Note on SA/SEA Process

This document addresses action number 3 and was raised at the Matter 1 hearing session:

Councils to provide legal note on case law relating to curing any deficiencies in SA/SEA by additional SA/SEA work during examination.

This document contains copies of the following:

1. Note on SA/SEA Process
2. Annex A: Cogent Land LLP v Rochford District Council (2012)
3. Annex B: No Adastral New Town Ltd v Suffolk Coastal District Council (2015)
4. Annex C: R (Friends of the Earth Ltd) v Secretary of State for Transport (2020)

Contents

IN THE MATTER OF:

SOUTH AND VALE JLP

NOTE ON SA/SEA PROCESS

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1. The purpose of this note is to summarise the case law which establishes that deficiencies in strategic environmental assessment (frequently presented, as here, within the sustainability appraisal) may be 'cured' by further work during the examination process. We have provided a copy of each of the judgments referred to in the annexes to this note.

2. In *Cogent Land LLP v Rochford District Council* [2012] EWHC 2542 (Admin) (**Annex A**) the examination of Rochford DC's Core Strategy had been suspended to allow the local planning authority to carry out a review of the SA and SEA following a judgment of the High Court. Rochford DC subsequently published an SA/SEA Addendum which specifically addressed the assessment of reasonable alternatives. The plan was later adopted with modifications recommended by the Inspector. The Claimant challenged the plan on the basis of deficiencies in the selection and assessment of reasonable alternatives. It argued that the SA/SEA Addendum, which addressed that subject, was not in law capable of curing the deficiencies. On that issue, Singh J held:

    a. "Strategic Environmental Assessment" is not a single document, still less is it the same thing as the Environmental Report: it is a process (para 112).
    b. The SEA Directive does not stipulate when during the plan making process the environmental assessment must occur, other than to say that it must be "before [the plan's] adoption". Similarly, the Directive only stipulates that public consultation should take place before adoption of the plan (para 113).

c. The approach that was being suggested by the claimant in that case "would lead to absurdity, because a defect in the development plan process could never be cured". It could always be argued that the preferred policy was simply a continuation of an *ex post facto* rationalisation. "Yet if that choice is on its merits the correct one or the best one, it must be possible for the planning authority to justify it, albeit by reference to a document which comes at a later stage of the process" (para 125).
d. Accordingly, a later SA/SEA Addendum "was capable, as a matter of law, of curing any defects in the earlier stages of the process" (para 127).

3. The judgment in *Cogent* was subsequently considered by the Court of Appeal in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] EWCA Civ 88 (**Annex B**). In that case Suffolk Coastal DC did not seek to challenge the High Court's conclusion that there had been deficiencies in the SEA process during the plan making process. The High Court found that those deficiencies had been cured by later work, and the requirements of the SEA Directive had been complied with by the time of adoption. That was challenged by the Appellant.

4. Richards LJ quoted extensively from the judgment in *Cogent* and held that "the conclusion reached by Singh J on the issue of principle was correct for the reasons he gave" (para 53). Richards LJ rejected the Appellant's suggestion that the case could be distinguished in some way, stating that "the reasoning of Singh J in *Cogent* is just as applicable to the deficiencies in the present case as it was to the defect in *Cogent* itself" (para 54). Underhill and Briggs LJJ agreed.

5. The judgments in *Cogent* and *No Adastral* were summarised by Lord Hodge DPSC and Lord Sales JSC in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52 (**Annex C**) as follows:

> "66 *In Cogent Land LLP v Rochford District Council* [2013] 1 P & CR Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of

supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111–126). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48–54). We agree with this analysis.

67 It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7."

6. In light of the above case law, it is clear beyond doubt that any deficiencies in the SA/SEA process prior to the submission of the JLP for examination are capable of being addressed and cured during the examination process. Should the Inspectors conclude that further SA/SEA work is required (for example, the work described under Action Point 4, should that be confirmed), the extra work and the results of public consultation upon it will then form part of the ongoing process of environmental assessment. That work should then be taken into account in reaching a conclusion on whether the plan is legally compliant.

Annex A: Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin)

COGENT LAND LLP v ROCHFORD DISTRICT COUNCIL AND BELLWAY HOMES LTD

QUEEN'S BENCH DIVISION

Singh J.: September 21, 2012

[2012] EWHC 2542 (Admin); [2013] 1 P. & C.R. 2

Core strategy; Environmental impact assessments; Green belt; Housing policy; Planning; Reasons

H1 *Development plan—application under s.113 of the Planning and Compulsory Purchase Act 2004—Strategic Environmental Assessment Directive 2001/42/EC—Environmental Assessment of Plans and Programmes Regulations 2004—later Addendum—whether effective to cure earlier defects.*

H2 The claimant sought to quash parts of the Rochford Core Strategy ("RCS") which was adopted by Rochford District Council ("the Council") on December 13, 2011, following an Examination in Public ("EiP") into a draft version of the RSC by an Inspector appointed by the Secretary of State for Communities and Local Government. The claimant owned freehold land in the general location of East Rochford. The challenge was to three housing policies in the RCS. Policies H2 and H3 identified a number of general locations proposed to be released from the Green Belt in satisfaction of the annual requirement to deliver housing for the plan period. Under those policies, the general location of West Rochford was to provide approximately 450 dwellings by 2015, with approximately 150 further dwellings from 2015 to 2021.

H3 In September 2006, the Council published a document called Core Strategy Issues and Options. It also published its Strategic Environmental Assessment ("SEA") and Sustainability Appraisal ("SA") in respect of that document. In May 2007, it published its Core Strategy Preferred Options and its SA and SEA in respect of that document. In October 2008, the Council published its Revised Core Strategy Preferred Options together with its SA and SEA in respect of that document. In 2009, it published its pre-submission Core Strategy and its SA and SEA in respect of that document. This was submitted for examination to the Secretary of State and EiP hearings were held in 2010 and 2011. On March 25, 2011, the High Court gave judgment in the case of Save Historic Newmarket v Forest Heath District Council and on April 7, 2011, the claimant requested that the EiP be suspended following that judgment. On May 11, 2011, the Council requested that the Inspector should not issue her report to allow the Council to carry out a review of the SA and SEA in respect of the submission draft Core Strategy and the Inspector agreed to that request. In July 2011, the Council published an Addendum to its SA and SEA in respect of the draft Core Strategy. On July 27,

2011, the claimant requested the Inspector to suspend the EiP until December that year. The Inspector refused this request. The Inspector submitted her report to the Secretary of State in October 2011 and in December 2011 the Council adopted the RCS, incorporating the changes recommended by the Inspector.

H4 The claimant submitted that:

H5 (1) The Council had breached the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004 ("the Regulations) in that it had failed to set out the reasons for its initial selection of various general areas for possible location of housing. It was submitted that a key stage in the production of the Core Strategy was reached when the Revised Core Strategy Preferred Options draft was published in 2008. The SA/SEA in 2008 failed to identify in outline (or at all) the reasons for the selection of the alternatives to be the subject of assessment in Policy H2. The SEA had to identify in outline the reasons for the selection of alternatives to be the subject of assessment at all and this was a different order of analysis from the actual assessment and selection of preferred options. This defect in the 2008 draft was not cured in September 2009, when the pre-submission version of the Core Strategy was published and accompanied by an SA/SEA.

H6 (2) The 2008 Revised Core Strategy Preferred Options draft preferred West Rochford as a general location for housing along with 10 other general locations. Under Policy H2 of that draft, East Rochford was identified as an "Alternative Option". This was the first time in the Core Strategy that any general development locations had been preferred and the first time that identified alternative locations had been rejected. Accordingly, the affected public were entitled to look to the SA/SEA accompanying the draft plan to understand why such a preference was being expressed in relation to reasonable alternatives and to examine the evidence upon which such a preference was based. The SA/SEA which accompanied the Preferred Options document did not allow the public this early and effective engagement.

H7 (3) The Addendum failed to meet the requirements of the Regulations (read with the Strategic Environmental Assessment Directive 2001/42/EC ("the Directive") in a number of ways as follows: (a) even if East Rochford was identified as a reasonable alternative, at all material times when East Rochford had been considered it had been considered solely against West Rochford and not against or as an alternative to any other housing location; (b) that the assessment of alternatives did not constitute a proper assessment on a comparable basis with the preferred locations. The consideration of alternatives in the Addendum was on a wholly different and lower scale (consistent with an ex post facto justification); (c) that the assessment in the Addendum was defective because it failed to take any account of the Council's own detailed findings in relation to the sustainable deliverability of the claimant's own site in East Rochford. The acceptance in a formal document issued to the Inspectorate by the Council (jointly with the claimant) that 326 dwellings at Coombes Farm in East Rochford would be acceptable in flood risk terms and in various other respects was clearly relevant to any comparable assessment but was left out of account.

H8 (4) Even if as a matter of fact the Addendum did comply with the requirements of the Regulations and the Directive, as a matter of law it was incapable of curing the defects in the earlier stages of the process.

H9 (5) The Inspector unfairly failed to re-open the public hearings on the issue of the Addendum. This was unfair and contrary to the provisions of section 20(6) of the Planning and Complusory Purchase Act 2004 ("the Act").

H10 **Held**, refusing the application,

H11 (1) There was an air of unreality about ground 1 since, in fact, the claimant's site was in a general location which was among those selected for further assessment. In any event, the Council did adequately explain the basis on which the initial selection of general locations to be considered for housing allocations had been made, in particular the environmental reasons in outline terms. The documents from 2008 and 2009 set out in outline the environmental reasons why parts of the western area of the district were to be considered for further assessment. There was no breach of the Regulations in this regard.

H12 (2) Taken in isolation, the court would be inclined to accept the claimant's submissions on ground 2. The SA/SEA in 2008 did not set out adequately the reasons for preferring the alternatives selected. However, the matter did not stop there because the claimant's submissions depended on its grounds (3) and (4) relating to the Addendum. If the Addendum cured any defects in the earlier stages of the process and if, as a matter of law it was capable of doing so, there would be no merit in ground (2).

H13 (3) The Addendum did adequately explain the environmental reasons why East Rochford was not a preferred location. On the evidence, the court rejected the claimant's contention that the Addendum was an "ex post facto justification" or a "bolt-on consideration of an already chosen preference" to justify a decision which had already been taken. The Addendum did adequately carry out an assessment on a comparable basis. It explained the reasons why, on environmental grounds, East Rochford was not considered a suitable general location for housing development and why other locations were preferred. There was a conceptual difference between development throughout the general location of East Rochford and the development of one or more sites within this general location. The claimant's submission confused two different issues, namely, whether the impacts of developing the claimant's site were sufficiently harmful as to justify refusal of permission for the claimant's site if that site was considered in isolation and whether the impacts of developing the claimant's site would be more harmful/less advantageous than those which would arise if development were carried out to the west of Rochford instead. The 2008 draft of the RCS described West Rochford as being more suitable than the other Rochford locations. It did not suggest that there were no locations to the east of Rochford where residential development might be acceptable. It was open to the claimant to draw the Inspector's attention to the Coombes Farm material in the EiP process and it had already done this long before the Addendum was produced. There was no basis for the suggestion that the Inspector was not properly informed of this matter.

H14 (4) Regulation 13 of the Regulations required "every draft plan…and its accompanying environmental report" (prepared in accordance with the Regulations) to be made available for the purposes of consultation by informing the public "as soon as reasonably practicable" of where documents could be viewed. However, this did not have the effect contended for by the claimant, that the Addendum was incapable as a matter of law of curing any earlier defects in the process. It meant simply that the draft plan, and any accompanying environmental report there happened to be, had to be available for public consultation as soon as reasonably

practicable. This was a timing provision. It did not prescribe the content of the report. Still less did it have the effect that if, for some reason, the accompanying report was not wholly adequate at that time, it could not be supplemented or improved later before adoption of the plan, for example by way of the Addendum in the present case. The Addendum was capable, as a matter of law, of curing any defects in the earlier stages of the process.

H15 (5) There was no breach of the rules of natural justice or the Act in the Inspector's approach. Although the scheduled hearings had been completed by the time the Council had sought to undertake the SA/SEA Addendum, the Inspector made it plain that she was prepared to contemplate the possibility of further hearings into the SA/SEA Addendum were such hearings considered necessary. All material arising in connection with the additional SA/SEA work carried out was published on the Council's website, which included all correspondence between the Council and the Inspector about the process being undertaken. The claimant's representatives were perfectly aware of the timetable being followed and that all documents were being published on line, and indicated their satisfaction with this process. The claimant did not request a re-opening of the hearings at the time. It was clear on the evidence that the Inspector's considered view was that such hearings were not necessary. That view was neither wrong nor unfair.

H16 **Cases referred to in the judgment:**

Heard v Broadland District Council [2012] EWHC 344 (Admin); [2012] Env. L.R. 23; [2012] P.T.S.R. D25

R (on the application of Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29; [2004] J.P.L. 751

R (on the application of Edwards) v Environment Agency (No.2) [2008] UKHL 22; [2008] 1 W.L.R. 1587; [2009] 1 All E.R. 57; [2008] Env. L.R. 34; [2008] J.P.L. 1278

Seaport Investments Ltd's Application for Judicial Review, Re [2007] NIQB 62; [2008] Env. L.R. 23

Save Historic Newmarket v Forest Heath District Council [2011] EWHC 606 (Admin); [2011] J.P.L. 1233; [2011] N.P.C. 35

H17 **Legislation referred to by the Court:**

Planning and Compulsory Purchase Act 2004

Environmental Assessment of Plans and Programmes Regulations 2004

Town and Country Planning (Local Development)(England) Regulations 2004

Directive 2001/42

H18 **Application** by the claimant, Cogent Land LLP, under s.113 of the Planning and Compulsory Purchase Act 2004 to quash parts of the Housing Chapter of the Rochford Core Strategy adopted by the defendant, Rochford District Council, on December 13, 2011. The facts are as stated in the judgment of Singh J.

H19 *R. Harris* and *S. White,* instructed by Clyde & Co, for the claimant.

G. Jones QC and *J. Lopez*, instructed by the Solicitor, Rochford District, for the defendant.

P. Brown QC, instructed by Reynolds Porter Chamberlain, for the Interested Party.

JUDGMENT

SINGH J.:

Introduction

1 This is an application under s.113 of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) to quash parts of the Housing Chapter of the adopted Rochford Core Strategy (RCS). The RCS was adopted by the defendant local planning authority on December 13, 2011. That adoption followed an Examination in Public (EiP) into a draft version of the RCS by an inspector appointed by the Secretary of State for Communities and Local Government.

2 The claimant owns the freehold interest in land to the south of Stambridge Road, which for present purposes can be described as being in the general location of East Rochford.

3 The claimant's challenge is to three housing policies in the adopted RCS: Policy H1 (Distribution), Policy H2 (General Locations) and Policy H3 (Phasing General Locations Post 2021). Policies H2 and H3 identify a number of general locations proposed to be released from the Green Belt in satisfaction of the annual requirement to deliver housing for the plan period. Under those policies, the general location of West Rochford is to provide approximately 450 dwellings by 2015, with approximately 150 further dwellings from 2015–2021.

4 The interested party, Bellway Homes Limited (Bellway) supports the defendant in opposing the present application. Bellway controls a site of some 33.45 hectares at Hall Road on the western edge of Rochford. Bellway participated in the consultations on the RCS and made detailed submissions at the EiP in support of the release of land to the west of Rochford (and its own site in particular) for residential development. In April 2010 Bellway submitted an application for outline planning permission for residential development of 600 dwellings, associated access and a new primary school. That application is in accordance with Policy H2 of the adopted RCS. On January 18, 2012 the defendant's Development Committee accepted the recommendation of its planning officers and resolved to grant planning permission for that development, subject to the conclusion of a s.106 agreement and the imposition of appropriate conditions. I was informed that no formal decision notice has yet been issued on the Bellway application, because the s.106 agreement is still being finalised.

5 The claimant's skeleton argument makes numerous criticisms of the defendant's approach to the production of the RCS. However, at the hearing it became clear that its essential grounds relate to the following:

(1) the defendant's selection of alternatives for potential general locations for housing (alleged failure to explain the initial selection process);
(2) the defendant's reasons given for preferring or rejecting reasonable alternatives (alleged failure to give an adequate explanation of the comparative assessment);
(3) the defendant's Addendum of July 2011 (alleged inadequacies in that document);
(4) whether, even if the Addendum was otherwise adequate, it was capable in law of curing the alleged earlier defects;

(5) the claimant also complains that in failing to re-open the public hearings the inspector failed to comply with the requirements of natural justice. Although the Secretary of State is not a defendant in these proceedings, it is argued that the defendant erred in law by adopting the inspector's report in spite of this alleged breach of natural justice.

Brief Chronology

6 In 2005 the defendant commenced preparation of its Core Strategy.

7 In September 2006 the defendant published a document called Core Strategy Issues and Options. It also published its Strategic Environmental Assessment (SEA) and Sustainability Appraisal (SA) in respect of that document.

8 In May 2007 the defendant published its Core Strategy Preferred Options. In June 2007 the defendant published its SA and SEA in respect of that document.

9 In February 2008 the claimant purchased its freehold interest in the land to which I have referred in East Rochford.

10 In October 2008 the defendant published its Revised Core Strategy Preferred Options. In November 2008 the defendant published its SA and SEA in respect of that document.

11 In September 2009 the defendant published its pre-submission Core Strategy and also its SA and SEA in respect of that document.

12 On January 14, 2010 the defendant submitted its Core Strategy for examination by the Secretary of State.

13 Between May 11 and 21, 2010 EiP hearings were held into the submission draft Core Strategy. There were also EiP hearings on September 7, 2010 and February 1–2, 2011.

14 On March 25, 2011 the High Court gave judgment in a case called *Forest Heath*, to which I will refer below. On April 7, 2011 the claimant requested that the examination be suspended following that judgment.

15 On May 11, 2011 the defendant requested that the inspector should not issue her report in order to allow the defendant to carry out a review of the SA and SEA in respect of the submission draft Core Strategy. On the same date the inspector agreed to delay publication of her report.

16 In July 2011 the defendant published an Addendum to its SA and SEA in respect of the submission draft Core Strategy.

17 On July 27, 2011 the claimant requested the inspector to suspend the examination until December that year. On August 11, 2011 the inspector refused to suspend the examination.

18 On October 27, 2011 the inspector submitted her report to the Secretary of State.

19 On December 13, 2011 the defendant resolved to adopt the RCS, incorporating changes recommended by the inspector, and on the same date did adopt the RCS. That is now the subject of the present challenge.

The development of the RCS in more detail

20 In its Draft Core Strategy (reg.25 version) of September 2006 the defendant set out options that it considered to be realistic to shape the development of its District in the period until 2021 and beyond. Options for development were presented in tables and listed in two categories of "possible" or "probable".

21 At para.4.6.2 this document said:

> "The council will allocate land in locations that are considered sustainable and such locations will be tested through the Strategic Environmental Assessment/Sustainability Appraisal process. The council will not allocate sites which are considered sensitive due to landscape designations, biodiversity issues or where there may be a risk of flooding."

22 Paragraph 4.6.3 stated:

> "Within the District there are three tiers of settlements. The top tier is that comprising Hawkwell/Hockley, Rayleigh and Rochford/Ashingdon. These are all towns and villages with a good range of services and facilities as well as some access to public transport. They are capable of sustaining some expansion, in-filling and redevelopment."

23 After describing in brief the second and third tier areas, para.4.6.6 stated:

> "Taking into account such sustainability issues, the council believes that the settlement pattern should be focussed on existing settlements, with the main settlements in the District taking the majority of development required. The majority is defined as 90% of the housing development required. The main settlements are considered to be Hawkwell/Hockley, Rayleigh and Rochford/Ashingdon."

24 In a table at p.149 of the document, the council set out the options which it considered should be considered as follows. In the column headed "possible" there were the following four bullet points:

> "• Greater dispersal to minor settlements, enabling possible regeneration of local facilities.
> • Split the housing allocation evenly between the parishes (excluding Foulness), so that each area gets a small amount of housing.
> • Develop a new settlement, well related to transport links and providing its own basic infrastructure.
> • Focus solely on an expansion of one settlement, creating a significant urban expansion."

25 Under the heading "probable" there were two bullet points as follows:

> "• Allocate the total number of housing units to the top (90%) and second tier (10%) settlements, to gain a smaller number of large sites which will deliver the greatest amount of infrastructure improvements.
> • A timescale will be specified detailing the expected phasing of development."

26 The next relevant document is the Draft Core Strategy Preferred Options (reg.26 version) of May 2007. Section 4.6, on general development locations, was in similar terms to the 2006 document. In particular, it again described the three tiers of settlement in the District, with the top tier comprising Hawkwell/Hockley, Rayleigh and Rochford/Ashingdon.

27 Paragraph 4.6.10 set out the defendant's preferred options for general development locations as follows:

"• The council will set out a policy detailing a settlement hierarchy split into three tiers based on services and sustainability.
• The council will set out a policy detailing a timescale for the expected phasing of development.
• The council will set out a policy allocating the total number of housing units to the top (90%) and second tier (10%) settlements, to gain a smaller number of large sites which will deliver the greatest amount of infrastructure improvements. The split (with approximate numbers) will be as follows: …"

There then followed a table with a description of the relevant location and the approximate number of units envisaged to be allocated there. The total number of units envisaged was 4,600. The number of units envisaged for Rochford/Ashingdon was 1,000.

28 Paragraph 4.6.11 set out alternative options for general development locations as follows:

"• Greater dispersal making more use of settlements in the East of the District.
• Greater dispersal to minor settlements, enabling possible regeneration of local facilities.
• Focus solely on an expansion of one settlement, creating a significant urban expansion."

29 Paragraph 4.6.15 stated:

"In reaching a decision about the broad distribution of future housing the starting point is that the top tier of settlements – Rayleigh (population 30,196), Rochford/Ashingdon (population 10,775), and Hockley/Hawkwell (population 20,140) are best placed to accommodate expansion."

30 Paragraph 4.6.16 stated:

"The top tier settlements are generally better located in relation to the highway network, though the provision of new housing must be used as an opportunity to seek infrastructure improvements, particularly in relation to the highway network."

31 Paragraph 4.6.20 stated:

"Rochford/Ashingdon has in theory reasonably good transport links to Southend and the A127, but in practice the area is heavily congested with congestion on Ashingdon Road being amongst the worst in the District. To the West, Hall Road links directly to the Cherry Orchard Way link road, but the railway bridge at the eastern end of Hall Road is a severe constraint on traffic movements."

32 Paragraph 4.6.21 stated:

"There are environmental designations on the West side of Ashingdon north of the railway line and Rochford town centre is a conservation area and its setting must be protected. There are some opportunities for expansion, though road infrastructure will need to be carefully considered."

33 The next relevant document is the Core Strategy Preferred Options document of October 2008. Section 3 of this document, which dealt with strategies, activities

and actions, listed the defendant's preferred options in green boxes and its alternative options in yellow boxes.

34 Page 13 of this document described the characteristics of the District in the following way:

> "The District of Rochford is situated within a peninsula between the Rivers Thames and Crouch, and is bounded to the East by the North Sea. The District has land boundaries with Basildon and Castle Point District and Southend-on-Sea borough councils. It also has marine boundaries with Maldon and Chelmsford Districts. The District has linkages to the M25 via the A127 and the A13 and direct rail links to London. … The landscape of the District has been broadly identified as being made up of three types:
>
> > 'Crouch and Roach Farmland; Dengle and Foulness Coastal; and South Essex Coastal Towns. The latter of these three is least sensitive to development.
> > The character of the District is split, with a clear East-West divide. Areas at risk of flooding and of ecological importance are predominantly situated in the sparsely populated, relatively inaccessible East. The West of the District contains the majority of the District's population, has better access to services and fewer physical constraints.'"

35 Page 20 of this document set out a brief description of the tiers of settlement. Page 26 of the document, headed "General Locations", stated:

> "It is the not the purpose of the Core Strategy to set out the precise locations for new development — this is done through the Allocations Development Plan Document. Instead, the Core Strategy will set out the general approach for the allocations document.
> The concept of sustainable development is at the heart of any decisions with regards to the location of housing. …
> As described in the Characteristics chapter of this document, the District's settlements can be divided into four tiers, with the settlements in the higher tiers being generally more suitable to accommodate additional housing development for the reasons described above. The settlement hierarchy is as follows …"

There then followed a table, setting out in numbered tiers 1 to 4 the following:

1. Rayleigh; Rochford/Ashingdon; Hockley/Hawkwell.
2. Hullbridge; Great Wakering.
3. Canewdon.
4. All other settlements.

36 At p.28 of the 2008 document there appeared Draft Policy H2 on "General locations and phasing – preferred option", which set out in a table the number of units envisaged to be allocated to various areas by 2015 and also the number of units envisaged to be allocated to each area between 2015 and 2021. In respect of West Rochford it was envisaged that there would be 300 units by 2015 and 100 units thereafter. In respect of East Ashingdon there would 120 units by 2015 and none thereafter. In respect of South East Ashingdon there would 120 units by 2015 and none thereafter.

37 At p.30 of the 2008 draft, in the discussion of alternative options under Policy H2 there was a reference to East Rochford as an alternative to other Rochford locations, and in answer to the question "Why is it not preferred?" there was stated the following:

> "It is considered that West Rochford is a more suitable location given its proximity to the train station, town centre and its relationship with areas of significant employment growth potential at London Southend airport and its environs. Traffic flows from new development to the East of Rochford would be predominantly through the centre of the town centre resulting in significant congestion."

38 The next relevant document is the SA/SEA non-technical summary in respect of the Rochford Core Strategy preferred options document of October 2008.

39 At about the same time, in November 2008, there was published the Technical Report in relation to the SA and SEA. Paragraph 1.6 of this Report, under the heading "Summary of Compliance with the SEA Directive and Regulations", stated:

> "The SEA Regulations set out certain requirements for Reporting the SEA process, and specify that if an integrated appraisal is undertaken (i.e. SEA is subsumed within the SA process, as for the SA of the Rochford LDF), then the sections of the SA Report that meet the requirements set out for Reporting the SEA process must be clearly signposted. The requirements for Reporting the SEA process are set out in Appendix 1 and within each relevant section of this Report."

40 Paragraph 5.3 of this document stated:

> "An emerging draft of the revised Preferred Options policies was then subject to SA in October 2008. A summary of the results of this appraisal is provided below, with the detailed working matrices provided in Appendix vii. On the whole, the findings of the SA suggest that the emerging Core Strategy policies will make significant contributions to the progression of SA objectives."

41 Paragraphs 5.7–5.11 dealt specifically with the Draft Policies H2 and H3. Paragraph 5.10 stated:

> "The actual locations for growth proposed in the policy are considered to be the most sustainable options available, within the context of the overall high levels of population growth being proposed in the East of England Plan. The policy recognises the distinctive landscape and bio-diversity areas in the District, (including coastal landscapes and flood-prone areas in the East of the District) and takes an approach to development that minimises impacts on these areas through steering development toward the more developed Western side of the District."

42 In Appendix 1 (Statement on Compliance with the SEA Directive and Regulations) para.1.8 stated:

> *"An outline for the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties encountered in compiling the required information*: This work, undertaken

> by Essex County Council's Environmental Assessment Team is available in the Regulation 25 Issues and Options SA Report, and is summarised in section 4 of this Report. Details of how the assessment was undertaken are provided in section 3 of this SA Report (appraisal methodology), and difficulties encountered in compiling information summarised in Section 4 of this report."

43 The next relevant document is the Core Strategy pre-submission draft of September 2009. Paragraph 4.9 of this document again set out the four tiers of settlement in the District.

44 In relation to Policy H2 (Extensions to Residential Envelopes and Phasing), a table at p.44 of this document stated that it was envisaged that 450 dwellings would be allocated to the area of West Rochford by 2015, and 150 dwellings between 2015 and 2021. In relation to East Ashingdon the figure was 100 dwellings by 2015 and none thereafter. Nothing was allocated in respect of East Rochford.

45 In relation to Policy H3 (Extension to Residential Envelopes post-2021), a table at p.45 of the document envisaged 500 dwellings in that period in relation to South East Ashingdon. Again, nothing was allocated in respect of East Rochford.

46 The next relevant document is the Technical Report for the SA/SEA in respect of the pre-submission draft of 2009. This had an Appendix 1 also, in similar terms to those which have already been quoted from the 2008 report: see in particular para.1.8 of that Appendix.

47 The next relevant document, which is very important to the present proceedings, is the Sustainability Appraisal Addendum dated July 2011. The introduction to this document highlighted the reasons why it had been produced. Paragraph 1.3 stated:

> "In light of the recent High Court ruling in *Save Historic Newmarket v Forest Heath District Council*, Enfusion advised the Council that it would be prudent to undertake a review of the Core Strategy Sustainability Appraisal, ensuring compliance with the new case law on SEA arising from this ruling. Rochford District Council has subsequently requested the issuing of a decision on the soundness of the Core Strategy be delayed to enable the Council to undertake such a review. The Planning Inspectorate has accepted this request and the Council commissioned Enfusion in May 2011 to undertake the work. In response to the findings of the *Forest Heath*case, this Addendum SA report provides a summary of the alternatives considered throughout the production of the plan setting out the reasons for selecting/rejecting those alternatives. It also includes consideration of more detailed housing locations (than previously appraised). … This Addendum Report should be read in conjunction with previous Sustainability Appraisal Reports and iterations of the Core Strategy, in particular the SA Report of the LDF Core Strategy proposed submission draft DPD [Development Plan Document] (2009) for a full account of how the Sustainability Appraisal has influenced the process to date."

48 Paragraph 2.2 of the Addendum stated that:

> "The recent *Forest Heath* High Court ruling and recommendations by DCLG in its report on the effectiveness of SEA and SA have clarified and provided an additional interpretation of the EU SEA Directive. This section of the SA

> Report Addendum therefore seeks to provide a clear summary of the alternatives considered throughout the SA process and the reasons for selecting/rejecting those alternatives."

49 Table 2.1 of the Addendum set out over several pages a summary of the approach to the assessment and selection of alternatives.

50 Section 3 dealt with "Further appraisal of alternatives: General housing development locations." Paragraph 3.1 stated:

> "As illustrated above, the Council has considered the results of the SA of issues and options (alternatives) in its selection and rejection of alternatives for plan-making. The Sustainability Appraisal considered a range of issues considered to be of key importance to the development of the Core Strategy. This included consideration of housing numbers and general locations for development (strategic options 4 and 5). The SA found that option E, the allocation of housing to the top and second tier settlements to gain a smaller number of large sites would have the most positive effects of all the options."

51 Para. 3.2 stated:

> "In light of the*Forest Heath* Ruling, it was decided to further develop this appraisal, considering the more detailed locations for development within individual top and second tier settlements. The recent publication (in February 2010) of the LDF Allocations DPD Discussion and Consultation Document has also enabled a further consideration of the realistic locations for development, as it incorporates the findings of the Call for Sites process and Strategic Housing Land Availability Assessment (SHLAA)."

52 Paragraph 3.3 stated:

> "Detailed appraisal of housing locations were undertaken for each of the top and second tier settlements and Canewdon, with full details provided in Appendix 1. …"

53 Table 3.1 then set out over several pages the "Housing Development Options for Rochford District: Reasons for selection/rejection". In this table, Location 1 was West Rochford and Location 3 was East Rochford. Under the heading "Reasoning for Progressing or Rejecting the options in plan making" it was stated in respect of Location 1 that this

> "was selected as it is a sustainable location, particularly in terms of accessibility, economy and employment, and balanced communities. In addition, the location relates well to London Southend airport and proposed employment growth there, is not subject to significant environmental constraints which would inhibit development, and is of a scale capable of accommodating other infrastructure, including a new primary school which would have wider community benefits. The location performs well to the proposed balanced strategy, and, due to its location in relation to Southend and the highway network, would avoid generating traffic on local networks for non local reasons. The location is unlikely to enable infrastructure improvements to King Edmund School, but is nevertheless selected for the aforementioned reasons."

54 It should be mentioned that the table also said that Location 5 (South East Ashingdon) and Location 6 (East Ashingdon) were selected as they are well located in relation to King Edmund Secondary School.

55 Turning to Location 3, East Rochford, the table said that this was not selected

> "as it was not considered as sustainable a location as West Rochford. There are greater environmental constraints to the East of Rochford, including Natura 2000 and Ramsar sites. Development to the East of Rochford has the potential to be affected by noise from London Southend airport, given its relationship to the existing runway. Whilst a small quantum of development may be accommodated within this general location avoiding land subject to physical constraints, such an approach is less likely to deliver community benefits, and would necessitate the identification of additional land, diluting the concentration of development and thus reducing the sustainability benefits of focussing development on larger sites. Location 3 is also unlikely to aid the delivery of improvements to King Edmund School. Furthermore, it would generate traffic on local networks for non local reasons, i.e. traffic to Southend would be likely to be directed through the centre of Rochford, including through the Conservation Area."

Legal framework

56 Section 19(5) of the 2004 Act requires a local planning authority to carry out an appraisal of the sustainability of the proposals in each development plan document and to prepare a report of the findings of that appraisal. This is known as an SA. It is common ground that the RCS is a development plan document by virtue of reg.7(a) of the Town and Country Planning (Local Development) (England) Regulations 2004 (SI 2004/2204).

57 The background to the present case can be found in Directive 2001/42 of the European Parliament and Council of June 27, 2001 on the assessment of the effects of certain plans and programmes on the environment. This is sometimes known as the Strategic Environmental Assessment (SEA) Directive.

58 The SEA Directive has been implemented in domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633). Part 3 of those Regulations concerns environmental reports and consultation procedures.

59 Regulation 12 provides that:

> "(1) Where an environmental assessment is required by any provision of Part 2 of these regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of –
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and geographical scope of the plan or programme.
>
> (3) The report shall include such information referred to in schedule 2 to these regulations as may be reasonably required, taking account of – [a number of matters are then set out in sub-paragraphs (a) to (d)]…."

60 Paragraph 8 of Sch.2 requires "an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken …" The other paragraphs in Sch.2 deal with a number of other items of information which must be included in an Environmental Report (ER); for example. the likely significant effects on the environment, including such matters as biodiversity, fauna, flora and climatic factors: see para.6 of Sch.2.

61 Regulation 13(1) provides that:

> "(1) Every draft plan or programme for which an Environmental Report has been prepared in accordance with Regulation 12 and its accompanying Environmental Report ('the relevant documents') shall be made available for the purposes of consultation in accordance with the following provisions of this Regulation."

62 Regulation 13(2) sets out a number of steps in relation to the consultation process which must be followed. Paragraph (3) specifies that the period for consultation must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents.

63 It was common ground before me that:

(1) the Regulations are the relevant source of law in this country, since the Directive, unlike an EU Regulation, is not directly applicable;
(2) the Regulations should be interpreted so far as possible in a way which is compatible with the Directive; and
(3) if an interpretation of the Regulations is incompatible with the Directive and no other interpretation is possible, then, to the extent of any incompatibility, the claimant may rely on a provision of the Directive, since there will, to that extent, have been a failure correctly to transpose the Directive into domestic law: in those circumstances the Directive may have direct effect.

It is therefore appropriate now to turn to the material provisions of the Directive.

64 Article 1 of the Directive provides:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive an Environmental Assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

65 Article 2(b) defines "Environmental Assessment" to mean:

> "The preparation of an Environmental Report, the carrying out of consultations, the taking into account of the Environmental Report and the results of the consultations in decision-making and the provision of information on the decision in accordance with articles 4 to 9."

66 Article 4, which sets out general obligations, provides in para.(1):

> "The Environmental Assessment referred to in article 3 shall be carried out in the preparation of a plan or programme and before its adoption or submission to legislative procedure."

67 Article 3, which deals with the scope of the Directive, requires in para.(1) that an Environmental Assessment, in accordance with arts 4–9, shall be carried out for plans and programmes referred to in paras 2–4 which are likely to have significant environmental effects.

68 Article 5(1) provides that:

> "Where an Environmental Assessment is required under article 3(1), an Environmental Report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex 1. Annex 1 sets out a number of matters, including at sub paragraph (h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken ... ."

69 Article 6 provides that:

> "(1) The draft plan or programme and the Environmental Report prepared in accordance with article 5 shall be made available to the authorities referred to in paragraph 3 of this article and the public.
> (2) The authorities referred to in paragraph 3 and public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate timeframes to express their opinion on the draft plan or programme and the accompanying Environmental Report before the adoption of the plan or programme or its submission to the legislative procedure. …"

70 Guidance on implementation of the Directive has been issued by the European Commission. Paragraph 1.5 of that Guidance makes it clear that it represents only the views of the Commission and is not of a binding nature. As Ouseley J. commented in *Heard v Broadland DC* [2012] EWHC 344 (Admin), at para.69, the Guidance is not a source of law.

71 Paragraph 4.2 of the Guidance states:

> "As a matter of good practice, the Environmental Assessment of plans and programmes should influence the way the plans and programmes themselves are drawn up. While a plan or programme is relatively fluid, it may be easier to discard elements which are likely to have undesirable environmental effects than it would be when the plan or programme has been completed. At that stage, an Environmental Assessment may be informative but is likely to be less influential. Article 4(1) places a clear obligation on authorities to carry out the assessment during the preparation of the plan or programme."

72 Paragraph 5.11 of the Guidance states that:

> "The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

73 Paragraph 5.12 of the Guidance states:

> "In requiring the likely significant environmental effects or reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in article 5(2) concerning the scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or Parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in Annex 1 should thus be provided for the alternatives chosen. …"

74 Paragraph 7.4 of the guidance, which relates to the definition of "Environmental Assessment" in art.2(b) of the Directive states that:

> "This definition clearly states that consultation involved is an inseparable part of the assessment. Further, the results of the consultation have to be taken into account when the decision is being made. If either element is missing, there is, by definition, no Environmental Assessment in conformity with the Directive. This underlines the importance that is attached to consultation in the assessment."

The claimant's Ground 1

75 The claimant submits that the defendant breached the requirements of the Regulations in that it failed to set out the reasons for its initial selection of various general areas for possible location of housing. It is common ground that this obligation did not arise in the early stages of the drafting process, from 2006. However, the claimant submits that a key stage in the production of the Core Strategy was reached when the Revised Core Strategy Preferred Options draft was published in October 2008.

76 In support of this contention the claimant relied upon a recent decision by Ouseley J., *Heard v Broadland District Council* [2012] EWHC 344 (Admin). In particular the claimant relied upon what was known in that case as Ground 1, which was considered at [53]–[72] of the judgment. The claimant emphasised what Ouseley J. said at [57] of his judgment, that the council in that case had not set out in any document "the outline reasons for the selection of alternatives at any particular stage."

77 Under Ground 1 the claimant submits that the SA/SEA in 2008 failed to identify in outline (or at all) the reasons for the selection of the alternatives to be the subject of assessment in Policy H2. The claimant submits that the SEA must identify in outline the reasons for the selection of alternatives to be the subject of assessment

at all and that this is a different order of analysis from the actual assessment and selection of preferred options. The claimant submits that this defect in the 2008 draft was not cured in September 2009, when the pre-submission version of the Core Strategy was published and was accompanied by an SA/SEA.

78 I do not accept this ground of challenge. There is an air of unreality about this ground since, in fact, this claimant's site was in a general location which was among those selected for further assessment. In any event, in my view, the defendant did adequately explain the basis on which the initial selection of general locations to be considered for housing allocations was made, in particular the environmental reasons in outline terms.

79 I have already quoted the relevant passages in the documents from 2008 and 2009 which set out in outline the environmental reasons why parts of the western area of the district were to be considered for further assessment.

80 In particular, the Technical Report in relation to the SA/SEA in 2008 addressed this at para.5.10. It was noted there that the "actual locations for growth proposed in the policy are considered to be the most sustainable options available" and that the "policy recognises the distinctive landscape and bio-diversity areas in the District." It was also noted that the policy "takes an approach to development that minimises impacts on these areas by steering development toward the more developed western side of the District."

81 Appendix 1 to that Technical Report, at para.1.8 (which I have already quoted) also cross-referred to the relevant sections of the earlier SA Report, which had provided an outline of the reasons for selecting the alternatives chosen and a description of the difficulties encountered in compiling the required information.

82 Furthermore, as I have already indicated, similar passages can be found in the Technical Report for the SA/SEA in respect of the pre-submission draft in 2009.

83 I therefore reject the claimant's Ground 1 that there was a breach of the Regulations in this regard.

The claimant's Ground 2

84 The claimant observes that the 2008 Revised Core Strategy Preferred Options draft preferred West Rochford as a general location for housing, along with 10 other general locations across the district.

85 Under Policy H2 of that draft, East Rochford was identified as an "Alternative Option" to "other Rochford" locations. It was said that:

> "It is considered that west Rochford is a more suitable location given its proximity to the train station, town centre and its relationship with areas of significant employment growth potential at London Southend Airport and its environs. Traffic flows from the new development top the east of Rochford would be predominantly through the centre of the town centre resulting in significant congestion."

86 This was the first time in the Core Strategy process that any general development locations had been preferred and the first time that identified alternative locations had been rejected. Accordingly, submits the claimant, the affected public were entitled (applying the provisions of the Regulations and the Directive) to look to the SA/SEA *accompanying* the draft plan to understand why such a preference was being expressed in relation to reasonable alternatives and to examine the

evidence upon which such a preference was based. However, the claimant submits, the SA/SEA which accompanied the Preferred Options document did not allow the public this early and effective engagement.

87 In this context the claimant again placed reliance on what was said by Ouseley J. at [57] of his judgment in *Heard*. He found in that case that there was no discussion in an SA, insofar as required by the Directive, of why the preferred options came to be chosen, and that there was no analysis on a "comparable" basis, insofar as required by the Directive, of the preferred option and selected reasonable alternatives.

88 On that last point, the claimant also emphasised what Ouseley J. said at [71]:

> "… it seems to me that, although there is a case for examination of a preferred option in greater detail, the aim of the Directive, which may affect which alternatives it is reasonable to select, is more obviously met by, and it is best interpreted as requiring, an*equal examination of the alternatives*which it is reasonable to select for examination alongside whatever, even at the outset, may be the preferred option. It is part of the purpose of this process to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of what the authority regards as reasonable alternatives … ." [Emphasis added]

89 Taken in isolation, I would be inclined to accept those submissions by the claimant under Ground 2. Although the defendant and Bellway argued to the contrary, in my view, the documents from which I have already quoted, in particular the Technical Report for the SA/SEA in 2008, did not set out adequately the reasons for preferring the alternatives that were selected. It was indeed "prudent", as Enfusion advised the defendant, to undertake a review of the sustainability of the Core Strategy.

90 However, the matter does not rest there, in my view. This is because the claimant's submission depends on its Grounds 3 and 4 relating to the Addendum. If, as the defendant and Bellway submit, the Addendum cured any defects in the earlier stages of the process (Ground 3) and if as a matter of law it was capable of doing so (Ground 4), there would be no merit in Ground 2 either. The main plank of the claimant's case is that the defendant was not entitled to seek to remedy any deficiencies in its procedures by way of the Addendum in July 2011. I therefore turn to those contentions under Grounds 3 and 4.

The claimant's Ground 3

91 The claimant submits that the Addendum fails to meet the requirements of the Regulations (read with the Directive) in a number of ways.

92 First, the claimant contends that, even if East Rochford was identified as a reasonable alternative, at all material times when East Rochford has been considered it has been considered solely against West Rochford and not against or as an alternative to any other housing location. No explanation even in outline has been given as to why it has been so limited as an alternative. The claimant complains that there was no appropriate comparison done between East Rochford and other locations such as Ashingdon.

93 I do not accept that contention. For example, the passages to which I have already referred, in particular the text of Table 3.1 in the Addendum, noted that Location

5 (South East Ashingdon) and Location 6 (East Ashingdon) were well located in relation to King Edmund School; Location 3 (East Rochford) was not. More generally, in my view, the Addendum did adequately explain the environmental reasons why Location 3 was not a preferred location.

94 Next, the claimant submits that the assessment of alternatives which was undertaken does not constitute a proper assessment on a comparable basis with the preferred locations. In particular, the claimant submits that the environmental effects of the preferred locations were considered in much more detail through the series of SEAs which had been produced since the Revised Preferred Options draft in 2008. The consideration of alternatives in the Addendum was on a wholly different and lower scale (consistent with what is alleged to be an ex post facto justification).

95 I do not accept that contention. Rather, I accept the defendant's and Bellway's submissions that:

(1) the Addendum was produced by independent consultants who will have been well aware of the fact that (as the inspector herself pointed out before the Addendum was commissioned) it must not be undertaken as an exercise to justify a predetermined strategy;
(2) the claimant's assertion that Enfusion were simply asked to "verify" the conclusions already reached by Council Members is emphatically denied by Cllr Hudson (see his witness statement, para.24);
(3) In any event, having considered the Addendum and the submissions made (by the claimant and others) in connection with it, the independent inspector concluded that there was "no compelling reason to question [its] integrity".
(4) Further, the inspector had specifically (and at the claimant's request) included within the "Matters and Issues" for consideration at the examination the question: "Are the broad locations identified for the supply of housing most appropriate when considered against all reasonable alternatives?" In that context, she considered whether the reasons advanced in the Addendum were sound and concluded that there was:

> "no compelling evidence to dispute the conclusion of the SA that the chosen locations are the most sustainable."

96 On October 27, 2011 the defendant received the inspector's report concluding that, with a limited number of changes, the RCS was sound. The report notes (para.3) that none of the changes materially altered the substance of the plan and its policies, or undermined the SA/SEA and participatory processes undertaken.

97 The inspector's report confirms her consideration of representations on the SA/SEA Addendum, as follows:

> "In June 2011, and following the judgement of the High Court in the case of *Save Historic Newmarket Ltd v Forest Heath District Council*, the Council published a draft Addendum to the Sustainability Appraisal which was subject to consultation between 13 June and 11 July 2011 and I have taken account of representations made in preparing my report" (para. 10).

98 At para.31 of her report, the inspector stated:

> "The SA is informed by a comprehensive scoping report and I find no reason to conclude that any significant effects have not been taken into account. The SA Addendum (July 2011) provides a more detailed appraisal of the alternative locations considered, and was subject to public consultation. I have taken into account criticisms that the Addendum was produced after the submission draft plan, but sustainability appraisal is an iterative process."

99 At para.32 she further stated:

> "Overall, there is no compelling reason to question the integrity of the SA as a whole, and no convincing evidence to dispute the conclusion of the SA that the chosen locations are the most sustainable, and therefore the CS is sound in relation to this issue."

100 Further, the inspector concluded at para.62, in respect of legal requirements, that the SA/SEA is adequate.

101 Following receipt of the inspector's report, the defendant prepared an SA/SEA Adoption Statement. The SA/SEA Adoption Statement also incorporates an SA/SEA Compliance Review and Quality Assurance, produced by Enfusion. The Compliance Review concludes:

> "Having undertaken this review, it is our professional opinion that the SA/SEA of the Rochford Core Strategy (incorporating the Addendum reports of September 2010 and July 2011) is compliant with the SEA Directive and requirements and PPS 12 requirements for Sustainability Appraisal." (para.1.4).

102 On the evidence before the Court, I therefore reject the claimant's contention that the Addendum was an "ex post facto justification" or a "bolt-on consideration of an already chosen preference" to justify a decision which had already been taken.

103 Furthermore, I reject the contention that the Addendum did not adequately carry out an assessment on a "comparable" basis. I have earlier set out relevant passages from the Addendum. It is clear from the Addendum, in my judgement, that:

(1) the 2009 SA/SEA had incorporated comments and representations received during public consultation on earlier iterations of the draft RCS and the sustainability appraisal undertaken throughout the plan-making process, since Issues and Options stage (para.1.1);
(2) it "provides a summary of the alternatives considered throughout the production of the plan setting out the reasons for selecting/rejecting those alternatives. It also includes consideration of more detailed housing locations" (para.1.3);
(3) the same method of appraisal using the SA framework of objectives and decision-aiding questions for sustainable development had been used in its production (para.1.5);
(4) "A strategic approach was taken — appropriate to the Core Strategy level of plan-making and to minimise pre-empting the preparation of the Site Allocations DPD that will consider sites in more detail" (para.1.7);
(5) it incorporates consideration of " … the approach to general locations within each settlement" (para.1.7); and
(6) it performs a comparative appraisal between locations and settlement areas:

> "• findings of 'no significant effects identified' were recorded in the Addendum as to denote ' … that the development of the location is unlikely to have a significant effect on the SA objective in question … ';
> • any 'cumulative issues of significance' were considered in the Sustainability Appraisal Submission report (section 6)."

104 In particular, the explanation at Table 3.1 adequately explained, in my judgement, the reasons why, on environmental grounds, East Rochford was not considered a suitable general location for housing development and why other locations were preferred.

105 The claimant also submits that the assessment in the Addendum was defective because it failed to take any account of the defendant's own detailed findings in relation to the sustainable deliverability of the claimant's own site in East Rochford. The claimant submits that those findings were relevant to which areas are to be preferred because they relate to the ability of the claimant's large site alone to produce a scale of housing (320 units plus) similar to or greater than that suggested for other preferred broad locations (West Rochford—450 units by 2015 and East Ashingdon—100 units). The claimant argues that the acceptance in a formal document issued to the Inspectorate by the defendant (jointly with the claimant) that 326 dwellings at Coombes Farm in East Rochford would be acceptable in flood-risk terms and in various other respects was clearly relevant to any comparable assessment, but was left out of the account.

106 However, I accept the submission by the defendant and Bellway that there is a conceptual difference between development throughout the general location of East Rochford and the development of one or more (non-specified) sites within this general location:

(1) the plan process and the claimant's appeal were concerned with two separate things. The plan process was concerned with identifying a broad geographical area within which it might be possible to locate 650 houses. The claimant's appeal was concerned with an application on a specific site for planning permission for 326 houses. It is not surprising that the consideration of the Coombes Farm application was carried out at a greater level of detail than the identification of broad areas for development in the RCS. However, whether or not Coombe Farm was suitable revealed nothing about the suitability of the surrounding area. This is particularly relevant, given that the claimant's proposals would only address part of the overall need for Rochford;

(2) to the extent that it might have been relevant to consider the claimant's particular site, this submission confuses two different issues, namely:

> • whether the impacts of developing the claimant's site (whether in terms of traffic, habitats, landscape or any other matter) were sufficiently harmful as to justify refusal of permission for the claimant's site *if that site were considered in isolation*;
> • whether the impacts of developing the claimant's site (whether in terms of traffic, habitats, landscape or any other matter) would be more harmful/less advantageous than those which would arise if development were carried out to the west of Rochford instead.

The claimant's planning appeal was concerned with the former; the RCS process was concerned with the latter. It was for this reason that the 2008 draft of the RCS described west Rochford as being "more suitable" than the other Rochford locations. It did not suggest, nor did it need to, that there were no locations to the east of Rochford where residential development might be acceptable; and

(3) in any event, one of the functions of the statutory process is to give members of the public the opportunity to draw what they perceive to be errors or omissions to the attention of the decision-maker. In the present case, if and so far as the claimant considered that the Addendum was wrong not to refer to the Statement of Common Ground and other material presented at the Coombes Farm planning appeal, it was open to it to draw the inspector's attention to this material in the EiP process. In fact, the claimant had already done this long before the Addendum was produced. This information was again drawn to the inspector's attention by a letter of June 24, 2011. Further detailed submissions were made on July 8, 2011. In the circumstances, there is no basis for the suggestion that the inspector was not properly informed of this matter.

107 Accordingly, I reject the claimant's Ground 3 and conclude that, on the facts of the present case, the Addendum was adequate.

The claimant's Ground 4

108 The claimant submits that, even if as a matter of fact, the Addendum did comply with the requirements of the Regulations and the Directive, as a matter of law it was incapable of curing the defects in the earlier stages of the process.

109 Both the defendant and Bellway observe, as a preliminary point, that this is not the position which the claimant took when it first wrote to the defendant, drawing its attention to the decision in *Forest Heath*. Rather, the letter sent on its behalf on April 7, 2011 asked for only a suspension of the process. It stated:

> "We would urge you to suspend any decision to adopt the Core Strategy until such time was the Council has conducted a fully objective and transparent assessment of the effects of the broad housing locations and their consideration against all reasonable alternatives."

110 They also observe that the claimant's argument that the process on which the defendant embarked was inadequate was not advanced until June 13, 2011, *after* the draft Addendum had been published for consultation. No such argument was advanced when the defendant first announced its intention to review the SA in light of recent developments in the field of sustainability appraisals on May 11, 2011.

111 Under Ground 4 the claimant relies, first, upon the language of reg.13, which requires "every draft plan… and its accompanying environmental report" (prepared in accordance with the Regulations) to be made available for the purposes of consultation by informing the public "as soon as reasonably practicable" of where the documents may be viewed. However, in my judgement, this does not have the effect contended for by the claimant, that the Addendum was incapable as a matter of law of curing any earlier defects in the process. It means simply that the draft plan, and any accompanying Environmental Report there happens to be, must be

available for public consultation as soon as reasonably practicable. This is a timing provision. It does not prescribe the content of the report. Still less does it have the effect that if, for some reason, the accompanying report is not wholly adequate at that time, it cannot be supplemented or improved later before adoption of the plan, for example by way of the Addendum in the present case.

112 I prefer the submissions that were made by the defendant and Bellway. First, it should be noted that "Strategic Environmental Assessment" is not a single document, still less is it the same thing as the Environmental Report: it is a *process*, in the course of which the Directive and the Regulations require production of an "Environmental Report". Hence, art.2(b) of the SEA Directive defines "environmental assessment" as:

> "the preparation of the environmental report, carrying out consultations, the taking into account of the environmental report and the results of the consultations in the decision making and the provision of information on the decision in accordance with Articles 4 to 9".

113 Furthermore, although arts 4 and 8 of the Directive require an "environmental assessment" to be carried out and taken into account "during the preparation of the plan", neither article stipulates when in the process this must occur, other than to say that it must be "before [the plan's] adoption". Similarly, while art.6(2) requires the public to be given an "early and effective opportunity … to express their opinion on the draft plan or programme and the accompanying environmental report", art.6(2) does not prescribe what is meant by "early", other than to stipulate that it must be before adoption of the plan. The Regulations are to similar effect: reg.8 provides that a plan shall not be adopted before account has been taken of the environmental report for the plan and the consultation responses.

114 The claimant relied upon several authorities said to support its submissions under Ground 4.

115 The first case is a decision of the High Court in Northern Ireland: *Seaport Investments Ltd's Application for Judicial Review, Re* [2008] Env LR 23, a decision of Weatherup J. on equivalent regulations in Northern Ireland which implemented, or purported to implement, the SEA Directive. The applicants in that case contended that the regulations had failed to transpose the Directive correctly in a number of respects. The applicants also contended that there had been a breach of the Regulations and the Directive on the facts of the case.

116 Weatherup J. accepted the applicants' argument in relation to what he called the second transposition issue: see [19]–[23] of the judgment. He then turned to whether there had been a failure to comply with the requirements of the Regulations and Directive.

117 At [47] he said:

> "The [scheme] of the Directive and the Regulations clearly envisages the*parallel development* of the Environmental report and the draft plan with the former impacting on the development of the latter throughout the periods before, during and after the public consultation. In the period before public consultation the developing Environmental Report will influence the developing plan and there will be engagement with the consultation body on the contents of the report. Where the latter becomes largely settled, even though as a draft plan, before the development of the former, then the

> fulfilment of the scheme of the Directive and the Regulations *may* be placed in jeopardy. The later public consultation on the Environmental Report and draft plan *may*not be capable of exerting the appropriate influence on the contents of the draft plan." [Emphasis added]

118 The claimant emphasised in particular the phrase "parallel development." However, it is important to read the passage as a whole, in particular the words I have emphasised towards the end of it: they indicate that Weatherup J. did not intend to lay down a general and absolute rule but was in truth stressing that whether or not the scheme of the Regulations and Directive is in fact breached will depend on the facts of each case.

119 At [49] Weatherup J. said:

> "Once again the Environmental Report and the draft plan operate together and the consultees consider each in the light of the other. This must occur at a stage that is sufficiently 'early' to avoid in effect a settled outcome having been reached and to enable the responses to be capable of influencing the final form. Further this must also be 'effective' in that it does in the event actually influence the final form.*While the scheme of the Directive and the Regulations does not demand simultaneous publication of the draft plan and the Environmental Report it clearly contemplates the opportunity for concurrent consultation on both documents*." [Emphasis added]

120 At [51] Weatherup J concluded on the facts of that case that:

> "When the development of the draft plan had reached an advanced stage before the Environmental Report had been commenced there was*no opportunity*for the latter to inform the development of the former. This was not in accordance with the scheme of Articles 4 and 6 of the Directive and the Regulations." [Emphasis added]

121 I accept the defendant's submission that, in *Seaport*, Weatherup J. confirmed that as regards the requirement for a ER to "accompany" a draft plan, the Directive and Regulations do not require "simultaneous" publication of a draft plan and the ER.

122 The claimant also relied upon the decisions of Ouseley J. in *Heard* (to which I have already made reference) and Collins J. in *Save Historic Newmarket Ltd v Forest Heath District Council*, the case which prompted the production of the Addendum. At [7] Collins J. said:

> "The challenge is brought on two grounds. First it is said that there was a failure to comply with the relevant EU Directive and the Regulations made to implement it that the Strategic Environmental Assessment (SEA) did not contain all that it should have contained. This if established would render the policy made in breach unlawful whether or not the omission could in fact have made any difference. That, as is common ground, is made clear by the decision of the House of Lords in<u>Berkeley</u>…. Although <u>Berkeley</u>concerned an EIA, the same principle applies to a SEA. To uphold a planning permission granted contrary to the provisions of that Directive would be inconsistent with the Courts obligations under European Law to enforce Community Rights. The same would apply to policies in a plan."

123 However, it is important to note what the actual decision in that case was, and the basis for it. At [40], Collins J., in accepting the claimant's first ground of challenge in that case, said:

> "In my judgement, Mr Elvin is correct to submit that*the final report* accompanying the proposed Core Strategy *to be put to the inspector* was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified *in the final report*. There was thus a failure to comply with the requirements of the Directive … ." [Emphasis added]

124 I accept Bellway's submission that the claimant's primary argument seeks to extend the principles in *Forest Heath* and *Heard* beyond their proper limit. Those were both cases where the Court was satisfied that *no* adequate assessment of alternatives had been produced prior to *adoption* of the plans in those cases. Although they comment (understandably) on the desirability of producing an Environmental Report in tandem with the draft plan, as does *Seaport*, neither is authority for the proposition that alleged defects in an Environmental Report cannot be cured by a later document.

125 I also consider, in agreement with the submissions by both the defendant and Bellway, that the claimant's approach would lead to absurdity, because a defect in the development plan process could never be cured. The absurdity of the claimant's position is illustrated by considering what would now happen if the present application were to succeed, with the result that Policies H1, H2 and H3 were to be quashed. In those circumstances, if the claimant is correct, it is difficult to see how the defendant could *ever* proceed with a Core Strategy which preferred West Rochford over East. Even if the defendant were to turn the clock back four years to the Preferred Options stage, and support a new Preferred Options Draft with an SA which was in similar form to the Addendum, the claimant would, if its main submission is correct, contend that this was simply a continuation of the alleged "ex post facto rationalisation" of a choice which the defendant had already made. Yet if that choice is on its merits the correct one or the best one, it must be possible for the planning authority to justify it, albeit by reference to a document which comes at a later stage of the process.

126 As both the defendant and Bellway submit, an analogy can be drawn with the process of Environmental Impact Assessment where it is settled that it is an:

> "unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain 'the full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement

> is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between."

See Sullivan J. in *R. (Blewett) v Derbyshire County Council* [2004] Env LR 29 at [41], approved by the House of Lords in *R. (Edwards) v Environment Agency* [2008] Env LR 34 at [38] and [61].

127 Accordingly, I reject the claimant's Ground 4 and conclude that the Addendum was capable, as a matter of law, of curing any defects in the earlier stages of the process.

The claimant's Ground 5

128 Under its final ground of challenge, the claimant submits that the inspector unfairly failed to re-open the public hearings on the issue of the Addendum. It observes that it was entitled to appear at all relevant stages of the EiP because it had made representations seeking to change the development plan document by the addition of East Rochford as a development location for housing and had requested that its representations be dealt with by way of hearing.

129 The claimant submits that the inspector's adoption of the written representation process to consider the Addendum meant that the claimant was not able to avail itself of this right in relation to the SA/SEA. This, it is alleged, was unfair and contrary to the provisions of s.20(6) of the 2004 Act.

130 In my judgement, there was no breach of the rules of natural justice or of the 2004 Act in the inspector's approach.

131 As Bellway points out, the claimant had already, in April 2010 (in advance of the EiP hearings), identified to the inspector the material from the Coombes Farm appeal which it considered relevant. That material was therefore available for consideration at the EiP.

132 Although the scheduled hearing sessions had been completed by the time the defendant had sought to undertake the SA/SEA Addendum, the inspector made it plain that she was prepared to contemplate the possibility of further EiP hearings into the SA/SEA Addendum were such hearings considered necessary.

133 This was in accordance with the way in which the defendant also envisaged things might go. On May 11, 2011 the defendant wrote to the Inspector, suggesting that they carry out additional work to the SA/SEA and that issue of the Examination report be delayed, pending this review:

> "In order to enable this additional work to be appropriately fed into the decision-making process, we respectfully request that the issuing of the Inspector's report be postponed. We appreciate that additional work on the SA will necessitate a delay in the examination process to allow for the additional work to be drafted, consulted upon, and the results fed into the plan-making process as appropriate. Furthermore,*we are mindful that the Inspector may wish to hold further hearing sessions to consider the results of the additional SA work*." [Emphasis added]

134 On May 25, 2011 the defendant suggested two timetables in relation to proceeding with the RCS examination, in order to account for potential scenarios following production of the SA Addendum (i.e. where changes to the RCS would and would not be required as a result of the additional SA work). The suggested

consultation period under Scenario 2 (i.e. where changes to the RCS would be required) was extended to six weeks.

135 As I have already said, the inspector confirmed that she was prepared to consider additional hearing sessions if necessary.

136 On June 10, 2011 the defendant stated:

> "We are mindful that the public consultation period set out in the scenario 2 timetable represents an opportunity to consult not only on any changes that may be required as a result of the SA review, but also on adjustments to extend the Plan period to 15 years."

137 All material arising in connection with the additional SA/SEA work carried out was published on the defendant's website, which included all correspondence between the defendant and the inspector about the process being undertaken. The claimant's representatives were perfectly aware of the timetable being followed and that all documents were being published online, and indicated their satisfaction with this process.

138 The defendant also points out that the claimant did not request a re-opening of the hearings at the time.

139 It is clear on the evidence before the Court that the inspector's considered view was that such hearings were not, as events turned out, necessary. I do not regard that view as one that was wrong or unfair. Accordingly, as I have indicated, I conclude on this ground that there was no breach of natural justice or the procedural requirements of the 2004 Act.

Conclusion

140 For the above reasons this application is refused.

Annex B: No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88

NO ADASTRAL NEW TOWN LTD v SUFFOLK COASTAL DC

COURT OF APPEAL (CIVIL DIVISION)

Richards, Underhill & Briggs LJJ: 17 February 2015

[2015] EWCA Civ 88; [2015] Env. L.R. 28

Appropriate assessments; Consultation; Core strategy; Residential development; Special Protection Areas; Strategic environmental assessments; Sustainability appraisals

H1 *Town & Country Planning—nature conservation—environmental assessment—Core Strategy—housing allocation in proximity of European protected sites—whether failure to comply with Strategic Environmental Assessment Directive—whether failure to comply with Habitats Directive and Regulations in failing to carry out screening assessment at sufficiently early stage or in relying upon uncertain mitigation—whether deficiencies in process legally capable of being "cured" later in process*

H2 The appellant (N) was a local residents action group opposed to policies providing for a strategic housing allocation for 2000 homes. A main concern was the proximity of the site to the Debden Estuary Special Protection Area (SPA) and Special Area of Conservation (SAC), with the closest part of the site being just over one km from the SPA. The Core Strategy (CS) had been drawn up by the respondent (S) over a period of six and a half years, with numerous draft versions and accompanying "sustainability appraisals" (SA) and "appropriate assessments" (AA). The site was selected from a number of options as the most suitable for housing development. N sought to quash provisions within the CS on the grounds that there had been failures to comply with the Strategic Environmental Assessment (SEA) Directive and the Habitats Directive, and implementing regulations. N argued that there had been two breaches by S: when it decided in July 2008 to select the site as the preferred option for 1,050 houses without having carried out a SA as required, and so failing to consider the Deben SPA which was not recognised as a potential constraint until December 2008; and when it decided, in July 2009, to double the amount of housing proposed on the site without carrying out any reconsideration of the earlier options for housing development. The Administrative Court found that in the course of that process there had been breaches of the procedural requirements of the SEA Directive with regard to the carrying out of environmental assessments and consultation of the public but that the flaws had been remedied before the CS was adopted. The first ground on appeal was that (a) as a matter of law, the earlier deficiencies had not been capable of being cured later in the process, and (b) as a matter of fact, they had not been so

cured. The latter argument was concentrated on the failure to consult on alternative options at the time when the decision was taken to move from 1,050 to 2,000 houses, it being submitted that at no subsequent stage had there been a "meaningful" consultation on other options. The second ground was that S had been in breach of the Habitats Directive by failing to carry out an early screening assessment. The third ground was that there had been a breach of the Habitats Directive by leaving mitigation measures over to later stages, "lower-tier" plan-making or specific projects, in circumstances where sufficient information had been available at the stage of adoption of the CS to enable mitigation to be determined with certainty at that time. Strategic Policy SP20 provided that "[if] the results of the Appropriate Assessment [at the Area Action Plan or planning application stage] show that part of the Strategy cannot be delivered without adverse impacts on designated European sites which cannot be mitigated, then the proposals will only make provision for the level and location of development for which it can be concluded that there will be no adverse effect on the integrity of a designated European nature conservation site".

H3 **Held**, in dismissing the appeal:

H4 1. The court had found in *Cogent Land LLP v Rochford D.C.* that defects at earlier stages of the proposal could in principle be cured at a later stage. The failure in *Cogent* to give adequate reasons for preferring the selected locations over alternatives was just as much a defect of process as were the deficiencies in the present case. In any event, the reasoning was equally applicable. There was no evidential basis for the proposition that the 2011 consultation had not been a real consultation or that S had approached the results of that with a closed mind. The judge had been correct in finding that when S made the decision to proceed with the CS, it had been fully informed about the environmental implications on all alternative areas and of the results of the public consultation on the effect of 2,000 dwellings on all five of the original option areas. She had also been right to find that the earlier deficiencies in the SEA process had been cured.

H5 2. None of the authority relied on by N showed even an obligation to carry out a screening assessment, let alone any rule as to when it should be carried out. If it was not obvious whether a plan or project was likely to have a significant effect on an SPA, it might be necessary in practice to carry out a screening assessment in order to ensure that the substantive requirements of the Habitats Directive were ultimately met. It might be prudent, and likely to reduce delay, to carry one out at an early stage of the decision-making process, but there was no obligation to do so. Accordingly, there had been no breach of that directive by failing to carry out a screening assessment until 2008. A full AA was in fact carried out and led to a properly based conclusion that the allocation of housing proposed in the CS would not have an adverse effect on the integrity of the SPA. That met the relevant requirements of the Directive.

H6 3. The important question in a case such as this was not whether mitigation measures were considered at the stage of CS in as much detail as the available information permitted, but whether there had been sufficient information at that stage to enable S to be duly satisfied that the proposed mitigation could be achieved in practice. That issue had been answered clearly and decisively in S's favour by the judge, concluding that the inspector had been quite justified in coming to a decision that the mitigation was sufficiently certain for Development Plan purposes. There was no inconsistency between that conclusion and the provision within

Strategic Policy SP20. That provision did not demonstrate any uncertainty as to the sufficiency or achievability of the mitigation measures proposed. It was simply an additional safeguard, so that if some unforeseen adverse impact was subsequently identified which could not be resolved by mitigation, the development would be cut back to the extent necessary to ensure that there would be no adverse effect on the integrity of the SPA.

H7 **Cases referred to:**

Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2014] EWHC 406 (Admin); [2015] Env. L.R. D1; [2015] P.T.S.R. D20

Briels v Minister van Infrastructuur en Milieu (C-521/12) [2014] P.T.S.R. 1120

Cogent Land LLP v Rochford D.C. [2012] EWHC 2542 (Admin); [2013] 1 P. & C.R. 2; [2013] J.P.L. 170

Commission v United Kingdom (C-6/04) [2005] E.C.R. I-9017; [2006] Env. L.R. 29

Feeney v Oxford City Council [2011] EWHC 2699 (Admin)

Heard v Broadland D.C. [2012] EWHC 344 (Admin); [2012] Env. L.R. 23; [2012] P.T.S.R. D25

Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02) [2004] E.C.R. I-7405; [2005] 2 C.M.L.R. 31; [2005] Env. L.R. 14

R. (on the application of Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin); [2004] Env LR 29; [2005] 1 P.L.R. 54

R. (on the application of Edwards) v Environment Agency (No. 2) [2008] UKHL 22; [2008] 1 W.L.R. 1587; [2008] Env. L.R. 34

R. (on the application of Hart D.C.) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16; [2009] J.P.L. 365

R. (on the application of Moseley) v Haringey L.B.C. [2014] UKSC 56; [2014] 1 W.L.R. 3947; [2014] P.T.S.R. 1317

Save Historic Newmarket Ltd v Forest Heath D.C. [2011] EWHC 606 (Admin); [2011] J.P.L. 1233; [2011] N.P.C. 35

Seaport Investments Ltd's Application for Judicial Review[2007] NIQB 62; [2008] Env. L.R. 23

Sweetman v An Bord Pleanála (C-258/11) [2014] P.T.S.R. 1092; [2013] 3 C.M.L.R. 16; [2015] Env. L.R. 18

Cairngorms Campaign v Cairngorms National Park Authority [2013] CSIH 65; 2014 S.C. 37

H8 **Legislation referred to:**

Directive 92/43 on the conservation of natural habitats and of wild fauna and flora arts 2 & 6 (Habitats)

Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment arts 3, 4, 5, 6, 8, 12 & 13 (SEA)

Planning and Compulsory Purchase Act 2004 s.113

Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633)

Town and Country Planning (Local Development) (England) Regulations 2004 (SI 2004/2204)
Conservation of Habitats and Species Regulations 2010 (SI 2010/490) regs 61 & 102
Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767)

H9 *Mr R. Buxton*, Solicitor Advocate, instructed by Richard Buxton Environmental and Public Law, appeared on behalf of the appellant.
Mr P. Shadarevian and *Ms E. Dring*, instructed by Suffolk Coastal District Council Legal Services, appeared on behalf of the first respondent.
The second respondent did not appear.

JUDGMENT

RICHARDS LJ:

Introduction

1 This case relates to a planning Core Strategy ("CS") adopted by Suffolk Coastal District Council on 5 July 2013, setting the framework for development within the Council's district until 2027. The focus of attention within the CS is the housing allocation for the Eastern Ipswich Plan Area (also referred to as the Area East of Ipswich). Five locations in that area were identified as options. The location that emerged as the preferred option and became part of the adopted CS is to the east of the A12 at Martlesham, more precisely to the south and east of Adastral Park. It is described in the documentation as Option 4 or Area 4 and is the subject of Strategic Policy SP20 of the adopted CS. The housing allocation on it was originally proposed to be 1050 dwellings but was increased to 2000 dwellings in the course of development of the CS.

2 The appellant, No Adastral New Town Ltd ("NANT"), is an action group of local residents opposed to the choice of Area 4 for the allocation of housing under the CS. The concern that gave rise to these proceedings relates to the proximity of the location to the Deben Estuary, which is not only a Site of Special Scientific Interest ("SSSI") but also a Special Protection Area ("SPA"), also known as a Natura 2000 site, enjoying a very high level of protection under European environmental law. At its closest, Area 4 is just over 1 kilometre from the edge of the Deben Estuary SPA. NANT's particular concern is that a large housing development so close to the SPA may result in significant disturbance to the birds on the SPA through an increase in visitor numbers and in dog walking on the site.

3 NANT brought a claim seeking to quash the relevant part of the CS. The claim was based, so far as material, on alleged breaches of the procedural requirements of two EU directives: (1) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the Strategic Environmental Assessment Directive or "the SEA Directive"), implemented in domestic law by The Environmental Assessment of Plans and Programmes Regulations 2004 ("the Sea Regulations"); and (2) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habits and of wild fauna and flora ("the Habitats Directive"),

currently implemented in domestic law by The Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations").

4 The claim was dismissed by Patterson J, sitting in the Administrative Court. Permission to appeal to this court was refused on the papers by the judge below and by Sullivan LJ on the papers but was granted on an oral renewal by Christopher Clarke LJ.

5 The process leading to the adoption of the CS in 2013 started in 2006 and went through many stages. Patterson J found that in the course of that process there were breaches of the procedural requirements of the SEA Directive with regard to the carrying out of environmental assessments and consultation of the public but that the flaws were remedied before the CS was adopted. By the first ground of appeal, NANT contends that (a) as a matter of law, the earlier deficiencies were not capable of being cured later in the process, and (b) as a matter of fact, they were not so cured.

6 The other issues in the appeal concern the judge's rejection of NANT's case under the Habitats Directive. By ground 2 NANT contends that the Council was in breach of the Directive by failing to carry out an early screening assessment. By ground 3 it contends that there was a breach of the Directive by leaving mitigation measures over to later stages ("lower-tier" plan-making or specific projects) in circumstances where sufficient information was available at the stage of adoption of the CS to enable mitigation to be determined with certainty at that time.

The legal framework

The Planning and Compulsory Purchase Act 2004 Act

7 The statutory framework for the preparation of a CS is contained in the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and related regulations. The governing regulations for most of the relevant period were the Town and Country Planning (Local Development) (England) Regulations 2004. With effect from 6 April 2012 they were the Town and Country Planning (Local Planning) (England) Regulations 2012.

8 The relevant provisions are described in paras 12–18 of the judgment below. I need only summarise the position here.

9 The 2004 Act requires a local planning authority to maintain a local development scheme involving the preparation of a CS and other local development documents, setting out the policies relating to the development and use of land in the authority's area. The preparation of a development plan document, including a CS, is subject to various procedural requirements. They include the following:

i) The local planning authority must carry out an appraisal of the sustainability of the proposals in the document (a sustainability appraisal or "SA") and prepare a report on the findings of the appraisal.

ii) Before submission to the Secretary of State (see below), a development plan document must be published and consulted upon.

iii) A development plan document must be submitted to the Secretary of State for independent examination, the purpose of which is to determine whether the document satisfies the procedural requirements relating to its preparation

and whether it is sound. The independent examination is carried out by an inspector who holds an inquiry and produces a report.

iv) The decision whether to adopt the development plan document is that of the local planning authority but its powers are constrained by the recommendations in the inspector's report.

10 A person aggrieved by a development plan document may challenge it by an application to the High Court under s.113 of the 2004 Act on the ground, *inter alia*, that a procedural requirement has not been complied with. That is the section under which the present challenge was brought.

The SEA Directive

11 Article 3 of the SEA Directive requires Member States to carry out a strategic environmental assessment of certain plans and programmes, including a CS. Article 4 provides that the assessment shall be carried out "during the preparation of a plan or programme and before its adoption …". Article 5 provides that where an environmental assessment is required, an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives, are identified, described and evaluated. Article 6 provides for relevant authorities and the public to be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report "before the adoption of the plan or programme …".

12 The SEA Regulations contain more detailed provisions. They include specifics about the information required for environmental reports and about the consultation procedures. They are set out at paras 23–26 of Patterson J's judgment. They echo the Directive in providing that an environmental assessment must be carried out "during the preparation of that plan or programme and before its adoption …" (reg.5); that the plan or programme "shall not be adopted …" before account has been taken of the environmental report and opinions expressed by the consultation bodies and public upon it (reg.8); that where an environmental assessment is required, the report "shall identify, describe and evaluate the likely significant effects on the environment of (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and geographical scope of the plan or programme" (reg.12); and that every draft plan or programme for which an environmental report has been so prepared, and the report itself, shall be made available for consultation (reg.13).

13 The SEA process is closely bound up in practice with the procedure under domestic law for preparation of development plan documents. This is also true of the assessments required by the Habitats Directive (see below). Thus, the Government's National Planning Policy Framework states:

> "165. … A sustainability appraisal which meets the requirements of the European Directive on strategic environmental assessment should be an integral part of the plan preparation process, and should consider all the likely significant effects on the environment, economic and social factors.
> 166. Local Plans may require a variety of other environmental assessments, including under the Habitats Regulationswhere there is a likely significant effect on a European wildlife site …. Wherever possible, assessments should

share the same evidence base and be conducted over similar timescales, but local authorities should take care to ensure that the purposes and statutory requirements of different assessment processes are respected."

14 In line with that policy guidance, the sustainability appraisals (SAs) in this case were intended to meet not only the requirements of the 2004 Act and related regulations but also the environmental assessment requirements of the SEA Directive and implementing regulations. Some of the SAs also appended assessments carried out to meet the requirements of the Habitats Directive and implementing regulations.

The Habitats Directive

15 The aim of the Habitats Directive, as set out in art.2, is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna in the European territory of the Member States. The provisions of direct relevance to this case are art.6(2) and (3):

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the area have been designated, in so far as such disturbance could be significant to the objectives of this Directive.
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4 [cases where a plan or project must be carried out for imperative reasons of overriding public interest], 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."

The "appropriate assessment" required by Article 6(3) is generally referred to in the documentation and in the judgment below as an "AA" and I shall adopt that abbreviation.

16 The Habitats Regulations contain more detailed provisions. Paragraphs [28]–[29] of Patterson J's judgment set out the text of reg.61 (relating generally to the making of AAs) and reg.102 (the requirement to make an AA in relation to land use plans). I need only quote reg.102(1), because of its relevance to the argument concerning the timing of an initial assessment:

> "Where a land use plan –
> (a) is likely to have a significant effect on a European site … (either alone or in combination with other plans or projects), and
> (b) is not directly connected with or necessary to the management of the site,

> the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives."

The process leading to the adoption of the CS

17 The factual history occupies a substantial chunk of Patterson J's judgment, at [30]–[91], to which reference can be made for matters of detail not covered here. I will concentrate on the key points.

18 Until 2010 the work was overseen within the Council by its Local Development Framework Task Group ("the LDFTG" or "the Task Group"). The Task Group made recommendations to Cabinet which in turn made recommendations to the full Council, the ultimate decision-maker. From 2010 the role of the Task Group was taken over by the Community, Customers and Partners Scrutiny Committee ("the Scrutiny Committee").

19 Various documents were prepared and published, and consultation exercises carried out, between 2006 and late 2008, by which time Area 4 had emerged as the Task Group's preferred option. The process up to this point was held by the judge not to meet the requirements of the SEA Directive because of the lack of an SA. It is also fair to say that the documentation during this period shows no real appreciation of the potential significance of the Deben Estuary as an SPA.

20 In December 2008, however, there was published for public consultation a document entitled "Core Strategy and Development Control Policies – Preferred Options". This document identified Area 4 as the Council's preferred option and explained its perceived advantages and disadvantages. It also outlined the other options considered and their respective advantages and disadvantages. The allocation proposed on Area 4 was 1,050 dwellings. The Preferred Options document was accompanied by an SA which assessed all the options. In addition, one of the appendices to the SA was an AA ("Screening and Scoping Stage") pursuant to the Habitats Regulations. This explained that a series of conclusions had been reached after consideration of possible disturbance factors and the conservation objectives. The results were set out in a table that "becomes the list of key issues upon which consultation with Natural England will take place and will inform the public consultation which is about to commence". For the Area East of Ipswich, the table identified a negative impact and commented:

> "Any development is likely to bring additional pressure to any of the sites of European interest, however the area near Martlesham identified as a 'preferred option' could have particularly negative impacts upon the Deben Estuary SPA/SSSI. Site-specific Appropriate Assessment will reveal further any issues."

21 Those documents and the responses to the consultation on them informed the subsequent decision-making process and were found by the judge to have cured the earlier deficiencies in the SEA process in respect of the proposals as they stood at that point, that is for a housing allocation of 1,050 dwellings on Area 4.

22 The next relevant feature of the process was an increase in the proposed allocation on Area 4 from 1,050 to 2,000 dwellings. A report for a meeting of the Task Group on 16 June 2009 analysed the results of the consultation on the December 2008 documents and put forward a revised strategy addressing issues raised. The proposal

in relation to the Eastern Ipswich Plan Area, as set out in the executive summary, was: "New housing … to be increased in order to create a large development there with an emphasis on it being a community with sufficient supporting infrastructure. The location for such a community remains at Martlesham although the location is specified as to south and east of Adastral Park." An allocation of 2000 new dwellings was proposed to be made at that location. The Task Group resolved to endorse those proposals and to make a recommendation accordingly to Cabinet. The recommendation was endorsed in turn by Cabinet on 7 July 2009.

23 The problem about that was that the SA and consultation on which the decision was based related to 1,050 dwellings, not 2,000. The judge held that the increase in the proposed allocation was a material change of circumstances requiring consultation on the effect of the additional dwellings on the various options originally considered.

24 A consultation on the proposed increase to 2,000 dwellings took place in September 2009 but was limited to Area 4 and therefore did not meet the point.

25 A further SA was prepared in January 2010 which did examine the comparative sustainability of an allocation of 2,000 dwellings in relation to each of the original option areas. That document, however, remained internal to the Council until August 2011 when, as explained below, it was published in updated form for consultation. Until then it was not capable of remedying the deficiency in the process.

26 That was the position as at 18 March 2010 when the full Council considered the draft CS for the first time and resolved to approve it for submission to the Secretary of State for examination. In the event, for reasons it is unnecessary to consider, a further decision was taken in summer 2010 not to submit the CS at that stage but to review it. The reviewed CS was then published for consultation in November 2010, together with an updated SA. On 17 February 2011 Cabinet, having considered the consultation responses, endorsed the reviewed CS and recommended that it be submitted for consideration by the full Council. But when the matter came before the full Council on 27 July 2011 it was resolved that the submission of the reviewed CS for examination by an inspector should be subject to yet further updating of, and consultation on, the SA and AA.

27 In consequence, updated versions of the SA and AA, together with the pre-submission draft of the CS, were published for consultation in August 2011. On what appears to have been a precautionary basis, essentially the same material was re-issued for consultation in November 2011. It is sufficient to consider the documents issued in November.

28 Appendix 6 to the November 2011 SA was headed "Iterations of policies under the Core Strategy" and summarised in some detail the evolution of the CS and related policies over the period of plan preparation. It dealt with the options that had been considered and the reasons for selection of the preferred option, in relation to overall housing requirement, housing distribution and housing areas, including the considerations that led to the preference for Area 4 over the other options for the Area East of Ipswich. Appendix 8 set out the sustainability appraisal of strategic housing areas undertaken in 2008 and 2010. It included the January 2010 update in which the five options for the Area East of Ipswich "are reappraised … to consider the potential impact of 2,000 houses being accommodated on the areas", using the same criteria as for previous SAs. In each case they were appraised against

a detailed matrix of objective assessment criteria, including biodiversity and geodiversity.

29 The Council relies on that SA, the consultation on it and the consideration given to it by the full Council in December 2011 (see below) as remedying the previous deficiency in the SEA process.

30 The November 2011 AA contained a detailed assessment of the impact of the Area 4 allocation, alone or in combination with other proposed housing allocations, on the Deben Estuary SPA. It is unnecessary to go into much of the detail because the adequacy of the assessment as such is not challenged: the two grounds of appeal concerning the Habitats Directive have a more limited scope, relating respectively to the timing of the screening assessment and to mitigation measures.

31 The conclusions of the section of the AA dealing with Area 4 (referred to as Martlesham) and a separate proposed allocation at Felixstowe included this:

> "6.2.45 Provided that strategic housing proposals for development at Martlesham and Felixstowe Peninsula are greater than 1 km from the Deben Estuary and Orwell Estuary respectively, together with improvements in accessibility to greenspace provision, it is unlikely that visitor recreation activity would substantially increase on the foreshore of those estuaries. It is therefore concluded that there would be no adverse affect [*sic*] upon the integrity of the respective European sites."

The section on mitigation included a tabular summary which identified the relevant impact as "New large-scale increase in car-borne trips for recreation on European sites causing harm to features of European interest, primarily for sites with car parking within 8 km". The mitigation proposed had two elements:

> "Improvements to convenient local greenspace for routine use thus reducing the demand for visits to European sites.
> The provision of a new Country Park (or similar high quality provision) to provide an alternative attraction for recreational activity for residents of existing and proposed new dwellings. This new Country Park will be attractive to dog walkers and others and include adequate provision for car parking, visitor facilities, dog bins, dogs off leads areas etc."

The conclusion was that with the proposed mitigation the relevant housing policies would have no adverse effect upon the integrity of any European site.

32 On 15 December 2011 the full Council again considered the matter, on the basis of the most recent documents and a report from officers which included a summary of issues raised by responses to the recent consultation and officers' advice that those comments raised no matters requiring further review of the CS. The debate at the meeting included consideration of a motion by one of the councillors that "(a) The Council agrees to undertake a full Strategic Environmental Assessment and Appropriate Assessment in relation to each strategic option for the East of Ipswich Allocations; (b) Prior to commencement of the examination in public, the Council consults the public and statutory consultees on the fresh SEA and AA reports so that the outcome of consultation was before the inspector; (c) The Council agrees to reconsider the preferred option in light of (a) and (b) above …". The motion was defeated by a substantial majority. It was resolved that the draft CS be published for pre-submission consultation and thereafter be submitted for examination by an inspector.

33 The draft CS was submitted for examination in May 2012. The history of the inspector's examination is summarised at [72]–[91] of Patterson J's judgment. I need mention only some of the matters covered.

34 BT plc, the owner of Adastral Park, had submitted a planning application for the site which, although distinct from the strategic policies of the CS, was relevant *inter alia* to the question of mitigation to avoid adverse effects to the Deben Estuary SPA. A revised appropriate assessment provided in July 2012 in support of BT's planning application included the proposed provision of some 54 hectares of public open space by way of on-site green space on BT's land, together with improvements to public rights of way encouraging movements away from the SPA, and additional measures related to the Deben Estuary to offset any residual impacts. That proposal was relied on by the Council, in its submissions to the inspector, as showing that the package of mitigation measures could be achieved by way of developer funding.

35 A statement of common ground on green infrastructure was agreed between Natural England, various other bodies and the Council. Natural England confirmed that it was happy with the detail provided in the draft CS. It noted that it had seen additional detail in relation to BT's planning application. The AA was agreed as using the best and most up to date information available. The statement contained certain agreed suggested modifications.

36 In February 2013, proposed modifications to the CS were published for consultation. They included modifications to policy SP20 that were relevant to the issue of mitigation. The inspector subsequently confirmed that the CS could be adopted subject to those modifications, and on 5 July 2013 the Council resolved to adopt it.

37 The adopted CS included an allocation of 2,000 new homes on Area 4. The text explained that the development would be progressed as part of the Area Action Plan. It included the following in relation to potential impact on the Deben Estuary SPA:

> "4.16 … The Core Strategy has been subject to Sustainability Appraisal and Appropriate Assessment both of which consider that the broad scale and distribution of development can be successfully mitigated. However, should the more detailed Appropriate Assessment of the Area Action Plan conclude that part of the Strategy cannot be delivered without adverse impacts on the Deben Estuary SPA which cannot be mitigated, then the Area Action Plan will only make provision for the level and location of development for which it can be concluded that there will be no adverse effect on the integrity of the SPA, even if this level is below that in the strategic allocation."

38 Strategic Policy SP20 itself stated that the strategic approach to development in the Eastern Ipswich Plan Area could be divided into three sections, one of which related to the area to be covered by the Martlesham, Newbourne & Waldringfield Area Action Plain. The strategy for that Area Action Plan was said to have a number of features listed in the policy. In line with the text quoted above, the list ended with this:

> "(xii) the Council will require further proposals to be supported by an Appropriate Assessment to meet the requirements of the Habitats Regulations. If the results of the Appropriate Assessment show that part of the Strategy cannot be delivered without adverse impacts on designated

> European sites which cannot be mitigated, then the proposals will only make provision for the level and location of development for which it can be concluded that there will be no adverse effect on the integrity of a designated European nature conservation site."

39 After a sentence relating to the necessary transport and other infrastructure to serve the proposed employment and housing, the policy continued:

> "… The November 2011 Appropriate Assessment and the mitigation measures it contains … will provide the basis for more detailed project level assessments associated with the Area Action Plan and planning application proposals and associated cumulative impacts. Those measures will be required to reflect the objectives set which include the creation of alternative opportunities for countryside recreation for existing and future residents as a preferred alternative to visiting European nature conservation sites; improved visitor infrastructure including wardening; and monitoring to quantify reductions in visitor harm achieved by mitigation projects.
> Specifically, on land to the south and east of Adastral Park, strategic open space in the form of a country park or similar high quality provision will be required to mitigate the impact of development at this site and the wider cumulative impact of residential development on the relevant designated European nature conservation sites."

Ground 1: compliance with the SEA Directive

Patterson J's judgment

40 The issues raised by the first ground of appeal arise out of [92]–[129] of Patterson J's judgment. Having set out the rival submissions, the judge began her discussion, at [106] et seq., by considering various provisions of the SEA Directive and the guidance on it issued by the European Commission. She continued:

> "118. The wording of the domestic Regulations, read in the context of the Directive, make it clear that the environmental assessment of a draft plan should be an ongoing process. The objective is to ensure that the environmental effects of emerging policies can be taken into account while plans are actually being "developed". To enable that to occur the process of preparing the environmental report should start, as the Commission says in its guidance, as early as possible, and ideally, at the same time as the preparation of the plan or programme.
> 119. That does not mean that there is an absolute rule that the plan and the environmental report proceed in parallel so that there is a requirement for simultaneous publication of the draft plan and environmental report. What it does mean though, in my judgement, is that there should be an integrated process whereby the environmental report assesses the emerging plan and the subsequent iteration of that plan has regard to the contents of the environmental report and public consultation on both documents. Whilst there is some flexibility in the process the objective of the Directive can only be met properly

by taking into account an environmental report on the environmental effects of the policies in a draft plan as the policies develop. What is required may vary according to the plan being promoted and the stage that it has reached."

41 On that basis the judge found that SAs should have been produced for the consultation exercises in 2006–2008, albeit relatively rudimentary at the commencement of the process and increasing in content as the draft plan developed. Without them, the decisions taken on the options were not adequately informed. She held that the decisions taken by the Task Group counted for that purpose, rejecting a contention that the first relevant decision was when the full Council resolved to approve the draft CS on 18 March 2010. Accordingly, there was a flaw in the early decision-making process. But she continued:

> "124. The matter, though, does not end there. In December 2008 the defendant published the Core Strategy and Development Control policies Preferred Option document with option 4 as the preferred option for 1050 houses. The latter document was accompanied by a SA and a scoping and screening report for an AA to be carried out under the 2010 Habitats Regulations. That clearly recorded the nature conservation significance of the Deben Estuary. The potential negative impact as a result of visitor pressure was clearly noted. Further consultation took place with that information clearly in the public domain.
>
> 125. When the results of the consultation exercise were considered by the LDFTG on 16th June 2009 their decision to proceed with the housing allocation on the Area East of Ipswich was thus a well and properly informed decision."

42 She moved to NANT's criticism of the decision to increase the housing allocation to 2000 without considering the effect of that increase on the sites which had originally been considered as alternatives before the preferred option was chosen. She considered a contention by the Council that by September 2009 the original alternative sites were non-starters: the reason for the increase was to provide significantly improved community facilities and a better opportunity to mitigate potential impacts on the countryside and the Deben Estuary through provision of properly managed open space, as well as delivering greater funding opportunities for transport provision, so that the rationale for increasing the number of dwellings on Area 4 could not apply elsewhere. She held, however:

> "128. The increase in the allocation on SP20 to 2000 houses was, in my judgment, a material change of circumstances. It would have been better, therefore, to have consulted as part of the September 2009 consultation on the effect of the additional dwellings at the original alternative option sites. However, an assessment of the alternative option sites was carried out in January 2010 for 2000 houses on each of the original options 1–5 in the [Eastern Ipswich Plan Area]. All of the options were assessed as having strongly negative impacts for bio-diversity. The overall assessment recorded,
>
> > ''The updated appraisal looking at 2000 houses suggests area 4 is very marginally the least sustainable however all areas will require new investment in infrastructure and generate similar concerns for cumulative impact upon Natural 2000 designations.''"

43 The judge's reference in that paragraph to the January 2010 SA requires qualification in that, as explained above, that SA was originally an internal document and was only published for consultation, in updated form, in August 2011 and again in November 2011. It is clear from other passages in her judgment, in particular at [67], that the judge was in fact aware of the point.

44 The judge concluded this section of her judgment as follows:

> "129. The claimant contends that because of the 2 significant errors the entire SEA process was vitiated. As is clear I do not accept that submission for the following reasons:—
>
> (i) the individual decisions complained about were corrected by the defendant before the plan was adopted as set out above;
>
> (ii) the decision to increase the housing numbers on SP20 to 2000 was taken on valid grounds taking into account environmental considerations as part of a classic planning judgement. There is no basis for separating out environmental considerations;
>
> (iii) when the council made the decision on the 18th March 2010 to proceed with the Development Plan it was fully informed about the environmental implications on all alternative sites and the results of the public consultation on the effect of 2000 houses on all 5 of the original option sites;
>
> (iv) the pre-submission draft Development Plan included an updated SA which dealt with the main issues raised on housing distribution, the alternative sites which had been considered, and the increase in housing numbers at SP20 including their environmental impact. Although the claimant criticises that document and that in August 2011, which also went out for consultation, on the basis that they create an unacceptable paper chase the situation is very different from the case of *Berkeley v Secretary of State for the Environment* [2000] 3 WLR 420 which the claimant relies upon. In that case there was no environmental assessment at all. In the instant case there was a complete reference back to earlier documents and the reasons for rejecting earlier options. Applying the test of Collins J in *Save Historic Newmarket Limited v Forest Heath* [2011] EWHC 606 at [40] … [t]he consultees were well aware of the reasons for rejecting the alternatives to the development that was proposed here.
>
> (v) The inspector considered whether the CS was sound in his report. He considered that it was for reasons set out in paragraphs 16-27 … of his report to the defendant. His report was fully reasoned and took into account all material considerations, including the development of the CS and the various legal judgments that were delivered during its preparation. It has not been criticised by the claimant;
>
> (vi) The council had sufficient and good reasons to act as it did as set out above. It, therefore, acted rationally at the critical stage of the Development Plan."

45 The reference in sub-paragraph (iii) to the Council's decision of 18 March 2010 requires a qualification corresponding to that made above in relation to the January 2010 SA. As at 18 March 2010, the January 2010 SA had not been consulted on: the consultation on that SA took place in August 2011 and then November 2011. It was the Council's decision of 15 December 2011, not the decision of 18 March 2010, that was informed by the results of the consultation. The judge's essential

reasoning, however, is not affected if the relevant passage in her judgment is amended so as to refer to the December 2011 decision rather than the March 2010 decision. I will proceed on the basis that the amendment is made.

The issues in the appeal

46 The Council does not seek to challenge the judge's findings that there were two deficiencies in the course of the SEA process, namely (i) the failure to carry out an SEA at the early stages of preparation of the CS, prior to the Preferred Options consultation in December 2008, and (ii) the failure to consult on the alternative options to Area 4 at the time when an increase in housing allocation to 2000 dwellings was proposed in September 2009. But the Council supports the judge's conclusion that each of those two deficiencies was subsequently cured and that the requirements of the SEA Directive and implementing regulations had been complied with by the time of adoption of the CS—indeed, by the time of submission of the draft CS for examination by the inspector. (The Council's concession in relation to (ii) makes it unnecessary to consider whether, as Mr Buxton repeatedly asserted in his submissions on behalf of NANT, the September 2009 consultation was unlawful on ordinary public law principles by reason of the failure to mention the alternatives considered: see *R (Moseley) v London Borough of Haringey* [2014] UKSC 56.)

47 By the first ground of appeal, NANT challenges the judge's conclusion. The ground is elaborately formulated and the development of it in written and oral submissions was not altogether clear, but there appear to be two essential contentions, namely that (a) as a matter of law, the earlier deficiencies were not capable of being cured later in the process, and (b) as a matter of fact, they were not so cured. I will consider each point in turn.

48 As to the legal issue, a convenient starting-point is the judgment of Singh J in *Cogent Land LLP v Rochford District Council and Bellway Homes Ltd* [2012] EWHC 2542 (Admin); [2013] 1 P. & C.R. 2, in which a very similar issue arose. The case concerned the development of a Core Strategy. The claimant submitted that documents produced in 2008 for the SA/SEA did not set out adequately the reasons for preferring the selected locations over alternatives that had been rejected, so that the public was not allowed the early and effective engagement that was required. The judge was inclined to accept that submission but he held that a July 2011 Addendum cured any defects in the earlier stages of the process.

49 In rejecting the claimant's submission that as a matter of law the Addendum was incapable of curing the earlier defects, Singh J reasoned as follows. First, he said this about the SEA process:

> "112. … First, it should be noted that 'Strategic Environmental Assessment' is not a single document, still less is it the same thing as the Environmental Report: it is a *process*, in the course of which the Directive and the Regulations require production of an 'Environmental Report'. Hence, art 2(b) of the SEA Directive defines 'environmental assessment' as:
>
> > "'the preparation of the environmental report, carrying out consultations, the taking into account of the environmental report and the results of the consultations in the decision making and the provision of information on the decision in accordance with Articles 4 to 9'."

> 113. Furthermore, although arts 4 and 8 of the Directive require an 'environmental assessment' to be carried out and taken into account 'during the preparation of the plan', neither article stipulates when in the process this must occur other than to say that it must be 'before [the plan's] adoption'. Similarly, while art 6(2) requires the public to be given an 'early and effective opportunity … to express their opinion on the draft plan or programme and the accompanying environmental report', art 6(2) does not prescribe what is meant by 'early', other than to stipulate that it must be before adoption of the plan. The Regulations are to similar effect: reg 8provides that a plan shall not be adopted before account has been taken of the environmental report for the plan and the consultation responses."

50 He then considered a number of authorities, including the decision of the the High Court in Northern Ireland in *Seaport Investments Ltd's Application for Judicial Review* [2008] Env. L.R. 23; the decision of Ouseley J in *Heard v Broadland District Council* [2012] EWHC 344 (Admin); [2012] Env. L.R. 23; and the decision of Collins J in *Save Historic Newmarket Limited v Forest Heath* [2011] EWHC 606 (Admin), to which the judge in the present case referred at [129(v)] of her judgment, quoted above. Singh J found that none of those authorities gave material support to the claimant's case.

51 Next, he gave the following additional reason in support of his view that defects at earlier stages of the proposal could in principle be cured at a later stage:

> "125. I also consider … that the claimant's approach would lead to absurdity, because a defect in the development plan process could never be cured. The absurdity of the claimant's position is illustrated by considering what would now happen if the present application were to succeed, with the result that Policies H1, H2 and H3 were to be quashed. In those circumstances, if the claimant is correct, it is difficult to see how the defendant could *ever*proceed with a Core Strategy which preferred West Rochford over East. Even if the defendant were to turn the clock back four years to the Preferred Options stage, and support a new Preferred Options Draft with an SA which was in similar form to the Addendum, the claimant would, if its main submission is correct, contend that this was simply a continuation of the alleged 'ex post facto rationalisation' of a choice which the defendant had already made. Yet if that choice is on its merits the correct one or the best one, it must be possible for the planning authority to justify it, albeit by reference to a document which comes at a later stage of the process."

52 Finally, at [126], Singh J drew an analogy with the cognate area of Environmental Impact Assessments, quoting from [41] of the judgment of Sullivan J in *R. (Blewett) v Derbyshire County Council* [2004] Env. L.R. 29, as approved by the House of Lords in *R. (Edwards) v Environment Agency* [2008] Env. L.R. 34:

> "[it is] an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based on such an unrealistic expectation. They recognise than an environmental statement may be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full

a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between."

53 Mr Buxton, in his submissions on behalf of NANT, said that he did not disagree with the analysis in *Cogent*. That was a realistic stance. In my judgment, the conclusion reached by Singh J on the issue of principle was correct for the reasons he gave. A similar view of the law was expressed by Sales J, albeit *obiter* and without the benefit of argument, in *Ashdown Forest Economic Development Llp v Secretary of State for Communities and Local Government* [2014] EWHC 406 (Admin), at [89]. In Sales J's view the correct focus for analysis under the SEA Directive was the Core Strategy documents submitted for independent examination by the inspector: "[the] procedures involved in independent examination of a plan by an inspector, including by examination in public, appear to me to be a consultation process which is capable of fulfilling the consultation requirement under Article 6 of the Directive".

54 Mr Buxton sought to distinguish *Cogent* as dealing with a different issue from that in the present case. He said that the defect in *Cogent* concerned the giving of reasons – it was a failure to explain why the Council had made its choices—whereas the deficiencies in the present case were defects of process. I do not accept that there is any relevant distinction between the two cases. The failure in *Cogent* to give adequate reasons for preferring the selected locations over alternatives was just as much a defect of process as were the deficiencies in the present case. In any event, the reasoning of Singh J in *Cogent* is just as applicable to the deficiencies in the present case as it was to the defect in *Cogent* itself.

55 Mr Buxton's submissions on the legal issue tended to slip into submissions on the factual issue, to which I now turn. NANT's case is that neither of the deficiencies identified by the judge was cured as a matter of fact. Although both deficiencies are relied on, the argument is concentrated on the failure to consult on alternative options at the time when the decision was taken to move from 1,050 to 2,000 houses on Area 4. What is said is that at no subsequent stage was there a "meaningful" consultation on the other options.

56 I think that there are two strands to that argument. First, NANT contends that by the time the Council came to take its decision in December 2011 on the basis of the further consultation, the Council's mind was effectively made up. The notion that the Council might have changed its mind and rejected the preferred option at that stage is said to be unrealistic. It is submitted that the purported consultation in November 2011 was not a real consultation and that it did not therefore cure the absence of a proper consultation at an earlier stage in the decision-making process.

57 In my judgment, that line of argument is untenable. I can see no evidential basis for the proposition that the November 2011 consultation was not a real consultation or that the Council approached the results of the consultation with a closed mind. The very fact that the meeting of the Council on 15 December 2011 included debate on a motion calling for reconsideration of the preferred option in the light of further assessments shows that the issue was still a live one at that time. The fact that the motion was defeated does not begin to show a closed mind on the part of those voting against it. There is nothing whatsoever to suggest that the decision taken by the Council at that meeting to submit the draft CS for examination by the

inspector was anything other than a genuine decision reached after due consideration of the November 2011 SA and the responses to the consultation on it.

58 The second strand to NANT's factual argument is a contention that the documentation consulted on in November 2011 did not sufficiently identify the reasons for rejecting the alternatives to Area 4 as locations for the allocation of 2000 dwellings. It is said that the SA involved too much of a "paper chase", referring back to previous documents, and in any event that cross-reference to previous flawed decisions did not save the position.

59 Again I cannot accept the argument. It is true that the November 2011 SA did refer back to previous documents: I have referred in particular, at paragraph 28 above, to the appendices that summarised the evolution of the CS, the options that had been considered and the reasons for selection of the preferred option, and that set out the sustainability appraisal of strategic housing areas undertaken in 2008 and 2010. All this was done, however, in a manner that was perfectly intelligible, and the material specifically included the January 2010 appraisal of the impact of an allocation of 2,000 dwellings on each of the five options originally considered. I agree with Patterson J that there was no unacceptable paper chase and that consultees were made well aware of the reasons for rejecting the alternatives to Area 4. I also agree with the judge that when the Council made the decision to proceed with the CS, it was fully informed about the environmental implications on all alternative areas and of the results of the public consultation on the effect of 2000 dwellings on all five of the original option areas. The judge was right to find that the earlier deficiencies in the SEA process had been cured.

60 I would therefore reject the first ground of appeal, relating to the SEA process. I turn to consider the two grounds of appeal relating to the Habitats Directive.

Ground 2: the timing of the AA under the Habitats Directive

61 Ground 2 is again elaborately formulated but the short question it raises is whether the Council was in breach of the Habitats Directive by not carrying out an initial screening assessment until December 2008. The purpose of a screening assessment is to determine whether a full AA is required. Mr Buxton submits that there is an obligation to carry out such a screening assessment at an early stage of the decision-making process and that December 2008 was too late since by that time Area 4 had already been selected as the preferred option. He submits that if the screening assessment had been carried out earlier, the Council would have appreciated at an earlier stage the significance of the Deben Estuary SPA and of the particularly negative impacts that the allocation of housing on Area 4 would have on the SPA, and it is possible that the whole process of area selection would have been different.

62 The relevant provisions of the Habitats Directive are art.6(2) and (3). I have set them out at [15] above. The overarching obligation in art.6(2) is that Member States must take appropriate steps to *avoid*, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated. Article 6(3) provides that any plan or project not directly connected with or necessary to the management of an SPA but likely to have a significant effect on it shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives; and in the light of the conclusions of the assessment, 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 and, if appropriate, after having obtained the opinion of the general public.

63 Thus, the language of art.6 focuses on the end result of avoiding damage to an SPA and the carrying out of an AA for that purpose. That point is carried through into reg.102(1) of the Habitats Regulations, quoted at [16] above, which provides that an AA must be made "before the plan is given effect". In this case, the November 2011 AA, on which the public was consulted, concluded that, subject to proposed mitigation, the housing allocation at Area 4 would have no adverse effect on the integrity of the SPA. Mitigation is considered separately below under the third ground of appeal. Subject to that, the assessment is not challenged. If the proposed development on Area 4 would have no adverse effect on the integrity of the SPA, the basic obligation in art.6(2) and the specific requirement of art.6(3) are satisfied. It is difficult to see in those circumstances how anything could turn on the timing of a screening assessment.

64 Mr Buxton submitted that art.6 is nevertheless to be interpreted as imposing an obligation to carry out a screening assessment at an early stage and that reg.102(1) is to be read down so as to comply with that interpretation (though he does not explain precisely how it is to be read for that purpose). He sought to derive support for this from *Sweetman v An Bord Pleanála* (C-258/11).

65 At [45]–[50] of her opinion in 22 November 2012, AG Sharpston states that art.6(3) lays down a two-stage test. At the first stage it is necessary to determine whether the plan or project is likely to have a significant effect on the site. The likelihood (or possibility) is a trigger for the obligation to carry out an AA. Where an AA is required, its purpose is that the plan or project should be considered thoroughly, on the basis of the best scientific knowledge in the field. At this, the second stage, the test which the expert assessment must determine is whether the plan or project 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. For my part, however, I see nothing in that passage to assist NANT's case. The Advocate General says nothing to the effect that there must be a screening assessment at an early stage in the decision-making process. She merely points to the need to determine at the first stage whether the plan or project is likely to have a significant effect on the site (a question that in my view will be capable of being answered in many cases without any screening assessment at all), and to the approach required at the second stage when an AA is carried out.

66 The judgment of the 11 April 2013, describes the two stages required by art.6(3) slightly differently. At [29]–[31] the Court states that the first stage "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"; and that the second stage "allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned …". The difference between that and the Advocate General's formulation is not, however, material. The Court's judgment again gives no support to the contention that there must be a screening assessment at an early stage in the decision-making process.

67 The Court in *Sweetman* referred back to Case C-127/02, [2004] E.C.R. I-7405, to which Mr Buxton also took us, but neither the opinion of the Advocate General nor the judgment of the Court in that case appears to me to take matters any further. The same applies to the later decision of the Court in *TC Briels and Others v*

Minister van Infrastructuur en Milieu (C-521/12), judgment dated 15 May 2014, to which brief reference was also made in submissions.

68 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 an early stage of the decision-making process. There is, however, no obligation to do so.

69 Accordingly, there was no breach of the Habitats Directive by failing to carry out a screening assessment in this case until December 2008. A full AA was in fact carried out and led to a properly based conclusion that the allocation of housing proposed in the CS would not have an adverse effect on the integrity of the SPA. That met the relevant requirements of the Directive.

Ground 3: the issue of mitigation under the Habitats Directive

70 Ground 3 is another elaborately formulated ground but is to the effect that the Council was in breach of Article 6 of the Habitats Directive by leaving mitigation measures over for assessment at the stage of the Area Action Plan or specific planning applications, in circumstances where sufficient information was available to assess the effectiveness of such measures at the stage of the CS. It is submitted to be contrary to the scheme of the Directive to leave matters of mitigation to lower-tier plan-making or specific project stages if the relevant information is known at the prior stage.

71 Mr Buxton cited the opinion of Advocate General Kokott in *Commission v United Kingdom* (C-6/04) [2005] E.C.R. I-9017, as supporting him on this issue. In my view, however, it does not take him very far. The case concerned various alleged failures by the United Kingdom to implement the Habitats Directive correctly. One matter of complaint, which was held to be well founded, was that the UK legislation did not require land use plans to be subject to an appropriate assessment. That was the context in which, at paragraph 49 of her opinion, the Advocate General dealt with an objection that the full effects of a measure would not be known at the land use plan stage:

> "49. The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. The assessment is to be updated with increasing specificity in subsequent stages of the procedure."

In that passage the Advocate General was saying no more than that the extent of detail of an assessment will depend on the precision of the plan, so that increased specificity will be required as one moves through the various stages of the approvals

procedure. She was certainly not addressing the question whether mitigation measures must be considered at each stage of the procedure in as much detail as the available information permits.

72 In my judgment, the important question in a case such as this is not whether mitigation measures were considered at the stage of CS in as much detail as the available information permitted, but whether there was sufficient information at that stage to enable the Council to be duly satisfied that the proposed mitigation could be achieved in practice. The mitigation formed an integral part of the assessment that the allocation of 2000 dwellings on Area 4 would have no adverse effect on the integrity of the SPA. The Council therefore needed to be satisfied as to the achievability of the mitigation in order to be satisfied that the proposed development would have no such adverse effect. As Sullivan J expressed the point in *R. (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16, at [76], "the competent authority is required to consider whether the project, as a whole, including [mitigation] measures, if they are part of the project, is likely to have a significant effect on the SPA".

73 That issue was answered clearly and decisively in the Council's favour by the judge, in the course of the passage at [138]–[157] of her judgment where she ran together this and the preceding ground of challenge. Thus, at [149], in relation to the proposed mitigation by the provision of a country park or similar to the south and east of Adastral Park, the judge quoted the inspector's finding that "[w]hile the detailed calculations of the specific scale of provision and types of facilities to be included are matters for an area action plan or planning application, there is sufficient evidence that this element of the mitigation available by the AA can be achieved and is deliverable in phase with the new housing development". At [150] she referred to the inspector's further finding that the provision of wardening and visitor management facilities to cope with additional visitor pressure to the area was capable of being delivered. At [151] she referred to the inspector's consideration of BT's proposals in connection with its planning application, including the proposed provision of open space. She went on to say:

> "152. The fact that the inspector was familiar with the proposed modification to SP20 and was satisfied that it could be incorporated within a sound plan meant that he was content that the proposed mitigation was practical and sufficiently certain for the plan stage. The main modifications procedure involves another SA and a further round of public consultation. The public, therefore, had every opportunity to comment, including the claimant. The inspector chose not to re-open the examination. He must have been satisfied, therefore, that the proposed modification in light of the representations was sound.
>
> 153. The claimant makes no criticism of the inspector's report for being irrational or, in itself, in error.
>
> …
>
> 155. Although the claimant asserts that Natural England carried out a *volte face*it is clear from a reading of the correspondence that they were involved in the plan making process throughout by the defendant and altered their initial position in the light of further evidence, including that within the BT planning application. They confirmed that they were satisfied that the final documents

were adequate and that their comments had been adequately incorporated …. In those circumstances, the inspector was quite justified in coming to a decision that the mitigation was sufficiently certain for Development Plan purposes …..”

74 There is no inconsistency between that conclusion and the provision within Strategic Policy SP20 that “[if] the results of the Appropriate Assessment [at the Area Action Plan or planning application stage] show that part of the Strategy cannot be delivered without adverse impacts on designated European sites which cannot be mitigated, then the proposals will only make provision for the level and location of development for which it can be concluded that there will be no adverse effect on the integrity of a designated European nature conservation site”. That provision does not demonstrate any uncertainty as to the sufficiency or achievability of the mitigation measures proposed. It is simply an additional safeguard, so that if some unforeseen adverse impact is subsequently identified which cannot be resolved by mitigation, the development will be cut back to the extent necessary to ensure that there will be no adverse effect on the integrity of the SPA. That is a sensible precautionary measure in a CS that sets the framework for development until 2027, and it serves to underline the obligation to have continuing regard to the avoidance of harm to the SPA at all subsequent stages of the planning process. Such an approach is in accordance with Article 6 of the Habitats Directive, not in breach of it.

75 I should mention that reference was made to two further domestic authorities in the submissions on this ground of appeal. They were *Feeney v Oxford City Council* [2011] EWHC 2699 (Admin), in which permission to appeal to the Court of Appeal was refused, and *The Cairngorms Campaign & Others v Cairngorms National Park Authority* [2013] CSIH 65, an appeal against which is proceeding in the Supreme Court. It suffices to say that we were not taken to any specific passages in the judgments and I have not found either case to be of particular assistance for the resolution of the present issue.

Conclusion

76 For the reasons given, I would dismiss the appeal.

UNDERHILL LJ:

77 I agree.

BRIGGS LJ:

78 I also agree.

Annex C: R (Friends of the Earth Ltd) v Secretary of State for Transport [2020] UKSC 52

Supreme Court

Regina (Friends of the Earth Ltd and another) *v* Secretary of State for Transport

[On appeal from Regina (Plan B Earth) v Secretary of State for Transport]

[2020] UKSC 52

2020 Oct 7, 8; Dec 16

Lord Reed PSC, Lord Hodge DPSC, Lady Black, Lord Sales, Lord Leggatt JJSC

Planning — Development — National policy statement — Secretary of State designating national policy statement on new runway capacity and airport infrastructure — Statement indicating preferred location for airport development as Heathrow and rejecting alternatives — Whether statement lawful — Whether United Kingdom's ratification of Paris Agreement on Climate Change (2016) creating obligations in domestic law — Whether commitment to Paris Agreement "Government policy" — Whether ministerial statements to House of Commons on Government's approach to Paris Agreement to be regarded as "Government policy" — Whether failure to take Paris Agreement into account rendering designation of national policy statement unlawful — Planning Act 2008 (c 29), ss 5(7)(8), 10(2)(3)

In June 2018, after having received a report by the independent Airports Commission and conducted a consultation exercise, the Secretary of State designated the Airports National Policy Statement pursuant to the Planning Act 2008 ("the Act")[1] for the purpose of outlining the policy framework in which an application for a development consent order would be determined. The policy statement set out the Government's preference to meet the need for new airport capacity in the South East of England through a scheme for a third runway at Heathrow Airport to the north west of the existing runways. Several objectors to that scheme, including two claimants who were charities concerned with climate change, sought judicial review challenging the lawfulness of the policy statement. The owner of Heathrow Airport appeared as an interested party in the proceedings. The key grounds of the two claimants' challenge were that the Secretary of State (i) had failed to take account of the various targets for the reduction of greenhouse gas emissions and global warming set out in the Paris Agreement on Climate Change, which the United Kingdom had ratified in November 2016, and (ii) had been in breach of the requirements under section 5(8) of the Act to have regard to "Government policy" particularly in view of two ministerial statements made to the House of Commons regarding the Government's approach to the Paris Agreement. The Divisional Court dismissed all the objectors' the claims and held that the policy statement had been lawfully produced. The Court of Appeal allowed the two claimants' appeals on the grounds that "Government policy" within the meaning of section 5(8) of the Act was to be broadly construed and that it was clear from the United Kingdom's ratification of the Paris Agreement and the two ministerial statements that the Paris Agreement formed part of "Government policy", that the Secretary of State had acted unlawfully in failing to take the Paris Agreement into account and that therefore the national policy statement was unlawful and of no legal effect.

[1] Planning Act 2008, s 5(5)–(8): see post, para 25.
S 10(1)–(3): see post, para 26.

A On appeal by the owner of Heathrow Airport—

Held, allowing the appeal, (1) that a purposive approach had to be adopted to section 5(8) of the Act which expanded upon the obligation that a national policy statement should give reasons for the policy set out in it, and the statutory words had to be interpreted in their context; that the purpose of the provision was to make sure that there was a degree of coherence between the policy set out in the statement, and established Government policies relating to the mitigation of and adaptation B to climate change; that "Government policy" within the meaning of section 5(8) pointed towards a policy which had been cleared by the relevant departments on a government-wide basis and was in carefully formulated written statements of policy; that for section 5(8) to operate sensibly "Government policy" had to be given a relatively narrow meaning so that the relevant policies could be readily identified because otherwise civil servants would have to trawl through Hansard and press statements to see if anything that had been said by a minister might be characterised as C "policy"; that Parliament could not have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field; that the epitome of "Government policy" was a formal written statement of established policy, but in so far as it might in exceptional circumstances extend beyond written statements, it was appropriate that there were clear limits on D what statements counted as "Government policy" in order to render them readily identifiable as such; that the criteria for a "policy" to which the doctrine of legitimate expectations could be applied was the absolute minimum required for a statement to constitute "policy" for the purposes of section 5(8); that the statement qualified as policy only if it was clear, unambiguous and devoid of relevant qualification; that the two ministers' statements, which plainly reflected the fact that there was a inchoate or developing policy being worked on within Government, did not fall within the E criteria for the statutory phrase; and that, accordingly, the Court of Appeal had been wrong in its construction of "Government policy" and in concluding that the two ministerial statements constituted that policy (post, paras 101–107).

(2) That the fact that the United Kingdom had ratified the Paris Agreement was not of itself a statement of "Government policy" in the requisite sense; that ratification was an act on the international plane and gave rise to the United Kingdom's obligations in international law which continued regardless of which F particular government remained in office; that as treaty obligations they were not part of United Kingdom law and did not give rise to legal rights or obligations in domestic law; that ratification did not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty; and that, accordingly, the Paris Agreement was not "Government policy" within the meaning of section 5(8) of the Act (post, paras 108, 112).

G (3) That in promulgating the national policy statement the Secretary of State had fulfilled the obligations under section 5(10) of the Act to act with the objective of contributing to the achievement of sustainable development; that the policy statement covered the Paris Agreement and followed the advice of the Committee on Climate Change that the existing measures under the Climate Change Act 2008 were capable of being compatible with the target set by the Paris Agreement; that the policy statement explained how aviation emissions were taken into account in setting carbon H budgets under the Climate Change Act 2008 in accordance with the advice given by the Climate Change Committee; that on all the evidence it could not be said that the Secretary of State had omitted to give consideration to greenhouse gas emissions or to give sufficient weight to the Paris Agreement when issuing the policy statement; that the Secretary of State had asked himself whether the Paris Agreement should be taken into account beyond the extent to which it was already reflected in the Climate

Change Act 2008 and had concluded, in the exercise of his discretion, that it would not be appropriate to do so; that the Secretary of State's view that the Paris Agreement had sufficiently been taken into account for the purposes of the designation of the policy statement was a rational one; and that, accordingly, the Secretary of State's assessment was within his discretion and could not be faulted (post, paras 120, 121, 124, 125, 128–134).

(4) That although the obligation to produce an appraisal of sustainability and an environmental report to accompany the national policy statement was required by European Union Directives, and their application was governed by European Union law, the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment was an area where domestic public law principles had the same effect as the parallel requirements of European Union law; that the intended objective of the report was to inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed plan or project to enable them to comment on it and suggest reasonable alternatives; that it was implicit in that objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it was properly focused on the factors which might have a bearing on the proposed plan or project; that there was a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider helpful or appropriate in the context of the decision to be taken would result in the public being drowned in unhelpful detail so that their ability to comment effectively would be undermined; that the Secretary of State had not treated the Paris Agreement as irrelevant and on that basis refuse to consider whether reference should be made to it; that on the contrary the evidence showed that he had followed the Climate Change Committee's advice that the United Kingdom's obligations under the Agreement were sufficiently taken into account; and that, therefore, the reports accompanying the policy statement were not defective (post, paras 145–150).

R (Blewett) v Derbyshire County Council [2004] Env LR 29 and *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, ECJ considered.

(5) That the Secretary of State had not acted irrationally in not attempting in the national policy statement to assess post-2050 carbon emissions against policies which had yet to be determined; that the policy in response to the global goals of the Paris Agreement was in the course of development when the national policy statement was designated, and it remained in development; that the policy statement did not immunise the new runway scheme from complying with future changes of law and policy; that the scheme would fall to be assessed against the emission targets at the date of the determination of the application for a development consent order and there were provisions in place to ensure that the new runway scheme complied with law and policy at the date when such an application was determined and mechanisms available by which emissions from the use of the runway could be controlled; that the policy statement reflected the uncertainty over the climate change effects of non-carbon emissions and the absence of an agreed metric which could inform policy; that the Secretary of State's decision was consistent with the advice of the Climate Change Committee and had been taken in the context of the response to the Paris Agreement which included an aviation strategy to address non-carbon emissions; that the national policy statement was only the first stage in a process by which permission would be given for the new runway scheme to proceed, and at that stage the Secretary of State had powers to address the emissions; and that, accordingly, the Secretary of State had not failed to have regard to the desirability of mitigating and adapting to

climate change pursuant to his duties under section 10(2) and (3) of the Act (post, paras 156–158, 161–163, 165–167).

Decision of the Court of Appeal [2020] EWCA Civ 214; [2020] PTSR 1446 reversed.

The following cases are referred to in the judgment of Lord Hodge DPSC and Lord Sales JSC:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508, HL(E)

Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935, HL(E)

CREEDNZ Inc v Governor General [1981] 1 NZLR 172

Findlay, In re [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)

Newick (Baroness Cumberlege of) v Secretary of State for Communities and Local Government [2018] EWCA Civ 1305; [2018] PTSR 2063, CA

No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88; [2015] Env LR 28, CA

Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy [2018] EWHC 1892 (Admin); [2019] Env LR 13

R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545; [1990] 1 All ER 91; [1989] STC 873, DC

R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513; [1995] 2 WLR 464; [1995] 2 All ER 244, HL(E)

R v Somerset County Council, Ex p Fewings [1995] 1 WLR 1037; [1995] 3 All ER 20; 93 LGR 515, CA

R (Blewett) v Derbyshire County [2003] EWHC 2775 (Admin); [2004] Env LR 29

R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening) [2008] UKHL 60; [2009] AC 756; [2008] 3 WLR 568; [2008] 4 All ER 927, HL(E)

R (Davies) v Revenue and Customs Comrs [2011] UKSC 47; [2011] 1 WLR 2625; [2012] 1 All ER 1048

R (Edwards) v Environment Agency [2008] UKHL 22; (Note) [2008] 1 WLR 1587; [2009] 1 All ER 57, HL(E)

R (Heathrow Hub Ltd) v Secretary of State for Transport (Speaker of the House of Commons intervening) [2019] EWHC 1069 (Admin), DC

R (Hurst) v London Northern District Coroner [2007] UKHL 13; [2007] 2 AC 189; [2007] 2 WLR 726; [2007] 2 All ER 1025, HL(E)

R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61; [2017] 2 WLR 583; [2017] 1 All ER 593, SC(E)

R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] UKSC 3; [2020] PTSR 221; [2020] 3 All ER 527, SC(E)

Shadwell Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin); [2013] Env LR D2

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403, HL(E)

Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968 (Case C-120/97) EU:C:1999:14; [1999] 1 WLR 927; [1999] ECR I-223, ECJ

Walton v Scottish Ministers [2012] UKSC 44; [2013] PTSR 51, SC(Sc)

No additional cases were cited in argument.

APPEAL from the Court of Appeal

The claimants, Friends of the Earth Ltd and Plan B Earth, sought judicial review pursuant to section 13 of the Planning Act 2008, of the decision of the Secretary of State for Transport on 26 June 2018 to designate a national policy statement entitled "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England". The statement was issued under section 5 of the 2008 Act for the purpose of setting out the policy framework within which any application for a development consent order for such development was to be determined and indicating that the Government's preferred location and scheme for meeting the need for new airport capacity in the South East of England was a third runway at Heathrow to the north west of the existing runways. Heathrow Airport Ltd appeared as an interested party to the claims.

On 1 May 2019 the Divisional Court (Hickinbottom LJ and Holgate J) [2019] EWHC 1070 (Admin); [2020] PTSR 240 dismissed the claims for judicial review. On 27 February the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) [2020] PTSR 1446 allowed the claimants' appeal and held that the national policy statement was unlawful and of no legal effect.

On 6 May 2020 the Supreme Court (Lord Reed PSC, Lord Hodge DPSC and Lord Sales JSC) granted Heathrow Airport Ltd permission to appeal, pursuant to which it appealed. The issue on the appeal was whether the Secretary of State's failure to take account of the United Kingdom's climate change commitments under the Paris Agreement on Climate Change rendered the designation of the Airports National Policy Statement favouring the development of a third runway at Heathrow Airport unlawful.

The facts are stated in the judgment of Lord Hodge DPSC and Lord Sales JSC, post, para 7.

Lord Anderson of Ipswich QC, Michael Humphries QC, Richard Turney and *Malcolm Birdling* (instructed by *Bryan Cave Leighton Paisner LLP*) for Heathrow Airport Ltd.

David Wolfe QC, Peter Lockley and *Andrew Parkinson* (instructed by *Leigh Day*) for the claimant Friends of the Earth Ltd.

The claimant Plan B Earth appeared by its director *Tim Crosland*.

The Secretary of State did not appear and was not represented.

The court took time for consideration.

16 December 2020. **LORD HODGE DPSC and LORD SALES JSC** (with whom **LORD REED PSC, LADY BLACK** and **LORD LEGGATT JJSC** agreed) handed down the following judgment.

Introduction

1 This case concerns the framework which will govern an application for the grant of development consent for the construction of a third runway at Heathrow Airport. This is a development scheme promoted by the appellant, Heathrow Airport Ltd ("HAL"), the owner of the airport.

2 As a result of consideration over a long period, successive governments have come to the conclusion that there is a need for increased airport capacity

in the South East of England to foster the development of the national economy.

3 An independent commission called the Airports Commission was established in 2012 under the chairmanship of Sir Howard Davies to consider the options. In its interim report dated 17 December 2013 the Airports Commission reached the conclusion that there was a clear case for building one new runway in the South East, to come into operation by 2030. In that report the Airports Commission set out scenarios, including a carbon-traded scenario under which overall carbon dioxide ("CO_2") emissions were set at a cap consistent with a goal to limit global warming to 2°C. The Commission reduced the field of proposals to three main candidates. Two of these involved building additional runway capacity at Heathrow Airport, either to the north west of the existing two runways ("the NWR Scheme") or by extending the existing northern runway ("the ENR Scheme"). The third involved building a second runway at Gatwick airport ("the G2R Scheme").

4 The Airports Commission carried out an extensive consultation on which scheme should be chosen. In its final report dated 1 July 2015 ("the Airports Commission Final Report") the Commission confirmed that there was a need for additional runway capacity in the South East by 2030 and concluded that, while all three options could be regarded as credible, the NWR Scheme was the best way to meet that need, if combined with a significant package of measures which addressed environmental and community impacts.

5 The Government carried out reviews of the Airports Commission's analysis and conclusions. It assessed the Airports Commission Final Report to be sound and robust. On 14 December 2015 the Secretary of State for Transport ("the Secretary of State") announced that the Government accepted the case for airport expansion; agreed with, and would consider further, the Airports Commission's shortlist of options; and would use the mechanism of a national policy statement ("NPS") issued under the Planning Act 2008 ("the PA 2008") to establish the policy framework within which to consider an application by a developer for a development consent order ("DCO"). The announcement also stated that further work had to be done in relation to environmental impacts, including those arising from carbon emissions.

6 In parallel with the development of national airports policy, national and international policy to combat climate change has also been in a state of development. The Climate Change Act 2008 ("the CCA 2008") was enacted on the same day as the PA 2008. It sets a national carbon target (section 1) and requires the Government to establish carbon budgets for the UK (section 4). There are mechanisms in the CCA 2008 to adjust the national target and carbon budgets (in sections 2 and 5, respectively) as circumstances change, including as scientific understanding of global warming develops.

7 In 1992 the United Nations adopted the United Nations Framework Convention on Climate Change. 197 states are now parties to the Convention. Following the 21st Conference of the parties to the Convention, on 12 December 2015 the text of the Paris Agreement on Climate Change was agreed and adopted. The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases, in particular CO_2, with the object of seeking to reduce the rate of increase in global warming and to contain such increase to well below 2°C above, and if possible to 1.5°C, above pre-

industrial levels. On 22 April 2016 the United Kingdom signed the Paris Agreement and on 17 November 2016 the United Kingdom ratified the Agreement.

8 An expansion of airport capacity in the South East would involve a substantial increase in CO_2 emissions from the increased number of flights which would take place as a result. The proposals for such expansion have therefore given rise to a considerable degree of concern as to the environmental impact it would be likely to have on global warming and climate change. This is one aspect of the proposals for expansion of airport capacity, among many others, which have made the decision whether to proceed with such expansion a matter of controversy.

9 On 25 October 2016 the Secretary of State announced that the NWR Scheme was the Government's preferred option. In February 2017 the Government commenced consultation on a draft of an Airports NPS which it proposed should be promulgated pursuant to the PA 2008 to provide the national policy framework for consideration of an application for a DCO in respect of the NWR Scheme. A further round of consultation on a draft of this NPS was launched in October 2017. There were many thousands of responses to both consultations. In June 2018 the Government published its response to the consultations. It also published a response to a report on the proposed scheme dated 1 November 2017 by the Transport Committee (a Select Committee of the House of Commons).

10 On 5 June 2018 the Secretary of State laid before Parliament the final version of the Airports NPS ("the ANPS"), together with supporting documents. As is common ground on this appeal, the policy framework set out in the ANPS makes it clear that issues regarding the compatibility of the building of a third runway at Heathrow with the UK's obligations to contain carbon emissions and emissions of other greenhouse gases could and should be addressed at the stage of the assessment of an application by HAL for a DCO to allow it to proceed with the development. As is also common ground, the ANPS makes it clear that the emissions obligations to be taken into account at the DCO stage will be those which are applicable at that time, assessed in the light of circumstances and the detailed proposals of HAL at that time.

11 On 25 June 2018 there was a debate on the proposed ANPS in the House of Commons, followed by a vote approving the ANPS by 415 votes to 119, a majority of 296 with support from across the House.

12 On 26 June 2018 the Secretary of State designated the ANPS under section 5(1) of the PA 2008 as national policy. It is the Secretary of State's decision to designate the ANPS which is the subject of legal challenge in these proceedings.

13 Objectors to the NWR Scheme commenced a number of claims against the Secretary of State to challenge the lawfulness of the designation of the ANPS on a wide variety of grounds. For the most part, those claims have been dismissed in the courts below in two judgments of the Divisional Court (Hickinbottom LJ and Holgate J) in the present proceedings [2020] PTSR 240 and an associated action *R (Heathrow Hub Ltd) v Secretary of State for Transport (Speaker of the House of Commons intervening)* [2019] EWHC 1069 (Admin), and in the judgment of the Court of Appeal in the present proceedings [2020] PTSR 1446.

14 The Divisional Court dismissed all the claims brought by objectors, including those brought by the respondents to this appeal (Friends of the Earth—"FoE"—and Plan B Earth). FoE is a non-governmental organisation concerned with climate change. Plan B Earth is a charity concerned with climate change.

15 However, the Court of Appeal allowed appeals by FoE and Plan B Earth and granted declaratory relief stating that the ANPS is of no legal effect and that the Secretary of State had acted unlawfully in failing to take into account the Paris Agreement in making his decision to designate the ANPS. The Court of Appeal set out four grounds for its decision: (i) the Secretary of State breached his duty under section 5(8) of the PA 2008 to give an explanation of how the policy set out in the ANPS took account of Government policy, which was committed to implementing the emissions reductions targets in the Paris Agreement ("the section 5(8) ground"); (ii) the Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, to have regard to the desirability of mitigating and adapting to climate change, in that he failed to have proper regard to the Paris Agreement ("the section 10 ground"); (iii) the Secretary of State breached his duty under article 5 of the Strategic Environmental Assessment Directive ("the SEA Directive", Parliament and Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment) to issue a suitable environmental report for the purposes of public consultation on the proposed ANPS, in that he failed to refer to the Paris Agreement ("the SEA Directive ground"); and (iv) the Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, in that he failed to have proper regard to (a) the desirability of mitigating climate change in the period after 2050 ("the post-2050 ground") and (b) the desirability of mitigating climate change by restricting emissions of non-CO_2 impacts of aviation, in particular nitrous oxide ("the non-CO_2 emissions ground").

16 The Court of Appeal also rejected a submission by HAL, relying on section 31 of the Senior Courts Act 1981, that it should exercise its discretion as to remedy to refuse any relief, on the grounds that (HAL argued) it was highly likely that even if there had been no breach of duty by the Secretary of State the decision whether to issue the ANPS would have been the same.

17 HAL appeals to this court with permission granted by the court. HAL is joined in the proceedings as an interested party. It has already invested large sums of money in promoting the NWR Scheme and wishes to carry it through by applying for a DCO in due course and then building the proposed new runway. The Secretary of State has chosen not to appeal and has made no submissions to us. However, HAL is entitled to advance all the legal arguments which may be available in order to defend the validity of the ANPS.

18 Prior to the Covid-19 pandemic, Heathrow was the busiest two-runway airport in the world. The pandemic has had a major impact in reducing aviation and the demand for flights. However, there will be a lead time of many years before any third runway at Heathrow is completed and HAL's expectation is that the surplus of demand for aviation services over airport capacity will have been restored before a third runway would be operational. Lord Anderson QC for HAL informed the court that HAL intends to proceed with the NWR Scheme despite the pandemic.

The Planning Act 2008

19 We are grateful to the Divisional Court for their careful account of the PA 2008, on which we draw for this section. The PA 2008 established a new unified "development consent" procedure for "nationally significant infrastructure projects" defined to include certain "airport-related development" including the construction or alteration of an airport that is expected to be capable of providing air passenger services for at least 10 million passengers per year (sections 14 and 23). Originally, many of the primary functions under the Act were to be exercised by the Infrastructure Planning Commission, established under section 1. However, those functions were transferred to the Secretary of State by the Localism Act 2011.

20 The mischiefs that the Act was intended to address were identified in the White Paper published in May 2007, Planning for a Sustainable Future (Cm 7120) ("the 2007 White Paper"). Prior to the PA 2008, a proposal for the construction of a new airport or extension to an airport would have required planning permission under the Town and Country Planning Act 1990. An application for permission would undoubtedly have resulted in a public inquiry, whether as an appeal against refusal of consent or a decision by the Secretary of State to "call in" the matter for his own determination. As para 3.1 of the 2007 White Paper said:

> "A key problem with the current system of planning for major infrastructure is that national policy and, in particular, the national need for infrastructure, is not in all cases clearly set out. This can cause significant delays at the public inquiry stage, because national policy has to be clarified and the need for the infrastructure has to be established through the inquiry process and for each individual application. For instance, the absence of a clear policy framework for airports development was identified by the inquiry secretary in his report on the planning inquiry as one of the key factors in the very long process for securing planning approval for Heathrow Terminal 5. Considerable time had to be taken at the inquiry debating whether there was a need for additional capacity. The Government has since responded by publishing the Air Transport White Paper to provide a framework for airport development. This identifies airport development which the Government considers to be in the national interest, for reference at future planning inquiries. But for many other infrastructure sectors, national policy is still not explicitly set out, or is still in the process of being developed."

21 Para 3.2 identified a number of particular problems caused by the absence of a clear national policy framework. For example, inspectors at public inquiries might be required to make assumptions about national policy and national need, often without clear guidance and on the basis of incomplete evidence. Decisions by ministers in individual cases might become the means by which government policy would be expressed, rather than such decisions being framed by clear policy objectives beforehand. In the absence of a clear forum for consultation at the national level, it could be more difficult for the public and other interested parties to have their say in the formulation of national policy on infrastructure. The ability of developers to make long-term investment decisions is influenced by the availability of

clear statements of government policy and objectives, and might be adversely affected by the absence of such statements.

22 The 2007 White Paper proposed that national policy statements would set the policy framework for decisions on the development of national infrastructure. "They would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development." The role of ministers would be to set policy, in particular the national need for infrastructure development (para 3.4).

23 Para 3.11 envisaged that any public inquiry dealing with individual applications for development consent would not have to consider issues such as whether there is a case for infrastructure development, or the types of development most likely to meet the need for additional capacity, since such matters would already have been addressed in the NPS. It was said that NPSs should have more weight than other statements of policy, whether at a national or local level: they should be the primary consideration in the determination of an application for a DCO (para 3.12), although other relevant considerations should also be taken into account (para 3.13). To provide democratic accountability, it was said that NPSs should be subject to parliamentary scrutiny before being adopted (para 3.27).

24 In line with the 2007 White Paper recommendation, Part 2 of the PA 2008 provides for NPSs which give a policy framework within which any application for development consent, in the form of a DCO, is to be determined. Section 5(1) gives the Secretary of State the power to designate an NPS for development falling within the scope of the Act; and section 6(1) provides that "[the] Secretary of State must review each [NPS] whenever the Secretary of State thinks it appropriate to do so".

25 The content of an NPS is governed by section 5(5)–(8) which provide that:

> "(5) The policy set out in [an NPS] may in particular— (a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area; (b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development; (c) set out the relative weight to be given to specified criteria; (d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development; (e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development; (f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.
>
> "(6) If [an NPS] sets out policy in relation to a particular description of development, the statement must set out criteria to be taken into account in the design of that description of development.
>
> "(7) [An NPS] must give reasons for the policy set out in the statement.

"(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

As is made clear, the NPS may (but is not required to) identify a particular location for the relevant development.

26 In addition, under the heading "Sustainable development", section 10 provides (so far as relevant to these claims):

"(1) This section applies to the Secretary of State's functions under sections 5 and 6.

"(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.

"(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of— (a) mitigating, and adapting to, climate change …"

27 The process for designation of an NPS is also set out in the Act. The PA 2008 imposed for the first time a transparent procedure for the public and other consultees to be involved in the formulation of national infrastructure policy in advance of any consideration of an application for a DCO.

28 The Secretary of State produces a draft NPS, which is subject to (i) an appraisal of sustainability ("AoS") (section 5(3)), (ii) public consultation and publicity (section 7), and (iii) parliamentary scrutiny (sections 5(4) and 9). In addition, there is a requirement to carry out a strategic environmental assessment under the SEA Directive as transposed by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("the SEA Regulations") (see regulation 5(2) of the SEA Regulations).

29 The consultation and publicity requirements are set out in section 7, which so far as relevant provides:

"(1) This section sets out the consultation and publicity requirements referred to in sections 5(4) and 6(7).

"(2) The Secretary of State must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal. This is subject to subsections (4) and (5).

"(3) In this section 'the proposal' means— (a) the statement that the Secretary of State proposes to designate as [an NPS] for the purposes of this Act or (b) (as the case may be) the proposed amendment.

"(4) The Secretary of State must consult such persons, and such descriptions of persons, as may be prescribed.

"(5) If the policy set out in the proposal identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal.

"(6) The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal."

30 A proposed NPS must be laid before Parliament (section 9(2) and (8)). The Act thus provides an opportunity for a committee of either House of

Parliament to scrutinise a proposed NPS and to make recommendations; and for each House to scrutinise it and make resolutions (see section 9(4)).

31 An NPS is not the end of the process. It simply sets the policy framework within which any application for a DCO must be determined. Section 31 provides that, even where a relevant NPS has been designated, development consent under the PA 2008 is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project". Such applications must be made to the relevant Secretary of State (section 37).

32 Chapter 2 of Part 5 of the Act makes provision for a pre-application procedure. This provides for a duty to consult pre-application, which extends to consulting relevant local authorities and, where the land to be developed is in London, the Greater London Authority (section 42). There are also duties to consult the local community, and to publicise and to take account of responses to consultation and publicity (sections 47–49; and see also regulation 12 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), which makes provision for publication of and consultation on preliminary environmental information). Any application for a DCO must be accompanied by a consultation report (section 37(3)(c)); and adequacy of consultation is one of the criteria for acceptance of the application (section 55(3) and (4)(a)).

33 Part 6 of the PA 2008 is concerned with "Deciding applications for orders granting development consent". Once the application has been accepted, section 56 requires the applicant to notify prescribed bodies and authorities and those interested in the land to which the application relates, who become "interested parties" to the application (section 102). The notification must include a notice that interested parties may make representations to the Secretary of State. Section 60(2) provides that where a DCO application is accepted for examination there is a requirement to notify any local authority for the area in which land, to which the application relates, is located (see section 56A)) and, where the land to be developed is in London, the Greater London Authority, inviting them each to submit a "local impact report" (section 60(2)).

34 The Secretary of State may appoint a panel or a single person to examine the application ("the Examining Authority") and to make a report setting out its findings and conclusions, and a recommendation as to the decision to be made on the application. The examination process lasts six months, unless extended (section 98); and the examination timetable is set out in the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) ("the Examination Rules"). In addition to local impact reports (section 60), the examination process involves written representations (section 90), written questions by the Examining Authority (rules 8 and 10 of the Examination Rules), and hearings (which might be open floor and/or issue specific and/or relating to compulsory purchase) (sections 91–93). As a result of the examination process, the provisions of the proposed DCO may be amended by either the applicant or the Examination Authority, eg in response to the representations of interested parties; and it is open to the Secretary of State to modify the proposed DCO before making it.

35 Section 104 constrains the Secretary of State when determining an application for a DCO for development in relation to which an NPS has effect, in the following terms (so far as relevant to these claims):

"(2) In deciding the application the Secretary of State must have regard to— (a) any [NPS] which has effect in relation to development of the description to which the application relates (a 'relevant [NPS]') … (b) any local impact report … (c) any matters prescribed in relation to development of the description to which the application relates, and (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

"(3) The Secretary of State must decide the application in accordance with any relevant [NPS], except to the extent that one or more of subsections (4) to (8) applies.

"(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the United Kingdom being in breach of any of its international obligations.

"(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

"(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would be unlawful by virtue of any enactment.

"(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

"(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with [an NPS] is met.

"(9) For the avoidance of doubt, the fact that any relevant [NPS] identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

36 Section 104 is complemented by section 106 which, under the heading "Matters which may be disregarded when determining an application", provides (so far as relevant to these claims):

"(1) In deciding an application for an order granting development consent, the Secretary of State may disregard representations if the Secretary of State considers that the representations— (a) … (b) relate to the merits of policy set out in [an NPS] …

"(2) In this section 'representation' includes evidence."

That is also reflected in sections 87(3) and 94(8), under which the Examining Authority may disregard representations (including evidence) or refuse to allow representations to be made at a hearing if it considers that they "relate to the merits of the policy set out in [an NPS]".

37 By section 120(1), a DCO may impose requirements in connection with the development for which consent is granted, eg it may impose conditions considered appropriate or necessary to mitigate or control the environmental effects of the development. Section 120(3) is a broad provision enabling a DCO to make provision relating to, or to matters ancillary to, the development for which consent is granted including any of the matters

listed in Part 1 of Schedule 5 (section 120(4)). That Schedule lists a wide range of potentially applicable provisions, including compulsory purchase, the creation of new rights over land, the carrying out of civil engineering works, the designation of highways, the operation of transport systems, the charging of tolls, fares and other charges and the making of byelaws and their enforcement.

38 Section 13 concerns "Legal challenges relating to [NPSs]". Section 13(1) provides:

> "A court may entertain proceedings for questioning [an NPS] or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if— (a) the proceedings are brought by a claim for judicial review, and (b) the claim form is filed before the end of the period of six weeks beginning with the day after — (i) the day on which the statement is designated as [an NPS] for the purposes of this Act, or (ii) (if later) the day on which the statement is published."

It was under section 13 that the claims by objectors to the ANPS were brought.

The Climate Change Act 2008

39 Again, we gratefully draw on the account given by the Divisional Court. As they explain, the UK has for a long time appreciated the desirability of tackling climate change, and wished to take a more rigorous domestic line. In the 2003 White Paper, "Our Energy Future—Creating a Low Carbon Economy" (Cm 5761), the Government committed to reduce CO_2 emissions by 60% on 1990 levels by 2050; and to achieve "real progress" by 2020 (which equated to reductions of 26–32%). The 60% figure emanated from the EU Council of Ministers' "Community Strategy on Climate Change" in 1996, which determined to limit emissions to 550 parts per million ("ppm") on the basis that to do so would restrict the rise in global temperatures to 2°C above pre-industrial levels which, it was then considered, would avoid the serious consequences of global warming. However, by 2005, there was scientific evidence that restricting emissions to 550ppm would be unlikely to be effective in keeping the rise to 2°C; and only stabilising CO_2 emissions at something below 450ppm would be likely to achieve that result.

40 Parliament addressed these issues in the CCA 2008.

41 Section 32 established a Committee on Climate Change ("the CCC"), an independent public body to advise the UK and devolved Governments and Parliaments on tackling climate change, including on matters relating to the UK's statutory carbon reduction target for 2050 and the treatment of greenhouse gases from international aviation.

42 Section 1 gives a mandatory target for the reduction of UK carbon emissions. At the time of designation of the ANPS, it provided:

> "It is the duty of the Secretary of State [then, the Secretary of State for Energy and Climate Change: now, the Secretary of State for Business, Enterprise and Industrial Strategy ('BEIS')] to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline."

The figure of 80% was substituted for 60% during the passage of the Bill, as evolving scientific knowledge suggested that the lower figure would not be sufficient to keep the rise in temperature to 2°C in 2050. Therefore, although the CCA 2008 makes no mention of that temperature target, as the CCC said in its report on the Paris Agreement issued in October 2016 (see para 73 below): "This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperatures to around 2°C above pre-industrial levels." The statutory target of a reduction in carbon emissions by 80% by 2050 was Parliament's response to the international commitment to keep the global temperature rise to 2°C above pre-industrial levels in 2050. Since the designation of the ANPS, the statutory target has been made more stringent. The figure of 100% was substituted for 80% in section 1 of the CCA 2008 by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056).

43 The Secretary of State for BEIS has the power to amend that percentage (section 2(1) of the CCA 2008), but only: (i) if it appears to him that there have been significant developments in scientific knowledge about climate change since the passing of the Act, or developments in European or international law or policy (section 2(2) and (3)): the Explanatory Note to the Act says, as must be the case, that "this power might be used in the event of a new international treaty on climate change"; (ii) after obtaining, and taking into account, advice from the CCC (section 3(1)); and (iii) subject to parliamentary affirmative resolution procedure (section 2(6)).

44 Section 1 of the CCA 2008 sets a target that relates to carbon only. Section 24 enables the Secretary of State for BEIS to set targets for other greenhouse gases, but subject to similar conditions to which an amendment to the section 1 target is subject.

45 In addition to the carbon emissions target set by section 1—and to ensure compliance with it (see sections 5(1)(b) and 8)—the Secretary of State for BEIS is also required to set for each succeeding period of five years, at least 12 years in advance, an amount for the net UK carbon account ("the carbon budget"); and ensure that the net UK carbon account for any period does not exceed that budget (section 4). The carbon budget for the period including 2020 was set to be at least 34% lower than the 1990 baseline.

46 Section 10(2) sets out various matters which are required to be taken into account when the Secretary of State for BEIS sets, or the CCC advises upon, any carbon budget, including:

> "(a) scientific knowledge about climate change; (b) technology relevant to climate change; (c) economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sectors of the economy; (d) fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing; (e) social circumstances, and in particular the likely impact of the decision on fuel poverty; (f) … (h) circumstances at European and international level; (i) the estimated amount of reportable emissions from international aviation and international shipping …"

Therefore, although for the purposes of the CCA 2008 emissions from greenhouse gases from international aviation do not generally count as emissions from UK sources (section 30(1)), by virtue of section 10(2)(i), in

relation to any carbon budget, the Secretary of State for BEIS and the CCC must take such emissions into account.

47 The evidence for the Secretary of State explains that the CCC has interpreted that as requiring the UK to meet a 2050 target which includes these emissions. The CCC has advised that, to meet the 2050 target on that basis, emissions from UK aviation (domestic and international) in 2050 should be no higher than 2005 levels, ie 37.5 megatons (million tonnes) of CO_2 ("$MtCO_2$"). This is referred to by the respondents as "the Aviation Target". However, the Aviation Policy Framework issued by the Government in March 2013 explains that the Government decided not to take a decision on whether to include international aviation emissions in its carbon budgets, simply leaving sufficient headroom in those budgets consistent with meeting the 2050 target including such emissions, but otherwise deferring a decision for consideration as part of the emerging Aviation Strategy. The Aviation Strategy is due to re-examine how the aviation sector can best contribute its fair share to emissions reductions at both the UK and global level. It is yet to be finalised.

The SEA Directive

48 Again, in this section we gratefully draw on the careful account given by the Divisional Court. As they explain, Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended ("the EIA Directive"), as currently transposed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), requires a process within normal planning procedures. (For the purposes of these claims, the transposing regulations have not materially changed over the relevant period; and we will refer to them collectively as "the EIA Regulations".) The SEA Directive as transposed by the SEA Regulations concerns the environmental impact of plans and programmes. The SEA Directive and Regulations applied to the ANPS. The EIA Directive would apply when there was a particular development for which development consent was sought, at the DCO stage.

49 Recital (1) to the SEA Directive states:

> "Article 174 of the Treaty provides that Community policy on the environment is to contribute to, inter alia, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development."

As suggested here, the SEA Directive relies upon the "precautionary principle" where appropriate.

50 Recital (4) states:

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the member states, because it ensures that such

effects of implementing plans and programmes are taken into account during their preparation and before their adoption." A

51 Recital (9) states:

"This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in member states or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, member states should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes." B

Thus, the requirements of the SEA Directive are essentially procedural in nature; and it may be appropriate to avoid duplicating assessment work by having regard to work carried out at other levels or stages of a policy-making process (see article 5(2)–(3) below). C

52 Recital (17) states:

"The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure." D

53 The objectives of the SEA Directive are set out in article 1:

"The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment." E

54 Article 3(1) requires an "environmental assessment" to be carried out, in accordance with articles 4 to 9, for plans and programmes referred to in article 3(2)–(4) which are likely to have significant environmental effects. Article 3(2) requires strategic environmental assessment generally for any plan or programme which is prepared for (inter alia) transport, town and country planning or land use and which sets the framework for future development consent for projects listed in Annexes I and II to the EIA Directive. Strategic environmental assessment is also required for other plans and programmes which are likely to have significant environmental effects (article 3(4)). By virtue of sections 104 and 106 of the PA 2008, the ANPS designated under section 5 sets out the framework for decisions on whether a DCO for the development of an additional runway at Heathrow under Part 6 of that Act should be granted. That development would, in due course, require environmental impact assessment under the EIA Directive and Regulations; and there is no dispute that the ANPS needed to be subjected to strategic environmental assessment under the SEA Directive and the SEA Regulations. F G H

55 Article 2(b) of the SEA Directive defines "environmental assessment" for the purposes of the Directive:

A "'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with articles 4 to 9."

56 Article 4(1) requires "environmental assessment [to be] … carried out
B during the preparation of a plan or programme and before its adoption", which in this instance would refer to the Secretary of State's decision to designate the ANPS.

57 Article 5 sets out requirements for an "environmental report". By article 2(c): "'environmental report' shall mean the part of the plan or programme documentation containing the information required in article 5
C and Annex I." In the case of the ANPS the environmental report was essentially the AoS.

58 Article 5(1) provides:

"Where an environmental assessment is required under article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme,
D and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

Annex I states, under the heading, "Information referred to in article 5(1)":

E "The information to be provided under article 5(1), subject to article 5(2) and (3), is the following: (a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes; (b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme; (c) the environmental
F characteristics of areas likely to be significantly affected; (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC [the Habitats and Birds Directives]; (e) the environmental protection objectives, established at
G international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation; (f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape
H and the interrelationship between the above factors; (g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme; (h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or

lack of know-how) encountered in compiling the required information; (i) a description of the measures envisaged concerning monitoring in accordance with article 10; (j) a non-technical summary of the information provided under the above headings."

Thus, the information required by the combination of article 5(1) and Annex I is subject to article 5(2) and (3), which provide:

"(2) The environmental report prepared pursuant to paragraph 1 shall include the information that *may reasonably be required* taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters *are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment*. (3) Relevant information available on environmental effects of the plans and programmes and obtained *at other levels of decision-making or through other Community legislation* may be used for providing the information referred to in Annex I." (Emphasis added.)

59 Accordingly, the information which is required to be included in an "environmental report", whether by article 5(1) itself or by that provision in conjunction with Annex I, is qualified by article 5(2) and (3) in a number of respects. First, the obligation is only to include information that "may reasonably be required", which connotes the making of a judgment by the plan-making authority. Second, that judgment may have regard to a number of matters, including current knowledge and assessment methods. In addition, the contents and level of detail in a plan such as the ANPS, the stage it has reached in the decision-making process and the ability to draw upon sources of information used in other decision-making, may affect the nature and extent of the information required to be provided in the environmental report for the strategic environmental assessment.

60 The stage reached by the ANPS should be seen in the context of the statutory framework of the PA 2008, as set out above (see paras 19–38). Section 5(5) authorises the Secretary of State to set out in an NPS the type and size of development appropriate nationally or for a specified area and to identify locations which are either suitable or unsuitable for that development. In addition, the Secretary of State may set out criteria to be applied when deciding the suitability of a location. Section 104(3) requires the Secretary of State to decide an application for a DCO in accordance with a relevant NPS, save in so far as any one or more of the exceptions in section 104(4)–(8) applies, which include the situation where the adverse impacts of a proposal are judged to outweigh its benefits (section 104(7)). Section 106(1) empowers the Secretary of State to disregard a representation objecting to such a proposal in so far as it relates to the merits of a policy contained in the NPS.

61 In the present case, the Secretary of State made it plain in the strategic environmental assessment process that the AoS drew upon and updated the extensive work which had previously been carried out by, and on behalf of, the Airports Commission, including numerous reports to the Airports Commission and its own final report. It is common ground that the Secretary of State was entitled to take that course.

62 Article 6 of the SEA Directive sets out requirements for consultation. Article 6(1) requires that the draft plan or programme and the environmental report be made available to the public and to those authorities designated by a member state under article 6(3) which, by virtue of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. In England, the designated authorities are Natural England, Historic England and the Environment Agency (see regulation 4 of the SEA Regulations). In the case of the ANPS, the Secretary of State also had to consult those designated authorities on the scope and level of detail of the information to be included in the environmental report (article 5(4)).

63 In relation to the consultation process, article 6(2) provides:

> "The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure."

64 "The public referred to in [article 6(4)]" is a cross-reference to the rules made by each member state for defining the public affected, or likely to be affected by, or having an interest in the decision-making on the plan. Regulation 13(2) of the SEA Regulations leaves this to be determined as a matter of judgment by the plan-making authority.

65 Article 8 requires the environmental report prepared under article 5, the opinions expressed under article 6, and the results of any transboundary consultations under article 7 to be "taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure".

66 In *Cogent Land LLP v Rochford District Council* [2013] 1 P & CR 2 Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111–126). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48–54). We agree with this analysis.

67 It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7.

68 Regulation 12 of the SEA Regulations transposes the main requirements in article 5 of the Directive governing the content of an environmental report as follows (emphasis added):

> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of— (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> "(3) The report shall include such of the information referred to in Schedule 2 to these Regulations *as may reasonably be required*, taking account of— (a) current knowledge and methods of assessment; (b) the contents and level of detail in the plan or programme; (c) the stage of the plan or programme in the decision-making process; and (d) the extent to which certain measures are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

Schedule 2 replicates the list of items in Annex I to the SEA Directive. No issue is raised as to the adequacy of that transposition.

69 As the Divisional Court observed, it is plain from the language "as may reasonably be required" that the SEA Regulations, like the SEA Directive, allow the plan-making authority to make a judgment on the nature of the information in Schedule 2 and the level of detail to be provided in an environmental report, whether as published initially or in any subsequent amendment or supplement.

Factual background

70 At the heart of the challenge to the ANPS is the Paris Agreement (para 7 above) which acknowledged that climate change represents "an urgent and potentially irreversible threat to human societies and the planet" (Preamble to the Decision to adopt the Paris Agreement). In article 2 the Paris Agreement sought to enhance the measures to reduce the risks and impacts of climate change by setting a global target of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels". Each signatory of the Paris Agreement undertook to take measures to achieve that long-term global temperature goal "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (article 4(1)). Each party agreed to prepare, communicate and maintain successive nationally determined contributions ("NDCs") that it intended to achieve and to pursue domestic mitigation measures with the aim of achieving the objectives of such NDCs (article 4(2)). A party's successive NDC was to progress beyond its current NDC and was to reflect its highest possible ambition (article 4(3)).

71 Notwithstanding the common objectives set out in articles 2 and 4(1), the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any NDC applicable to the state in question. So far as concerns the United Kingdom, it is common ground that the relevant NDC is that adopted and communicated on behalf of the EU, which set a binding target of achieving 40% reduction of 1990 emissions by 2030. This is less stringent than the targets which had already

A been set in the fourth and fifth carbon budgets issued pursuant to section 4 of the CCA 2008, which were respectively a 50% reduction on 1990 levels for the period 2023–2027 and a 57% reduction for the period 2028–2032.

72 Before the United Kingdom had signed or ratified the Paris Agreement two government ministers made statements in the House of Commons about the Government's approach to the Paris Agreement. On 14 March 2016 the Minister of State for Energy, Andrea Leadsom MP, told the House of B Commons that the Government

> "believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law—the question is not whether, but how we do it, and there is an important set of questions to be answered before we do".

C Ten days later (24 March 2016) Amber Rudd MP, Secretary of State for Energy and Climate Change, responded to an oral question on what steps her department was taking to enshrine the net zero emissions commitment of the Paris Climate Change Conference by stating that: "the question is not whether we do it but how we do it."

73 The Government received advice from the CCC on the UK's response D to the Paris goal. At a meeting on 16 September 2016 the CCC concluded that while a new long-term target would be needed to be consistent with the Paris goal, "the evidence was not sufficient to specify that target now".

74 In October 2016 the CCC published a report entitled "UK Climate Action following the Paris Agreement" on what domestic action the Government should take as part of a fair contribution to the aims of the E Paris Agreement. In that report the CCC stated that the goals of the Paris Agreement involved a higher level of global ambition in the reduction of greenhouse gases than that which formed the basis of the UK's existing emissions reduction targets. But the CCC advised that it was neither necessary nor appropriate to amend the 2050 target in section 1 of the CCA 2008 or alter the level of existing carbon budgets at that time. It advised that there would be "several opportunities to revisit the UK's targets in the F future" and that "the UK 2050 target is potentially consistent with a wide range of global temperature outcomes". In its executive summary (p 7) the CCC summarised its advice: "Do not set new UK emissions targets now … The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

75 In October 2017 the Government published its "Clean Growth G Strategy" which set out its policies and proposals to deliver economic growth and decreased emissions. In Annex C in its discussion of UK climate action it acknowledged the risks posed by the growing level of global climate instability. It recorded the global goals of the Paris Agreement and that global emissions of greenhouse gases would need to peak as soon as possible, reduce rapidly thereafter and reach a net zero level in the second half of this century. It recorded the CCC's advice in these terms:

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> "In October 2016 the [CCC] said that the Paris Agreement target 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements', but that the UK should not set new UK emissions targets now, as it already had stretching targets and achieving them will be a positive contribution to global

climate action. The CCC advised that the UK's fair contribution to the Paris Agreement should include measures to maintain flexibility to go further on UK targets, the development of options to remove greenhouse gases from the air, and that its targets should be kept under review."

76 In December 2017 Plan B Earth and 11 other claimants commenced judicial review proceedings against the Secretary of State for BEIS and CCC alleging that the Secretary of State had unlawfully failed to revise the 2050 target in section 1 of the CCA 2008 in line with the Paris Agreement.

77 The Secretary of State pleaded:

> "[While] the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain nationally determined contributions to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to 'well below 2°C' above pre-industrial levels and pursuing efforts to limit them to 1.5°C. *This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim*." (Emphasis in original.)

The CCC also explained its position in its written pleadings:

> "The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was unfeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement."

78 At an oral hearing (*Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2019] Env LR 13), Supperstone J refused permission to proceed with the judicial review, holding among other things that the Paris Agreement did not impose any legally binding target on each contracting party, that section 2 of the CCA 2008 gave the Secretary of State the power, but did not impose a duty, to amend the 2050 target in the event of developments in scientific knowledge or European or international law or policy, and that on the basis of the advice of the CCC, the Secretary of State was plainly entitled to refuse to change the 2050 target. Asplin LJ refused permission to appeal on 22 January 2019.

79 In January 2018 the CCC published "An independent assessment of the UK's Clean Growth Strategy". In that report the CCC explained that the aim of the Paris Agreement for emissions to reach net zero in the second half of the century was likely to require the UK to revise its statutory 2050 target to seek greater reductions and advised that "it is therefore essential that actions are taken now to enable these deeper reductions to be achieved" (p 21). The CCC invited the Secretary of State for BEIS to seek further advice from it and review the UK's long-term emissions targets after the publication of the report by the Intergovernmental Panel on Climate Change ("IPCC") on the implications of the Paris Agreement's 1.5°C goal.

80 In January 2018 the Government published "A Green Future: Our 25 Year Plan to Improve the Environment" in which it undertook to continue its work in providing international leadership to meet the goals of the Paris Agreement (for example, p 118). In early 2018 governments, including the UK Government, were able to review a draft of the IPCC report and in early

June 2018 the UK Government submitted final comments on the draft of the IPCC report.

81 On 17 April 2018 the Government announced at the Commonwealth Heads of Government Meeting that after the publication of the IPCC report later that year, it would seek the advice of the CCC on the implications of the Paris Agreement for the UK's long-term emissions reductions targets.

82 At the same time the Government was working to develop an aviation strategy which would address aviation emissions. In April 2018, after public consultation, the Department for Transport published "Beyond the Horizon: The Future of UK Aviation—Next Steps towards an Aviation Strategy" in which it undertook to investigate technical and policy measures to address aviation emissions and how those measures related to the recommendations of the CCC. It stated (para 6.24):

> "The Government will look again at what domestic policies are available to complement its international approach and will consider areas of greater scientific uncertainty, such as the aviation's contribution to non-carbon dioxide climate change effects and how policy might make provision for their effects."

83 On 1 May in response to an oral parliamentary question concerning the offshore wind sector Claire Perry MP, Minister of State for Energy and Clean Growth, stated that the UK was the first developed nation to have said that it wanted to understand how to get to a zero-carbon economy by 2050.

84 On 5 June 2018 the Government issued its response to the consultation on the draft ANPS and the Secretary of State laid the proposed ANPS before Parliament. On the same day, the Secretary of State presented a paper on the proposed ANPS to a Cabinet sub-committee giving updated information on the three short-listed schemes and the Government's preference for the NWR Scheme. In relation to aviation emissions it stated that it was currently uncertain how international carbon emissions would be incorporated into the Government's carbon budget framework, that policy was developing and would be progressed during the development of the Aviation Strategy. The Government's position remained that action to address aviation emissions was best taken at an international level.

85 On 14 June 2018 the Chair of the CCC (Lord Deben) and Deputy Chair (Baroness Brown) wrote to the Secretary of State expressing surprise that he had not referred to the legal targets in the CCA 2008 or the Paris Agreement commitments in his statement to the House of Commons on the proposed ANPS on 5 June and stressing the need for his department to consider aviation's place in the overall strategy for UK emissions reduction. They stated that the Government should not plan for higher levels of aviation emissions "since this would place an unreasonably large burden on other sectors".

86 The Secretary of State responded on 20 June 2018 stating that the Government remained committed to the UK's climate change target and that the proposed ANPS made it clear that an increase in carbon emissions that would have a material impact on the Government's ability to meet its carbon reduction targets would be a reason to refuse development consent for the NWR. He stated that the Government was confident that the measures and requirements set out in the proposed ANPS provided a strong basis for mitigating the environmental impacts of expansion. He explained that

the forthcoming Aviation Strategy would put in place a framework for UK carbon emissions to 2050, "which ensures that aviation contributes its fair share to action on climate change, taking into account the UK's domestic and international obligations".

87 After the parliamentary debate on 25 June 2018 (para 11 above), the Secretary of State designated the ANPS as national policy on 26 June 2018 (para 12 above). Section 5 of the ANPS focused on the potential impacts of the NWR Scheme and the assessments that any applicant would have to carry out and the planning requirements which it would have to meet in order to gain development consent. In its discussion of greenhouse gas emissions the ANPS stated that the applicant would have to undertake an environmental impact assessment quantifying the greenhouse gas impacts before and after mitigation so that the project could be assessed against the Government's carbon obligations. In para 5.82 the ANPS stated:

> "Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets."

88 As in this appeal a challenge has been made as to the factual basis of the Secretary of State's decision not to consider the possible new domestic emissions targets which might result from the Paris Agreement, it is necessary to mention the evidence before the Divisional Court on this matter. In her first witness statement Ms Caroline Low, the Director of the Airport Capacity Programme at the Department for Transport, stated (para 458):

> "In October 2016 the CCC said that the Paris Agreement 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements' but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy that it is possible that the existing 2050 target could be consistent with the temperature stabilisation goals set out in the Paris Agreement. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has followed this advice and considered existing domestic legal obligations as the correct basis for assessing the carbon impact of the project, and that it is not appropriate at this stage for the Government to consider any other possible targets that could arise through the Paris Agreement."

89 Her account was corroborated by Ms Ursula Stevenson, an engineering and project management consultant whom the Secretary of State retained to deal with the process for consideration of the environmental impacts of the NWR Scheme. She stated (witness statement para 3.128) that the Department had followed the CCC's advice when preparing the AoS required by the PA 2008 (see para 28 above) and accordingly had considered existing domestic legal obligations to be the correct basis for assessing the carbon impact of the project. She added:

A "At this stage, it is not possible to consider what any future targets [sic] might be recommended by the CCC to meet the ambitions of the Paris Agreement. It is expected that, should more ambitious targets be recommended and set through the carbon budgets beyond 2032, then government will be required to make appropriate policy decisions across all sectors of the economy to limit emissions accordingly."

B She emphasised (para 3.129) that the obligations under the CCA 2008 could be made more stringent in future, should that prove necessary, and that the ANPS provided that any application for a DCO would have to be assessed by reference to whatever obligations were in place at that time.

90 The IPCC Special Report on Global Warming of 1.5°C was published on 8 October 2018. It concluded that limiting global warming to that C level above pre-industrial levels would significantly reduce the risks of challenging impacts on ecosystems and human health and wellbeing and that it would require "deep emissions reductions" and "rapid, far-reaching and unprecedented changes to all aspects of society". To achieve that target global net emissions of CO_2 would need to fall by about 45% from 2010 levels by 2030, reaching zero by 2050.

D **91** The Government commissioned the CCC to advise on options by which the UK should achieve (i) a net zero greenhouse gas target and/or (ii) a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement, including whether now was the right time to set such a target.

92 In December 2018 the Department for Transport published consultation materials on its forthcoming Aviation Strategy. In "Aviation E 2050: The future of UK aviation" the Department stated (paras 3.83–3.87) that it proposed to negotiate in the International Civil Aviation Organisation (the UN body responsible for tackling international aviation climate emissions) for a long-term goal for international aviation that is consistent with the temperature goals of the Paris Agreement and that it would consider appropriate domestic action to support international F progress. It stated that the Government would review the CCC's revised aviation advice and advice on the implications of the Paris Agreement. In the same month, in a paper commissioned and published by the Department and written by David S Lee, "International aviation and the Paris Agreement temperature goals" the author acknowledged that the Paris Agreement had a temperature-based target which implied the inclusion of all emissions G that affect the climate. The author stated that aviation had significant climate impacts from the oxides of nitrogen, particle emissions, and effects on cloudiness but that those impacts were subject to greater scientific uncertainty than the impacts of CO_2. It recorded that examples of CO_2 emission equivalent metrics indicated up to a doubling of aviation CO_2 equivalent emissions to account for those non-CO_2 effects.

93 On 1 May 2019 P arliament approved a motion to declare a climate H and environmental emergency.

94 On the following day, the CCC published a report entitled "Net zero: The UK's contribution to stopping global warming", in which they recommended that legislation should be passed as soon as possible to create a new statutory target of net-zero greenhouse gases by 2050 and the inclusion of international aviation and shipping in that target (p 15). That

recommendation, so far as it related to the CO_2 target, was implemented on 26 June 2019 when the Climate Change Act (2050 Target Amendment) Order 2019 amended section 1(1) of the CCA 2008.

95 On 24 September 2019 the CCC wrote to the Secretary of State for Transport advising that the international aviation and shipping emissions should be brought formally within the UK's net-zero statutory 2050 target. The statutory target has not yet been changed to this effect but international aviation and shipping are taken into account when the carbon budgets are set against the statutory target: section 10(2)(i) of the CCA 2008.

96 On 25 June 2020 the CCC published its 2020 P rogress Report to Parliament entitled "Reducing UK emissions", in which it recommended that international aviation and shipping be included in the UK climate targets when the Sixth Carbon Budget is set (which should be in 2021) and net zero plans should be developed (p 22). It recommended that the UK's airport capacity strategy be reviewed in the light of COVID-19 and the net-zero target and that action was needed on non-CO_2 effects from aviation (p 180). The parties to this appeal have stated in the agreed statement of facts and issues that it was expected that the Government's Aviation Strategy will be published before the end of 2020.

97 From this narrative of events it is clear that the Government's response to the targets set in the Paris Agreement has been developing over time since 2016, that it has led to the amendment of the statutory CO_2 target in section 1(1) of the CCA 2008 approximately one year after the Secretary of State designated the ANPS, and that the Government is still in the process of developing its Aviation Strategy in response to the advice of the CCC.

98 Before turning to the legal challenges in this appeal it is also important to emphasise that, as we have stated in para 10 above, HAL, FoE and Plan B Earth agree that should the NWR Scheme be taken forward to a DCO application, the ANPS would not allow it to be assessed by reference to the carbon reduction targets, including carbon budgets, that were in place when the ANPS was designated in June 2018. The ANPS requires that the scheme be assessed against the carbon reduction targets in place at the time when a DCO application is determined: para 5.82 of the ANPS which we have set out in para 87 above. There is therefore no question of the NWR Scheme being assessed in future against outdated emissions targets.

The judgments of the Divisional Court and the Court of Appeal

99 A number of objectors to the NWR Scheme and the ANPS brought a large number of disparate claims in these proceedings to challenge the ANPS. The Divisional Court heard the claims on a "rolled up" basis, that is to say by considering the question of whether to grant permission to apply for judicial review at the same time as considering the merits of the claims should permission be granted. The hearing lasted for seven days and involved a full merits consideration of all the claims by the Divisional Court. In a judgment of high quality, described by the Court of Appeal as a tour de force, the Divisional Court dismissed all of the claims. For some claims it granted permission to apply for judicial review and then dismissed them on the merits. For others, it decided that they were not reasonably arguable on the merits and refused to grant permission. After thorough examination, the Divisional Court reached the conclusion that none of the claims which

form the subject of grounds (i) to (iv) in the present appeal were reasonably arguable, and accordingly refused permission to apply for judicial review in relation to each of them.

100 In relation to those claims, the Court of Appeal decided that they were both arguable and that they were made out as good claims. Accordingly, the Court of Appeal granted permission in relation to them for the respondents to apply for judicial review of the decision to designate the ANPS and then held that the ANPS was of no legal effect unless and until a review was carried out rectifying the legal errors.

Analysis

Ground (i)—the section 5(8) ground

101 This ground raises a question of statutory interpretation. Section 5(7) and (8) of the PA 2008, which we set out in para 25 above, provide that an NPS must give reasons for the policy set out in the statement and that the reasons must explain how the policy in the NPS "takes account of Government policy relating to the mitigation of, and adaptation to, climate change".

102 Mr Crosland for Plan B Earth presented this argument. Mr Wolfe QC for FoE adopted his submissions. Mr Crosland submits that it was unlawful for the Secretary of State when stating the reasons for the policy in the ANPS in June 2018 to have treated as irrelevant the Government's commitment to (a) the temperature target in the Paris Agreement and (b) the introduction of a new net-zero carbon target. The Government's commitment to the Paris Agreement targets constituted "Government policy" within the meaning of section 5(8) of the PA 2008 and so should have been addressed in giving the reasons for the ANPS.

103 Plan B Earth advanced this argument before the Divisional Court, which rejected the submission. The Divisional Court held that the Paris Agreement did not impose an obligation on any individual state to implement its global objective in any particular way, Parliament had determined the contribution of the UK towards global targets in section 1 of the CCA 2008 as a national carbon cap which represented the relevant policy in an entrenched form, and the Secretary of State could not change that carbon target unless and until the conditions set out in that Act were met.

104 The Court of Appeal disagreed with the approach of the Divisional Court and held that Government policy in section 5(8) was not confined to the target set out in the CCA 2008. The words "Government policy" were words of the ordinary English language. Taking into account the consequences of the Paris Agreement involved no inconsistency with the provisions of the CCA 2008. Based on the Secretary of State's written pleadings the Court of Appeal concluded that the Secretary of State had received and accepted legal advice that he was legally obliged not to take into account the Paris Agreement and the court characterised that as a misdirection of law. We address that conclusion in the next section of this judgment at paras 124–129 below. The court held that section 5(8) of the PA 2008 simply required the Government to take into account its own policy. The statements of Andrea Leadsom MP and Amber Rudd MP in March 2016 (para 72 above) and the formal ratification of the Paris Agreement showed that the Government's commitment to the Paris Agreement was part

of "Government policy" by the time of the designation of the ANPS in June 2018. A

105 The principal question for determination is the meaning of "Government policy" in section 5(8) of the PA 2008. We adopt a purposive approach to this statutory provision which expands upon the obligation in section 5(7) that an NPS give reasons for the policy set out in it and interpret the statutory words in their context. The purpose of the provision is to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change. The section speaks of "Government policy", which points toward a policy which has been cleared by the relevant departments on a government-wide basis. In our view the phrase is looking to carefully formulated written statements of policy such as one might find in an NPS, or in statements of national planning policy (such as the National Planning Policy Framework), or in government papers such as the Aviation Policy Framework. For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which might be characterised as "policy". Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field. B C D

106 In our view, the epitome of "Government policy" is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it is appropriate that there be clear limits on what statements count as "Government policy", in order to render them readily identifiable as such. In our view the criteria for a "policy" to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute "policy" for the purposes of section 5(8). Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification: see for example *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, per Bingham LJ; *R (Davies) v Revenue and Customs Comrs* [2011] 1 WLR 2625, paras 28 and 29, per Lord Wilson JSC, delivering the judgment with which the majority of the court agreed, and para 70, per Lord Mance JSC. The statements of Andrea Leadsom MP and Amber Rudd MP (para 72 above) on which the Court of Appeal focused and on which Plan B Earth particularly relied do not satisfy those criteria. Their statements were not clear and were not devoid of relevant qualification in this context. They did not refer to the temperature targets at all and they both left open the question of how the Paris Agreement goal of net zero emissions would be enshrined in UK law. Andrea Leadsom went out of her way to emphasise that "there is an important set of questions to be answered before we do." The statements made by these ministers were wholly consistent with and plainly reflected the fact that there was then an inchoate or developing policy being worked on within Government. This does not fall within the statutory phrase. E F G H

107 We therefore respectfully disagree with the Court of Appeal in so far as they held ([2020] PTSR 1446, para 224) that the words "Government

policy" were ordinary words which should be applied in their ordinary sense to the facts of a given situation. We also disagree with the court's conclusion (para 228) that the statements by Andrea Leadsom MP and Amber Rudd MP constituted statements of "Government policy" for the purposes of section 5(8).

108 Although the point had been a matter of contention in the courts below, no party sought to argue before this court that a ratified international treaty which had not been implemented in domestic law fell within the statutory phrase "Government policy". Plan B Earth and FoE did not seek to support the conclusion of the Court of Appeal (para 228) that it "followed from the solemn act of the United Kingdom's ratification of [the Paris Agreement]" that the Government's commitment to it was part of "Government policy". The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense. Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, "are not part of UK law and give rise to no legal rights or obligations in domestic law" (*R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, para 55). Ratification does not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty. Moreover, it cannot be regarded in itself as a statement devoid of relevant qualification for the purposes of domestic law, since if treaty obligations are to be given effect in domestic law that will require law-making steps which are uncertain and unspecified at the time of ratification.

109 Before applying these conclusions to the facts of this case, it is necessary to consider another argument which HAL advances in this appeal. HAL renews an argument which the Divisional Court had accepted at least in part. HAL argues that because Parliament had set out the target for the reduction of carbon emissions in section 1 of the CCA 2008 and had established a statutory mechanism by which the target could be altered only with the assent of Parliament, "Government policy" was entrenched in section 1 and could not be altered except by use of the subordinate legislation procedure in sections 2 and 3 of the CCA 2008. The statutory scheme had either expressly or by necessary implication displaced the prerogative power of the Government to adopt any different policy in this field. In support of this contention HAL refers to the famous cases of *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, to which this court referred in *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

110 The short answer to that submission is that it is possible for the Government to have a policy that it will seek parliamentary approval of an alteration of the carbon target, which is to be taken into account in section 5(8) of the PA 2008. The ousting of a prerogative power in a field which has become occupied by a corresponding power conferred or regulated by statute is a legal rule which is concerned with the validity of the exercise of a power, and to the extent that exercise of powers might require reference to the target set out in section 1 of the CCA 2008 it would not be open to the Government to make reference to a different target, not as yet endorsed by Parliament under the positive resolution procedure applicable to changes to

that statutory target. However, the rule does not address what is Government policy for the purposes of section 5(8) of the PA 2008. If at the date when the Secretary of State designated the ANPS, the Government had adopted and articulated a policy that it would seek to introduce a specified new carbon target into section 1 of the CCA 2008 by presenting draft subordinate legislation to that effect for the approval of Parliament, the Secretary of State could readily record in the ANPS that the Government had resolved to seek that change but that it required the consent of Parliament for the new target to have legal effect. Further, questions such as how to mitigate non-CO_2 emissions fell outside the carbon emissions target in the CCA 2008.

111 Turning to the facts of the case, it is clear from the narrative of events in paras 70–96 above that in June 2018, when the Secretary of State for Transport designated the ANPS, the Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development. There was no established policy beyond that already encapsulated in the CCA 2008. The Government followed the advice of the CCC. The CCC's advice in 2016 was that the evidence was not sufficient to specify a new carbon target and that it was not necessary to do so at that time (paras 73–74 above). In early 2018 the CCC invited the Government to seek further advice from it after the publication of the IPCC's report (para 79 above). During 2018 the Government's policy in relation to aviation emissions was in a process of development and no established policy had emerged on either the steps to be taken at international level or about which domestic measures would be adopted; it was expected that the forthcoming Aviation Strategy would clarify those matters (paras 83 and 86 above). The Government's consultation in December 2018 confirmed that the development of aviation-related targets was continuing and in 2020 the Government's Aviation Strategy is still awaited (paras 92 and 96 above).

112 Against this background, the section 5(8) challenge fails and HAL's appeal on this ground must succeed. It is conceded that the Paris Agreement itself is not Government policy. The statements by Andrea Leadsom MP and Amber Rudd MP in 2016, on which Plan B Earth principally founds, do not amount to Government policy for the purpose of section 5(8) of the PA 2008. The statements concerning the development of policy which the Government made in 2018 were statements concerning an inchoate and developing policy and not an established policy to which section 5(8) refers. Mr Crosland placed great emphasis on the facts (i) that the Airports Commission had assessed the rival schemes against scenarios, one of which was that overall CO_2 emissions were set at a cap consistent with a worldwide goal to limit global warming to 2°C, and (ii) that that scenario was an input into Secretary of State's assessment of the ANPS at a time when the UK Government had ratified the Paris Agreement and ministers had made the statements to which we referred above. But those facts are irrelevant to the section 5(8) challenge. It is not in dispute that the internationally agreed temperature targets played a formative role in the development of government policy. But that is not enough for Plan B Earth to succeed in this challenge. What Mr Crosland characterised as a "policy commitment" to the Paris Agreement target did not amount to "Government policy" under that subsection.

113 Finally, Mr Crosland sought to raise an argument under section 3 of the Human Rights Act 1998 that interpreting section 5(8) so as to preclude consideration of the temperature limit in the Paris Agreement would tend

A to allow major national projects to be developed and that those projects would create an intolerable risk to life and to people's homes contrary to articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). This argument must fail for two reasons. First, as Lord Anderson for HAL submits, the argument was advanced as a separate ground before the Divisional Court and rejected, that finding was not appealed to the Court of Appeal, and is therefore not
B before this court. Secondly, even if it were to be treated as an aspect of Plan B Earth's section 5(8) submission and thus within the scope of the appeal (as Mr Crosland sought to argue), it is in any event unsound because any effect on the lives and family life of those affected by the climate change consequences of the NWR Scheme would result not from the designation of the ANPS but from the making of a DCO in relation to the scheme. As HAL
C has conceded and the respondents have agreed, the ANPS requires the NWR Scheme to be assessed against the emissions targets which would be current if and when an application for a DCO were determined.

Ground (ii): the section 10 ground

D **114** Mr Wolfe for FoE presented the submissions for the respondents on this ground and grounds (iii) and (iv). Mr Crosland for Plan B Earth adopted those submissions.

115 Section 10 of the PA 2008 applies to the Secretary of State's function in promulgating an NPS. In exercising that function the Secretary of State must act with the objective of contributing to the achievement of sustainable development. Sustainable development is a recognised term in the
E planning context and its meaning is not controversial in these proceedings. As explained in paras 7 and 8 of the National Planning Policy Framework (July 2018), at a very high level the objective of sustainable development involves "meeting the needs of the present without compromising the ability of future generations to meet their own needs"; it has three overarching elements, namely an environmental objective, an economic objective and a social objective. For a major infrastructure project like the development of
F airport capacity in the South East, which promotes economic development but at the cost of increased greenhouse gases emissions, these elements have to be taken into account and balanced against each other. Section 10(3)(a) provides that the Secretary of State must, in particular, have regard to the desirability of "mitigating, and adapting to, climate change". Unlike in section 5(8) of the PA 2008, this is not a factor which is tied to Government
G policy.

116 As it transpired, very little divided the parties under this ground. The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

H > "the judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which

> regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."

117 The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute:

> "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118 These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333–334. See also *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, paras 55–59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221, paras 29–32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119 As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] PTSR 2063, paras 20–26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–411, per Lord Diplock).

120 It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There

A is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121 Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in B the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: C see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 (Lord Hoffmann).

122 The Divisional Court ([2020] PTSR 240, para 648) and the Court of Appeal ([2020] PTSR 1446, para 237) held that the Paris Agreement fell within the third category identified in *Fewings* [1995] 1 WLR 1037. In so far as it is an international treaty which has not been incorporated into domestic D law, this is correct. In fact, however, as we explain (para 71 above), the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to E issue the ANPS.

123 At para 5.69 of the ANPS the Secretary of State stated:

> "The Government has a number of international and domestic obligations to limit carbon emissions. Emissions from both the construction and operational phases of the [NWR Scheme] project will be relevant to meeting these obligations."

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This statement covered the Paris Agreement as well as other international treaties. At para 5.71 the ANPS correctly stated that "[the] UK's obligations on greenhouse gas emissions are set under the [CCA 2008]". As explained above, the relevant NDCs required to be set under the Paris Agreement were covered by the target in the CCA 2008 and the carbon budgets set under G that Act. At paras 5.72–5.73 of the ANPS it was explained how aviation emissions were taken into account in setting carbon budgets under the CCA 2008 in accordance with the advice given by the CCC.

124 We have set out the evidence of Ms Low and Ms Stevenson regarding this topic (paras 88 and 89 above) which confirms that, in acting for the Secretary of State in drawing up the ANPS, they followed the advice of the CCC that the existing measures under the CCA 2008 were capable of H being compatible with the 2050 target set by the Paris Agreement. The CCC did not recommend adjusting the UK's targets further at that stage. They were to be kept under review and appropriate adjustments could be made to the emissions target and carbon budgets under the CCA 2008 in future as necessary. According to that advice, therefore, sufficient account was taken of the Paris Agreement by ensuring that the relevant emissions target and

carbon budgets under the CCA 2008 would be properly taken into account in the construction and operation of the NWR Scheme. The ANPS ensured that this would occur: see para 5.82 (set out at para 87 above).

125 Therefore, on a correct understanding of the ANPS and the Secretary of State's evidence, this is not a case in which the Secretary of State omitted to give any consideration to the Paris Agreement; nor is it one in which no weight was given to the Paris Agreement when the Secretary of State decided to issue the ANPS. On the contrary, the Secretary of State took the Paris Agreement into account and, to the extent that the obligations under it were already covered by the measures under the CCA 2008, he gave weight to it and ensured that those obligations would be brought into account in decisions to be taken under the framework established by the ANPS. On proper analysis the question is whether the Secretary of State acted irrationally in omitting to take the Paris Agreement further into account, or give it greater weight, than in fact he did.

126 In its judgment, the Divisional Court recorded (para 638) that the Secretary of State accepted that, in designating the ANPS, he took into account only the CCA 2008 carbon emission targets and did not take into account either the Paris Agreement or otherwise any post-2050 target or non-CO_2 emissions (these latter points are relevant to ground (iv) below). However, this way of describing the position masks somewhat the way the Paris Agreement did in fact enter into consideration by the Secretary of State. In the same paragraph, the Divisional Court summarised two submissions advanced by counsel for the Secretary of State as to why the Secretary of State's approach was not unlawful: (i) on its proper construction, and having regard to the express reference to the UK's international obligations in section 104(4) of the PA 2008, the PA 2008 requires the Secretary of State to ignore international commitments except where they are expressly referred to in that Act; alternatively, (ii) even if not obliged to ignore such commitments, the Secretary of State had a discretion as to whether to do so and was not obliged to take them into account. The Divisional Court rejected the first argument but accepted the second. It noted that the Secretary of State was bound by the obligations in the CCA 2008, "which … effectively transposed international obligations into domestic law" (para 643). Beyond that, the Secretary of State had a discretion whether to take the Paris Agreement further into account, and had not (even arguably) acted irrationally in deciding not to do so. It therefore refused to give permission for judicial review of the ANPS on this ground. The court said ([2020] PTSR 240, para 648):

> " … In our view, given the statutory scheme in the CCA 2008 and the work that was being done on if and how to amend the domestic law to take into account the Paris Agreement, the Secretary of State did not arguably act unlawfully in not taking into account that Agreement when preferring the NWR Scheme and in designating the ANPS as he did. As we have described, if scientific circumstances change, it is open to him to review the ANPS; and, in any event, at the DCO stage this issue will be revisited on the basis of the then up-to-date scientific position."

127 Mr Wolfe sought to support the judgment of the Court of Appeal in relation to this ground. He argued that the evidence for the Secretary of State had to be read in the light of the first submission made by his counsel in the

Divisional Court, and that the true position was that the Secretary of State (acting by his officials and advisers) had been advised that he was not entitled to have regard to the Paris Agreement when deciding whether to designate the ANPS and had proceeded on that basis, with the result that he had not in fact exercised any discretion in deciding not to have further regard to the Paris Agreement. He also submitted that it was obvious that it was a material consideration. Mr Wolfe was successful in persuading the Court of Appeal on these points ([2020] PTSR 1446, paras 203 and 234–238 of its judgment). The Court of Appeal accepted his submissions that there was an error of law in the approach of the Secretary of State "because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10" and

> "[if] he had asked himself that question … the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account".

128 With respect to the Court of Appeal, they were wrong to overturn the judgment of the Divisional Court on this ground. Mr Wolfe's submissions conflated a submission of law (submission (i) above) made by counsel for the Secretary of State as recorded in para 638 of the judgment of the Divisional Court and the evidence of fact given by the relevant witnesses for the Secretary of State. In making his submission of law, counsel was not giving evidence about the factual position. There is a fundamental difference between submissions of law made by counsel and evidence of fact. Clearly, if the Secretary of State had been correct in submission (i) that would have provided an answer to the case against him whatever the position on the facts. This explains why counsel advanced the submission. But it is equally clear that if that submission failed, the Secretary of State made an alternative submission that he had a discretion whether to take the Paris Agreement further into account than was already the case under the CCA 2008 and that there had been no error of law in the exercise of that discretion. That was the submission accepted by the Divisional Court.

129 In our view, both the submissions of Mr Wolfe which the Court of Appeal accepted are unsustainable. The Divisional Court's judgment on this point is correct. On the evidence, the Secretary of State certainly did ask himself the question whether he should take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the CCA 2008 and concluded in the exercise of his discretion that it would not be appropriate to do so. As mentioned above, this case is in the class referred to in para 121 above.

130 Mr Wolfe sought to suggest that in deciding the case as it did, the Court of Appeal had acted as a first instance court (since the Divisional Court had refused to give permission for judicial review on this ground) and that it had made factual findings to contrary effect which this court was not entitled to go behind. He also submitted that HAL, in its notice of appeal, had not questioned the factual position as it was taken to be by the Court of Appeal and was therefore not entitled to dispute it on this appeal.

131 Neither of these submissions has any merit. The Divisional Court considered the claims brought against the Secretary of State at a rolled-up

hearing lasting many days and considered each claim in full and in depth. In respect of all aspects of the Divisional Court's decision, both in relation to those claims on which it granted permission for judicial review but then dismissed the claim and in relation to those claims (including those relating to grounds (i) to (iv) in this appeal) on which after full consideration it decided they were unarguable and so refused to grant permission for judicial review, the Court of Appeal correctly understood that its role was the conventional role of an appellate court, to examine whether the Divisional Court had erred in its decision. In any event, this court can read the undisputed evidence of Ms Low and Ms Stevenson for itself and has the benefit of an agreed statement of facts and issues which makes it clear what the true factual position was. The Court of Appeal was wrong to proceed on the basis of a different assessment of the facts. On a fair reading of HAL's notice of appeal, it indicated that its case under this ground was to be that the Secretary of State had a discretion whether to have regard to the Paris Agreement, which discretion had been exercised lawfully. In any event, that was put beyond doubt by HAL's written case. FoE and Plan B Earth have been on notice of HAL's case under this ground for a long time and are in no way prejudiced by it being presented in submissions to this court.

132 The view formed by the Secretary of State, that the international obligations of the UK under the Paris Agreement were sufficiently taken into account for the purposes of the designation of the ANPS by having regard to the obligations under the CCA 2008, was in our judgment plainly a rational one. Mr Wolfe barely argued to the contrary. The Secretary of State's assessment was based on the advice of the CCC, as the relevant independent expert body. The assessment cannot be faulted. Further, the ANPS itself indicated at para 5.82 that the up-to-date carbon targets under the CCA 2008, which would reflect developing science and any change in the UK's international obligations under the Paris Agreement, would be taken into account at the stage of considering whether a DCO should be granted. That was a necessary step before the NWR Scheme could proceed. Moreover, as observed by the Divisional Court, there was scope for the Secretary of State to amend the ANPS under section 6 of the PA 2008, should that prove to be necessary if it emerged in the future that there was any inconsistency between the ANPS and the UK's obligations under the Paris Agreement.

133 It should also be observed that the carbon emissions associated with all three of the principal options identified by the Airports Commission (that is, the NWR Scheme, the ENR Scheme and the G2R Scheme) were assessed to be broadly similar. Accordingly, reference to the Paris Agreement does not provide any basis for preferring one scheme rather than another. To the extent the obligations under the Paris Agreement have a bearing on the decision to designate the ANPS, therefore, they are only significant if it is to be argued that there should not be any decision to meet economic needs by increasing airport capacity by one of these schemes. But in light of the extensive work done by the Airports Commission about the need for such an increase in capacity it could not be said that the Secretary of State acted irrationally in considering that the case for airport expansion had been sufficiently made out to allow the designation of the ANPS. The respondents did not seek to argue that this aspect of his reasoning was irrational. As we have noted above, the concept of sustainability in section 10 of the PA 2008 includes consideration of economic and social factors as well as environmental ones.

134 In light of the factual position, it is not necessary to decide the different question whether, if the Secretary of State had omitted to think about the Paris Agreement at all (so that this was a case of the type described in para 120 above), as an unincorporated treaty, that would have constituted an error of law. That is not a straightforward issue and we have not heard submissions on the point. We say no more about it.

Ground (iii): The SEA Directive ground

135 The SEA Directive operates along with the EIA Directive to ensure that environmental impacts from proposals for major development are properly taken into account before a development takes place. The relationship between the Directives was explained by Lord Reed JSC in *Walton v Scottish Ministers* [2013] PTSR 51, paras 10–30. The SEA Directive applies "upstream", at the stage of preparation of strategic development plans or proposals. The EIA Directive requires assessment of environmental impacts "downstream", at the stage when consent for a particular development project is sought. Although the two Directives are engaged at different points in the planning process for large infrastructure projects such as the NWR Scheme, they have similar objects and have to deal with similar issues of principle, including in particular the way in which regard should be had to expert assessment of various factors bearing on that process. These points indicate that a similar approach should apply under the two Directives.

136 The SEA Directive is implemented in domestic law by the SEA Regulations. It is common ground that the SEA Regulations are effective in transposing the Directive into domestic law. Accordingly, it is appropriate to focus the discussion of this ground on the SEA Directive itself.

137 The structure of the SEA Directive appears from its provisions, set out and discussed above. The Directive requires that an environmental assessment of major plans and proposals should be carried out. The ANPS is such a plan, which will have a significant effect in setting the policy framework for later consideration of whether to grant a DCO for implementing the NWR Scheme. Therefore the proposal to designate it under section 5 of the PA 2008 required an "environmental assessment" as defined in article 2(b). The environmental assessment had to include "the preparation of an environmental report" and "the carrying out of consultations". An environmental report for the purposes of the Directive is directed to providing a basis for informed public consultation on the plan.

138 The decision-making framework under the SEA Directive is similar to that under the EIA Directive for environmental assessment of particular projects. Under the EIA Directive, an applicant for planning consent for particular projects has to produce an environmental statement which, among other things, serves as a basis for consultation with the public. Under the SEA Directive, the public authority which proposes the adoption of a strategic plan has to produce an environmental report for the same purpose. In due course, any application by HAL for a DCO will have to go through the process of environmental assessment pursuant to the EIA Directive and the EIA Regulations.

139 FoE and Plan B Earth complain that the environmental report which the Secretary of State was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris

Agreement. Mr Wolfe pointed out that the Secretary of State did not include the Paris Agreement in the long list of legal instruments and other treaties appended to the scoping report produced in March 2016 (ie after the Paris Agreement was adopted in December 2015 but before it was signed by the UK in April 2016 and ratified by it in November 2016) for the purposes of preparing the draft AoS which was to stand as the Secretary of State's environmental report for the purposes of the SEA Directive for the consultation on the draft ANPS. No reference to the Paris Agreement was included in the AoS used for the February 2017 consultation on the draft ANPS, nor in that used for the October 2017 consultation on the draft ANPS.

140 Against this, HAL points out that the carbon target in the CCA 2008 and the carbon budgets set under that Act were referred to in the AoS, as well as in the draft ANPS itself, so to that extent the UK's obligations under the Paris Agreement were covered in the environmental report. Beyond that, the evidence of Ms Stevenson (who led the team who prepared the AoS on behalf of the Secretary of State) makes it clear that the Secretary of State followed the advice of the CCC in deciding that it was not necessary and would not be appropriate to make further reference to the Paris Agreement in the AoS. The existing domestic legal obligations were considered to be the correct basis for assessing the carbon impact of the project, and it would be speculative and unhelpful to guess at what different targets might be recommended by the CCC in the future. Therefore, despite its omission from the scoping report, when the AoS actually came to be drafted the Paris Agreement (which had been ratified by the UK after the scoping report was issued) had been considered and the Secretary of State, acting by Ms Stevenson and her team, had decided in the exercise of his discretion not to make distinct reference to it.

141 As regards the law, the parties are in agreement. Any obligation to make further reference to the Paris Agreement in the environmental report depended on the application of three provisions of the SEA Directive. Under paragraph (e) of Annex I, the AoS had to provide information in the form of "the environmental protection objectives, established at international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation". But, as stated in the introduction to Annex I, this was "subject to article 5(2) and (3)" of the Directive, set out at para 58 above.

142 It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report. It is also common ground that the approach to be followed in deciding whether the Secretary of State has exercised his discretion unlawfully for the purposes of that provision is that established in relation to the adequacy of an environmental statement when applying the EIA Directive, as set out by Sullivan J in *R (Blewett) v Derbyshire County Council* [2004] Env LR 29 ("*Blewett*"). *Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level. In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) Beatson J held that the *Blewett* approach was also applicable in relation to the adequacy of an environmental report under the SEA Directive. The Divisional Court and the

A Court of Appeal in the present case endorsed this view (at paras 401–435 and paras 126–144 of their respective judgments). The respondents have not challenged this and we see no reason to question the conclusion of the courts below on this issue.

143 As Sullivan J held in *Blewett* (paras 32–33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the B EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal *Wednesbury* principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation "gives C those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies". The EIA Directive and Regulations do not impose a standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 D Sullivan J warned against adoption of an "unduly legalistic approach" in relation to assessment of the adequacy of an environmental statement and said:

> "The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that 'an [environmental impact assessment] application' (as defined in the Regulations) must be E accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 404, the purpose is 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' F about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There G will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between."

Lord Hoffmann (with whom the other members the Appellate Committee agreed on this issue) approved this statement in *R (Edwards) v Environment* H *Agency* [2009] 1 All ER 57, para 38.

144 As the Divisional Court and the Court of Appeal held in the present case, the discretion of the relevant decision-maker under article 5(2) and (3) of the SEA Directive as to whether the information included in an environmental report is adequate and appropriate for the purposes of providing a sound and sufficient basis for public consultation leading to

a final environmental assessment is likewise subject to the conventional *Wednesbury* standard of review. We agree with the Court of Appeal when it said ([2020] PTSR 1446, para 136):

> "The court's role in ensuring that an authority—here the Secretary of State—has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information 'may reasonably be required' when taking into account the considerations referred to —first, 'current knowledge and methods of assessment'; second, 'the contents and level of detail in the plan or programme'; third, 'its stage in the decision-making process'; and fourth 'the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment'. These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional '*Wednesbury*' standard of review—as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

145 The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134–135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, 937, point 50:

> "… The court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed."

146 The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for

promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.

147 The appositeness of Sullivan J's analysis in *Blewett* at para 41, quoted above, has been borne out in this case. The draft ANPS issued with the AoS for the purposes of consultation included the statement that it was compatible with the UK's international obligations in relation to climate change. Concerns about the impact of the expansion of Heathrow on the UK's ability to meet its climate change commitments were raised in representations made during the consultation. In the Government's response to the consultation published on 5 June 2018 these representations were noted and the Government's position in relation to them was explained (paras 8.18–8.19 and 8.25). The Government's view was that the NWR Scheme was capable of being compatible with the UK's international obligations and that there was no good reason to hold up the designation of the ANPS until future policy in relation to aviation carbon emissions, which was in a state of development internationally and domestically, was completely fixed. Accordingly, it is clear that the public was able to comment on the Paris Agreement in the course of the consultation and that their comments were taken into account in the environmental assessment required by the SEA Directive. It again appears from this material that the Secretary of State did have regard to the Paris Agreement when deciding to designate the ANPS.

148 As we have said, Mr Wolfe did not challenge the legal framework set out above. In particular, he did not challenge the appropriateness of applying the *Wednesbury* standard in relation to the exercise of discretion under article 5(2) and (3). Instead, in line with his submission under ground (ii) above, his submission was that the Secretary of State had decided that the Paris Agreement was not a relevant statement of international policy falling within Annex I, paragraph (e), because he had been advised that it was legally irrelevant to the decision he had to take as to whether to designate the ANPS. Thus, according to Mr Wolfe, the Secretary of State had never reached the stage of exercising his discretion whether to include a distinct reference to the Paris Agreement in the AoS. The Secretary of State's decision that the Paris Agreement was irrelevant as a matter of law was wrong, and therefore the Secretary of State had erred in law because he simply did not turn his mind to whether reference to it should be included in the environmental report (the AoS). This was the argument which the Court of Appeal accepted at

paras 242 to 247. The Court of Appeal's reasoning on this point was very short because, as it pointed out, it followed its reasoning in relation to the respondents' submissions in relation to section 10 of the PA 2008 (ground (ii) above).

149 In our view, as with the ground (ii) above, Mr Wolfe's submission and the reasoning of the Court of Appeal cannot be sustained in light of the relevant evidence on the facts. As we have explained, the Secretary of State did not treat the Paris Agreement as legally irrelevant and on that basis refuse to consider whether reference should be made to it. On the contrary, as Ms Stevenson explains in her evidence, in compiling the AoS as the environmental statement required under the SEA Directive the Secretary of State decided to follow the advice of the CCC to the effect that the UK's obligations under the Paris Agreement were sufficiently taken into account in the UK's domestic obligations under the CCA 2008, which were referred to in the ANPS and the AoS. Further reference to the Paris Agreement was not required. As we have already held above, this was an assessment which was plainly rational and lawful.

150 Therefore, we would uphold this ground of appeal as well. Having regard to the evidence regarding the factual position, the Divisional Court was right to reject this complaint by the respondents (paras 650–656). The Secretary of State did not act in breach of any of his obligations under the SEA Directive in drafting the AoS as the relevant environmental report in respect of the ANPS, and in omitting to include any distinct reference in it to the Paris Agreement.

Ground (iv)—the post-2050 and non-CO_2 emissions grounds

151 This ground concerns other matters which it is said that the Secretary of State failed to take into consideration in the performance of his duty under section 10(2) and (3) of the PA 2008. Those provisions, as we have said, obliged the Secretary of State in performing his function of designating the ANPS to do so "with the objective of contributing to sustainable development" and in so doing to "have regard to the desirability of … mitigating, and adapting to, climate change".

152 FoE has argued and the Court of Appeal (paras 248–260) has accepted that the Secretary of State failed in his duty under section 10 to have regard to (i) the effect of emissions created by the NWR Scheme after 2050 and (ii) the effect of non-CO_2 emissions from that scheme. The Divisional Court dealt with this matter together with the matter which has become ground (ii) in this appeal, namely whether the Secretary of State failed to have regard to the Paris Agreement in breach of section 10, as issue 19 in the rolled up hearing (paras 633–648, 659(iv)) and held that that FoE's case was not arguable. The Court of Appeal (para 256) correctly treated this issue as closely bound up with what is now ground (ii) in this appeal. It is not in dispute in this appeal that in assessing whether the Secretary of State was bound to address the effect of the post-2050 emissions and the effect of the non-CO_2 emissions in the ANPS we are dealing with the third category of considerations in Simon Brown LJ's categorisation in *R v Somerset County Council, Ex p Fewings* (para 116 above). The Secretary of State had a margin of appreciation in deciding what matters he should consider in performing his section 10 duty. It is also not in dispute that it is appropriate to apply the *Wednesbury* irrationality test to that decision (para 119 above). The task

for the court therefore is one of applying that legal approach to the facts of this case.

153 We address first the question of post-2050 emissions before turning to the non-CO_2 emissions.

(i) post-2050 emissions

154 FoE's argument on the relevance to the objectives of the Paris Agreement of the impacts of emissions after 2050 was straightforward. An assessment of the impact of the emissions from aircraft using the north west runway by reference to a greenhouse gas target for 2050 fails to consider whether it would be sustainable for the additional aviation emissions from the use of the north west runway to occur after 2050 given the goal of the Paris Agreement for global emissions to reach net zero in the second half of the century.

155 HAL submitted that the Secretary of State's approach is entirely rational. Lord Anderson points out, and FoE accepts, that the Airports Commission assessed the carbon emissions of each of the short-listed schemes over a 60-year appraisal period up to 2085/2086 and that the same appraisal period was used in the AoS which accompanied the ANPS. The Secretary of State therefore did take into account the fact that there would be carbon emissions from the use of the north west runway after 2050 and quantified those emissions. It was not irrational to decide not to attempt to assess post-2050 emissions by reference to future policies which had yet to be formulated. It was rational for him to assume that future policies in relation to the post-2050 period, including new emissions targets, could be enforced by the DCO process and mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth.

156 In our view, HAL is correct in its submission that the Secretary of State did not act irrationally in not attempting in the ANPS to assess post-2050 emissions against policies which had yet to be determined. It is clear from the AoS that the Department for Transport modelled the likely future carbon emissions of both Heathrow and Gatwick airports, covering aircraft and other sources of emissions, to 2085/2086 (paras 6.11.1–6.11.3, 6.11.13 and Table 6.4). As we have set out in our discussion of ground (i) above, policy in response to the global goals of the Paris Agreement was in the course of development in June 2018 when the Secretary of State designated the ANPS and remains in development.

157 Further, as we have already pointed out (paras 10 and 98 above), the designation of the NWR Scheme in the ANPS did not immunise the scheme from complying with future changes of law and policy. The NWR Scheme would fall to be assessed against the emissions targets which were in force at the date of the determination of the application for a DCO. Under section 120 of the PA 2008 (para 37 above) the DCO may impose requirements corresponding to planning conditions and requirements that the approval of the Secretary of State be obtained. Under section 104 (para 35 above), the Secretary of State is not obliged to decide the application for the DCO in accordance with the ANPS if (i) that would lead the United Kingdom

to be in breach of any of its international obligations, (ii) that would lead the Secretary of State be in breach of any duty imposed by or under any other enactment, (iii) the Secretary of State is satisfied that deciding the application in accordance with the ANPS would be unlawful by virtue of any enactment and (iv) the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits. There are therefore provisions in place to make sure that the NWR Scheme complies with law and policy, including the Government's forthcoming Aviation Strategy, at the date when the DCO application is determined.

158 There are also mechanisms available to the Government, as HAL submits (para 155 above), by which the emissions from the use of the north west runway can be controlled.

(ii) non-CO_2 emissions

159 To understand FoE's argument in relation to non-CO_2 emissions, it is necessary first to identify what are the principal emissions which give rise to concern. Mr Tim Johnson, of the Aviation Environmental Federation, explained in his first witness statement that aircraft emit nitrogen oxides, water vapour and sulphate and soot aerosols, which combine to have a net warming effect. Depending on atmospheric humidity, the hot air from aircraft exhausts combines with water vapour in the atmosphere to form ice crystals which appear as linear condensation trails and can lead to cirrus-like cloud formation. Using the metric of radiative forcing (RF), which is a measure of changes in the energy balance of the atmosphere in watts per square metre, it is estimated that the overall RF by aircraft is 1.9 times greater than the forcing by aircraft CO_2 emissions alone, but the RF metric is not suitable for forecasting future impacts. He recognised that there is continuing uncertainty about the impacts of non-CO_2 emissions, which tend to be short-lived, but he stated that there is high scientific consensus that the total climate warming effect of aviation is more than that from CO_2 emissions alone. Scientists are exploring metrics to show how non-CO_2 impacts can be reflected in emission forecasts for the purpose of formulating policy.

160 There is substantial agreement between the parties that there is continuing uncertainty in the scientific community about the effects of non-CO_2 emissions. The Department for Transport acknowledged this uncertainty in the AoS (para 6.11.11):

> "The assessment undertaken is based on CO_2 emissions only … There are likely to be highly significant climate change impacts associated with non-CO_2 emissions from aviation, which could be of a similar magnitude to the CO_2 emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty and have therefore not been assessed. There are also non-CO_2 emissions associated with the operation of the airport infrastructure, such as from refrigerant leaks and organic waste arisings, however, evidence suggests that these are minor and not likely to be material."

The AoS returned to this topic (Appendix A-9, para 9.11.5):

> "In addition, there are non-carbon emissions associated with the combustion of fuels in aircraft engines while in flight, which are also thought to have an impact on climate change. As well as CO_2, combustion of aviation fuel results in emission of water vapour, nitrogen oxides (NOx) and aerosols. NOx are indirect greenhouse gases, in that they do not give rise to a radiative effect themselves, but influence the concentration of other direct greenhouse gases … With the exception of sulphate aerosols, all other emissions cause warming. In addition, the flight of aircraft can also cause formation of linear ice clouds (contrails) and can lead to further subsequent aviation-induced cloudiness. These cloud effects cause additional warming. Evidence suggests that the global warming impact of aviation, with these sources included, could be up to two times that of the CO_2 impact by itself, but that the level of scientific uncertainty involved means that no multiplier should be applied to the assessment. For these reasons the [Airports Commission] did not assess the impact of the non-CO_2 effects of aviation and these have not been included in the AoS assessment. This position is kept under review by DfT but it is worth noting that non-CO_2 emissions of this type are not currently included in any domestic or international legislation or emissions targets and so their inclusion in the assessment would not affect its conclusion regarding legal compliance. *It is recommended that further work be done on these impacts by the applicant during the detailed scheme design, according to the latest appraisal guidance*." (Emphasis added.)

161 This approach of addressing the question of capacity by reference to CO_2 emissions targets, keeping the policy in relation to non-CO_2 emissions under review and requiring an applicant for a DCO to address such impacts by reference to the state of knowledge current at the time of the determination of its application was consistent with the advice of the CCC to the Airports Commission and to the Secretary of State. The Airports Commission recorded that advice in its interim report in December 2013: because of the uncertainties in the quantification of the impact of non-CO_2 emissions, the target for constraining CO_2 emissions remained the most appropriate basis for planning future airport capacity. The approach of reconsidering the effect of all significant emissions when determining an application for a DCO is reflected in the ANPS which addressed the CO_2 emissions target and stated (para 5.76):

> "Pursuant to the terms of the Environmental Impact Assessment Regulations, the applicant should undertake an assessment of the project as part of the environmental statement, to include an assessment of *any likely significant climate factors*… The applicant should quantify the greenhouse gas impacts before and after mitigation to show the impacts of the proposed mitigation." (Emphasis added.)

The approach remains consistent with the CCC's advice since the designation of the ANPS. In its letter of 24 September 2019 to the Secretary of State recommending that international aviation and shipping emissions be included in a net-zero CO_2 emissions target, the CCC stated:

> "Aviation is likely to be the largest emitting sector in the UK by 2050, even with strong progress on technology and limiting demand. *Aviation also has climate warming effects beyond CO_2, which it will be important to monitor and consider within future policies*." (Emphasis added.)

162 The Government in its response to consultations on the ANPS (para 11.50) stated that it will address how policy might make provision for the effects of non-CO_2 aviation emissions in its Aviation Strategy. That strategy is due to be published shortly.

163 The Secretary of State when he designated the ANPS was aware that the applicant for a DCO in relation to the NWR Scheme would have to provide an environmental assessment which addressed, and would be scrutinised against, the then current domestic and international rules and policies on aviation and other emissions. He would have been aware of his power to make requirements under section 120 of the PA 2008 and to depart from the ANPS in the circumstances set out in section 104 of that Act (para 157 above).

164 The Court of Appeal ([2020] PTSR 1446, para 258) upheld FoE's challenge stating the precautionary principle and common sense suggested that scientific uncertainty was not a reason for not taking something into account at all, even if it could not be precisely quantified at this stage. The court did not hold in terms that the Secretary of State had acted irrationally in this regard but said (para 261) that, since it was remitting the ANPS to the Secretary of State for reconsideration, the question of non-CO_2 emissions and the effect of post-2050 emissions would need to be taken into account as part of that exercise.

165 We respectfully disagree with that approach. The precautionary principle adds nothing to the argument in this context and we construe the judgment as equating the principle with common sense. But a court's view of common sense is not the same as a finding of irrationality, which is the only relevant basis on which FoE seeks to impugn the designation in its section 10 challenges. In any event we are satisfied that the Secretary of State's decision to address only CO_2 emissions in the ANPS was not irrational.

166 In summary, we agree with the Divisional Court that it is not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-CO_2 emissions in the ANPS for six reasons. First, his decision reflected the uncertainty over the climate change effects of non-CO_2 emissions and the absence of an agreed metric which could inform policy. Secondly, it was consistent with the advice which he had received from the CCC. Thirdly, it was taken in the context of the Government's inchoate response to the Paris Agreement. Fourthly, the decision was taken in the context in which his department was developing as part of that response its Aviation Strategy, which would seek to address non-CO_2 emissions. Fifthly, the designation of the ANPS was only the first stage in a process by which permission could be given for the NWR Scheme to proceed and the Secretary of State had powers at the DCO stage to address those emissions. Sixthly, it is clear from both the AoS and the ANPS itself that the applicant for a DCO would have to address the environmental rules and policies which were current when its application would be determined.

Conclusion

167 It follows that HAL succeeds on each of grounds (i) to (iv) of its appeal. It is not necessary therefore to address ground (v) which is concerned with the question whether the court should have granted the relief which it did. We would allow the appeal.

Appeal allowed.

SHIRANIKHA HERBERT, Barrister