Case No: C1/2015/0076

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division, High Court
Mrs Justice Lang

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

LORD JUSTICE UNDERHILL

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Between :

ABBOTSKERSWELL PARISH COUNCIL	**Appellant**
- and -	
TEIGNBRIDGE DISTRICT COUNCIL & ANR	**Respondents**

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Ms Jenny Wigley (instructed by **Richard Buxton Environmental & Public Law**) for the **Appellant**
Mr Michael Bedford (instructed by **Teignbridge District Council Legal Services**) for the **Respondents**

Hearing date : 05 June 2015

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Approved Judgment

Lord Justice Underhill :

1. This is a renewed application for permission to appeal against a decision of Lang J dismissing the Applicant's application under section 113 of the Planning and Compulsory Purchase Act 2004 to quash all or part of the Teignbridge Local Plan. Since it is a permission application I will not rehearse the background to the claim or the Judge's reasoning. Exceptionally, because of the time pressure created by a following hearing, I have reserved my judgment. The Applicant has been represented by Ms Jenny Wigley of counsel. Also exceptionally, Mr Michael Bedford of counsel has appeared for the Respondent, and I invited his submissions on some particular points.

2. There are three grounds of appeal, which I take in turn.

3. As to ground 1, when I first read the papers, starting with paras. 34-36 of the judgment of Lang J, I understood the issue to be one of general principle about the standard of review to be applied by the Court in considering an appropriate assessment under the first limb of article 6.3 of the Habitats Directive, or of a plan or project adopted in the light of such an assessment under the second limb (or, to put it in domestic terms, under sub-paras. (1) or (4) of reg. 102); and that appears to have been Sullivan LJ's approach when considering the case on the papers. But Ms Wigley accepts that there is now, even if there may not have been before, binding authority at this level that as regards matters of judgment and evaluation the Court's role is limited to a *Wednesbury*-type review: see *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, at paras. 78-80. The way that she puts her case is that the specific defects which she alleges in the Plan do not, at least arguably, involve any question of judgment or evaluation, but constitute plain lacunae in the protection afforded: these would appear to engage the jurisdiction of the Court even without reference to the passage in the judgment of the ECJ in *Sweetman* [2014] PTSR 1092 to which she attaches importance. I turn therefore to consider those defects.

4. The starting-point for the Applicant's case in this regard is that the "appropriate assessment" carried out on behalf of the Respondent by Kestrel Wildlife Ltd recommended three ways in which the integrity of the relevant site, as regards the greater horseshoe bat, should be protected against adverse impact. Taking them in ascending order of generality:

   (1) The second bullet point under the relevant heading in para. 13.6 of the assessment reads:

   > "For some proposals, it will be necessary for a bespoke Greater Horseshoe Bat Mitigation Plan to be prepared, submitted and agreed prior to the grant of *any planning permission* [my emphasis]. Such plans will need to demonstrate with very high levels of certainty that there will be no adverse effect on the integrity of the South Hams SAC."

   This is the specific site-level protection.

(2) The "Supplementary Report on Greater Horseshoe Bats and the South Hams SAC" recommends "a series of bespoke Greater Horseshoe Bat Mitigation Plans … to be developed for each of the major settlements" – elsewhere referred to as a "settlement plan". The description of these plans under para. 2.2.1 of the Supplementary Report identifies five such settlements and says "these plans will need to be prepared and submitted by the developer and agreed with the Council *before planning permission is granted* [again, my emphasis]". The purpose is to inform mitigation measures over a wider area than the allocated sites, in order to reflect the range over which bats may forage.

(3) The third bullet point in para. 3.16 of the Primary Assessment reads:

> "Potential 'in-combination' effects on the South Hams SAC will be mitigated through the preparation of a landscape scale Greater Horseshoe Bat Mitigation Strategy. Any applications received in advance of the completion of this work will have to consider the in-combination impacts which are likely to require greater consideration of other plans and projects and greater evidence base."

5. The question is whether those requirements were adequately incorporated in the Plan.

6. As to (1), there is no dispute. In respect of each site where an allocation is made, the relevant policy contains a provision as follows:

> "A bespoke Greater Horseshoe Bat mitigation plan for [the site] must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the foraging area within the SAC sustenance zone and as part of a strategic flyway used by commuting Greater Horseshoe Bats associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects."

7. As regards (2) and (3), policy EN10 – "European Wildlife Sites" – contains a general policy that "roost strategic flyways and sustenance zones" for Greater Horseshoe Bats "will be protected and, where possible, enhanced to reflect the specific requirements of that species", with various particular points being made. The policy ends:

> "A Habitat Regulations Assessment (HRA), required under the Habitats Directive, has been undertaken on the policies within the Local Plan to ensure that there will not be an adverse impact on any such site. Additionally, it is a requirement under the Habitat Regulations that any development proposals which may have an impact on a European Site are subject to further assessment in order to avoid harm to those sites."

The supporting text, at para. 5.29, contains the following passage:

> "Further, more detailed, guidance has been prepared by Natural England, the 'South Hams SAC – Greater Horseshoe Bat Consultation Zone Planning Guidance' which indicates the location of these zones. The Council, in collaboration with the other planning authorities with responsibilities for the South Hams SAC, will prepare and publish, as a supplementary planning document (SPD), a Greater Horseshoe Bat Mitigation Strategy. This will eventually replace the above guidance published by Natural England. The proposed Mitigation Strategy SPD will identify the requirements for and provision of measures necessary to mitigate the likely affects of all types of developments (both alone and in combination with other projects) in all areas where there could be an adverse affect on the integrity of the South Hams SAC. Bespoke mitigation plans will be produced at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combinations impacts from development proposed in the Plan."

8. The text, though not explicitly the policy, thus provides for both the settlement level bespoke mitigation plans recommended in the assessment and the "landscape level" Bat Mitigation Strategy – i.e. items (2) and (3). But the Applicant's point is that no timescale is provided for either measure to be taken and, more specifically, there is no requirement that the plans or strategy be in place before planning permission is granted in respect of any of the allocated sites. That is a frank departure from the recommendations of the appropriate assessment and thus, it is said, constitutes not simply a difference of evaluation on a matter of planning judgment but a failure which makes it impossible, as required by the Directive, to ascertain that the Plan would not adversely affect the integrity of the relevant sites.

9. I am afraid I cannot accept that that is arguable. It is necessary to consider separately the settlement level plans and the landscape mitigation strategy.

10. So far as the settlement level plans are concerned, the absence of a specific requirement in the Plan that these should be completed before any planning application is determined does not compromise the protection of the site. It remains a requirement of the grant of planning permission that the developer can demonstrate that there will be no adverse effect on the site either as a result of his own development or (importantly) "in combination with other plans or projects": see the quote from the policy at para. 6 above. If he is unable to do so because that is impossible without a settlement-level plan of the type recommended in the supplementary report, then permission must be refused.

11. As for the landscape-level strategy, it is clear that the assessment itself did not anticipate that it would be in place before any permission could be granted in accordance with the allocations in the Plan. That is apparent from the reference in the passage quoted at para. 4 (3) above to "any applications received in advance of the completion of this work".

12. I turn to ground 2. The main point concerns the Council's failure to adopt Natural England's advice, in its email of 2.5.14, that the text of the Plan should explain that settlement-level mitigation plans should be in place before any development is permitted. I agree with Sullivan LJ that it is not arguable that this was an error of law, for essentially the same reason as I have given at para. 10 above. Generalisations about the weight to be given to Natural England's views, and the involvement of members, have to be read in the context of the particular departure in question. I am not convinced that in observing that there was no such requirement in the original assessment Lang J overlooked what had been said in Kestrel's supplementary report; but even if she did the basic point is unaffected. Ms Wigley's point about the supposed inconsistency in the Council's approach to other aspects of Natural England's advice is, with respect, a debating point: what matters is simply whether its failure to follow its advice in this particular respect was justified.

13. As to ground 3, this was somewhat refined in Ms Wigley's advocate's statement from the point made in the original skeleton, which seemed to me unarguable in the light of the fact that the assessment itself did not require the landscape-level strategy to be in place before any development was permitted (and nor did Natural England). But the reformulated submission that the Plan involved "putting off indefinitely" the completion of the landscape-level strategy and the settlement-level plans seems to me equally unsustainable. It is true that no deadline was specified, but that is quite different from a decision to "postpone indefinitely". The Plan is clearly to be understood as requiring them to be got on with with reasonable expedition, and – to repeat – if they are not in place and if absence of risk cannot be shown without them permission cannot be granted. In addition, as regards the landscape-level strategy, it is clear that the Council – like Kestrel – recognised that this would take a little time, because of the need to involve other authorities. I can see nothing arguably unlawful in any of this. Nor is it inconsistent with the principle enunciated by A-G Kokott that assessments should be carried out at the earliest possible stage: it is still necessary to decide what that requires in the circumstances of a particular case.

14. For those reasons, despite Ms Wigley's well-constructed skeleton argument and advocate's statement and her careful development of them in submissions, I would refuse permission to appeal.