely" significant effect under the Habitats Directive is a very low one, under which the *possibility* of a significant effect is sufficient, was spelled out by Advocate General Sharpston at paras 45-49 of her Opinion in Case C-258/11, *Sweetman v An Bord Pleanaia* [2013] 3 CMLR 16.

15. For the purposes of the present appeal it can be assumed that there is no material distinction between the test for an EIA and the test for an Appropriate Assessment, both as regards the threshold of likelihood and as regards the relevance of proposed remedial measures in determining whether a significant effect is likely.

Planning conditions

16. A local planning authority has a wide power to impose such conditions on a planning permission as it thinks fit. To be valid, however, a condition must reasonably relate to the permitted development (*Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 55). Paragraph 14 of Circular 11/95, *Use of Conditions in Planning Permission*, states that in addition to satisfying the court's criteria for validity, the Secretary of State takes the view that conditions should not be imposed unless they are both necessary and effective and do not place unjustifiable burdens on applicants; and that as a matter of policy, conditions should only be imposed where they are necessary, relevant to planning, relevant to the development to be permitted, enforceable, precise, and reasonable in all other respects.

The facts

17. The following account of the facts omits some of the detail contained in the deputy judge's judgement, to which reference can be made for further information if required.
18. The application for planning permission for the development was made on 1 October 2009. It was accompanied by a site specific assessment which recognised that the proposal involved the potential to discharge materials to the nearby ditch system and ultimately to the River Wensum. This potential was proposed to be mitigated by a staged system of drainage, involving an interceptor/separator facility and thereafter a storage infiltration basin to be planted with indigenous plants to act as a secondary passive treatment system.
19. In February 2010 a Phase I Ecological Assessment was produced. Among the passages in it noted by the judge were statements that potential risks to the River Wensum SAC and coastal and flood plain habitat had not been fully evaluated; that it was essential that pollution control measures and operation of the interceptor were adequate for the lorry park in all conditions, particularly during heavy rainfall; that the effectiveness of the infiltration basin should also be thoroughly assessed to ensure that no contaminants would enter the groundwater and ditch system; and that it was assumed that an Appropriate Assessment would be required.
20. The Council adopted an EIA screening opinion on 23 April 2010. The opinion stated that the site was in a sensitive area and that the development fell within Schedule 2 but that the development was not likely to have significant effects on the environment and that an EIA was not required. The conclusion was summarised in this way:

“Subject to the applicant/agent ensuring that appropriate mitigation and safeguarding measures are put in place to prevent the possible discharge of pollutants and contamination from the site in the River Wensum (SAC & SSSI). Advice received from Natural England (Mike Meadows) that subject to pollution prevention measures being clearly identified and addressed, EIA would not be necessary.”

It is common ground that the screening opinion was legally in error, since the mitigation and safeguarding measures had not been fully identified at that stage and the Council could not therefore lawfully be satisfied that they would prevent the risk of pollutants entering the river.
21. By letter dated 14 May 2010, Natural England objected to the planning application, on the basis that there was insufficient information for it to advise whether the proposal was likely to have significant effects on the protected site. On the same date, Mr Lyon of the Council expressed

concerns to CMGL about the adequacy of the submitted water measures. Later in May, the Environment Agency wrote to the Council recording concerns about the absence of a flood risk assessment and other relevant matters.

22. On 10 July 2010 there was produced a Flood Risk Assessment and Pollution Prevention Strategy (“the July 2010 FRA”) in respect of the development. It contained detailed mitigation measures and recorded that “it is expected that after the various treatment measures have been incorporated into the scheme, the quality of the surface water will be sufficient enough to be discharged into the IDB [Internal Drainage Board] local drainage ditch network”.
23. In July 2010 a Phase II Ecological Assessment was produced. It was directed towards small animals, reptiles and birds.
24. On 13 August 2010 Natural England withdrew its objection to the development, noting that the July 2010 FRA and the Phase II Ecological Assessment had “addressed satisfactorily the concerns raised in our previous letter”. Mr Meadows, of Natural England, dealt with the matter at some length in his witness statement, stating *inter alia*:

“12.3 ... I would only involve a specialist in this type of application if there were any difficult or contentious technical issues, or uncertainties in the application. In my professional opinion the Application does not fall into that category as the July 2010 FRA fully addressed the risks to a level in accordance with the 06/2005 circular [relating to the Habitats Regulations].

12.4 The mitigation measures proposed in the Application do not represent novel or untested techniques. Similar methods have and are being successfully used around the country.

...

12.6 On the basis of the layers of protection outlined above, it was my view that the quality of surface water from the application site finally discharging to the River Wensum meant that a probability or risk of a significant effect on the River Wensum SAC could be ruled out on the independent expert evidence considered and that the SAC would not be prevented from achieving its conservation objectives.”

25. By letter dated 19 August 2010 the Environment Agency informed the Council that it was maintaining its objection to the application, for a variety of reasons. In response, a further flood risk assessment was produced (“the August 2010 FRA”), making a number of changes to the July 2010 FRA in order to meet the Environment Agency’s objections.
26. On 5 October 2010 the Council’s Conservation, Design and Landscape (“CDL”) team submitted detailed objections to the application. This was followed by internal discussions within the Council and the submission of additional input by CMGL. On 9 December 2010 the CDL team noted the recent submission of additional information and plans, and withdrew its objections on the basis of recommended conditions attached to the permission. On 13 December 2010 Natural England confirmed that it had no comments additional to those in its letter of 13 August 2010.
27. At a meeting on 20 January 2011 the Council’s Development Control Committee resolved by a bare majority to give the senior planning officer delegated powers to approve the development, subject to the imposition of a number of planning conditions. The officers’ report for that meeting included the following in relation to impact on wildlife and designated sites, specifically the River Wensum SSSI and SAC:

“... Being located within the Wensum Valley, natural drainage from the application site and adjoining sites feed into the River Wensum and there is therefore a hydrological connection between the application site and the River Wensum. This is important in relation to the proposed development because any pollution entering into the Wensum associated with the proposed development could have a significantly adverse impact on protected species.

Whilst there were initially a significant number of concerns in relation to the impact of the proposed lorry park on the River Wensum SAC and SSSI, primarily in relation to the way in which any pollution from the lorry park would be captured and prevented from entering the drainage and river system, the applicant has made a number of amendments to the scheme which have overcome those initial concerns. As such, subject to the imposition of conditions, neither Natural England nor the Council’s Conservation, Design and Landscape Manager have objected to the proposal in relation to impact on the SSSI or SAC.”

28. The meeting was followed by a large number of complaints locally about the meeting and its outcome. Amongst other matters, the solicitors acting for the Ryburgh Village Action Group complained that there had been a failure to comply with the requirements of the EIA and Habitats Directives. The Council contacted Natural England and received a response on 26 July 2011 that “Natural England is satisfied that there would *not* be a likely significant effect on the River Wensum SAC as a result of this proposal and our advice is therefore that an Appropriate Assessment is *not* required” (emphasis in original).
29. On 30 August 2011 the Norfolk Rivers Internal Drainage Board (“the IDB”) wrote to the Council with updated comments on the application. The letter included a strong request to the Council that, if it were minded to approve the proposals, it should “impose suitable conditions requiring all necessary discharge consents to be obtained and copies submitted to you, and requiring details of the proposed finished levels of the development and surface water drainage systems to be prepared, such that they all have to be submitted and approved by you prior to the commencement of development works on site”.
30. On 8 September 2011 the application was returned to the Council’s Development Control Committee as a matter of prudence, in the light of the passage of time and the extensive representations made. The officers’ report for the meeting attached the previous report but also contained a further section on considerations relating to the EIA and Habitats Directives. In relation to the Habitats Directive, it summarised the views of Natural England and stated:

“Officers have approached this issue of any likely significant effect on a precautionary basis and considered whether there is any probability or risk that the proposal will have significant effects on the SAC, whether individually or in combination with any other project. Officers agree with the conclusions of Natural England in light of all the information that has been submitted.

... [Officers] are of the view that no appropriate assessment is required in light of all the information that now exists and that there would not be a likely significant effect on the River Wensum SAC as a result of this proposal and that the requirements of the Habitats Directive and Habitats Regulations have been satisfied.

The Committee is therefore asked to consider all the relevant information in the same way and reach its own view in light of this advice. If, contrary to the views of Natural England and the Officers, the Committee considers that there is a probability or risk of any significant effect, then an appropriate assessment would be required.”

31. The report went on to consider the EIA Directive, stating that officers had approached this too on a precautionary basis, and referring to the advice of Natural England and to the contrary assertion made on behalf of the Ryburgh Village Action Group. It continued:

“The Officers’ view remains that the proposal is not EIA development on the basis that there are not likely to be significant environmental effects. This view takes full account of the site’s location and proximity to the designated sites and all the representations and evidence received to date. The Officers’ view is supported by the recent response from Natural England dated 26 July 2011 in respect of the SAC which confirms that, in their opinion, there would not be a likely significant effect on the River Wensum SAC ... as a result of this proposal if the proposed mitigation measures are put in place. The Officers consider the same conclusion is appropriate in respect of the SSSI and in respect of the environment generally.

Based on the available evidence, it is considered that the decision to date that the proposal is not EIA Development is correct. If the Committee agree, the Council is entitled to determine the planning application without the need for an Environmental Statement in compliance with the requirements of the Environmental Impact Assessment Directive and the EIA Regulations on the basis that the proposal is not EIA development.

The Committee are therefore invited to review the position and to determine whether or not it agrees with the advice of its Officers. If, contrary to the views of its officers, it considers that the proposal is EIA Development, then an Environmental Statement would be required before the application can be determined.”

32. The report also referred to the letter from the Norfolk Rivers IDB, stating that further consideration would be given to the points raised and that the Committee would be updated orally in this respect at the meeting.
33. The substance of the comments on the EIA and Habitats Directives was repeated in the report’s summary. This led on to the officers’ recommendation that the application be approved subject to the imposition of appropriate conditions. The proposed conditions included conditions relating to implementation of a surface water drainage scheme in accordance with the details set out in the August 2010 FRA (conditions 13 and 14). The reasons for those conditions were expressed to be to prevent flooding and pollution of the water environment.
34. At the meeting of the Committee on 8 September 2011, Mr Lyon, as Team Leader (Enforcement and Special Cases), added an oral report on the issues arising under the EIA and Habitats Directives. He also referred to a further letter from an objector raising issues in respect of drainage, in relation to which he stated that the IDB had confirmed that it would be necessary for CMGL to obtain consent to discharge into the watercourse, and that the conditions requested by the IDB would help mitigate the drainage issues raised by the objector.
35. The senior planning officer then requested the Committee to consider whether it agreed with the officers’ view in respect of the Directives, noting that the application could not be determined at the meeting in the event that the Committee considered the development to be EIA development. The minutes of the meeting record:

“Having considered the Officer’s report and the issues outlined in the presentation by the Team Leader (Enforcement and Special Cases), the Committee indicated its agreement with the Officers’ view by 9 votes to 0 with 1 abstention.”
36. The minutes go on to record the substantive debate on whether the application for planning permission should be granted. Among the contributions made by councillors was this:

“Councillor Mrs P Grove-Jones stated that she was a Member of the Broads IDB. She expressed concern that there could be substantial run-off from the site into the River Wensum.

The Team Leader (Enforcement and Special Cases) stated that the IDB had indicated clearly that the applicant would require consent to discharge to a watercourse. It was a matter for the

applicant to deal with. A number of conditions had been suggested and additional conditions would be imposed in respect of land levels. The key issue was to ensure that there would be no adverse impact on the River Wensum. It was impossible to give a 100% guarantee that there would never be a pollution incident but every effort had been made to ensure that all matters had been considered and appropriate mitigation measures put in place. Officers were satisfied that the concerns could be addressed by appropriate planning conditions.

Councillor Mrs Grove-Jones requested that water monitoring be carried out over a period of time to assess whether there were any pollution issues. The Team Leader (Enforcement and Special Cases) stated that a condition could be added to require monitoring to be carried out.”

37. After further discussion, the Committee resolved by 10 votes to 2 to approve the application “subject to the imposition of appropriate conditions including ... drainage including monitoring of water quality ...”.
38. The formal grant of planning permission was issued on 13 September 2011. The conditions to which it was subject included a number of additional conditions foreshadowed at the meeting on 8 September.
39. First, conditions were included to meet the concerns expressed by the Norfolk Rivers IDB. Condition 15 required the obtaining of consent from the IDB to discharge water from the proposed development to a watercourse. Condition 17 required the proposed finished levels of the lorry park to be submitted to and approved by the local planning authority in consultation with the IDB and the Environment Agency.
40. Secondly and more pertinently, in response to the request by Councillor Mrs Grove-Jones, the following conditions as to the monitoring of water quality were included (conditions 23 and 24, with reasons as set out in the grant of permission):

“23. No development whatsoever shall be commenced in relation to the development hereby permitted until such time as details of a scheme to monitor water quality in the drainage network between the proposed outflow pipe from the attenuation lagoon and the point of discharge into the River Wensum has been submitted to and approved in writing by the Local Planning Authority. The water quality monitoring scheme details shall specify, amongst other things, the time period over which water quality will be monitored, the proposed water quality sampling methodology (including frequency of sampling and establishment of ‘baseline’ water quality), how results will be verified and the proposed method and frequency of advising the Local Planning Authority of those results. Thereafter the water quality monitoring scheme shall be implemented in strict accordance with the approved details.

Reason: To ensure that there is a proper assessment of water quality so as to be able to identify and prevent diminution of water quality and consequent potential harm to the River Wensum Site of Special Scientific Interest and Special Area of Conservation in accordance with Policy EN10 of the adopted North Norfolk Core Strategy and taking account of the Environmental Impact Assessment Directive and Habitats Directive, as transposed into national law.

24. In respect of the requirements of Condition 23, in the event that water quality diminishes and the diminution of water quality is considered to be attributable (either in part or in whole) to the lorry park and associated development hereby permitted, the applicant or successors in title shall initially take all reasonably necessary steps to prevent water quality diminishing to such an extent that it could have a significant adverse impact on the River Wensum Site of Special Scientific Interest and Special Area of Conservation. Thereafter, plans/ proposals to restore the quality of water to equivalent or better quality

than before the permitted development commenced shall be submitted to and approved in writing by the Local Planning Authority and the approved plans/proposals shall be carried out in full in accordance with an approved timetable.

Reason: To ensure that, in the event of water quality diminishing as a result of the proposed development necessary steps are taken to restore water quality and prevent consequent potential harm to the River Wensum Site of Special Scientific Interest and Special Area of Conservation in accordance with Policy EN10 of the adopted North Norfolk Core Strategy and taking account of the Environmental Impact Assessment Directive and Habitats Directive, as transposed into national law”

The judgement of the deputy judge

41. The deputy judge dealt economically with the claimant’s case as to internal inconsistency and irrationality in the Council’s decision. He said that the decision whether to require an Appropriate Assessment or an EIA was one for the Committee to make on 8 September 2011. At para 116 he referred to matters that could be relied on to provide assurance that there was no risk of pollutants entering the river. At para 117 he referred to matters which pointed the other way. He continued:

“118. The Committee, as the decision making body, was entitled to take a view about these matters. The first decision, not to have an Appropriate Assessment or an EIA suggested that the Committee thought that there was no relevant risk. This would have been a rational and reasonable conclusion available to the Committee, in the light of the detailed matters set out above.

119. However the Committee also decided to impose a requirement for testing of water quality to ensure pollutants were not contaminating the river, and a scheme for remediation in the event that they did. These conditions, which could only be imposed where the Committee considered them necessary, suggested that the Committee considered that there was a risk that pollutants could enter the river. This would also have been a rational and reasonable conclusion available to the Committee, in the light of the detailed matters set out above..

120. It does not seem to me that the Council could, rationally, adopt both positions at once. Although Ms Dehon [counsel for the Council] put the matter as persuasively and fairly as it could be put, I do not consider that it is open for me to consider that this inconsistency was simply a function of local democracy at work, and that it could be ignored

121. I do not think that in these circumstances the decision can be saved by exercising a discretion not to quash the decision. The Committee will have to consider whether it considers that there is no relevant risk of pollutants entering the river. If there is no risk, the Committee can grant planning permission, but will not be entitled to impose conditions 23 and 24. If there is such a risk the Committee will have to require an Appropriate Assessment and an EIA to be obtained.

122. For this reason it seems to me that the Council’s decision dated 13 September 2011 must be quashed”

The arguments on the appeal

42. The appellants challenge the deputy judge’s finding of inconsistency. The primary ground of appeal is that in finding that the Council’s decisions could not rationally co-exist, the deputy judge erroneously conflated the distinct legal tests involved in determining (a) whether an EIA is required, (b) whether an Appropriate Assessment is required, and/or (c) whether water

quality monitoring conditions were appropriate. The other grounds do not add much to the primary ground. The case at bottom is that the Council could rationally conclude both that an EIA and an Appropriate Assessment were not required and that the conditions to which the planning permission was subject should include Conditions 23 and 24; and that the deputy judge was wrong to find to the contrary.

43. I accept the appellants' case on this issue. In my judgement, there was no inconsistency between the two positions adopted by the Council. They were sequential and separate aspects of the Committee's decision-making process and reasoning. The decision that an EIA and an Appropriate Assessment were not required came first. It was the subject of a vote by which the Committee indicated its agreement with the officers' view that the development was not likely to have significant effects on the SSSI or the SAC. Unless the Committee had accepted that view, the substantive debate on whether to approve the application for permission could not have proceeded. The inclusion of conditions relating to the monitoring of water quality came at a later point and, as the minutes of the meeting make clear, was agreed to in order to provide a particular councillor, Mrs Grove-Jones, with the reassurance she sought in the course of the substantive debate. The inclusion of the conditions was suggested first by the Team Leader (Enforcement and Special Cases) and was adopted by the Committee through its decision to approve the application subject to conditions that included the monitoring of water quality. Factually, there is nothing in the minutes to suggest that the inclusion of the additional conditions was suggested or agreed to because there was considered to be a likelihood that the development would give rise to a diminution in the water quality in the drainage network, let alone a likelihood of the water quality diminishing to such an extent that it could have a significant adverse impact on the SSSI or the SAC.
44. The view taken by the deputy judge appears to have been that the Committee could lawfully impose conditions relating to the monitoring of water quality only if it considered that there was a "risk that pollutants could enter the river" (by which he must have meant a likelihood, for the purposes of the EIA and Habitats Directives, that they would enter the river), because conditions could only be imposed where the Committee considered them necessary. That conditions should not be imposed unless they are necessary is, strictly speaking, a policy requirement rather than a statutory precondition to their validity (see para 16 above). But in any event the Committee could properly consider that the conditions were necessary as a precautionary measure for the purposes of reassurance, without considering that in their absence there was a likelihood that pollutants would enter the river.
45. In his submissions on behalf of the respondent, Mr Harwood QC laid stress on the reasons given for the inclusion of Conditions 23 and 24 at the time of the formal grant of permission. The reasons referred in each case to "taking account of" the EIA and Habitats Directives as transposed into national law. Mr Harwood submitted that this showed that the conditions were part of an attempt to deal with the risk of significant effects, rather than being addressed to lesser environmental effects which would not engage the Directives. I do not accept that argument. The fact that the Directives were taken into account in deciding to impose the conditions does not entail an acceptance that the requirements of the Directives could not be met in the absence of the conditions.
46. It is important, too, to focus on the wording of the conditions themselves. Condition 23 is concerned simply with the assessment of water quality. In the event that a diminution in quality is detected and is considered to be attributable to the development, condition 24 provides for steps to be taken "to *prevent* water quality diminishing to such an extent that it could have a significant impact" on the SSSI and SAC (emphasis added). Again there is nothing in the wording to suggest a likelihood of the water quality diminishing, let alone of it diminishing to such an extent that it could have a significant impact on the SSSI and SAC.

47. There are some similarities between this issue and a point that arose in *Feeney v Secretary of State for Transport* [2013] EWHC 1238 (Admin). That case concerned an order permitting the construction of a section of railway which would pass close to an SAC and SSSI. The order included a condition providing for a scheme of assessment of air quality which would include means of mitigation in the event that defined criteria or thresholds were not met or were exceeded when the railway was in operation. The Secretary of State's decision letter referred to the condition as "an appropriate precautionary measure to exclude the possibility of significant effects on the SAC". As appears at paras 45-46 of the judgement of Ouseley J, one of the arguments for the objectors was that the condition could not properly be taken into account in determining whether an Appropriate Assessment was necessary; alternatively, that its existence showed that there was a risk of harm and it could not be known, before the grant of development consent, whether the condition would be effective in removing that risk. At para 50 of his judgement, Ouseley J referred to the problem that the Habitats Directive required greater certainty as to effects than was given by the predictive data provided by the railway company. He continued:
- "50. ... The uncertainty was not so much what the position was at present but what it would be with the railway in operation and the traffic changes which the new station and car park would also cause. There might be no harm as Chiltern Railways contended, and one purpose of the condition was to test whether that prediction turned out to be correct. Another purpose was to deal with what should happen were that to prove optimistic; there might be some harm, which was the unlikely possibility which the Inspector accepted had to be dealt with, as a matter of precaution
51. The purpose therefore of the condition ... is to assess and then eliminate the effects of the residual range of uncertainty between no harm and harm which is 'unlikely'"
48. That passage illustrates the point that a condition can in principle be imposed to address a situation falling short of one that is considered to involve a likelihood of significant adverse effects. That, as it seems to me, is how conditions 23 and 24 are to be viewed in the present case, though this case is stronger than *Feeney* because there is here no perceived "residual range of uncertainty" that the conditions are intended to address.
49. For those reasons I take the view that the basis on which the deputy judge decided to quash the planning permission cannot stand.
50. That brings me to the various alternative ways in which the respondent seeks to uphold the deputy judge's order. I will consider the arguments in the form in which they were advanced by Mr Harwood at the hearing, which did not mirror with any precision the points set out in the respondent's notice.
51. The main thrust of Mr Harwood's submissions was that at its meeting on 8 September 2011 the Committee was not in a position to make a lawful decision as to whether the development was likely to have significant effects on the River Wensum SSSI and SAC. The decision was to be seen as the end of a process that had gone badly wrong from the start. The original screening opinion was unlawful. Various bodies had submitted objections or expressed concerns over time. The concerns expressed by the IDB remained unresolved by the time of the Committee's meeting. Against that background, the members of the Committee were being asked to go through what for them would have been the unfamiliar exercise of deciding whether an EIA or Appropriate Assessment was required. They were not given sufficient information for that purpose. They were not told how low the threshold of likelihood is: the officers' report referred simply to "probability or risk". They were not shown the criteria in Schedule 3 to the Regulations, nor the guidance in Circular 02/99 concerning those criteria and the significance of proximity to a sensitive location. They were not told the effect of the *Gillespie* line of cases, that mitigation measures can be relied on as removing the need for an EIA and an Appropriate

Assessment only if they are sufficiently certain in their outcome as to reduce the risk to below the level of likelihood. It is submitted that in those circumstances the deputy judge ought not to have found that it was reasonably open to the Committee on the material before it to decide that an EIA and an Appropriate Assessment were not required.

52. I am not persuaded by that line of argument. It is true that the decision-making process got off to a bad start, with a flawed screening opinion. But that did not lead in practice to any failure to consider relevant matters. The concerns expressed by Natural England and the Environment Agency, in particular, ensured that the question of mitigation measures was properly addressed. The measures proposed in the resulting flood risk assessments served to meet those concerns. Natural England's final view that there would not be a likely significant effect was re-stated in emphatic terms in its letter of 26 July 2011, which was one of the documents before the Committee and was highlighted in the officers' report. The letter from the Norfolk Rivers IDB contained nothing to cast doubt on that position, and the Committee was correctly informed at the meeting that the conditions requested by the IDB would help mitigate the drainage issues raised by an objector. The members of the Committee were also given sufficient guidance on the relevant legal principles. The decided cases on the meaning of "likelihood" were not referred to, but the officers' report did refer to the issue of "risk" of significant effects, and there is nothing to suggest that members in practice applied too relaxed a test. The significance of the site's proximity to the River Wensum SSSI and the SAC was spelled out very clearly in the report and will have been obvious to everyone. The relevance of mitigation measures to the assessment of the likelihood of significant adverse effects was also sufficiently clear from the report, without the need for specific reference to the *Gillespie* line of cases. In my view, therefore, the Committee was put in a position where it could properly make the requisite assessment as to the likely effect of the development on the SSSI and the SAC, and I agree with the deputy judge that the decision not to have an EIA or an Appropriate Assessment was "a rational and reasonable conclusion available to the Committee" on the material before it.
53. The other main point taken by Mr Harwood concerns environmental effects other than those relating to the River Wensum SSSI and SAC. It is submitted that issues had been raised in respect of landscape impact, noise, traffic, light pollution, and effects on protected species outside the designated sites, but that the Committee focused only on the SSSI and the SAC and did not consider, and was not put in a position properly to consider, other environmental effects or environmental effects overall.
54. The deputy judge dismissed the relevant ground of claim robustly:

"123. I should record that there was nothing in the materials set out above to show that an Appropriate Assessment or an EIA should be required on account of noise, light and other pollution risks, which was the Claimant's ground 2."

In my judgement, he was correct to reach that conclusion. Other environmental effects were in reality a minor issue, and the focus of attention was rightly on the effects of the development on the SSSI and the SAC. Once it was found that the development was not likely to have significant effects on the SSSI or the SAC, there was nothing else that could sensibly give rise to a requirement for an EIA or an Appropriate Assessment.

55. The Council's Mr Lyon dealt with this issue as follows in his witness statement:

"6. Whilst it is correct that the proposed development could have some effects in relation to landscape, light pollution and species outside of the designated sties (hence the mitigation measures and conditions relating to such matters), the key question for me was whether or not these aspects are likely to have 'significant effects' on the receiving environment. In my professional opinion, whilst matters in relation to landscape, light pollution, highways and species outside of the designated areas were all relevant matters

that needed to be considered and were duly considered as part of the application process, the impacts in relation to these specific matters were not so significant as to justify the need for EIA in their own right.

7. Whilst being mindful of other potential impacts, when undertaking the screening opinion my focus was primarily drawn to the potential impact on the nearby River Wensum, which is designated nationally as [an SSSI and an SAC]”
56. The statement that such matters did not give rise to the need for an EIA “in their own right” is unfortunate, since it might be taken to suggest, erroneously, that it was not necessary to consider environmental effects on a cumulative basis. I am inclined to the view, however, that Mr Lyon did not fall into that error but was simply making the point that these other matters were of minor significance for the overall assessment, which is why his focus was primarily on the SSSI and the SAC. That was also the focus of the solicitors for the Ryburgh Village Action Group, in their letter dated 10 June 2011 contending that an Appropriate Assessment and an EIA were required.
57. The way the matter was presented in the officers’ reports to the Committee meant that members of the Committee also had their attention focused on the effects of the development on the SSSI and the SAC, rather than on other environmental effects or cumulative effects. The report for the meeting on 8 September did, however, record the officers’ conclusion that the absence of likelihood of significant effects applied not only to the SSSI and the SAC but also “in respect of the environment generally”. It also summarised the representations received since the meeting in January 2011 and discussed a number of the issues raised (including highway impact, lighting and visual amenity), albeit under separate headings from those relating to EIA and Appropriate Assessment. The oral presentation by Mr Lyon at the meeting on 8 September also drew attention to those matters, as well as to recent complaints about noise and vehicle movements.
58. In the light of all of that, it seems to me that the Committee’s agreement with the officers’ view that an EIA and Appropriate Assessment were not required can be taken to have encompassed consideration of all relevant environmental effects, not just the effects on the SSSI and the SAC. I also consider that the Committee was given sufficient information to enable it to reach a proper conclusion on all relevant matters, and that the conclusion it reached was reasonably open on the materials before it. Accordingly, I agree with the deputy judge on this issue and I would dismiss the case advanced by Mr Harwood in relation to it.
59. Those are the only matters I think it necessary to deal with. Other matters have either fallen away or are too insubstantial to merit specific attention. Within the latter category I include what appeared to me to be a bad point advanced by Mr Harwood as to the effect and adequacy of condition 14.

Conclusion

60. For the reasons I have given I would allow the appeal and set aside paragraphs 1 and 2 of the deputy judge’s order, by which he allowed the claim for judicial review and quashed the planning permission. Consequential matters will need to be addressed by counsel in writing.

Lord Justice Lewison :

61. I agree.

Mr Justice Coleridge :

62. I also agree.