



Trinity Term

[2015] UKSC 52

On appeal from: [2013] EWCA Civ 1657

JUDGMENT

**R (on the application of Champion) (Appellant) v North Norfolk District Council and
another (Respondents)**

before

Lord Neuberger, President

Lord Mance

Lord Clarke

Lord Carnwath

Lord Toulson

JUDGMENT GIVEN ON

22 July 2015

Heard on 23 June 2015

Appellant

Richard Buxton

(Instructed by Richard Buxton Environmental and Public
Law)

Respondents

C Lockhart-Mummery QC

Zack Simons

(Instructed by Howes
Percival)

LORD CARNWATH: (with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Toulson agree)

The issues

1.

The appeal concerns a proposed development by Crisp Maltings Group Ltd (“CMGL”) at their Great Ryburgh plant in Norfolk, in the area of the North Norfolk District Council (“the council”). It was opposed by the appellant, Mr Matthew Champion, a member of the Ryburgh Village Action Group. The proposal involved the erection of two silos for 3,000 tons of barley, and the construction of a lorry park with wash bay and ancillary facilities, on a site close to the River Wensum. Permission was

granted by the council, following consultation with the relevant statutory bodies, notably Natural England (NE) and the Environment Agency (EA), on 13 September 2011.

2.

The river is a Special Area of Conservation, part of the EU Natura 2000 network of sites, and thus entitled to special protection as a “European site” under the EU Habitats Directive (Directive 97/62/EC), which is given effect in this country by the Conservation and Habitats Species Regulations 2010 (“the Habitats Regulations”). The river was described in one council report as –

“... probably the best whole river of its type in nature conservation terms, with a total of over 100 species of plants, a rich invertebrate fauna and a relatively natural corridor. The river supports an abundant and diverse invertebrate fauna including the native freshwater crayfish (a European protected species) as well as a good mixed fishery.”

3.

The appellant’s complaint, in short, is that the council failed to comply with the procedures required by the regulations governing Environmental Impact Assessment (EIA) and “appropriate assessment”, respectively under EIA and Habitats Regulations.

Legislation

Environmental Impact Assessment

4.

Directive 2011/92/EU (“the EIA Directive”) provides the framework for the national regulations governing environmental assessment. The preamble (para (2)) states that Union policy is based on “the precautionary principle” and that effects on the environment should be taken into account “at the earliest possible stage in all the technical planning and decision-making processes”. By article 2 the EIA Directive requires member states to adopt all measures necessary to ensure that projects “likely to have a significant effect on the environment” are subject to environmental impact assessment before consent is given. The projects to which it applies are those defined in article 4 and annexes I and II. Projects in annex I require assessment in any event; those in annex II (which covers the present project) require a “determination” by the “competent authority” whether it is likely to have a significant effect, so as to require assessment (article 4(2)). The competent authority is the authority designated for that purpose by the member state (article 1(f)). For projects subject to assessment member states are required to adopt the measures necessary to ensure that the developer supplies in an appropriate form the information specified in annex IV, which includes details of the project and its anticipated effects, and the measures proposed to prevent or reduce adverse effects (article 5). That information is to be made available to the public likely to be affected, who must be given “early and effective opportunities” to participate in the decision-making process (article 6).

5.

In the United Kingdom the environmental assessment procedure is integrated into the procedures for granting planning permission under the planning Acts. The current regulations are the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2011. It will be convenient to refer to these (“the EIA Regulations”), although they replaced the 1999 Regulations which were in force at the time of the present application. The Regulations do not follow precisely the form of the EIA Directive, but there is no suggestion of any failure of implementation. The starting point is the expression “EIA development”, defined by reference to Schedules 1 and 2 (corresponding to annexes I and II of the EIA Directive).

6.

Although the Regulations do not in terms “designate” a “competent authority”, it is clear at least by implication that this role is given in the first instance to the local planning authority, which is given the task of determining whether Schedule 2 development is EIA development (see eg regulation 4(6)).

7.

The mechanism by which the authority determines whether assessment is required is referred to in the Regulations as “screening” (not an expression used in the EIA Directive). A “screening opinion” may be given in response to a specific request by the developer (regulation 5), or, in various circumstances where an application is received by the authority for development which appears to require EIA and is not accompanied by an environmental statement (regulations 7-10).

8.

Regulation 3 prohibits the grant of consent for EIA development without consideration of the “environmental information”, defined (by regulation 2) to include the “environmental statement” and any representations duly made about the environmental effects of the development. The contents of the environmental statement are defined by reference to Schedule 4 (which corresponds to annex IV of the EIA Directive, and like it includes a reference to measures envisaged to prevent, reduce or offset any significant adverse effects on the environment).

9.

The environmental statement, in proper form, is central to this process. In *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, Lord Hoffmann rejected the submission that it was enough if the relevant information was available to the public in the various documents provided for inspection:

“... I do not accept that this paper chase can be treated as the equivalent of an environmental statement. In the first place, I do not think it complies with the terms of the Directive. The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language. It is true that article 6(3) gives member states a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows member states to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the annex III information which should have been provided by the developer.” (p 617D-F)

Habitats Directive

10.

Council Directive 92/43/EEC (“the Habitats Directive”) provides for the establishment of a European network of special areas of conservation under the title Natura 2000. Article 6 imposes duties for the protection of such sites. By article 6(3)

“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the

plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

Article 6(4) provides for limited exceptions, but only “for imperative reasons of overriding public interest, including those of a social or economic nature”.

11.

The relevant implementing regulations are the [Conservation of Habitats and Species Regulations 2010](#) (“the Habitats Regulations”). Regulation 61 reproduces the effect of article 6(3). A “competent authority”, before deciding to give consent for a project which is “likely to have a significant effect on a European site ... (either alone or in combination with other plans or projects)” must make “an appropriate assessment of the implications for that site in view of that site’s conservation objectives”. It may agree to the project “only after having ascertained that it will not adversely affect the integrity of the European site”, having regard to “any conditions or restrictions” subject to which they propose that the consent should be given.

12.

Authoritative guidance on the interpretation of article 6(3) has been given by the Court of Justice of the European Union (“CJEU”) in (Case C-127/02) Waddenzee [2006] 2 CMLR 683 (relating to a proposal for mechanical cockle-fishing in the Waddenzee Special Protection Area). There is an elaborate analysis of the concept of appropriate assessment, taking account of the different language versions, in the opinion of Advocate General Kokott (paras 95-111). In its judgment the court made clear that the article set a low threshold for likely significant effects:

“41. ... the triggering of the environmental protection mechanism provided for in article 6(3) of the Habitats Directive does not presume - as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled ‘Managing Natura 2000 Sites: The provisions of article 6 of the Habitats Directive (92/43/EEC)’ - that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.”

The court noted that article 6(3) adopts a test “essentially similar” to the corresponding test under the EIA Directive. (para 42), and that it “subordinates” the requirement for an appropriate assessment of a project to the condition that there be “a probability or a risk that the latter will have significant effects on the site concerned”. The Habitats Directive had to be interpreted in accordance with the precautionary principle which is one of the foundations of Community policy on the environment (para 44). It concluded:

“45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site’s conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.”

13.

As to the content of such appropriate assessment, the court said:

“52. As regards the concept of ‘appropriate assessment’ within the meaning of article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site’s conservation objectives.

54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from articles 3 and 4 of the Habitats Directive, in particular article 4(4), be established on the basis, *inter alia*, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in annex I to that Directive or a species in annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed ...

56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.”

14.

More recently in *Sweetman v An Bord Pleanála* (Galway County Council intervening) (Case C-258/11) [2014] PTSR 1092 the court spoke of the two stages envisaged by article 6(3):

“29. That provision thus prescribes two stages. The first, envisaged in the provision’s first sentence, requires the member states to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site [citing *Waddenzee* (above) paras 41, 43]

...

31. The second stage, which is envisaged in the second sentence of article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of article 6(4).

...

40. Authorisation for a plan or project, as referred to in article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects ...”

The application and its consideration

15.

Before addressing the issues of law, it is necessary to return to the factual background. The application for planning permission was initially made on 1 October 2009, but not validated until 15

April 2010. It was accompanied by a "Site Specific Flood Risk Assessment", which recognised that the proposal involved the potential to discharge surface water runoff to the nearby ditch system and could lead to pollution reaching the River Wensum. This risk was to be mitigated by a staged system of drainage, involving an interceptor/separator facility and thereafter a storage infiltration basin to be planted with indigenous plants to act as a secondary passive treatment system.

16.

The lengthy process of investigation and consultation, which led eventually to the grant of conditional permission for the proposal on 13 September 2011, is described in detail in the judgments below. For present purposes the process can be divided into three main phases:

i)

October 2009 to June 2010: the initial supporting material, consultations with statutory agencies, and EIA screening (23 April 2010);

ii)

July 2010 to January 2011: submission of July Flood Risk Assessment (updated in August) and Phase II Ecological Assessment, leading to withdrawal of statutory objections and the decision of the planning committee on 20 January 2011 to give delegated powers to officers to approve the development subject to conditions;

iii)

June 2011 to September 2011: correspondence with appellant's solicitors leading to a reference back to the committee and final decision to approve on 8 September 2011.

Phase 1

17.

It became apparent at a very early stage that the main environmental issue was the possible effect of run-off from the site to the river. On this there was a substantial degree of common ground between all concerned that more information was required, and that appropriate assessment under the Habitats Regulations was likely to be needed:

i)

In response to an informal approach by CMGL's planning consultant, Natural England on 3 December 2009 expressed concern in respect of the possible effect on the river of the drain system, "particularly in relation to the potential for diesel spillage and polluted run-off from the water bay when lorries are washed down". They said that if "hydrological connectivity" could be established, it was likely that an appropriate assessment would be required under the Habitats Regulations.

ii)

In February 2010 a "Phase I Ecological Assessment", commissioned by CMGL from specialist consultants, recorded that the potential risks to the River Wensum SAC "had not been fully evaluated". It was essential that pollution control measures and operation of the Interceptor were adequate for the lorry park in all conditions, particularly during heavy rainfall. It was "assumed that an Appropriate Assessment will be required under the Habitats Regulations 1994 which will fully address risks to the SAC and identify further mitigation requirements".

iii)

On 14 May 2010 Natural England objected to the application on the basis that there was "insufficient information" for them to advise whether the proposal was likely to have significant effects on the river

under the Habitats Regulations. The applicant should be required to submit information relating to “the hydrological connectivity between the Surface Water Infiltration Basin and drain system adjacent to the proposed lorry park, and the River Wensum SAC”.

iv)

On the same day the planning officer wrote to CMGL expressing his own concerns that the submitted water measures would be inadequate. He observed that the details submitted in respect of flood risk and surface water management were “very sketchy and imprecise regarding the actual management train to be used to handle surface water pollutants”. Advice from the Construction Industry Research and Information Association (CIRIA) suggested that the use of oil receptors should be avoided where possible, primarily because of the management required to maintain them, and the risk that inadequate management in heavy rain could result in pollutants not being properly contained.

v)

On 28 May 2010, the Environment Agency wrote to the council recording their objection on the basis of the inadequate flood risk assessment, noting in particular the lack of information on the infiltration test and the design of the infiltration basin.

18.

The screening opinion The formal registration of the application in April 2010 seems to have triggered the EIA screening process. The evidence comes in a copy of the standard form filled in by the relevant planning officer, Mr Lyon, acting under delegated powers, and signed by him on 23 April 2010. That was supplemented by a witness statement. According to this, he contacted Natural England by way of telephone call on 23 April, and spoke with Mr Mike Meadows:

“I explained the proposed development to Natural England and was advised that, subject to pollution prevention measures being clearly identified and addressed, an Environmental Impact Assessment would not be required.”

The screening form, as completed by him, indicated that the site was in a sensitive area and that the development fell within Schedule 2 of the Regulations, but that it was not likely to have significant effects on the environment and no EIA was required, the reasons being given as follows:

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

19.

Given the views expressed by Natural England in December 2009 and again in May 2010 as to the need for further information and the likely need for appropriate appraisal, this report of Mr Meadows’s views seems surprising. He also gave evidence of the same conversation. Although he confirmed Mr Lyon’s account as “broadly accurate”, it was not a formal consultation and he had kept no record. It was not Natural England’s role to decide whether an EIA is necessary and he “did not purport to do so on this occasion”. His advice was solely related to the degree to which there might be a significant effect on the SPA “on the basis that CMGL would advance suitable pollution prevention control measures”. In the same evidence he makes clear that on the information then available he could not exclude the risk of significant effects on the SAC.

20.

On 10 July 2010 new consultants for CMLG produced a Flood Risk Assessment and Pollution Prevention Strategy ("the July 2010 FRA"). Part of the scope of the report was to "carry out an assessment of the environmental impacts of the proposals to the water environment (and provide potential solutions) including pollution risks to groundwater, surface water and the adjacent SSSI". This contained detailed information about site conditions and hydrology, and set out detailed mitigation measures, to be "formulated in accordance with the relevant guidance".

21.

The responses of the statutory authorities to this new information were mixed:

i)

On 13 August 2010, Natural England withdrew their objection, indicating that the new material had "addressed satisfactorily" the concerns raised in their previous letter.

ii)

The Environment Agency, by letter dated 19 August 2010, maintained its objection on a number of grounds, including the absence of details about future maintenance. In response CMGL's consultants prepared a further report ("the August 2010 FRA"), which included further details of run off and peak rainfall proposed by the Environment Agency were incorporated, and proposals for a larger separator, and also set out the proposed maintenance regime. This satisfied the Agency, which on 13 September 2010 withdrew its previous objection, on the condition that a surface water drainage scheme in accordance the August 2010 FRA be implemented prior to the completion and occupation of the development.

iii)

On 3 October a report from the council's own Conservation, Design and Landscape team maintained their objections, commenting on inadequacies in the two FRAs. On 9 December 2010, following receipt of further information from CMGL, they withdrew their objections. The judge noted (para 85), and as I understand accepted, the evidence of the planning officer as to the reasons for their change of position.

22.

It follows that by the time the proposal came before the committee on 20 January 2011 the concerns of all the statutory consultees on the SAC issue had been overcome. The committee resolved by a bare majority to give the senior planning officer delegated powers to approve the development, subject to the imposition of a number of planning conditions.

Phase 3

23.

The January decision was met by a large number of complaints locally. On 10 June 2011, solicitors for the appellant, acting for the Ryburgh Village Action Group, wrote complaining that there had been a failure to comply with the requirements of the Habitats and EIA Directives. Of the former they noted that NE's view in early correspondence that assuming "hydrological connectivity" with the SAC an appropriate assessment would be required, but that, although hydrological connectivity had been established, no appropriate assessment had been undertaken. Of the latter, they said that the EIA screening dated 23 April 2010 had been defective because it failed to "assess the specifics of the environmental issues raised in the application", and asking for the council to revise its EIA screening to require the developer to carry out a full environmental assessment.

24.

On 2 August 2011, the council wrote to the appellant's solicitors noting that the application was to be referred back to a future Development Committee. The letter drew attention to the current views of Natural England on this issue, and invited "any further specific comments or evidence" to support the assertion that an appropriate assessment under the Habitats Directive or an Environmental Impact Assessment under the EIA Directive was still required. A response was requested within 21 days. Apart from a holding letter, there was no substantive response to this letter before the meeting of the Development Control Committee, which took place on 8 September 2011.

25.

At that meeting the committee had a detailed officer's report. As the judge noted (para 99), the report summarised the extensive representations against the proposed development, including concerns about "light pollution, noise pollution, the storage of hazardous fuel, environmental degradation, wildlife habitat destruction, water table and river pollution", but also extensive representations in support on local economic grounds. In relation to an objection concerning drainage, it was reported that consent would be needed from the Internal Drainage Board, which had requested a number of conditions. In relation to the Habitats Directive, it summarised the views of Natural England and stated:

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

In relation to the EIA Directive, the officers' view "remains that the proposal is not EIA development on the basis that there are not likely to be significant environmental effects". This view was supported by the recent response from Natural England confirming that "there would not be a likely significant effect on the River Wensum SAC ... as a result of this proposal if the proposed mitigation measures are put in place".

26.

The committee were invited first to agree the officers' view that the proposal was not EIA development, and that it was entitled to determine the planning application without the need for an environmental statement or appropriate assessment. This was approved (by nine votes to zero with one abstention). The officers then recommended that the application be approved subject to the conditions, including implementation of a surface water drainage scheme in accordance with the details set out in the August 2010 FRA (conditions 13 and 14). There followed a substantive debate on whether the application for planning permission should be granted. In particular, there was discussion of one councillor's continuing concern about the risk of substantial run-off from the site into the River Wensum. She proposed that water monitoring should be carried out over a period of time to assess whether there were any pollution issues. The committee then resolved (by ten votes to two) to approve the application subject to appropriate conditions to deal with this point. The formal planning permission was issued on 13 September 2011. The conditions included conditions 23 and 24 relating to monitoring of water quality and remedial measures if needed, as requested by the councillor.

The present proceedings

27.

The proceedings for judicial review were commenced by a claim form filed on 12 December 2011. They were heard in April 2013 before James Dingemans QC, sitting as a Deputy High Court Judge,

who allowed the application and quashed the permission. In his judgment (paras 119-121) the judge accepted that the committee would have been entitled on the material before them in 2011 rationally to reach the conclusion that there was no relevant risk requiring appropriate assessment or an EIA. However, he thought such a conclusion was inconsistent with their decision at the same time to impose a requirement for testing of water quality and remediation if necessary:

“These conditions, which could only be imposed where the Committee considered them necessary, suggested that the Committee considered that there was a risk that pollutants could enter the river. This would also have been a rational and reasonable conclusion available to the Committee, in the light of the detailed matters set out above.

It does not seem to me that the council could, rationally, adopt both positions at once. ... I do not consider that it is open for me to consider that this inconsistency was simply a function of local democracy at work, and that it could be ignored. ...”

He did not think that the decision could be saved by exercising a discretion not to quash. Accordingly he ordered that the grant of permission be quashed. At the same time he dismissed a separate claim to quash the response given by Natural England, which he considered to have been based on the correct Waddenzee test. There has been no appeal against that part of his judgment.

28.

In the Court of Appeal the only substantive judgment was given by Richards LJ. He set out the relevant statutory provisions relating to both the EIA and the Habitats Directives. In connection with the former he noted that “in determining the likelihood of significant effects, it is open to the decision-maker to have regard to proposed remedial measures”, citing *Gillespie v First Secretary of State* [2003] EWCA Civ 400, [2003] Env LR 30, and *R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408, [2004] Env LR 21. He added:

“The only other point I should mention in relation to the EIA Regulations is that they make provision for a local planning authority to adopt an early ‘screening opinion’ as to whether a proposed development requires an EIA. A defective screening opinion does not, however, invalidate the entire decision-making process. The ultimate question is whether planning permission has been granted without an EIA in circumstances where an EIA was required: see *R (Berky) v Newport City Council* [2012] EWCA Civ 378, [2012] Env LR 35, per Carnwath LJ at para 22” (para 12).

I would respectfully question Richards LJ’s reliance on my own remarks in *Berky*, which were not directed to the same issue. However, the judgment thereafter seems to have proceeded on the basis (which does not seem to have seriously challenged) that a defect in the screening process at an early stage could be remedied by proper consideration at the time of the actual grant.

29.

Having set out the facts, he addressed the appeal against the judge’s decision to quash the permission (paras 42-49). He was unable to support the judge’s reasoning. The committee’s decision on the issues arising under the Directives showed that they were satisfied that there would be no significant adverse effects. That was not inconsistent with the imposition of conditions “as a precautionary measure for the purposes of reassurance, without considering that in their absence there was a likelihood that pollutants would enter the river”. Although this point was not abandoned by Mr Buxton in this court, it was not strongly pressed in his written or oral submissions. In my view the Court of Appeal was clearly right on this issue, and I need say no more about it.

30.

On the other grounds of challenge, Richards LJ noted that the main thrust of the submissions of Mr Harwood QC (then appearing for Mr Champion) had been that the committee at its meeting on 8 September 2011 was not in a position to make a lawful decision as to whether an EIA or appropriate assessment was required, having been given insufficient information for that purpose: for example as to how low the threshold of likelihood was, as to the relevant criteria and the significance of proximity to a sensitive location, or as to the case law on the relevance of mitigation measures (para 51).

31.

Richards LJ did not accept that submission. He said:

“It is true that the decision-making process got off to a bad start, with a flawed screening opinion. But that did not lead in practice to any failure to consider relevant matters. The concerns expressed by Natural England and the Environment Agency, in particular, ensured that the question of mitigation measures was properly addressed. The measures proposed in the resulting flood risk assessments served to meet those concerns. Natural England’s final view that there would not be a likely significant effect was re-stated in emphatic terms in its letter of 26 July 2011, which was one of the documents before the Committee and was highlighted in the officers’ report ...”

The committee had all the necessary information before them, and there was nothing to suggest that they applied too relaxed a test. The significance of the site’s proximity to the River Wensum SSSI and the SAC was spelled out very clearly in the report, as was the relevance of mitigation measures to the assessment. He concluded:

“In my view, therefore, the Committee was put in a position where it could properly make the requisite assessment as to the likely effect of the development on the SSSI and the SAC, and I agree with the deputy judge that the decision not to have an EIA or an Appropriate Assessment was ‘a rational and reasonable conclusion available to the Committee’ on the material before it.” (para 52)

He also rejected, in the same terms as the judge, the grounds of challenge relating to matters other than effects on the SAC. In view of these conclusions, it was not necessary for the court to consider the possible exercise of discretion in relation to remedies.

The arguments in the appeal

32.

Before this court, the argument for Mr Champion has been presented for the first time by Mr Richard Buxton, appearing as a solicitor-advocate. The emphasis appears to have shifted from the arguments as presented to the courts below, and certainly as addressed in their judgments. At their heart are two related issues, first the timing of the decision whether EIA (or appropriate assessment) is required, and secondly the relevance of mitigation measures. They are put perhaps most succinctly in his printed case in the context of the EIA Regulations (para 14):

“... domestic law (in line with the [preamble to the EIA Directive]) anticipates a decision on whether or not EIA is required to be made by the decision-making authority at an early stage. It is accepted that it may happen for whatever reason that a decision not to have EIA is made erroneously at an earlier stage and this can and must be rectified. Indeed the decision-maker should keep a negative screening under review. However what is not permitted, but which occurred starkly in the present case, is reliance on ‘mitigation measures’ during the consenting process (here, measures contained in

the [July FRA]) to convert a project that is likely to have significant effects on the environment into one which is judged not to do so and thus screen out the project from the assessment process.”

33.

No objection has been taken to this reformulation. The issues, as set out in the agreed statement of facts and issues, are in summary:

i)

The correct approach towards the timing of screening for the need for EIA and AA, in the process of applying for planning permission or other consents;

ii)

Whether or to what extent “mitigation measures” may be taken into account in EIA screening.

iii)

If either the first or second issue is decided in the appellant’s favour, whether the court nevertheless can and should exercise its discretion to refuse to quash the planning permission.

iv)

Whether the answers to the above points under European law are sufficiently clear not to require a reference to the CJEU.

“Screening” and the Habitats Directive

34.

It is convenient first to address Mr Buxton’s contention that a process analogous to EIA screening is an implicit requirement of the Habitats Directive. As he puts it in his case:

“In summary as the CJEU explains the HD process is a two-step process and the decision maker has to be sure at stage one (the screening stage) that the possibility of adverse effects can be excluded before dispensing with the requirement for AA. In order to satisfy the HD, the decision-maker doing the screening must identify the conservation objectives of the site and the risks posed by the project and reach a decision that the risks to the conservation objectives can be excluded on the basis of objective information.

If the risks are not excluded and an AA is required at stage 2, the project can only be authorised if the decision maker can be sure that no reasonable scientific doubt remains as to an absence of adverse effects to the conservation objectives.”

This two-stage view of the process under the Habitats Directive was not as such challenged by Mr Lockhart-Mummery. To some extent, as I understood him, he felt constrained by the fact that a similar approach had been adopted by the council itself. However, since there seems to be some confusion on the point, it is important that we should address it as a matter of principle.

35.

As has been seen, the Habitats Directive and Regulations contain no equivalent to “screening” under the EIA Regulations. Mr Buxton relies on the opinion of Advocate General Sharpston in *Sweetman* itself. She was principally concerned to dispel confusion created by different terminology used in some of the cases to describe the test under article 6(3). In her view all that was needed at what she called “the first stage” of article 6(3) was to show that there “may” be a significant effect (para 47):

“49. The threshold at the first stage of article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site ...

50. The test which that expert assessment must determine is whether the plan or project in question has ‘an adverse effect on the integrity of the site’, since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not ‘should we bother to check?’ (the question at the first stage) but rather ‘what will happen to the site if this plan or project goes ahead; and is that consistent with “maintaining or restoring the favourable conservation status” of the habitat or species concerned?’...”

36.

Mr Buxton suggests that her first stage (“Should we bother to check?”) can be regarded as analogous to “screening”. He points also to use of the term “screening” in a document entitled “Assessment of plans and projects significantly affecting Natura 2000 sites - Methodological guidance” (prepared by consultants for the European Commission in 2001). It identifies four stages in the process under article 6(3): stage one “screening”; stage two “appropriate assessment”; stage three “assessment of alternative solutions”; stage four “assessment where no alternative solutions exist and where adverse effects remain”.

37.

However, there is nothing in the language of the Habitats Directive to support a separate stage of “screening” in any formal sense. Nor is it reflected in the reasoning of the CJEU itself. In *Sweetman* the first stage was the appropriate assessment, the second the decision whether in the light of its conclusions the project could be permitted. “Triggering” was simply the word the CJEU used to set the threshold for the first stage. The same approach is also found in the European Commission’s guidance *Managing Natura 2000 Sites: The Provisions of article 6 of the ‘Habitats’ Directive 92/43/EEC*, which adds a third stage, with reference to article 6(4):

“Article 6(3) and (4) define a step-wise procedure for considering plans and projects.

(a) The first part of this procedure consists of an assessment stage and is governed by article 6(3), first sentence.

(b) The second part of the procedure, governed by article 6(3), second sentence, relates to the decision of the competent national authorities.

(c) The third part of the procedure (governed by article 6(4)) comes into play if, despite a negative assessment, it is proposed not to reject a plan or project but to give it further consideration.

The applicability of the procedure and the extent to which it applies depend on several factors, and in the sequence of steps, each step is influenced by the previous step.” (para 4.2)

38.

It is true that the guidance, when commenting on the low threshold required to “trigger” the safeguards in article 6(3) and (4), observes that the formula is “almost identical” to that in the EIA Directive, and it comments on the close relationship in practice between the two procedures (paras 4.4.2, 4.5.1). The guidance also extends to the content of the assessment, again drawing parallels with the “methodology” envisaged by the EIA Directive (para 4.5.2). However, there is no suggestion that this imposes any separate legal obligation analogous to EIA screening.

39.

It is important to emphasise that the legal requirements must be found in the legislation, as interpreted by the CJEU itself, not (with respect) in the opinions of the Advocates General nor in guidance issued by the Commission (however useful it may be as an indication of good practice). At least in this country the use of the term “screening” in relation to the Habitats Directive is potentially confusing, because of the technical meaning it has under the EIA Regulations. The formal procedures prescribed for EIA purposes, including “screening”, preparation of an environmental statement, and mandatory public consultation, have no counterpart in the Habitats legislation. As Sullivan J said in *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), [2008] 2 P & CR 302, para 71:

“Unlike an EIA, which must be in the form prescribed by the EIA Directive, and must include, for example, a non-technical summary, enabling the public to express its opinion on the environmental issues raised (see *Berkeley v the Secretary of State for the Environment* [2001] 2 AC 603 per Lord Hoffmann at p 615), an appropriate assessment under article 6(3) and regulation 48(1) does not have to be in any particular form (see para 52 of *Waddenzee* judgment), and obtaining the opinion of the general public is optional ...”

40.

A similar argument by Mr Buxton was rejected by the Court of Appeal in *No Adastral New Town Ltd (NANT) v Suffolk Coastal District Council* [2015] EWCA Civ 88, paras 63-69. Richards LJ considered the language of article 6(3), which “focuses on the end result of avoiding damage to an SPA and the carrying out of an AA for that purpose”. He noted the difference in *Sweetman* between the Advocate General’s formulation, but found no support in the court’s judgment for the contention that “there must be a screening assessment at an early stage in the decision-making process”:

“In none of this material do I see even an obligation to carry out a screening assessment, let alone any rule as to when it should be carried out. If it is not obvious whether a plan or project is likely to have a significant effect on an SPA, it may be necessary in practice to carry out a screening assessment in order to ensure that the substantive requirements of the Directive are ultimately met. It may be prudent, and likely to reduce delay, to carry one out [at] an early stage of the decision-making process. There is, however, no obligation to do so.” (para 68)

41.

The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the “trigger” for appropriate assessment is met (and see paras 41-43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal “screening opinion” in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an “appropriate assessment”. “Appropriate” is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project “will not adversely affect the integrity of the site concerned” taking account of the matters set in the article. As the court itself indicated in *Waddenzee* the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee*:

“107. ... the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant

information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.”

In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgement of the authority.

42.

In the present case, in the light of the new information provided and the mitigation measures developed during the planning process, the competent authority, in common with their expert consultees, were satisfied that any material risk of significant effects on the SAC had been eliminated. Although this was expressed by the officers as a finding that no appropriate assessment under article 6(3) was required, there is no reason to think that the conclusion would have been any different if they had decided from the outset that appropriate assessment was required, and the investigation had been carried out in that context. Mr Buxton has been unable to point to any further action which would have been required to satisfy the Waddenzee standard. The mere failure to exercise the article 6(3) “trigger” at an earlier stage does not in itself undermine the legality of the final decision. It follows that issue (i), relating to the timing of “screening” as a matter of law, is one which can only arise under the EIA Regulations.

Timing of EIA screening

43.

It is not in dispute that authorities should in principle adopt screening opinions early in the planning process. That intention is expressed in the preamble to the EIA Directive, and carried into the trigger events in the EIA Regulations. Equally, it is not in dispute that a negative screening opinion may need to be reviewed in the light of later information. In *R (Mageean) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 863, [2012] Env LR 3, in the context of screening directions made by the Secretary of State, it was held that that circumstances may require initial screening decisions to be reviewed where “other material facts come to light”. In *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2013] PTSR 406, Pill LJ applied the same reasoning to the adoption of screening opinions by local planning authorities:

“40. Mr Maurici [for the Secretary of State] accepted that screening decisions will usually be made at an early stage of the planning process. However, if a council came to the belief during the course of making the decision that the proposed development might have significant effects on the environment it would be open to the council to require an environmental statement at that stage ...”

44.

Mr Lockhart-Mummery QC (for the respondents) also relies on words of Elias J in *British Telecommunications Plc v Gloucester City Council* [2001] EWHC (Admin) 1001, [2002] 2 P & CR 33. The issue in that case was different. The council had failed to adopt a screening opinion within the three week period provided for by the Regulations; the claimant argued that it was too late to require an environmental statement. In dismissing this argument, Elias J made some more general comments on the procedure:

“Provided the procedures relating to consultation are complied with, and the representations are before the planning authority when it makes its decision, neither logic nor common sense nor the public interest dictate that the courts should treat the exercise as invalid merely because the planning

authority only realised the need for the statement late in the day. Similarly, in my view it also follows that if a decision is taken not to call for a statement, that is capable of being a valid decision notwithstanding that it was not taken until shortly before the permission was given. There would be no point in requiring a fresh application in which the authority would again conclude that no statement was required.” (para 58, emphasis added)

45.

While the actual decision in that case was unremarkable, the second sentence in the passage quoted above (“Similarly ...”) is perhaps open to misinterpretation. It is one thing to say that a negative opinion, lawfully arrived at on the information then available, may need to be reviewed in the light of subsequent information. It is quite another to say that a legally defective opinion not to require EIA, or even a failure to conduct a screening exercise at all, can be remedied by the carrying out of an analogous assessment exercise outside the EIA Regulations. Even if that exercise results in the development of mitigation measures which are in themselves satisfactory, it would subvert the purposes of the EIA Directive for that to be conducted outside the procedural framework (including the environmental statement and consultation) set up by the Regulations.

46.

In the present case, there is no disagreement that it was appropriate for the authority to undertake a screening exercise in April 2010, once the application was formally registered. Nor is it now in dispute that the exercise was legally defective. As the judge said:

“... in circumstances where the pollution prevention measures had not been fully identified at that stage ... the council could not be satisfied that the mitigation measures would prevent a risk of pollutants entering the river, when the mitigation measures were not known ...” (para 60)

Mr Lyon evidently relied on his understanding of the advice of Mr Meadows, but he in turn had not regarded it as a formal consultation, and it was not part of his role to advise on EIA issues. More importantly, it was impossible at that stage to reach the view that there was no risk of significant adverse effects to the river. All the expert opinion, including that of CMGL’s own advisers, was to the effect that there were potential risks, and that more work was needed to resolve them. It was also clear that the mitigation measures as then proposed had not been worked up to an extent that they could be regarded as removing that risk. This could be regarded as an archetypal case for environmental assessment under the EIA Regulations, so that the risks and the measures intended to address them could be set out in the environmental statement and subject to consultation and investigation in that context.

47.

In my view that defect was not remedied by what followed. It is intrinsic to the scheme of the EIA Directive and the Regulations that the classification of the proposal is governed by the characteristics and effects of the proposal as presented to the authority, not by reference to steps subsequently taken to address those effects. No point having been taken about delay since the date of the defective screening opinion (an issue to which I shall return), Mr Buxton’s request in June 2011 that the development should be reclassified as EIA development was in principle well-founded. It was not enough to say that the potential adverse effects had now been addressed in other ways.

Mitigation measures

48.

The second agreed issue relates to the relevance of “mitigation measures” in EIA screening. It is said to be common ground that mitigation measures may be considered as part of the process of appropriate assessment “once it has been decided following screening that appropriate assessment should be carried out”. In the case as presented by Mr Buxton, the issue is not so much the relevance of mitigation measures in general, but the reliance on them at the permission stage to dispense retrospectively with the requirement for EIA which should have been initiated at the outset.

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 DC* [2002] EWHC 2009 (Admin), [2003] Env LR 17 (relating to a proposed egg production unit for 12,000 free-range chickens). Sullivan J said:

“45. Whilst each case will no doubt turn upon 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 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 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?”

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.

52.

We were shown various statements on the same issue, with arguably differing shades of emphasis, in a number of judgments of the Court of Appeal: *Gillespie v First Secretary of State* [2003] Env LR 30,

paras 37, 48, 49; *R (Jones) v Mansfield District Council* [2004] Env LR 21, paras 38-39; *R (Catt) v Brighton and Hove City Council* [2007] EWCA Civ 298, [2007] Env LR 32, paras 33-35. Some were cited by the Court of Appeal in the present case. Mr Lockhart-Mummery, rightly in my view, did not rely on any of those statements as representing a material departure from the approach of Sullivan J. They simply illustrate the point that each case must depend on its own facts. In *R (Jones) v Mansfield District Council* (in a judgment with which I agreed), Dyson LJ said:

“39. I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case.”

53.

As far as concerns the present case, it is not now in dispute that the screening opinion should have gone the other way. The mitigation measures as then proposed were not straightforward, and there were significant doubts as to how they would be resolved. I do not ignore Mr Meadows’ evidence to the court that the proposed mitigation did not represent “novel or untested techniques” and that “similar methods have and are being successfully used around the country”. But that was said in the light of the further reports produced in July 2010, and even then there remained unresolved problems for the Environment Agency and the council’s own officers, for example in relation to the maintenance regime. The fact that they were ultimately resolved to the satisfaction of Natural England and others did not mean that there had been no need for EIA. The failure to treat this proposal as EIA development was a procedural irregularity which was not cured by the final decision.

Discretion

54.

Having found a legal defect in the procedure leading to the grant of permission, it is necessary to consider the consequences in terms of any remedy. Following the decision of this court in *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, it is clear that, even where a breach of the EIA Regulations is established, the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice (para 139 per Lord Carnwath, para 155 per Lord Hope).

55.

Those statements need now to be read in the light of the subsequent judgment of the CJEU in *Gemeinde Altrip v Land Rheinland-Pfalz* (Case C-72/12) [2014] PTSR 311. That concerned a challenge to proposals for a flood retention scheme, on the grounds of irregularities in the assessment under the EIA Directive. A question arose under article 10a of the Directive 85/337 (article 11 of the 2011 EIA Directive), which requires provision for those having a sufficient interest to have access to a court to challenge the “substantive or procedural” legality of decisions under the Directive. One question, as reformulated by the court (para 39), was whether article 10a was to be interpreted as precluding decisions of national courts that make the admissibility of actions subject to conditions requiring the person bringing the action –

“... to prove that the procedural defect invoked is such that, in the light of the circumstances of the case, there is a possibility that the contested decision would have been different were it not for the defect and that a substantive legal position is affected thereby.”

56.

In answering that question, the court reaffirmed the well-established principle that, while it is for each member state to lay down the detailed procedural rules governing such actions, those rules -

“in accordance with the principle of equivalence, must not be less favourable than those governing similar domestic actions and, in accordance with the principle of effectiveness, must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law” (para 45)

Since one of the objectives of the Directive was to put in place procedural guarantees to ensure better public information and participation in relation to projects likely to have a significant effect on the environment, rights of access to the courts must extend to procedural defects (para 48).

57.

The judgment continued:

“49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.

50. In that regard, it should be borne in mind that article 10a of that Directive leaves the member states significant discretion to determine what constitutes impairment of a right ...

51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of subparagraph (b) of article 10a of that Directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked.

52. It appears, however, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.

53. Therefore, the new requirements thus arising under article 10a of that Directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.

54. In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337."

58.

Allowing for the differences in the issues raised by the national law in that case (including the issue of burden of proof), I find nothing in this passage inconsistent with the approach of this court in Walton. It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive.

59.

Judged by those tests I have no doubt that we should exercise our discretion to refuse relief in this case. In para 52 of its judgment, the Court of Appeal summarised the factors which in its view entitled the authority to conclude that applying the appropriate tests, and taking into account the agreed mitigation measures, the proposal would not have significant effects on the SAC. That, admittedly, was in the context of its consideration whether the committee arrived at a "rational and reasonable conclusion", rather than the exercise of discretion. However, there is nothing to suggest that the decision would have been different had the investigations and consultations over the preceding year taken place within the framework of the EIA Regulations.

60.

This was not a case where the environmental issues were of particular complexity or novelty. There was only one issue of substance: how to achieve adequate hydrological separation between the activities on the site and the river. It is a striking feature of the process that each of the statutory agencies involved was at pains to form its own view of the effectiveness of the proposed measures, and that final agreement was only achieved after a number of revisions. It is also clear from the final report that the public were fully involved in the process and their views were taken into account. It is notable also that Mr Champion himself, having been given the opportunity to raise any specific points of concern not covered by Natural England before the final decision, was unable to do so. That remains the case. That is not to put the burden of proof on to him, but rather to highlight the absence of anything of substance to set against the mass of material going the other way.

61.

For completeness I should mention that, in his written submissions to this court, Mr Buxton attempted to rely on a witness statement which had been prepared for the High Court in support of an additional ground relating to failure to consider cumulative effects of "incremental development" at the site over many years. This he suggests can be used as "evidence ... that it is at least possible that ... lawful screening might produce a different substantive result". However, as he accepts, this ground, and the evidence in support, were not admitted in the High Court. This court can only proceed on the evidence properly before it.

Conclusion

62.

For the reasons given, I would dismiss the appeal, albeit for somewhat different reasons from those of the Court of Appeal, taking account of the different emphasis of the arguments before us. Although the proposal should have been subject to assessment under the EIA Regulations, that failure did not in the event prevent the fullest possible investigation of the proposal and the involvement of the public. There is no reason to think that a different process would have resulted in a different decision, and Mr Champion's interests have not been prejudiced. Finally, I see no need for a reference to the CJEU. As I have attempted to indicate, the principles, in so far as not clear from the Directives themselves, are fully covered by existing CJEU authority, and the only issues are their application to the facts of the case.

63.

I would add two final comments. First, as I have said, no issue has been taken on the delay which elapsed between the screening opinion in April 2010 and the date when it was first challenged in correspondence more than a year later. The formal provision, in both the EIA Directive and the Regulations, for a decision on this issue at an early stage seems designed to provide procedural clarity for the developer and others affected. It is in no-one's interest for the application to proceed in good faith for many months on a basis which turns out retrospectively to have been defective. However, in *R (Catt) v Brighton & Hove City Council* [2007] Env LR 32, para 39ff, it was decided by the Court of Appeal (applying by analogy the decision of the House of Lords in *R (Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593) that a failure to mount a timely legal challenge to the screening opinion was no bar to a challenge to a subsequent permission on the same grounds. Although we have not been asked to review that decision, I would wish to reserve my position as to its correctness. I see no reason in principle why, in the exercise of its overall discretion, whether at the permission stage or in relation to the grant of relief, the court should be precluded from taking account of delay in challenging a screening opinion, and of its practical effects (on the parties or on the interests of good administration).

64.

Secondly, although this development gave rise to proper environmental objections, which needed to be resolved, it also had support from those who welcomed its potential contribution to the economy of the area. It is unfortunate that those benefits have been delayed now for more than four years since those objections were, as I have found, fully resolved. I repeat what I said, in a similar context, in *R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408:

"57. The appellant (who is publicly funded) lives near the site, and shares with other local residents a genuine concern to protect her surroundings. ... With hindsight it might have saved time if there had been an EIA from the outset. However, five years on, it is difficult to see what practical benefit, other than that of delaying the development, will result to her or to anyone else from putting the application through this further procedural hoop.

58. It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race. Furthermore, 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."

65.

In this case also CMGL may feel in retrospect that it would have been better if they had prepared an environmental statement under the EIA Regulations on their own initiative rather than simply relying

on the negative opinion of the planning officer. That might in any event have been a more logical response to the advice of their own consultant that appropriate assessment under the Habitats Directive was likely to be required.

66.

Jones was decided at a time when the extent of the court's discretion to refuse relief in such cases was less clear. It is to be hoped that this appeal has enabled this court to lay down clearer guidance as to the circumstances in which relief may be refused even where an irregularity has been established. In future cases, the court considering an application for permission to bring judicial review proceedings should have regard to the likelihood of relief being granted, even if an irregularity is established. (I emphasise that this is said without any reference to the new section 31A(2) of the Senior Courts Act 1981, which as is agreed does not apply to this appeal.)