

Neutral Citation Number: [2015] EWCA Civ 4

Case No: C1/2014/0846

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN’S BENCH, ADMINISTRATIVE COURT
Mr Justice Stewart
CO/9155/2013**

Royal Courts of Justice
Strand, London, WC2A 2LL

15th January 2015

B e f o r e :

**THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE LEWISON
and
LADY JUSTICE KING**

Between:

**THE QUEEN on the application of SUSAN
SAVAGE** **Appellant**

- and -

MANSFIELD DISTRICT COUNCIL **Respondent**

- and -

THE LINDHURST GROUP **Interested Party**

**MR DOUGLAS EDWARDS QC & MS ANNABEL GRAHAM PAUL (instructed by
Richard Buxton Environmental & Public Law) for the Appellant
MR ANDREW HOGAN (instructed by Ashfield & Mansfield Shared Legal Service) for
the Respondent
MR DAVID ELVIN QC (instructed by Marrons Shakespeares) for the Interested Party
Hearing date : 10 December 2014**

Lord Justice Lewison:

Introduction

1. On 17 April 2013 Mansfield District Council (“the Council”) granted outline planning permission for a large mixed use development close to Harlow Wood. The permitted

development extends over 169 hectares and includes up to 1700 dwellings, commercial uses, a primary school, green spaces and play areas. Ms Savage is one of a group of local residents who object to the development. She has been given permission to challenge the grant of the planning permission by judicial review.

2. Although the development site does not include any part of Harlow Wood, Harlow Wood itself is part of the Sherwood Forest region, in which there are substantial breeding populations of nightjar and woodlark. Some 300 metres to the south of the development site lies a Site of Special Scientific Interest (an “SSSI”) called Rainworth Lakes. Where proposed development is likely to affect an SSSI the planning authority must consult Natural England. The Council therefore consulted Natural England before deciding to grant planning permission. The grounds of challenge essentially fasten on alleged defects in that consultation process. In short they are:
 - i) The Council did not follow Natural England’s advice to carry out a “risk-based assessment” and by not doing so failed to comply with its legal duty;
 - ii) The Council’s officers misled the Council’s planning committee about Natural England’s true position and their decision might have been different but for that fact;
 - iii) The Council ought to have reconsidered the position between the date on which they resolved to grant planning permission and the date on which they actually granted it because there had been a material change of circumstances; and
 - iv) One provision of a section 106 agreement was unlawful.

The legal framework

3. It is well known that, partly as a result of European legislation, environmental considerations are playing an ever greater role in the determination of planning applications. Directive 2009/147/EC (“the Wild Birds Directive”) required member states to take measures to maintain bird populations and to preserve and maintain diversity and habitats. Certain specified species of bird were to be given special protection by protecting their habitats. But article 4.4 also imposed a more general duty:

“In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.”
4. In addition Directive 92/43/EEC (“the Habitats Directive”) aimed to promote the maintenance of biodiversity by requiring member states to take measures to maintain or restore natural habitats and wild species listed in the Annexes to the Directive at a favourable conservation status, introducing robust protection for those habitats and species of European importance. Article 4 required member states to designate special areas of conservation in accordance with specified criteria. Article 6.1 required member states to establish necessary conservation measures for special areas of conservation. Article 6.3 stated:

“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.”
5. The UK’s current response to the requirements of the Wild Birds Directive and the Habitats Directive is to transpose those requirements in the Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”).

6. Regulation 61 of the Habitats Regulations provides, so far as material:
 - “(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 or a European offshore marine site (either alone or in combination with other plans or projects), and
 - (b) is not directly connected with or necessary to the management of that site,must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives....
 - (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.”
7. Regulation 5 defines the “appropriate nature conservation body” as Natural England. A local authority falls within the definition of a “competent authority” in regulation 7. A “European site” is defined by regulation 8. Thus under the Habitats Regulations themselves a site does not qualify for protection until it has actually been designated as a Special Protection Area (an “SPA”).
8. However, the obligation to consult Natural England has been widened by paragraph 118 of the National Planning Policy Framework (the “NPPF”) as follows:

“the following wildlife sites should be given the same protection as European sites:

 - potential Special Protection Areas and possible Special Areas of Conservation;
 - listed or proposed Ramsar sites; and
 - sites identified, or required, as compensatory measures for adverse effects on European sites, potential Special Protection Areas, possible Special Areas of Conservation, and listed or proposed Ramsar sites.”
9. Footnote 26 to this paragraph explains that:

“Potential Special Protection Areas, possible Special Areas of Conservation and proposed Ramsar sites are sites on which Government has initiated public consultation on the scientific case for designation as a Special Protection Area, candidate Special Area of Conservation or Ramsar site.”
10. It is clear from this footnote that a site does not qualify for protection under the NPPF until the Government has initiated public consultation on the case for its designation. A proposed SPA is known in the jargon as a pSPA. Perhaps I should explain that “Ramsar sites” are wetlands of international importance designated under the Ramsar Convention. They have no bearing on our case.
11. If a site becomes a European site after the grant of planning permission regulation 63 of the Habitats Regulations applies. It provides, so far as material:
 - “(1) Where before the date on which a site becomes a European site or a European offshore marine site a competent authority have decided to undertake, or have given any consent, permission or other authorisation for, a plan or project to which regulation 61(1) would apply if it were to be reconsidered as of that date, the authority must, as soon as reasonably practicable—
 - (a) review their decision or, as the case may be, the consent, permission or other authorisation; and
 - (b) affirm, modify or revoke it.

- (2) They must for that purpose make an appropriate assessment of the implications for the site in view of that site's conservation objectives; and the provisions of regulation 61(2) to (4) apply, with the appropriate modifications, in relation to such a review.

...

- (4) Nothing in this regulation affects anything done in pursuance of the decision, or the consent, permission or other authorisation, before the date mentioned in paragraph (1)."

12. Regulation 129 provides:

"(1) Natural England may—

- (a) provide advice and assistance, or make representations, to any competent authority on any matter which relates to England and is connected with the discharge of the competent authority's functions under these Regulations; and
- (b) undertake, commission or support (whether by financial means or otherwise) such research and scientific work as they consider is required for the purposes of providing advice or assistance or making representations under sub-paragraph (a)."

13. In addition to these regulations, regulation 9A (8) provides:

"So far as lies within their powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds (except habitats beyond the outer limits of the area to which the new Wild Birds Directive applies)."

14. This tracks the duty imposed by article 4.4 of the Wild Birds Directive. It is not limited to SPAs or pSPAs but applies generally. This is confirmed by Case C-355/90 *Commission of the European Communities v Spain* in which the court held at [22] that the duty arising under article 4.4 (which is the origin of regulation 9A (8)) was not confined to areas where an SPA had already been established.

15. Section 97 of the Town and Country Planning Act 1990 ("the Act") gives a local planning authority power to revoke a planning permission. Where the permission relates to the carrying out of building or other operations, the power must be exercised before the operations have been completed. If planning permission is revoked section 109 of the Act provides for the payment of compensation.

16. Section 106 of the Act provides that:

"(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (... "a planning obligation"), enforceable to the extent mentioned in subsection (3)—

- (a) restricting the development or use of the land in any specified way;
- (b) requiring specified operations or activities to be carried out in, on, under or over the land;
- (c) requiring the land to be used in any specified way; or
- (d) requiring a sum or sums to be paid to the authority ... on a specified date or dates or periodically."

17. A planning obligation is enforceable against the person entering into the obligation and any person deriving title from him. The power to enter into planning obligations is limited to some extent by regulation 122 (2) of the Community Infrastructure Regulations 2010 which provides:

"A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

- (a) necessary to make the development acceptable in planning terms;
- (b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.”

The relevant facts

18. The application for outline planning permission was made on 8 February 2010. It was accompanied by an ecological assessment prepared after informal consultation with, among others, Natural England. The Council also consulted Natural England who gave their initial response in a letter dated 1 April 2010. Natural England said that the ecological assessment was “very comprehensive” and had “a very positive approach to providing biodiversity enhancement”. They were “generally supportive of the approach, survey methodologies, findings and recommendations made”. They “strongly welcomed” the work presented on nightjar. But they advised additional mitigation measures; and in particular a buffer zone of 400 metres from Harlow Wood. They followed this with a modified letter on 16 April in which they pointed out that “the Sherwood area supports a nightjar population that qualifies for consideration as to whether the area should be classified as an SPA for this species of European importance.” It was possible that an SPA boundary could include Harlow Wood. If it were to, then the Council would have to undertake a Habitats Regulation Assessment. They concluded:
“It is therefore advised that it would be prudent to ensure that all potential impacts on the nightjar population have been adequately avoided with appropriate measures at this stage, in order to ensure that any future need for a Habitats Regulations Assessment is met with a robust set of measures in place.”
19. In response the Council asked on 13 May 2010 for Natural England’s confirmation whether the site was covered by a pSPA or SPA and therefore “whether additional consideration is required beyond that which would normally be applied to a planning application”. They also asked for guidance on the process if there was no formal designation in place. Natural England replied on 3 June 2010. They said:
“It is presently Natural England’s view that based on Government’s previous practice, the Sherwood Forest region is not a pSPA and therefore the provisions of the Habitats Regulations do not presently apply. Natural England has not so far provided any advice to the Secretary of State on the selection of any SPA in the Sherwood Forest area, i.e. the process has not commenced that leads the site to be classed as formally “proposed”. Given that it is Natural England’s view that current practice would be not to treat the Sherwood area as a pSPA, we are therefore bound to advise your authority to that effect.”
20. They went on to say, however, that there remained a possibility of an area of Sherwood Forest being recommended as an SPA, and that it would be beneficial for the Council to consider the implications of a future classification.
“Natural England would therefore advise that local planning authorities may wish to adopt a fully recorded “risk based approach” or similar to provide decision-making with a degree of future-proofing until such a time that there is more certainty on whether the Sherwood Forest area is to be afforded pSPA or SPA status.... This advice is given to enable the Council to be adequately prepared in order to ensure that any future need for a Habitats Regulations Assessment for the reserved matters/full application, and/or as part of a review of any extant permission, is met with a robust set of measures in place.”
21. They went on to say that they recognised the uncertainty placed considerable difficulties on local planning authorities and concluded:
“Currently, based on our advice that the site is not a pSPA or SPA at the present time, Natural England can only advise on what we see as the best approach for Local Planning Authorities to take. How each local authority actually chooses to confront this issue is a matter for them.”
22. This advice was encapsulated in an Advice Note to Local Planning Authorities dated 28 June 2010. That advice note also said:

“Natural England suggest that as part of a risk-based approach to forward planning and decision-making, development plans and proposals are accompanied by an additional and robust assessment of the likely impacts arising from the proposals on breeding nightjar and woodlark in the Sherwood Forest area. This should ideally cover the potential direct, indirect and cumulative impacts which may include, but may not be limited to, the following;

- Disturbance to breeding birds from people, their pets, noise, traffic and or artificial lighting
- Loss, fragmentation and / or damage to breeding and / or feeding habitat
- Bird mortality arising from domestic pets and / or predatory mammals and birds
- Bird mortality arising from road traffic and / or wind turbines
- Pollution and / or nutrient enrichment of breeding habitats.”

23. Over the summer Natural England met the developers. They wrote to the Council on 8 September 2010 with an update. Their advice on the status of the site remained the same. They repeated that:

“We have also recently advised you that it would be beneficial for the Council to consider the implications of a future SPA classification for the Lyndhurst development, bearing in mind the requirement within the Habitats Regulations for the review of permissions where there is a likelihood of significant effects upon a pSPA/SPA, should the classification come forward. ...

Natural England has therefore advised that local planning authorities may wish to adopt a fully recorded “risk based approach” or similar to provide decision-making with a degree of future-proofing until such a time as there is more certainty on whether the Sherwood Forest area is to be afforded pSPA or SPA status.... This advice continues to be given to enable the Council to be adequately prepared in order to ensure that any future need for a Habitats Regulations Assessment for the reserved matters/full application, and/or as part of a review of any extant permission, is met with a robust set of measures in place.”

24. They had considered proposals by the developer for a barrier to protect the breeding ground of nightjar which they described as “a comprehensive and carefully considered approach.” All practical measures had been carefully designed and incorporated and there appeared to be “little else that could be added”. However, they reiterated the point that standard practice was for a 400 metre buffer zone to be established round SPAs elsewhere in the country. If Sherwood Forest were to be designated as an SPA it was “quite possible” that such a buffer would be required, in which case it would remove the majority of the residential element of the development. They concluded by saying that it was for the Council to take a risk based approach to determining the application and that:

“Natural England is unable to support or object to the Lyndhurst proposal in terms of its potential effects upon an SPA that has not yet been formally proposed.”

25. The substance of this advice was repeated in Natural England’s letter of 16 November 2010, which was designated their “Formal Response” on all submitted documentation. The only significant addition related to the proposed barrier. Natural England commented that because the 400 metre buffer zone had been adopted elsewhere the effectiveness of the barrier remained “unproven and therefore uncertain”:

“For this reason, in a pSPA or SPA situation, Natural England would be unlikely to support the use of a barrier to prevent adverse effects upon SPA ground nesting bird interest features.”

26. I should note three points at this stage. First, Natural England were not saying that the barrier and associated measures would not work. If they had thought that then they would doubtless have objected rather than remain neutral. They were saying no more than they did not know whether the measures would work. Second, their non-approval of the barrier was limited to a “pSPA or SPA situation”. Third, in that situation it was likely that a 400 metre buffer zone

would be applied; and it was for that reason that they could not support the barrier and associated measures.

27. At some point, probably in early July 2011, Natural England saw the report that the Council's planning officers intended to place before the planning committee. Natural England took the view, in an e-mail of 11 July 2011, that the report did not fully reflect Natural England's advice "with specific regard to the issue of the need for a risk based approach and the possibility of a future Sherwood SPA. Whilst it could be argued that the points are not factually incorrect, it is considered that the report does not properly represent Natural England's advice". They asked for the e-mail to be placed before the committee. The substance of their comments was that:

"With regard to the Lyndhurst proposal, Natural England has made it clear that on the issue of the possibility of a future SPA, we cannot object to the proposal. However, we have also made it clear that on the issue of the possibility of a future SPA and the application of a risk based approach, we also cannot support the proposal because, despite all measures that have been included, the close proximity of the development to Harlow Wood and the unproven effectiveness of barrier fencing leads us to conclude that if the site was formally proposed as an SPA Natural England would be likely to object if a 400m buffer zone was applied.

The committee report makes reference to Natural England finding the proposals acceptable with regard to the consideration of the possibility of an SPA (paragraph 1 of Ecological Issues section) and has no objection (paragraph 4 of Ecological Issues section). This fails to fully reflect our advice of 'no objection but also not able to support the proposal'.

The protocol to protect Harlow Wood includes the barrier fencing, which Natural England has repeatedly said has unproven and uncertain effectiveness, and would be unlikely to be supported by Natural England if an SPA was in place. Again it is felt that this advice is not truly reflected in the committee report, where it is stated that the protocol has met with the acceptance of Natural England (paragraph 6 of Ecological Issues section)."

28. On the same day Natural England re-issued their Advice Note in substantially the same terms as the June 2010 version.
29. The officers do not appear to have altered their report despite the e-mail of 11 July, no doubt because the planning committee was due to meet on the following day and the agenda and accompanying papers had already been sent out. The relevant sections read:

"Ecological Issues

The site consists primarily of greenfield land, the majority of which is in use for agricultural purposes. In order to ascertain the impact that the development would have on the ecology of the area, Natural England and Nottinghamshire Wildlife Trust (NWT) have been formally consulted on the application. Although details would be finalised at reserved matters stage, no objection has been raised by Natural England. It is noted that NWT have objected to the proposal, in particular with regard to the issues relating to the presence of Nightjar and Woodlark within the area and whether a potential Special Protection Area (pSPA) or a Special Protection Area (SPA) will be designated. However as Natural England considers that the proposals are acceptable in principle subject to conditions and a Section 106 agreement being secured, the comments of NWT are noted but do not justify the refusal of planning permission.

Potential Special Protection Area/Special Protection Area

Natural England has advised that the presence of a substantial breeding population of Nightjar and Woodlark in the Sherwood Forest region may warrant classification of suitable territories and habitat as a Special Protection Area (SPA) under the European Union Birds Directive. Prior to such an area being designated a potential Special Protection Area would need to be established (pSPA) by the Secretary of State. However this process has not been commenced and at the present time Natural England's formal advice is that the Sherwood Forest region is not an existing pSPA or SPA. The relevance

of this to the Lindhurst proposal is that Harlow Wood, to the southern boundary of the site, has been identified by NWT as an important area for Nightjars and Woodlark and therefore could be included within any pSPA or SPA designated. If such a designation was made, it would be necessary to undertake a Habitat Regulations Assessment and to assess any impacts that the Lindhurst proposal would have on the pSPA and SPA, even if outline and/or reserved matters approval had been given by the Council at that point.

In the event that a Habitat Regulations Assessment identified that the Lindhurst development would have an unacceptable impact upon any pSPA or SPA designated and these impacts could not be successfully mitigated against, it could become necessary to formally modify or revoke the permission, to prevent the adverse impact(s) from arising. If the permission was revoked then the Council would be liable to pay compensation to the applicant/land owners which, given the size of the development, could represent a significant sum. The advice from Natural England is therefore to take a risk based approach prior to the granting of outline planning permission.

At the present time, with no pSPA or SPA designated, Natural England has no objection to the proposal. The applicant has presented a proposed protocol to reduce any impact upon the adjacent Harlow Wood which consists of a number of elements including fencing and a water barrier to prevent access from both people and cats and this is accepted as being appropriate for the present circumstances, subject to final details being secured by way of a planning condition. An area of replacement land suitable for ground nesting birds would be provided off-site and this would form part of the Section 106 planning obligation. However, Natural England advise that if a pSPA or SPA is designated, based upon approaches taken in similar circumstances elsewhere in the country, it is likely that an exclusion zone of 400 metres from the pSPA/SPA could be applied within which no residential development could take place. If such an exclusion zone was applied to the Lindhurst proposal it would prevent the residential development on much of the land to the south of the MARR route and any permission in place (which was not already built out) may need to be modified or revoked.

Legal opinion has been obtained regarding this matter in order that the risk to the Council if a pSPA/SPA is designated can be assessed. It is considered that the biggest risk lies with the possibility that the permission would have to be modified or revoked and that the Council would be obliged to pay compensation to the parties affected by this. To eliminate this possibility, the applicant has agreed to include a provision within the Section 106 planning obligation that the owners would not seek compensation in the event the planning permission is modified or revoked. The legal opinion obtained suggests that using a Section 106 agreement to indemnify the Council against the financial risk of modification or revocation is a legitimate way to proceed.

The Rainworth Incinerator Public Inquiry decision has been considered and the reasons for refusal relating to the pSPA/SPA issues are noted. However given that the Lindhurst site is adjacent to, but not within, an area identified as important for Nightjars and Woodlarks, that an extensive protocol has been devised to offer protection to Harlow Wood and this has met with the acceptance of Natural England, and that the Section 106 Planning Obligation would contain an indemnification should planning permission need to be revoked, it is considered that adequate measures have been put in place to address issues relating to the pSPA/SPA at the present time. In conclusion, it is considered that the proposed development, circumstances and site characteristics of the Rainworth Incinerator proposal were materially different to the Lindhurst proposals and therefore the Lindhurst development must be considered upon its own merits.”

30. The planning committee met on 12 July. Although the e-mail from Natural England was not placed before the committee, the initial rubric of the minutes record that additional correspondence from Natural England was reported verbally. There is a transcript of what was said. Mr Cook, the planning officer, presented the report. In introducing it he told the

committee that there had been a number of observations, and he mentioned that Natural England had contacted the Council to clarify their position. He continued (with emphasis added):

“Natural England support many of the principles set out in the scheme such as habitat creation, sustain urban drainage systems, green roofs, etc, but are not in a position to either support or object to those proposals affecting that part of the site which adjoins an area of Harlow Wood which may be designated as a special protection area...”

“Turning to ecological issues, Natural England and Notts Wildlife have been consulted on the application. No objection has been raised by Natural England to various elements of the proposal in respect of habitat creation such as green roofs but neither objection nor supports the proposal that may impact on the proposed future SPA at Harlow Wood. Notts Wildlife Trust have objected to the proposal however, as Natural England consider that the proposal in part as acceptable in principle subject to conditions and to section 106 agreement being secured...”

Looking at the potential special protection area the presence of a substantial breeding population of Nightjars and wood lark in the Sherwood Forest region may warrant classification of a suitable territories and habitats as a special protection area under the European Union Bird Directive. However, this process has not commenced and at the present time Sherwood Forest Region is not an existing PSPS or SPA. If such a designation were to be made it would be necessary to undertake a habitat regulations assessment and to assess any impact the Lindhurst Development would have on these areas even if outline and or reserve matters approval had been given by the Council at that point. *In the event that a habitat regulations assessment identified that the Lindhurst Development would have an unacceptable impact on those areas and these impacts could not be successfully mitigated against it could become necessary to formerly modify or revoke the permission in which case the Council would be liable to pay compensation to the Applicants and Landowners. The advice from Natural England is therefore to take a risk based approach prior to the granting of outline planning permission.* In the absence of an SPA the Applicant proposes measures to reduce the potential impact on Harlow Wood. In an area of complementary land suitable for ground nesting birds will be provided off-site and this would be part of the Section 106 Agreement however, Natural England advised that *if an SPA is declared based upon the approach its taken in similar circumstances elsewhere in the country it is likely that an exclusion zone of 400 metres from the area would be applied* within which no residential development could take place. If such an exclusion zone were applied to the Lindhurst Development’s proposals it would prevent the residential development on much of the land to the south of the Marr Route and any permission in place which was not already built out may need to be modified or revoked. A legal opinion has been obtained regarding this matter in order that the risk to the Council if such an area is designated can be assessed. It is considered that the biggest risk lies with the possibility that permission would have to be modified or revoked and that the Council would be obliged to pay compensation to the parties affected by this. To eliminate this possibility the Applicant has agreed to include a provision within Section 106 Obligation that the owners would not seek compensation in that event the planning permission is modified or revoked. The legal opinion obtained suggests that using a Section 106 Agreement to indemnify the Council against financial risk of modification or revocation is a legitimate way to proceed.

The Rainworth Incinerator Public Inquiry decision has been considered and the reasons for its refusal relating to the PSPA and SPA issues are noted. However, given that the Lindhurst site is adjacent to but not within an area identified important for Nightjars and wood larks and *an intensive protocol has been devised to offer protection to Harlow Wood and although this has not been met with the acceptance of Natural England* and that a Section 106 Obligation would contain an indemnification should planning

permission need to be revoked *it is considered that adequate measures have been put in place to address issues relating to the PSPA at the present time.*”

31. Mr Saxton, the chief planning officer also addressed the committee. He said (with emphasis added):
- “I would also clarify the point from the report earlier that whilst an extensive protocol has been devised in relation to the protection of Harlow Wood *Natural England have confirmed that they will neither support nor object to that protocol but would not support any barrier fencing in the event that PSPA was declared.*”
32. The committee then voted and with the aid of the chair’s casting vote the proposed development was approved, subject to the negotiation and finalisation of a section 106 agreement.
33. On 14 January 2013 Natural England wrote to the Council. They confirmed that there was still no pSPA or SPA in the area and therefore they did not consider that there was a specific legal requirement for the Council to undertake a formal appropriate assessment. They continued:
- “As previously advised, and as set out in our advice note, it has been strongly recommended that the Council still consider the potential risks to ground nesting birds that would form interest features of any future SPA, and their associated habitat, namely nightjar and woodlark...
- On the specific point of a possibility of a future SPA classification, our advice is that the decision does not, in our view, follow our suggested risk based approach...
- On checking the committee report prior to the planning committee for the Lyndhurst proposal last year, I felt that Natural England’s advice had not been fairly presented within the report and I therefore telephoned and emailed to clarify our position and asked that my email be provided to the committee...I am led to believe that the email was not read to or given to committee members.”
34. On 15 February 2013 Natural England sent another e-mail to the Council. In it they said that they had:
- “... cautioned the approach that the Authority has taken to manage the potential risk of a pSPA for Woodlark and Nightjar being created in the future (and the approach does deviate from our own guidance on a risk based approach).”
35. They also reminded the Council that they had advised that the barrier fencing was unproven and uncertain in its effectiveness; and reminded the Council of its legal duty under regulation 9 (8) of the Regulations. Further discussions took place between the Council and Natural England on the details of the conditions to be attached to the planning permission, but nothing turns on those.
36. By April the terms of the section 106 agreement had been finalised, and on 17 April 2013 the Council formally granted outline planning permission. The section 106 was made at the same time. The impugned provision in its original form was:

“6. Protected Species (Nightjars)

- 6.1 Subject to the District Council complying with paragraph 3 of the Third Schedule below, in the event that the Planning Permission is modified or revoked pursuant to the review provisions in Regulation 69 of the Conservation of Habitat and Species Regulations 2010 and s. 97 of the 1990 Act the Owners shall not apply to the District Council for compensation pursuant to s. 107 of the 1990 Act.”
37. Paragraph 3 of the Third Schedule required the Council to use its reasonable endeavours to resist any attempt by others to seek an order for the revocation or modification of the planning permission. Clause 6 has since been redrafted to read as follows:

“Subject to the District Council complying with paragraph 3 of the Third Schedule below, in the event that the Planning Permission is revoked or modified pursuant to the review provisions in Regulation 69 of the Conservation of Habitats and Species Regulations 2010 and s.97 of the 1990 Act if the Owners apply to the District Council for compensation pursuant to s.107 of the 1990 Act the Owners further covenant that 7 days after the date of any award of, or agreement to pay statutory compensation to pay to the District Council a sum equal to the statutory compensation awarded or agreed, by way of indemnity to the District Council.”

38. The change is that instead of prohibiting an application for compensation, the owners now covenant to pay the Council the amount of any compensation awarded. The modified version has not been executed but the developers have offered an undertaking to do so.

The status of Natural England’s advice

39. Since the first ground of appeal asserts that the Council did not follow Natural England’s advice to conduct a “risk-based assessment” it seems to me that the first question is: what was the status of that advice? Although the Council was obliged to consult Natural England about the potential impact of the development of the SSSI, no complaint is made in relation to the SSSI. The complaint is that the Council failed to follow Natural England’s advice about carrying out a risk based assessment in relation to the potential impact of the development on a possible pSPA or SPA. We have seen that under regulation 61 (3) of the Habitats Regulations a planning authority must consult Natural England. This duty arises if the planning authority is considering the grant of planning permission which is likely to have a significant effect on a European site. In such a case the planning authority must carry out an assessment. The reason why it must consult Natural England is “for the purposes of the assessment”. If no assessment is required, then it must follow that no consultation is required. The NPPF extends the obligation to pSPAs. In the case of a pSPA the planning authority must consult Natural England and (I assume) must conduct a habitat assessment. But a site only becomes a pSPA once the government has initiated consultation. That has not happened in the case of Sherwood Forest. It follows in my judgement that the Council had no obligation to consult Natural England about the potential impact of the development on nightjar or woodlark.
40. No doubt Natural England had the power to give advice to the Council under regulation 129 of the Habitats Regulations; and no doubt that advice, coming as it did from an expert body, would have been a material consideration. But I do not consider that it goes any further than that. In so far as the first ground of appeal, as developed in the skeleton argument, is founded on the premise that Natural England was a statutory consultee, that premise is, in my judgement, ill-founded. For the same reason in so far as that ground is founded on the duties of a public body to take into account the results of a consultation that it is not obliged to undertake, it is equally ill-founded.
41. In fact in oral submission Mr Edwards QC, on behalf of Ms Savage, accepted that as regards the question of nightjar and woodlark, Natural England was not a statutory consultee. But, he said, the Council gave inadequate weight to Natural England’s advice, coming as it did from an authoritative and responsible source. The problem with this argument is that, as Mr Edwards also accepted, questions of weight are matters for the decision maker; all the more so on issues that involve planning judgements. An attack based on an allegation that the Council gave too little weight to advice received from one particular source is almost bound to fail.

Natural England’s advice

42. Next it is necessary to consider what Natural England’s advice was, and why it was given. To answer the second part of the question first, it was given because there was a risk that Sherwood Forest might be proposed as an SPA and a further risk that, if it was, its boundaries might include Harlow Wood in which event any planning permission would have to be reviewed. This seems to me to be clear from Natural England’s correspondence. The nesting habits of nightjar and woodlark would be affected to the same extent by the development whether or not Harlow Wood formed part of an SPA. In other words the risk to habitats is the

same irrespective of the legal status of Harlow Wood. Thus the advice was all given in the context of a possible change in the *legal* rather than the physical landscape. This is also clear from Natural England's letter of 8 September 2010, where having drawn attention to the requirement in the Habitats Regulations for a review of permissions in the event of designation as an SPA they went on to say that "Natural England has *therefore* advised" that the Council might wish to adopt a risk based approach. Part of the purpose of such an approach would be to provide "a degree of future-proofing". In context "future-proofing" is nothing to do with the impact on the habitat of the birds, but on what the future might hold for the Council if it had already granted planning permission. The letter goes on to say that the advice was given in order for the Council to be adequately prepared in the event of (among other things) "a review of any extant permission."

43. So one has to ask: what was the risk to which Natural England referred in advising a "risk-based assessment"? In my judgement the risk was that if the Council had already granted planning permission it would have to reassess the environmental impact of the development on habitats, and if detrimental effects could not be mitigated, the permission would have to be revoked or modified. From the Council's perspective, therefore, the risk was ultimately the financial risk of having to pay compensation.
44. Moreover, as Natural England also said in their letter of 10 June 2010, having referred to the possible future classification of Sherwood Forest as an SPA:
"How each local authority actually chooses to confront this issue is a matter for them."
45. Thus the "issue" to which Natural England referred was the risk of a future proposal or actual designation which would require a Habitats Assessment, and the possibility of a revocation or modification of a granted planning permission. The Council chose to meet that risk in two different ways. The first was by the acceptance of the protocol which the applicants had proposed for protecting wildlife in Harlow Wood. This was designed, after extensive collection of data, to mitigate or eliminate harmful effects of the development on the nightjar and woodlark populations. It included not only a physical barrier but also proposals for a ranger service to monitor the site, and the imposition of restrictive covenants prohibiting the keeping of cats. Although Natural England had said that the proposals for a barrier were unproven and uncertain, they nevertheless also said that the proposals in the protocol were "a comprehensive and carefully considered approach;" that "all practical measures available to try to prevent access by people and domestic cats" had been incorporated and there appeared to be "little else that could be added". As we have seen Mr Cook, the planning officer, told the committee that it was his view that "adequate measures have been put in place to address issues relating to the PSPA at the present time". The committee were entitled to accept that advice. The second was by clause 6 of the section 106 agreement which, if valid, protected it against the risk of having to compensate the developer for loss sustained as a result of revoking or modifying the granted permission. That is what the Council chose, and as Natural England had advised, the choice was for the Council to make.
46. I found it very difficult to understand precisely what more the Council was supposed to do, even if it had followed Natural England's advice. The data had been collected, mitigation measures had been proposed and, in the Council's view they were adequate. If all that the "risk based assessment" was to do was to incorporate Natural England's suggestion of a 400 metre buffer zone, that would not have required any further assessment. All it would have required was the adoption of that suggestion.

An independent breach of duty?

47. Mr Edwards also submitted that the Council's failure to conduct a risk-based assessment was an independent breach of the Council's duty under regulation 9A (8):
"So far as lies within their powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds..."

48. One must remember that, in the UK, the full duty imposed by the Habitats Regulations already goes beyond established SPAs, because it also extends to pSPAs. In the case of a site which is not even a pSPA in my judgement the Council complied with its duty to “use all reasonable endeavours” by adopting the protocol which the applicants had proposed. I agree with the Council that the Habitats Regulations, supplemented by the NPPF, do not require a local planning authority to require to undertake a “shadow assessment” or other quasi-appropriate assessment in respect of sites which are not even pSPAs.
49. Moreover, as Mr Elvin QC submitted on behalf of the developers, Natural England did not object to the development; and their only reservation was based on the possibility of future classification as an SPA. If there had been any serious suggestion of a breach of the Council’s duty under regulation 9A (8) Natural England would have raised it.
50. The duty is, moreover, no more than a duty to “take all reasonable steps”. The steps proposed by the Council were, according to Natural England, “all practicable steps” that could be taken. It is not, in my judgement, seriously arguable that the Council failed to comply with its duty under regulation 9A (8).
51. I would reject the first ground of challenge.

Were members adequately informed?

52. The starting point here is that Natural England accepted that nothing in the officers’ written report was factually incorrect. By the time that Natural England had commented on the draft, it was too late to amend it before the meeting on the following day. It is true that Natural England’s e-mail was not placed before the committee, but if the substance of Natural England’s comments were fairly relayed to the committee, I do not consider that the committee’s decision would be vitiated: *R v Selby DC ex p Oxton Farms* (18 April 1997), [1997] EGCS 60 per Judge LJ.
53. The points to which Natural England drew attention in the e-mail of 11 July were these:
- i) The report failed fully to reflect their advice of ‘no objection but also not able to support the proposal;’ and
 - ii) The report referred to the protocol to protect Harlow Wood which included the barrier which Natural England had repeatedly said had unproven and uncertain effectiveness, and would be unlikely to be supported by Natural England if an SPA was in place. The written report quite wrongly said that the protocol had been “accepted” by natural England
 - iii) The report (and the officers in oral amplification) wrongly conflated the risk to habitats and the risk to the public purse.
54. So far as the first of these points is concerned, Mr Cook told the committee:
- “Natural England ... are not in a position to either support or object to those proposals affecting that part of the site which adjoins an area of Harlow Wood which may be designated as a special protection area.”
55. He repeated that statement later in his presentation.
56. In my judgement that was a fair summary of Natural England’s position of ‘no objection but also not able to support the proposal.’ So far as the second of these points is concerned, Mr Cook told the committee:
- “... an intensive protocol has been devised to offer protection to Harlow Wood and although this has not been met with the acceptance of Natural England... it is considered that adequate measures have been put in place to address issues relating to the PSPA at the present time.”
57. Accordingly, although Mr Cook told the committee that Natural England did not accept the protocol he gave it as his own opinion that the measures were adequate in the context of a pSPA. Mr Saxton told the committee:

“... an extensive protocol has been devised in relation to the protection of Harlow Wood Natural England ... would not support any barrier fencing in the event that PSPA was declared.”

58. In my judgement that also fairly summarises Natural England’s position. It is also true to say that Mr Cook also told the committee that Natural England had advised taking “a risk based approach prior to the granting of outline planning permission”; and he also explained that if an SPA were to be declared a 400 metre buffer zone would be a likely feature of it. Thus the committee were told:
- i) That Natural England neither supported nor objected to the proposal;
 - ii) Natural England had not approved the protocol;
 - iii) Natural England would not support the barrier in the event that a pSPA was declared;
 - iv) If an SPA were declared it was likely that a 400 metre exclusion zone would be applied within which no residential development could take place.
59. Mr Edwards submitted that the officers’ explanation was deficient because it did not explain why Natural England took the view that it did. It is apparent, however, that the reason why Natural England took the view that it did was that they thought that if Harlow Wood became part of an SPA a 400 metre exclusion zone would be imposed. That potential consequence was explained to the committee. Next he said that the officers did not explain why the Council had declined to follow Natural England’s advice to carry out a risk based assessment. But as I have said the risks were those consequent on the possible designation of Harlow Wood as part of an SPA and the Council did in fact choose to address that risk in the way that I have explained. Finally he said that the officers (and hence the Council) had wrongly conflated the risk to habitats and the risk to the public purse. I do not agree. In my judgement the very purpose of Natural England’s advice was to enable the Council to be prepared for a possible change in the legal status of Harlow Wood. That had everything to do with the public purse. In my judgement Natural England’s position was fairly explained to the committee.
60. It is true that Natural England have subsequently expressed reservations about the way that the Council reached its decision and remain concerned that their position might not have been fully explained. But Natural England were not, as far as I can see, shown the transcript of what the officers told the committee before the debate began.
61. So far as the third point is concerned, it is not one that Natural England raised in commenting on the written report. Since they had clearly studied the report with care, if they had been concerned about the way in which the risk had been described, they would surely have raised it. In fact, for reasons I have explained, I think that the risk that Natural England had in mind was indeed the potential risk to the public purse contingent on a change in the legal status of Harlow Wood.
62. I would reject the second ground of challenge.

Should the debate have been reopened between the resolution to grant and the grant?

63. In the absence of some new material consideration arising between the date of the resolution to grant and the grant itself, there can be no duty to re-open the decision.
64. Mr Edwards sought to rely on the fact that between the date of the resolution to grant planning permission and the actual grant the Council’s officers produced a decision tree to set down the procedure for assessing the risk of development on nightjar and woodlark, and for consulting Natural England. However, although this document was published on the Council’s website, it was for internal use and had no status as a development plan policy, a draft development plan policy, or a supplementary planning document. In order to have achieved any of those statuses, the regulatory requirements of the Town and Country Planning (Local Planning) (England) Regulations 2012 (including public consultation) should have been followed. They were not.

The decision tree was no more than a methodology. In my judgement it was not a material consideration.

65. It follows that the only material considerations relied on are those arising under the first two grounds of challenge. Since I have rejected both of them, this ground must fail too.

The section 106 agreement

66. The argument under this head is that the committee did not decide that the development would be acceptable in planning terms in the absence of the section 106 agreement. The section 106 agreement (and its promise to eliminate financial risk to the council in the event of a revocation of the planning permission) was something on which the committee placed weight. The obligation in clause 6 of the section 106 agreement neither overcomes a 'legitimate planning objection' nor is necessary to do so. Consequently it falls foul of regulation 122 of the Community Infrastructure Levy Regulations 2010.
67. The original section 106 agreement purported to preclude any application for compensation in the event of a revocation or modification of the planning permission. It has since been modified so as to provide for a payment by the developers of the amount of any compensation awarded. It is common ground that the modified obligation falls within section 106 (1) (d).
68. So the question is whether it is struck down by regulation 122 (2) of the Community Infrastructure Regulations. Regulation 122 will only be engaged if that particular planning obligation was a reason for granting planning permission. If proposed development is acceptable in planning terms the securing of additional benefits by means of a planning obligation is not unlawful: *Derwent Holdings Ltd v Trafford BC* [2011] EWCA Civ 832 at [15].
69. In my judgement there is a disconnect between clause 6 of the section 106 agreement and carrying out the development itself. Clause 6 will only come into operation if the planning permission is revoked or modified; and the development affected by the revocation or modification does *not* go ahead. If the development has already been built, then revocation is impossible. I fail to see how the mere grant of planning permission has any environmental (or indeed any other tangible) impact on the world. It is only the *implementation* of the planning permission which has that effect. But once the planning permission has been implemented, clause 6 cannot operate to the extent that implementation has taken place. So I fail to see how clause 6 can be said to have been used to overcome a planning objection to the development. Regulation 122 simply does not bite.
70. For the same reason it necessarily follows that the committee did think that the development was acceptable in planning terms; and must have thought so even without clause 6 of the section 106 agreement. If the development went ahead, and was built out, then the development would exist in the real world but clause 6 would never come into operation. So the decision to grant planning permission necessarily implies that the committee thought that the built development would be acceptable in planning terms. This is supported by the fact that in the reasons given for the grant of planning permission the Council stated that they had had regard to the presence of protected species including mitigation measures and that "the proposal will not cause harm to the environment". The stated reasons for the grant of permission do not mention this clause in the section 106 agreement at all. Nor does the summary in the officers' report recommending reasons for the grant.
71. I would dismiss the challenge on all grounds.

Lady Justice Eleanor King:

72. I agree.

The President of the Family Division (Sir James Munby):

73. I also agree.