Landmark CHAMBERS

HABITATS UPDATE

Planning High Court Challenges Annual Conference 2017

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Introduction

1. A brief overview of habitats law (including the Conservation of Habitats and Species Regulations 2017)

2. Recent domestic case law
   i. Wealden DC v SSCLG [2017] EWCA Civ 39
   ii. Wealden DC v SSCLG [2017] EWHC 351 (Admin)
   iii. R (DLA Delivery Ltd) v Lewes DC [2017] EWCA Civ 58
   iv. Baroness Cumberlege v SSCLG [2017] EWHC 2057 (Admin)

3. Recent European case law:
   i. Case C 142/16 Commission v Germany

North Norfolk Coast SSSI (Blakeney Point): an example of successful and intense habitat conservation

A brief overview of habitats law

- In UK and European legislation, habitat conservation primarily achieved through designation of sites which are considered to **merit special consideration or protection.**
- UK is signatory to a number of European and international instruments relating to conservation of habitats (such as Bern Convention, Bonn Convention)
- UK as EU member state (for now….) is bound by obligations under Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, known as the Habitats Directive. Was adopted in 1992.
- Also provides protection through domestic law - in particular The Conservation of Habitats and Species Regulations 2010 - transpose Habitats Directive (NB 2017 regs coming into force).

A brief overview of habitats law

The provisions of the Directive require Member States to introduce a range of measures, including:

- Maintain or restore European protected habitats and species listed in the Annexes at a favourable conservation status as defined in Articles 1 and 2;
- Contribute to a coherent European ecological network of protected sites by designating Special Areas of Conservation (SACs) for habitats listed on Annex I and for species listed on Annex II. These measures are also to be applied to Special Protection Areas (SPAs) classified under Article 4 of the Birds Directive. Together SACs and SPAs make up the Natura 2000 network (Article 3);
- **Ensure conservation measures are in place to appropriately manage SACs and ensure appropriate assessment of plans and projects likely to have a significant effect on the integrity of an SAC. Projects may still be permitted if there are no alternatives, and there are imperative reasons of overriding public interest. In such cases compensatory measures are necessary to ensure the overall coherence of the Natura 2000 network (Article 6);**
- Member States shall also endeavour to encourage the management of features of the landscape that support the Natura 2000 network (Articles 3 and10);
- Undertake surveillance of habitats and species (Article 11),
- Ensure strict protection of species listed on Annex IV (Article 12 for animals and Article 13 for plants).
- Report on the implementation of the Directive every six years (Article 17), including assessment of the conservation status of species and habitats listed in the Annexes to the Directive.

Regulation 61 in Habitats Regulations 2010 (Regulation 63 of Habitats Regulations 2017)

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.

The new regulations – The Conservation of Habitats and Species Regulations 2017

- Come into force on **30 November 2017**
- First, do the Habitat Regulations 2017 represent a change to the law? No – they introduce a small number of minor amendments designed to "*rectify omissions and improve clarity of drafting*" (Explanatory Memorandum).
- "*No new policy or regulatory burden*" (Explanatory Memorandum)
- Therefore, main practical significance is that decision-makers and others involved in habitats matters will need to **update references** from 30 November 2017 (e.g. Regulation 61 now Regulation 63 etc).
- NB: "*likely to remain in place for some time after the UK exits the EU*" (Explanatory Memorandum)

It ain't over ‘til it's over…

Ashdown Forest – a busy year

Wealden DC v Secretary of State for Communities and Local Government [2017] (Court of Appeal)

- Court of Appeal – appeal against decision of Lang J who quashed decision of inspector on appeal.
- 103 dwellings, provision of 10ha of SANG (2.4km from Ashdown Forest)
- The council refused permission on basis that "both alone and in combination with other plans and proposals, [the proposed development] would have an adverse effect on the integrity of the SPA and SSSI, including impact through pressures for increased recreational use of the Ashdown Forest and the intensification of nitrogen deposition in the protected area by additional traffic generated."
- The proposal had "not demonstrated adequate mitigation for the **cumulative impacts** caused to the biodiversity interests".

Wealden DC v Secretary of State for Communities and Local Government [2017] (Court of Appeal)

- Developer at inquiry argued that a range of heathland management plans could be put into place as mitigation for increased nitrogen deposits so that the development would have no LSE on the SAC.

- Inspector accepted this position and concluded that "even taking account of the low threshold required by *Sweetman*, with mitigation [achieved by way of conditions and s106], there would be no LSE on the heaths. It follows that an *appropriate assessment* is not required, and that concerns with regard to N deposition should not prevent the development."

Wealden DC v Secretary of State for Communities and Local Government [2017] (Court of Appeal)

- Inspector had erred in failing to consider **deliverability** and **efficacy** of mitigation measures – needed to be "firm commitments" and "solid proposals" for mitigation.
- Related to this was his failure to grapple with the evidence of the council's witness on this point.
- Notwithstanding that the inspector's ultimate (unlawful) conclusion was that the mitigation measures proposed precluded LSE and the need for an appropriate assessment, Lindblom LJ approved the inspector's **precautionary approach** as consistent with the Habitats Directive, European case law, *Smyth* and *Champion*.

Wealden DC v Secretary of State for Communities and Local Government [2017] (Court of Appeal)

"That conclusion depended on his judgment that, with mitigation, including heathland management to mitigate the effects of nitrogen deposition, the proposed development, together with other proposals, was not likely to have significant effects on the European site. Such mitigation, as he made clear, was essential to his "precautionary approach". So, ***if there was any real doubt about the requisite heathland management coming forward, his conclusion that an "appropriate assessment" was not required would, to that extent, be undermined.*** *It was* ***necessary for him to establish with reasonable certainty that the relevant mitigation, including heathland management, would actually be delivered****. But he did not do that. He did not identify a* ***solid proposal*** *for heathland management, relevant to this proposed development, to which there was* ***a firm commitment*** *on the part of those who were going to carry it out."*

Wealden DC v Secretary of State for Communities and Local Government [2017] (High Court)

- Wealden DC successfully applied to quash the joint core strategy ("JCS") prepared by neighbouring Lewes DC and South Downs National Park Authority.
- The HRA for the JCS had failed to consider the effects of the strategy in combination with an earlier JCS (between WDC and SDNA) adopted by WDC in 2013 in terms of potential air quality impacts on Ashdown Forest SAC caused by increased traffic flows.
- That determination in the HRA that not LSE in this respect made in consultation with Natural England.
- WDC argued that if the relevant data had been properly amalgamated, the effects of the increased traffic flow would not have been deemed not LSE (tipped over a 1000 AADT threshold) and an appropriate assessment would have been required.

Wealden DC v Secretary of State for Communities and Local Government [2017] (High Court)

- Jay J held that Natural England's advice was erroneous and irrational. That infected the decision-making process and vitiated the conclusion in the HRA.
- "…*The Wednesbury error in the underlying advice creates, without more, an equivalent Wednesbury error in the evaluative assessments carried out in formulating the HRA.*"
- Note of caution – cannot unreasonably rely on expert advice even if from statutory consultee such as Natural England, whose views may be given considerable weight.
- Procedural point – when challenging a JCS (or rather its adoption as part of development plan) time runs from the date each LPA adopted the JCS. JCS applies to each area on a discrete basis. WDC succeeded only in terms of SDNPA's adoption of JCS.

R (DLA Delivery Ltd) v Lewes District Council [2017] (Court of Appeal)

- Challenge to decision to allow Newick Neighbourhood Plan to go to referendum – four sites were selected, none of which Claimant developer had an interest in, but all of which were within 7km "zone of influence" of Ashdown Forest.
- HRA prepared for emerging local core plan strategy, and relied on in NNP process, concluded that residential development in zone of influence would require mitigation in form of suitable alternative green space ("SANG") but the planning authority concluded that NNP did not require "appropriate assessment" since emerging local plan core strategy introduced the necessary mitigation.
- Claimant challenged lack of SANG in the NNP itself.

R (DLA Delivery Ltd) v Lewes District Council [2017] (Court of Appeal)

- Challenge failed.
- Even in context of "precautionary" approach the planning judgment formed by DC and examiner that appropriate assessment for NNP was not required was **not irrational** or **unlawful**.
- Both DC and examiner understood that SANGs would in due course have to be identified and brought forward in a reasonable time to enable the allocated sites to be developed for housing within period of NNP (and that DC was working towards provision of SANGs).
- Therefore unnecessary to resolve in the plan-making process which particular sites would be suitable for SANGs, or their timing. Such uncertainty was not an obstacle for allocations of housing in the NNP.
- Lindblom LJ expressly drew contrast with "*a case of a failure by a local planning authority or an inspector to recognise the need for mitigation of a particular kind to be in place before planned development may proceed, or to address the deliverability of that mitigation...*" (c.f. Wealden)

Baroness Cumberlege of Newick v SSCLG [2017]

- Section 288 application to quash decision of SSCLG allowing an appeal against refusal of planning permission for scheme for up to 50 dwellings in Newick, Sussex. Here the appeal had been allowed by the Secretary of State who had recovered it due to the then emerging NNP.
- Secretary of State granted conditional outline planning permission.
- Decision was challenged by Baroness Cumberlege and her husband, both local residents and members of the Newick Village Society.
- Claimants contended that decision should be quashed given site's relationship with the 7km "zone of influence".

Baroness Cumberlege of Newick v SSCLG [2017]

- Secretary of State's assessment of the implications of the proposed development was based on a mistake of fact – part of site was located within the 7km zone of influence whereas inspector had concluded that it was located outside.
- Significantly, the result was that planning permission was granted in breach of regulation 68(3) of Habitats Regulations which provides that outline planning permission must not be granted if development likely to adversely affect integrity of a European site ***could*** be carried out under the permission.
- Condition applied to outline permission did not necessarily secure that no houses could be constructed within 7km zone of influence.
- NB Habitats Directive only been transposed so that the relevant test is applicable to planning permission (*not* one for reserved matters).

Case C 142/16 Commission v Germany

- CJEU declared that, by authorising the construction of the Moorburg coal fired power plant without conducting an appropriate and comprehensive assessment of its implications, Germany failed to fulfil its obligations under Article 6(3) of the Habitats Directive.
- Germany failed to ensure that, before granting consent for the Moorburg plant, it had ascertained that it would not adversely affect the integrity of the upstream European Sites, contrary to the second sentence of article 6(3) of the Directive, in particular that Germany had wrongly classified the second fish ladder as a ‘mitigating’ measure.
- Germany had failed to assess the cumulative effects of the Moorburg plant together with other projects including the existing pumped hydro plant operational since 1958.

Case C 142/16 Commission v Germany

Summary: what should you take away from this talk?

1. Generally, courts (both domestic and European) are upholding legal challenges and/or quashing decisions based on flawed considerations of effects on protected sites. Remember precautionary approach!
2. Mitigation measures need to be "**solid proposals**", and have "**firm commitments**" behind them, to be properly fed into an assessment on likely significant effect/whether an appropriate assessment is required.
3. *However*, there is a distinction between application of test to specific applications for planning permission and to plan-making – the latter is a question of rationality/planning judgment and can lawfully be some uncertainty.
4. Remember to consider **cumulative effects** of proposals with other proposals.
5. Worth ensuring any **expert evidence** relied on at LSE stage or in appropriate assessment has **rational basis** – may vitiate assessment if not (even if from Natural England).

Thank you for your attention.

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