Neutral Citation Number: [2018] EWHC 3485 (Admin) Case No: CO/424/2017

IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION PLANNING COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 18 December 2018

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **Claimant**

on the application of

JAMES KENYON

- and - **SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT** **Defendant**

(1) WAKEFIELD COUNCIL
(2) HEMSWORTH TOWN COUNCIL
(3) SAUL CONSTRUCTION LIMITED **Interested Parties**

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Marc Willers QC and Paul Stookes (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Carine Patry (instructed by the **Government Legal Department**) for the **Defendant**
The **Interested Parties** did not appear and were not represented

Hearing date: 22 November 2018

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Approved Judgment

MRS JUSTICE LANG :

1. On 27 January 2017, the Claimant applied for judicial review of a direction by the Defendant, made on 16 December 2016, under regulation 4(3) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 Regulations"), that proposed development at the disused Hemsworth Sports Complex, Hemsworth, Pontefract, West Yorkshire (hereinafter "the Site") was not EIA development within the meaning of regulation 2 of the 2011 Regulations, and so an environmental statement to assess the environmental effects of the development was not required.

2. The Claimant is a local resident, who is concerned by an application by the Third Interested Party ("the developer") to the First Interested Party, (hereinafter "the Council"), for outline planning permission for a development of 150 homes at the Site, because of its potential environmental impacts, among other reasons. In particular, residents at the new development are likely to use cars, which will increase air pollution levels locally. Furthermore, the land is partially contaminated because the Site (a former brickworks quarry) was used for landfill, and other purposes.

3. The application for outline planning permission was made in January 2008 and it was granted by the Council on 24 November 2010. It was quashed by the High Court on 14 February 2012, because of the failure to carry out an EIA screening opinion. On 20 May 2013, the Council issued a negative EIA screening opinion and, on 5 September 2013, the Council again resolved to grant outline planning permission. On 31 March 2016, the Council granted a second permission, although on 1 July 2016, in a second claim for judicial review, the second grant of outline planning permission was quashed by consent.

4. On 5 September 2016, the Claimant applied to the Defendant for a screening direction, under regulation 4(8) of the 2011 Regulations. His solicitor Dr Paul Stookes, provided lengthy submissions and evidence in support of the application. On 21 November 2016, Wakefield Council again issued a negative screening opinion. On 16 December 2016, the Defendant made a screening direction, concluding that the proposal met the applicable criteria for an urban development project under paragraph 10(b) of schedule 2 to the 2011 Regulations, but it was not EIA development because it was not likely to have significant effects on the environment, applying the criteria in schedule 3.

5. The Claimant challenged the Defendant's decision on the following grounds, as pleaded in his 'Detailed Statement of Facts and Grounds':

   i) The Defendant failed properly to consider the cumulative environmental effects of the proposal in his screening direction;

   ii) The Defendant placed undue reliance upon conditions in an attempt to remedy the adverse environmental effects which were likely to arise from the proposal;

   iii) The Defendant failed to consider other relevant environmental matters relevant to the proposal, including loss of woodland, open space and recreation areas;

   flood risk; and the increase in greenhouse gas emissions generated by the new homes.

6. On 15 August 2018, Sir Ross Cranston (sitting as a High Court Judge), granted the Claimant permission to apply for judicial review on ground 1 to the "limited extent indicated below", which related only to air quality. The Judge refused permission on grounds 2 and 3. The Claimant did not challenge the Judge's decision on ground 1, but made a renewed application for permission on grounds 2 and 3, which was listed to be heard on the same occasion as the substantive hearing. However, the Claimant abandoned ground 3 at the commencement of the hearing. I considered ground 2 on a rolled-up basis, together with ground 1.

The legal framework

7. The EIA Directive 2011/92/EU was implemented in the UK by the 2011 Regulations, which governed the procedures to be followed in determining this application, as the application pre-dated the coming into force of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

8. "EIA development" is defined in regulation 2(1) as being either "Schedule 1 development" or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

9. Regulation 4 stipulated when development is to be treated as "EIA development": "(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.

> (2) The events referred to in paragraph (1) are—
>
> (a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or
>
> (b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development.
>
> (3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development.
>
> (4)
>
> (a) The Secretary of State may direct that these Regulations shall not apply in relation to a particular proposed development specified in the direction either—
>
> (i) in accordance with Article 2(3) of the Directive (but without prejudice to Article 7 of the Directive), or
>
> (ii) if the development comprises or forms part of a project serving national defence purposes and in the opinion of the Secretary of State compliance with these Regulations would have an adverse effect on those purposes;

(b) Where a direction is given under paragraph (4)(a) the Secretary of State must send a copy of any such direction to the relevant planning authority.

(5) Where a direction is given under paragraph (4)(a)(i) the Secretary of State must—

(a) make available to the public the information considered in making the direction and the reasons for making the direction;

(b) consider whether another form of assessment would be appropriate; and

(c) take such steps as are considered appropriate to bring the information obtained under the other form of assessment to the attention of the public.

(6) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

(7) Where a local planning authority adopts a screening opinion under regulation 5(5), or the Secretary of State makes a screening direction under paragraph (3)—

(a) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion; and

(b) the authority or the Secretary of State, as the case may be, shall send a copy of the opinion or direction and a copy of the written statement required by sub-paragraph (a) to the person who proposes to carry out, or who has carried out, the development in question.

(8) The Secretary of State may make a screening direction either—

(a) of the Secretary of State's own volition; or

(b) if requested to do so in writing by any person.

(9) The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of “Schedule 2 development” is satisfied in relation to that development.

(10) The Secretary of State shall send a copy of any screening direction and a copy of the written statement required by paragraph (7)(a) to the relevant planning authority."

10. By regulation 5, the applicant for planning permission may request the local planning authority to adopt a screening opinion. The authority has 21 days to provide the opinion (or a longer period as may be agreed). The applicant may ask the Secretary of State to make a screening direction if the local planning authority does not adopt a screening opinion within the specified timescales, or if they determine that the proposed development is "EIA Development".

11. Schedule 3 to the 2011 Regulations identifies three criteria which may be relevant to a particular development:

(i) Characteristics of development;

(ii) Location of development; and (iii)

Characteristics of the potential impact.

12. Paragraph 1 of Schedule 3 provides:

"**Characteristics of development**

The characteristics of development must be considered having regard, in particular, to— (a) the size of the development;

(b) the cumulation with other development;

(c) the use of natural resources;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used."

13. Paragraph 2 of Schedule 3 provides as follows:

"**Location of development**

The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to—

(a) the existing land use;

(b) the relative abundance, quality and regenerative capacity of natural resources in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas—

(i) wetlands;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v)[areas classified or protected under Member States' legislation], areas designated by Member States pursuant to Council Directive 2009/147/EC on the conservation of wild birds and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora;

(vi) areas in which the environmental quality standards laid down in EU legislation have already been exceeded;

(vii) densely populated areas;

(viii) landscapes of historical, cultural or archaeological significance."

14. Paragraph 3 of Schedule 3 provides:

"**Characteristics of the potential impact**

The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to—

(a) the extent of the impact (geographical area and size of the affected population);

(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;

(d) the probability of the impact;

(e) the duration, frequency and reversibility of the impact."

The screening direction

The decision letter

15. In a letter dated 16 December 2016, the Defendant informed the Claimant of his decision, namely, that although the Defendant considered the proposal to be schedule 2 development, within the meaning of the 2011 Regulations 2011, "having taken into account the selection criteria in Schedule 3 to the 2011 Regulations, the Secretary of State does not consider that the proposal is likely to have significant effects on the environment, see the attached written statement which gives the reasons for direction as required by 4(7) of the EIA Regulations".

The written statement

16. The written statement, also dated 16 December 2012, stated as follows:

"**Full Statement of reasons as required by 4(5)(a) of amended EIA Regulations including conclusions on likeliness of significant environmental effects.**

Schedule 3 selection criteria for Schedule 2 development refers:

1 (a) – (f) **regarding characteristics of development** The proposal is for residential development of 150 homes (outline with means of access only).

2 (a)-(c) (i) – (viii) **regarding location of development**
The application site of the proposal is a 6.01 hectares brownfield site. It is set within an urban environment immediately surrounded by other housing/commercial property, and beyond is further housing/commercial properties and community facilities.

3 (a) – (e) **regarding characteristics of potential impact** The proposed development exceeds the criterion/threshold of 5 hectares for Schedule 2, Category 10 (b) development. The Council considers the proposed development, including in terms of issues of noise, odour, emissions, dust, land contamination and air quality, is not likely to result in significant effects, and therefore that the proposal is not EIA development. More specifically in relation to land contamination resulting from past land use, the Council is of the view that issues can be controlled through condition. The Council has also considered cumulative impact, and is of the view that given the nature of the proposal i.e. residential dwellings in the wider environmental context of an urban area, the application is not likely to result in significant effects.

The Secretary of State notes the Council's recent screening opinion for the proposed development, and for the information supplied with the application, and has had due regard to Planning Practice Guidance on assessing environmental impacts. Whilst there are land contamination issues on the application site, this has been investigated and measures/mitigations are within supporting information to the proposal, and the Council has referred to conditions should the proposal receive permission. In view of this, the Secretary of State considers this issue does not result in significant effect, over and above that which is normally present at an existing developed site.

The application will also result in impact from an increase in traffic in the locality, and from noise/dust/odour, from both the construction and operational phases but the Secretary of State notes the application site is not in any designated area nor is it an AQMA. In respect of these issues, the Secretary of State has considered the evidence before him, and is of the view that the proposal will not result in a likely significant effect, above that which any urban development proposal on an existing developed site would normally present. Overall, he is of the

view there are no likely significant impacts resulting from the proposed development and EIA is not required."

The screening analysis

17. In response to a request from the Claimant, the Defendant also disclosed his "screening analysis" which included the following assessments material to this claim:

"**Natural Resources**

…

4 Are there any areas on or around the location which contain important, high quality or scarce resources e.g. groundwater, surface waters, forestry, agriculture, fisheries, tourism, minerals, which could be affected by the project?

Consideration: The location for the proposed development is in a mining area which may contain unrecorded mining related hazards, however the site is not located in a Development High Risk Area as identified by the Coal Authority. The site is a former brickworks quarry which dates back to approximately 1900 which then underwent partial infilling with domestic wastes in 1950/60s. Restoration occurred in the 1980s with colliery spoil and more recently the land has been used by the developer of a boundary site during construction of new houses on the adjacent land. Resulting from this action and former use is land contamination including a moderate risk from ground gas, and risk of potential pollution to surface and ground water. As regards land contamination, the Applicant has supplied a Geo-environmental Ground Investigation Report which details that in three, of twenty-two, hot spot areas, materials should be removed to enable to the safe redevelopment of the site for residential purposes. The remainder of the report does not confirm anything highly unusual at the application site but recommends practical steps of excavation of soil from the site and storage off-site, and back-filling with clean imported granular material complying with specific specification. The Council's Land Quality Officer has reviewed the supporting information to the proposal, has raised queries with content, and resulting from this is a condition would be requested to secure a remediation strategy should the proposal progress to planning permission. No objection has been raised by the Environment Agency. The Secretary of State has taken note of all the above, and concludes the site/area is of low sensitivity and therefore the proposal is unlikely to result in significant

effect.

…

Waste and pollution

6 Will the Project release pollutants or any hazardous, toxic or noxious substances to air?

Consideration: During clearance of the site and construction, there is potential for pollutants to be released in to the air however this would be managed through standard legislation/regulation. See also Q4 regarding contaminated land. It is not considered the operational stage will release hazardous substances in to the air beyond those associated with a standard urban development of housing.

…

8 Are there any areas on or around the location which are already subject to pollution or environmental damage (e.g. contamination, or where existing legal environmental standards at any level are exceeded such as AQMAs etc) which could be affected by the project?

Consideration: The site is not evidenced as within any Air Quality Management Area (AQMA). However, there is an AQMA at a junction of Cross Hill, and traffic for the development is likely to add to existing traffic using this junction. However given the scale of the proposed development, is not considered to have likely significant effects.

…

Social

14 Is the project in a location where it is likely to be highly visible to many people?

Consideration: At its southern boundary, the application site is not visible to individuals due to an area of trees which screens the site from neighbouring houses. To the west, north and east there is housing, and some commercial property, and the application site will be visible to residents and business users through the gaps which exist between buildings. It is not considered that there will be any likely significant effects.

…

17 Are there existing, land uses on or around the location e.g. homes, gardens, other private property, industry, commerce, recreation, public open space (including parks), community facilities, agriculture, forestry, tourism, mining or quarrying, hospitals, schools, places of worship, community facilities which could be affected by the project?

Consideration: see Q14. Beyond the roads (which included residential and commercial buildings) that surround the

application site are churches, community facilities and schools. During the construction phase, these may be impacted from pollution/particle emission and emissions from plant and machinery. During the operation phase, there may also be some impact from urban emissions (vehicles) but this would not be over and above what would be expected in a normal urban area and it is not considered that there will be any likely significant effects.

18 Are there any areas on or around the location which are densely populated or built-up, which could be affected by the project?

Consideration: see Q14 and Q17. It is considered the local area is not as densely populated or built up as in inner-cities, and while there may be some impact from construction and operational phases, this would not be over above what would be expected in a normal urban area and it is not considered that there will be any likely significant effects.

Transport

19 Are there any transport routes on or around the location which are susceptible to congestion which could be affected by the project?

Consideration: see Q15 above. Surrounding roads are B roads. There are no major roads (motorways) in close proximity to the application site. Although patterns of local road use will be affected, by an increased number of residents, the proposal is not likely to be a significant generator or new trips onto the network.

…

Cumulative Impact

21. Are there any existing or future land uses on or around the location or beyond (e.g. trans-frontier) which could be affected by the project (eg including because of cumulative impact)?

Consideration: See Q8, 14, 17 & 18. Beyond this proposal at this application site, there has been new housing of 25 and 14 dwellings constructed on the boundaries of the site to the north/north east respectively. It is also noted that there is currently a proposal for 24 houses to the southern boundary with the Council which is presently at the consultation stage. The Secretary of State has considered these applications in terms of their size and scale and the context of the local area. The local area is urban – residential with some commercial and given this together with the size and scale of the development completed/proposed, the Secretary of State considers that while there may be some cumulative impact, this would not be to the

extent that it would be likely to result in significant cumulative impact."

The Council's screening opinion

18. In the written statement, the Defendant expressly noted the Council's screening opinion, dated 21 November 2016. The relevant passages in the screening opinion were as follows:

> "**Characteristics of development**
>
> ……
>
> *The cumulation with other development*
>
> 3.6 The site forms a housing allocation within the Council's adopted Site Specific Policies Local Plan and has an indicative capacity of 179 dwellings on an area of approximately 6ha. It is noted that new housing has recently been constructed to the boundaries of the site. Application no: 09/00883/FUL was for 25 houses located adjacent to Kirkby Road, to the north east of the application site. A further development of 14 dwellings providing social housing has been completed to the north of the site (application no: 09/01522/FUL). There is a housing allocation in the Council's Site Specific Policies Local Plan (HS53, Kirkbygate, Hemsworth) located to the southern boundary of the application site off Kirkbygate which has an indicative capacity of 25 dwellings. The Council is currently considering an application on this site for 24 dwellings (15/01592/FUL).
>
> 3.7 Slightly further afield, there is a housing allocation located off Grove Lane to the north east of the application site which has full planning permission for 25 dwellings and work on site have commenced. A further permission for 7no. dwellings (13/0153/OUT and 16/01932/REM) on land at Broad Oaks has also been granted permission.
>
> 3.8 There are 2 further housing allocations within the Site Specific Policies Local Plan within Hemsworth but these are not in the immediate vicinity of the application site. There is an allocation to the west of the site off Ashfield Road (HS54) which has an indicative capacity of 74 houses and a site to the north west of the town centre at West End (HS55) which has an indicative capacity of 160 dwellings.
>
> 3.9 Applications for a new Community Building at Bullenshaw Road, Hemsworth (08/00007/FUL) and new Sports Facilities (comprising a flood lit all weather multi use pitch, and a full sized grass football pitch), changing rooms and car park at Sandygate, Hemsworth (08/00872/FUL) have been approved, the developments have been completed and are in use.

3.10 Given the scale of the current proposal, which is an allocated housing site within the Local Development Plan, together with the above mentioned development and possible future development within the vicinity of the site, it is considered that in the context of the wider settlement, there would not be likely to be any significant cumulative environmental impacts.

…..

Pollution and nuisances

3.13 Issues of noise, odour, emissions, dust, land contamination and air quality are assessed in the 'characteristics of potential impact' section at paragraphs 3.20 – 3.27 but these are considered to not be likely to have significant effects on the environment.

….

Characteristics of potential impact

3.20 The application site has been fenced off and has not been used for sport and recreation for a number of years. The proposed residential development of the site will result in additional traffic and there will be an impact in respect of traffic generation, access, servicing, parking and highway safety issues associated with the development (in both its construction phase and once completed). It is noted that, should the proposal for residential development not come forward, bringing the site back into use as a sports facility would have an impact in terms of additional traffic associated with the use of the site. It is considered, given the scale of development proposed, that the impacts from the complete development would not be likely to have significant effects on the environment. The construction phase will result in additional traffic from construction workers and particularly from large construction vehicles associated with deliveries and removal of any wastes and/or contaminated materials from the site. Although the current proposal would result in additional traffic movements and other associate impacts, it is considered, given the limited site area and scale of development, that the traffic and other associated issues will not be likely to have a significant impact on the environment.

….

3.23 The site has not been used for some time but could be brought back into use and there would be a degree of traffic associated with this use. The site is not located in an Air Quality Management Area (AQMA) although it is noted that there is an AQMA at the road junction at Cross Hill, Hemsworth and traffic from the development, both during construction and once completed, is likely to add to standing

traffic at this junction. The vehicle emissions include nitrogen dioxide and carbon dioxide which can have an adverse impact on the environment. However, in view of the scale and location of the proposal, it is considered that the impact on air quality would not be likely to have any significant effects on the environment.

3.24 The proposed housing would not result in significant increases in odour and emissions. Emissions relating to associated traffic have been discussed above. The housing will result in additional noise both during construction and once completed and there will also be additional light emissions when compared to the previous use of the site for sport and recreation. The site is located in a predominantly residential area within the settlement boundary and, given the scale and location of the development, and it is considered that any noise and light emissions would not result in a significant environmental impact.

3.25 The site is located in a mining area which may contain unrecorded mining related hazards. The site is not situated in a Development High Risk Area as identified by the Coal Authority and the Coal Authority's Standing Advice is appropriate. It is therefore considered that any issues arising from historic coal mining would not be likely to have any significant effect on the environment.

3.26 The site is a former brickworks quarry which dates back to around the early 1900s which was then partially infilled with domestic wastes in the 1950s/60's. Restoration of the site occurred in the 1980s with what is believed to be predominantly colliery spoil to bring the ground levels up to surrounding levels. It is also noted that the site has been utilised by the developer during construction of the new housing to the boundary of the site. Land contamination is known to exist from the supporting information submitted with the application and, given the above, there is a moderate risk from ground gas. There is also a risk of potential for pollution to surface and groundwater. The Council's Land Quality Officer has raised a number of queries in respect of the supporting information submitted with the application which will require addressing by the developer should planning permission be forthcoming prior to commencement of development and a condition would be requested to secure a remediation strategy. No objections have been raised by the Environment Agency. It is considered that, although further information would be required prior to any development on site commencing, it is considered that the proposals would not be likely to have any significant effect on the environment.

…

3.28 There are considered to be no significant, potential effects of the development when assessed against the criteria within Schedule 3, Part 3 sections (a) to (e) of the 2011 Regulations, which includes: (i) the extent of the impact (geographical area and size of population), (ii) the transfrontier nature of the impact, (iii) the magnitude and complexity of the impact, (iv) the probability of the impact, (v) the duration frequency and reversibility of the impact.

4.0 Conclusions

4.1 Having regard to Schedule 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and the advice in Circular 02/99, the following conclusions are drawn in relation to the proposals:-

- Taking account of the nature and scale of the development, it is considered that its impacts would not be likely to give rise to significant environmental effects.

- It is considered that the locality is not sensitive or vulnerable to the extent that the proposed development would be likely to have significant environmental effects; and

- The development is considered to not be one with particular complex and hazardous effects.

5.0 Opinion

5.1 On the basis of the above, and in accordance with regulations 7 and 5(4), (5) of the 2011 Regulations, it is considered that the proposals **do not** constitute EIA development."

The Claimant's grounds for judicial review

Ground 1

19. The Claimant's primary submission was that the Defendant ought to have considered the issue of air quality in the context of the longstanding failure to reduce air pollution, and he referred to *R(ClientEarth) v Secretary of State for Environment, Food and Rural Affairs (No. 3)* [2018] Env LR 21, per Garnham J., at [5]:

> "Proper and timely compliance with the law in this field matters. It matters, first, because the Government is as much subject of the law as any citizen or any other body in the UK. Accordingly, it is obliged to comply with the Directive and the Regulations and with the orders of the court. Second, it matters because, as is common ground between the parties to this litigation, a failure to comply with these legal requirements exposes the citizens of the UK to a real and persistent risk of significant harm. The 2017 Plan says that "poor air quality is

> the largest environmental risk to public health in the UK. It is known to have more severe effects on vulnerable groups, for example the elderly, children and people already suffering from pre-existing health conditions such as respiratory and cardiovascular conditions". As I pointed out in the November 2016 judgment, DEFRA's own analysis has suggested that exposure to nitrogen dioxide (NO_2) has an effect on mortality "equivalent to 23,500 deaths" every year."

20. On the Claimant's reading of the screening direction, the Defendant did not conclude that significant effects would not arise. Instead, he erroneously concluded that assessment was not required because the increase was not significant for an urban

area. However, elevated nitrogen dioxide ("NO_2") levels in urban areas were of particular concern.

21. At the hearing, the Claimant rightly abandoned his pleaded submission, in paragraph 21 of the Statement of Facts and Grounds, that the Defendant was guilty of "project splitting" or "slicing up" a series of developments that should have been considered as a whole. That submission was unsupported by the evidence.

22. However, the Claimant maintained his submission that the Defendant failed to consider the likely cumulative environmental effects from this proposal, combined with actual and proposed development at other sites nearby. The Claimant alleged that, in so far as the Defendant did consider the cumulative effect of these other sites, he failed to do so adequately. Both he and the Council failed to consider cumulative effects under both the characteristics of projects (paragraph 1 of schedule 3) and the location of projects (paragraph 2 of schedule 3), as required by EIA Directive 2011/92/EU.

23. Regulation 4(6) of the 2011 Regulations did not fully transpose article 4(3) of the EIA Directive which provides that the assessor must take into account the Annex III selection criteria, whereas regulation 4(6) conferred a discretion on the assessor, requiring him to take into account such of the selection criteria set out in schedule 3 as are relevant to the development. The Claimant contended that both the Defendant and the Council unlawfully relied on this discretion to omit consideration of factors, such as the cumulative increase in traffic and air pollution and its cumulative impact on the local area and Air Quality Management Area ("AQMA").

Ground 2

24. The Claimant submitted that the Defendant placed undue reliance upon unknown and unquantified conditions to attempt to mitigate potentially significant adverse environmental harm, to support his finding that the proposal was not EIA development. Unless the conditions involved uncontroversial or effective methods of control or were intrinsic to the proposal, then both the potentially significant adverse effects and any measures proposed to mitigate them should be subject to EIA. This was clear from Article 5(3) of the EIA Directive. To screen out the potentially significant environmental effects by reliance upon conditions defeated the purpose of the Directive.

25. In paragraph 3.26 of its screening opinion[1], the Council recognised that there were concerns with contaminated land and that there was moderate risk from ground gas and the potential for pollution to surface and groundwater. It referred to queries raised by the Council's Land Quality Officer in respect of the supporting information submitted with the application which would have to be addressed by the developer, prior to commencement of development and a condition would be requested to secure a remediation strategy. However, holding over the requirement to provide environmental information to the post-permission condition stage offended the key purpose of Article 2(1) of the Directive.

26. The Defendant adopted the same mistaken approach as the Council, referring to the Council's view that matters could be "controlled through condition", and then unlawfully concluding that there was no need for EIA because any "significant effect" would not be "over and above that which is normally present at an existing developed site".

Conclusions

Law

27. The test to be applied in considering whether an environmental statement is required is as specified in regulation 2 of the 2011 Regulations, namely, is the development likely to have significant effects on the environment? The authorities on the meaning of the test were reviewed and confirmed by the Court of Appeal in *R (Loader) v Secretary of State for Communities* [2012] EWCA Civ 869, [2013] PTSR 406, per Pill LJ at [25] – [29]:

> "25 The correct test, submitted Mr Maurici on behalf of the Secretary of State, is that specified in regulation 2: Is the development likely to have significant effects on the environment?
>
> 26 He accepted that the expression "is likely to have" in the Directive and Regulations means no more than that there is a serious possibility of it happening. In *R (Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157*, Moore-Bick LJ, with whom Jackson LJ agreed, stated, at paragraph 17:
>
> > "In my view something more than a bare possibility is probably required, though any serious possibility would suffice."
>
> 27 In *R (Morge) v Hampshire County Council [2010] EWCA Civ 608*, Ward LJ, with whom Hughes LJ and Patten LJ agreed, stated, at paragraph 80, that:
>
> > "'likely' connotes real risk and not probability."
>
> 28 The test and approach to be applied were stated in *Jones v Mansfield [2004] Env LR 21*. At paragraph 17, Dyson LJ stated:

1 At [18] of this judgment

> "Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion." 29 At paragraph 38, Dyson LJ stated:
>
> > "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 judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*). The effect on the environment must be "significant". Significance in this context is not a hardedged concept: as I have said, the assessment of what is significant involves the exercise of judgment." Carnwath LJ stated, at paragraph 61:
> >
> > > "Furthermore, the word 'significant' does not lay down a precise legal test. It requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped but which is well-suited to the familiar role of planning authorities, under the guidance of the Secretary of State.""

28. Ms Patry correctly submitted that there must be a likelihood of <u>significant</u> effects, which cannot be equated with either "any", "identified" or "moderate" effects. As identified in the Planning Practice Guidance 'Environmental Impact Assessment' (Paragraph: 018 Reference ID: 4-018-20140306) "[o]nly a very small proportion of Schedule 2 development will require an assessment".

29. In considering the Claimant's submissions, I reminded myself that the local planning authority has been entrusted with the task of judging whether the development is likely to have significant effects on the environment, and the Court will only intervene if it errs in law.

30. In *R* (*Hockley) v Essex County Council* [2013] EWHC 4051 (Admin), Lindblom J. helpfully reviewed the authorities at [23] to [25]:

> "23. In *R. (on the application of Jones) v Mansfield District Council* [2004] Env. L.R. 21 Carnwath L.J., as he then was, emphasised (in paragraph 58 of his judgment) that "the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle race", and that "it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case."
>
> 24. In *R. (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 Moore-Bick L.J. said (in paragraph 20 of his judgment) that it was important to bear in mind "the nature of what is involved in giving a screening opinion". A screening opinion, he said, "is

> not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others". Nor does it require "a full assessment of any identifiable environmental effects". What is involved in a screening process is "only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all". The court should not, therefore, impose too high a burden on planning authorities in what is simply "a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment …". In the light of the decision of the *European Court of Justice in Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Lnadbouw, Natuurbeheer en Visserij* [2004] E.C.R. I-7405 and the Advocate General's opinion in *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* [2010] Env. L.R. 18 Moore-Bick L.J. said (in paragraph 17 of his judgment) that a likelihood in this context was "something more than a bare possibility … though any serious possibility would suffice".

25. In *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, Pill L.J., with whom Toulson and Sullivan L.JJ. agreed, said (in paragraph 31 of his judgment) that there was "ample authority that the conventional *Wednesbury* approach applies to the court's adjudication of issues such as these". That principle is firmly established in the domestic jurisprudence. For example, in *R. (on the application of Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114) Beatson L.J. said (in paragraph 22 of his judgment) that the "assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of "likelihood" and "significance"" (see also paragraph 40 of Laws L.J.'s judgment in *Bowen-West v Secretary of State* [2012] EWCA Civ 321*)*. In *Jones v Mansfield* Carnwath L.J. said (at paragraph 61) that because the word "significant" does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped."

31. More recently, in *R (Birchall Gardens LLP) v Herts CC* [2017] Env. L.R. 17, Holgate J. reiterated these principles at [66] – [67]: "66. It is common ground that the analysis in paragraph 20 of the judgment of Moore-Bick LJ in *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 continues to apply to the screening process under the *2011 Regulations (Mackman v Secretary of State for Communities and Local Government* [2015] EWCA Civ 716; [2016] Env. L.R. 6 at paragraph 7). A screening opinion does not involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include environmental factors. Nor does it include a full assessment of any identifiable environmental effects. It includes only a decision, almost inevitably on the basis of less than complete information, as to whether an EIA needs to be undertaken at all.

> The court should not impose too high a burden on planning authorities in relation to "what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment."
>
> 67. The issues of whether there is sufficient information before the planning authority for them to issue a screening opinion and whether a development is likely to have significant environmental effects, are both matters of judgment for the planning authority. Such decisions may only be challenged in the courts on grounds of irrationality or other public law error *(R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408; [2004] Env L.R. 21 (paragraphs 14-18 and 52–55 and *R (Noble Organisation Ltd) v Thanet District Council* [2005] ECWA Civ 782; [2006] Env. L.R.8 paragraph 30)."

32. Regulation 4(7)(a) of the 2011 Regulations requires the assessor to give "clearly and precisely the full reasons" for a screening opinion. In *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, Beatson LJ (at [31]) applied the guidance given in *South Bucks DC v Porter (No 2)* [2004] UKHL 33, per Lord Brown at [35] - [36]. However, as Sullivan LJ explained in *Mackman v Secretary of State for Communities and Local Government and Uttlesford District Council* [2015] EWCA Civ 716, at [17], it is important to bear in mind the function of a screening opinion under the 2011 Regulations when applying regulation 4(7)(a). It is not to be equated with a decision letter on appeal, in terms of the amount of detail required in the reasons given for a screening opinion. He added, at [20], "the level of detail in a screening opinion would depend upon the complexity of the issues to be considered in the particular case, so that the test was whether the reasons were adequate for this particular application".

Ground 1

33. Applying these principles to this claim, I do not consider that the Claimant has established that the Defendant's screening direction was unlawful under ground 1.

34. In my judgment, the Claimant's submissions that the Defendant failed properly to consider pollution and air quality and, failed adequately to assess cumulative effect, were based on an unduly forensic and nit-picking reading of the assessments. It is well-established that planning decision letters should be read fairly and in good faith, and as a whole, in a straightforward manner, without excessive legalism or criticism (see *Clarke Homes v. Secretary of State for the Environment* (1993) 66 P & CR 263, per Lord Bingham at 271; *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83, per Lord Hoffmann LJ at 84). In my view, screening assessments should be read in the same manner.

35. It was apparent from the evidence that the issue of air quality was carefully addressed by the Council in the planning application process, and that this would have informed the Council's screening opinion. For example, the Officer's Report to the Council's Planning Committee dated 5 September 2013, stated:

> "**Air Quality**
>
> The site is not located in an Air Quality Management Area (AQMA), although there is an AQMA north of the site in the centre of Hemsworth which has recently been adopted. In such areas air quality is a concern, mostly caused by road traffic, and pollution levels may exceed guidelines set by the government. Policy CS10 states that urban areas are the places where the LDF spatial strategy concentrates most development, so without action air quality in these areas might deteriorate. It is considered important that new development does not worsen air quality. Promoting the use of public transport, walking and cycling as alternatives to the car will help to reduce greenhouse gas emissions and air pollution.
>
> Policy CS10 seeks to minimise the risk of all forms of pollution. Policy D20 requires development proposals to be consistent with the aims and objectives of the Council's Air Quality Action Plan.
>
> Given the scale of the proposed development and its location close to an AQMA, the Council's Scientific Officer has been consulted. In respect of the impact from construction, it is recommended that a construction environmental management plan is adopted and that the developer be a member of the Good Constructors Scheme.
>
> In view of the proximity of the site to the newly adopted AQMA, the Council's Scientific Officer has requested that electric vehicle charging points are provided on each dwelling with dedicated parking and 1 point per 10 dwellings where there are parking courts. As discussed earlier in this report, there are viability issues regarding this development and it is considered that the provision of charging points would not be viable in this instance.
>
> The Council's Highways Section has recommended a condition for agreement of a Travel Plan to encourage the use of alternative modes of transport to the private car. Given that the site is not located within the AQMA together with the relatively small impact the proposal would have on existing air quality given the size of the proposed development, it is considered that lack of charging points wold be insufficient reason for refusal of the scheme."

36. Pollution and air quality were addressed in the Council's screening opinion at paragraphs 3.13, 3.20, 3.23 and 3.24[2]. Cumulative impact was considered at paragraphs 3.6 to 3.10[2]. It was legitimate and helpful for the planning officer to address the issues by reference to the lists of categories and factors in schedule 3 to the 2011 Regulations. On a fair reading, this did not result in either air quality or cumulative impact being excluded from proper consideration.

37. The Site was one of five sites allocated for housing in Hemsworth in the Wakefield Local Development Framework Site Specific Policies Local Plan ("the Local Plan"),

2 At [18] of this judgment

which was adopted on 12 September 2012. Other sites allocated for housing development, and consented developments, were expressly considered, at paragraphs 3.6 – 3.10[2]. Sites B and C were considered in paragraph 3.6 and Site D in paragraph 3.7[2]. The allocations (Sites E and F) were addressed in paragraph 3.8[2], where the Council said that they were not in the immediate vicinity of the Site. The Council concluded, in paragraph 3.10, that:

> "Given the scale of the current proposal, which is an allocated housing site within the Local Development Plan, together with the above mentioned development and possible future development within the vicinity of the site, it is considered that in the context of the wider settlement, there would not be likely to be any significant cumulative environmental impacts."

38. The conclusions in the screening opinion clearly applied to air quality, as well as other environmental issues, and the judgment of the Council, at paragraph 4.1[3], was that the proposed development would not be likely to have significant environmental effects. This was a detailed and conscientious consideration of the issues, and the Defendant was entitled to place reliance upon it.

39. The Defendant expressly noted the Council's screening opinion in its assessments and had the benefit of the detailed analysis carried out by the Council.

40. The Defendant's screening analysis considered air quality and traffic at paragraphs 8, 17, 18 and 19[4], concluding that, although the proposal would generate some limited additional traffic, it would not have significant environmental effects, because of its scale. It considered potential effects on the AQMA at paragraph 8[4]. It expressly referred to the consented housing developments on Sites B and D, and the application for housing on Site C, under the heading "Q21 Cumulative Impact":

> "Beyond this proposal at the application site, there has been new housing of 25 and 14 dwellings constructed on the boundaries of the site to the north/north east respectively.
>
> It is also noted that there is currently a proposal for 24 houses to the southern boundary with the Council which is presently at the consultation stage. The Secretary of State has considered these applications in terms of their size and scale and the context of the local area. The local area is urban – residential with some commercial and given this, together with the size and scale of the development completed/proposed, the Secretary of State considers that while there may be some cumulative impact, this would not be to the extent that it would be likely to result in significant cumulative impact."

41. Thus, the Defendant was expressing his considered judgment, on the evidence, that there would not be significant cumulative impact on, *inter alia,* air quality. This was a careful and detailed assessment. It is reasonable to assume that the Defendant and his advisers were well aware of the causes and effects of air pollution and the need to address it.

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3 At [18] of this judgment

4 At [17] of this judgment

42. The Defendant did not refer to Sites E and F, but I do not consider that the absence of an express reference to Sites E and F meant that the Defendant overlooked them, as they were referred to in the Council's screening opinion, which the Defendant expressly took into account. The Council advised that they were not in the immediate vicinity of the Site. Moreover, as at the date of the assessment, there was no proposed development at those sites, despite their allocation in the local plan. There had been no applications for planning permission for those sites, and no applications were imminent. It was a reasonable exercise of judgment on the part of the Defendant not to include them in his assessment of cumulative impact.

43. A similar situation arose in *R (Oldfield) v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1446, where Maurice Kay L.J. said:

> "24. …It is important that an assessment is made in the light of what is known and what is reasonably predictable or ascertainable at the time. Although the Dreamland site was earmarked for development, its future remained uncertain. The issue of the compulsory purchase order remained unresolved and no planning application was forthcoming. In those circumstances, it was permissible for the Secretary of State to conclude that there were at that point no cumulative significant environmental effects…."

44. Obviously, a screening opinion or direction can only be based upon the information known to the assessor at the relevant time, and that may be incomplete. In this case, the Defendant received a substantial amount of information from Dr Stookes of Richard Buxton in September 2016, and from the Council, whose screening opinion was dated 21 November 2016. Unsurprisingly, the application for planning permission for a nursing home about 500 metres from the Site (referred to as Site G) was not included, since the application was made as late as 18 November 2016. Planning permission was granted on 18 April 2017, which post-dated the Council's screening opinion and the Defendant's screening direction. I do not consider that the Defendant can be fairly criticised for not referring to it, and absent any unlawfulness, the screening direction must stand. Generally, in cases where an unforeseen subsequent development proposal may alter the assessment of cumulative environmental effects, the solution is for there to be a further screening and/or for the cumulative environmental effects to be considered in the course of the application for planning permission for the subsequent development proposal.

45. As Lindblom J. observed in *Hockley*, at [102]:

> "There has to be a sensible limit to what a screening decisionmaker is expected to do. This view is supported in the cases to which I have referred, notably, for example, in *Bateman* … Conjecture about future development on other sites that might or might not act with the development in question to produce indirect, secondary or cumulative effects is not in the screening decision-maker's remit. I do not think that the precautionary approach extends to that."

46. The Defendant's written statement summarised the Defendant's assessment and conclusions, expressly referring to air quality, traffic, and cumulative impact. He concluded, in the final paragraph, that there would be an impact from an increase in

traffic in the locality. He took into account, as he was entitled to do, that the Site was not in a designated area nor was it an AQMA. He concluded that the impact from the increase in traffic would not have significant environmental effects. In reaching that key conclusion, which the Claimant overlooked, he took into account that this was an urban development proposal on an existing developed site, which he was entitled to do. In my view, any such assessment can properly have regard to both the location of the site and the existing development on site (if any), when considering the environmental impact of a new development. For example, the outcome of the assessment could be affected if the proposal was for development on a previously undeveloped site situated in open countryside. It follows that I disagree with the Claimant's submission that the Defendant concluded that assessment was not required because the increase was not significant for an urban area. That is a misreading of the decision, in my view.

47. It was legitimate for the authors of the screening analysis and the written statement to address the issues by reference to the lists of categories and factors in schedule 3 to the 2011 Regulations. On a fair reading, all aspects of air quality and cumulative impact were considered and taken into account in reaching the overall conclusion that there were no likely significant effects on the environment arising from the proposed development, and so an EIA was not required.

48. When these assessments were carried out, neither the Council nor the Defendant had the benefit of seeing the Air Quality Assessment report by REC, commissioned by the developer, as it was only submitted to the Council in January 2017, although dated November 2016. However, the report supported the Defendant's conclusions, and would not have resulted in a different outcome to his assessment.

49. That report assessed potential air quality impacts based on anticipated traffic data for 2020, with and without the proposed development of Site A, and using 2015 emissions, despite the fact that "air quality is predicted to improve in the future". The report identified that "the use of 2020 traffic data and 2015 emission factors is considered to provide a worst-case scenario and therefore a sufficient level of confidence can be placed within the predicted pollution concentrations. This approach is considered to be in line with the guidance provided within the IAQM policy statement".

50. The report modelled predicted annual mean NO_2 concentrations at a number of sensitive receptors – including receptors around the AQMA. The predicated NO_2 impacts of the development were assessed as being negligible at all of the sensitive receptors modelled. The report concluded as follows:

> "Potential impacts during the operational phase of the development may occur due to road traffic exhaust emissions associated with vehicles travelling to and from the site. An assessment was therefore undertaken using the West Yorkshire guidance criteria to determine the potential for the development to affect local air quality. This indicated that the development is considered to be classified as **Type 2 – Major.** The required level of mitigation measures were identified and assuming these are implemented, the residual effect from construction and operational phase activities is predicted to be acceptable for the scale and nature of the development. Dispersion modelling was undertaken in order to quantify pollutant concentrations at the site and to predict air quality impacts as a result of road vehicle

> exhaust emissions associated with traffic generated by the development. Results were subsequently verified using monitoring results obtained from WMDC.
>
> The dispersion modelling results indicated that pollutant levels across the site were below the relevant AQOs. The location is therefore considered suitable for residential use without the inclusion of mitigation measures to protect future users from poor air quality. Predicted impacts on NO2 and PM10 concentrations as a result of operational phase exhaust emissions were predicted to be negligible at all sensitive receptor locations considered within the vicinity of the site. The overall significance of potential impacts was determined to be not significant, in accordance with the EPUK and IAQM guidance. Based on the assessment results, air quality is not considered a constraint to planning consent for the proposed development."

51. The report also noted, in Appendix 2, that "Similarly to emission factors, background concentrations for 2015 were utilised in preference to the development opening year. This provided a robust assessment and is likely to overestimate actual pollutant concentrations during the operation of the proposals."

52. Furthermore, the Council has decided to revoke the AQMA in central Hemsworth because of the improvement in air quality, in the concentration of NO_2, recorded in the 2018 Air Quality Annual Status Report, published in June 2018. It stated "[t]here is a continuing improvement in local air quality from 2014 with results in 2017 well below the AQOL…"

53. In the light of this evidence, the Defendant's fall-back position was that, even if the assessment was flawed, the Court should not quash it because the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred (section 31(2A) of the Senior Courts Act 1981) and there had been

no substantial prejudice (*Walton v. Scottish Minister* [2013] P TSR 51). However, as I have rejected the Claimant's challenge to the lawfulness of the screening direction, I do not need to consider the fall-back position.

Ground 2

54. I agree with the Defendant's submission that the Claimant's challenge under ground 2

is unsupported by the evidence. The Council's screening opinion assessed the risks in paragraph 3.26[5] and concluded that "the proposals would not be likely to have any significant effect on the environment". It is notable that it recorded that no objections were raised by the Environment Agency.

55. The Defendant, at paragraph 4[6] of the screening analysis, also assessed the risks, with the benefit of a Geo-Environmental Ground Investigation report, and the review by the Council's Land Quality Officer. The Defendant concluded that the proposal was unlikely to result in significant effects on the environment.

5 At [18] of this judgment

6 At [17] of this judgment

56. In the written statement[7], the Secretary of State concluded that the land contamination issues, which would be subject to mitigation measures and conditions if planning permission were granted, did not result in significant effects on the environment, beyond those normally present at an existing developed site.

57. In my view, the Defendant was entitled to assess the likely significant effects on the basis that this was an existing developed site, not virgin soil, for the same reasons as I have set out at paragraph 46 above.

58. As a matter of law, the Defendant was entitled to rely on identified remediation measures and/or measures secured by condition in respect of contaminated land in determining that a proposed development was not likely to give rise to significant environmental effects, see *Gillespie v First Secretary of State* [2003] Env LR 30, in particular, per Pill LJ at [37] and [39].

59. The way in which potential mitigating measures may be taken into account has been authoritatively set out by Lord Carnwath in the Supreme Court in *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710, at [49] – [51]:

> "49. The relevance of mitigation measures at the screening stage has been addressed in a number of authorities. One of the first *was R (Lebus) v South Cambridgeshire District Council* [2003] Env LR 366 (relating to a proposed egg production unit for 12,000 free-range chickens). Sullivan J said, at para 45-46:
>
> > "45. Whilst each case will no doubt turn on its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.
> >
> > 46. It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance."
>
> 50. Of the particular proposal in that case, he said, at para 50, that it must have been obvious that with a proposal of this kind there would need to be a number of "non-standard planning conditions and enforceable obligations under section

7 At [16] of this judgment

106", and that these were precisely the sort of controls which should have been "identified in a publicly-accessible way in an environmental statement prepared under the Regulations":

> "it was not right to approach the matter on the basis that the significant adverse effects could be rendered insignificant if suitable conditions were imposed. The proper approach was to say that potentially this is a development which has significant adverse environmental implications: what are the measures which should be included in order to reduce or offset those adverse effects?" (Para 51.)

51. Those passages to my mind fairly reflect the balancing considerations which are implicit in the EIA Directive : on the one hand, that there is nothing to rule out consideration of mitigating measures at the screening stage; but, on the other, that the EIA Directive and the Regulations expressly envisage that mitigation measures will where appropriate be included in the environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA."

60. This was a case in which the exercise of judgment by the assessors (the Council and the Defendant) was that there was no likelihood of significant effects on the environment. The Claimant has not established an arguable case that these conclusions were wrong either in fact or in law, and therefore the claim is unarguable.

Conclusions

61. Permission to apply for judicial review on ground 2 is refused, and the claim is dismissed.