Neutral Citation Number: [2021] EWHC 2408 (Admin)

Case No: CO/2511/2020

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

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 25 August 2021

Before :

HHJ WORSTER
sitting as a Judge of the High Court

- -

Between :

David Sahota	**Claimant**
- and -	
Herefordshire Council	**Defendant**
- and -	
John Morgan	**Interested Party**

- -
- -

Alex Goodman (instructed by **Ridgemont Legal Services**) for the **Claimant**
Matthew Henderson (instructed by **Herefordshire Council Legal Services**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 24 May 2021

- -

Approved Judgment

HHJ WORSTER :

Introduction

1. The Claimant seeks an order quashing the Defendant's grant of planning permission to the Interested Party given on 4 June 2020. That permission related to the erection of a cattle shed and a one bay extension to an existing general purpose agricultural storage building on a farm in the upper Golden Valley in Herefordshire, just outside the River Wye Special Area of Conservation ("SAC").

2. Permission was granted by Neil Cameron QC sitting as a Deputy High Court Judge on the following basis:

> *…it is arguable that the Defendant erred by failing to take into account the cumulative effects of the proposed development, and thereby failed to consider whether the proposal was likely to have significant effects on the River Wye SAC and/or undertake an appropriate assessment.*

3. The reference to an appropriate assessment is to an assessment pursuant to regulation 63(1) of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). The basis for permission refers back to the Statement of Facts and Grounds at paragraphs 3c [12] and 39b [25] where is it said that:

> *The Council failed to consider cumulative impacts of the development along with other developments on the question of whether it should conduct an appropriate assessment …*

4. The Claimant lives close to the application site, and objected to the planning application when it was made. When permission was granted he brought these proceedings by a claim form issued on 16 July 2020. The Defendant defends the claim. The Interested Party has played no active part.

5. There are two bundles of documents. The first is a trial bundle, and the second a bundle of background documents. I refer to those documents by reference to their page numbers in square brackets, using the prefix "LA" in relation to documents in the second bundle. Counsel provided full skeleton arguments for the hearing, and after hearing oral argument I reserved judgment. The parties have since provided short supplemental written submissions dealing with two authorities decided after the claim had been heard.

6. The essence of the Claimant's challenge is that the Defendant's Planning Committee was misled by the advice contained within the Planning Officer's report to the effect that there was no need for a Habitats Regulation Assessment. The challenge is not a reasons challenge. Put simply, the Claimant's case is that the advice failed to take account of the cumulative effects of the development. The Committee followed that advice, and consequently it erred when granting planning permission. The Defendant's case is that the advice was correct, but that even if the Council did err in law, relief should be refused pursuant to section 31(2A) of the Senior Courts Act 1981 because it is highly likely that the outcome for the Claimant, namely the grant of the permission, would have been the same.

7. The Defendant relies upon a witness statement from the Council's Ecology and Arboriculture Officer to explain the process which led to the advice he gave to the Planning Committee, and in support of its case under section 31(2A). That statement is

at [140]-[146] and the six exhibits follow at [147]-[161]. The Claimant objects to that evidence. He submits that it is not admissible on the question of what was in the mind of the Planning Committee, but accepts that it is admissible on the question of the test under section 31(2A). I gave limited permission for the Claimant to rely upon some evidence in reply in relation to the section 31(2A) issue. Before I come to the question of whether that evidence is relevant or admissible, and the question of whether the advice was (or might have been) misleading, I set out the regulatory background, the relevant law and the material relating to the planning process.

The Habitats Regulations

8. Regulation 63 of the Habitats Regulations provides as follows:

> *(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 of the plan or project for that site in view of that site's conservation objectives.*
>
> *(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 specifies […]*

This regulation gives effect to the obligation found in the first sentence of article 6(3) of the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992).

9. In this case the parties agree that the River Wye SAC is a European site for the purposes of the Habitats Regulations, the Defendant is '*the competent authority*' and Natural England is '*the appropriate nature conservation body'*. Both Mr Goodman and I were grateful to Mr Henderson for his analysis of the current status of the Habitats Regulations. He set out that analysis in a footnote to paragraph 18 of his skeleton argument, the effect of which is that the Habitats Regulations are retained EU law and continue in effect in domestic law.

10. Regulation 63(1) imposes a single obligation on a competent authority to undertake an appropriate assessment of a plan or project before deciding to undertake or give permission for that plan or project if (i) the plan or project is likely to have a significant effect on a European site (either alone or in combination with other plans or projects) and (ii) the plan or project is not directly connected with or necessary to the management of that site. Here the issue arises under limb (i), with particular reference to the question of the effect of the plan or project in combination with other plans and projects. Mr Goodman made a number of submissions as to what those effects might be, and how they could combine to have a significant effect on the SAC. I return to those below.

11. The meaning of the word "likely" in regulation 63(1)(a) was considered by Advocate-General Sharpston in her opinion in *Sweetman v An Bord Pleanala* (C-258/11); [2014]

PTSR 1092; see in particular at paragraphs [45]-[50] of her opinion. Whilst "likely" has a particular meaning in the English language, the Advocate-General noted that the expression used in other language versions was weaker, and concluded that "likely to have a significant effect" was to be understood as referring to the "possibility of there being a significant effect on the site …". The requirement that the effect be "significant" excludes plans which have no appreciable effect on the site.

12. At [49] the Advocate-General says that the "threshold at this first stage of art.6(3) is thus a very low one". At [50] she frames the question using simpler terminology as "should we bother to check?"

13. The question of whether the application of regulation 63 involves a screening assessment prior to the full assessment was considered by Lord Justice Richards in *No Adastral New Town Limited v Suffolk Coastal District Council* [2015] EWCA Civ 88:

> *65 … 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.*
>
> *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.*

14. In his judgment in *R. (Champion) v North Norfolk District Council* [2015] UKSC 52 Lord Carnwath agreed with Richards LJ in *No Adastral*. There was no formal requirement for screening to be found in the language of the Habitats Directive or the Habitats Regulations. Lord Carnwath regarded the use of the term "screening" in the context of the Habitats Regulations as potentially confusing given the formal screening procedures found in the Environmental Impact Assessment regulations and elsewhere. As to the nature of the process, again he agreed with Richards LJ in *No Adastral*:

> *41 … The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met (and see paras 41-43 of Waddenzee). But this informal threshold decision is not to be confused with a formal "screening opinion" in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment".*

15. The threshold for this "trigger", or "informal threshold decision" is recognised to be a very low one. So for example, in his judgment in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, Sales LJ referred to the matter in these terms:

> *76 If the competent authority can be sure from the information available at the preliminary screening stage … that there will be no significant harmful effects on the relevant protected site, there would be no point in proceeding to carry out an "appropriate assessment" to check the same thing.*

16. Mr Henderson submits that this informal threshold decision of whether or not the plan or project will have likely significant effects "is a question of degree calling for the exercise of judgment": see *Kelton v Wiltshire Council* [2015] EWHC 2853 (Admin) *per* Cranston J at [57]. He refers to the judgment of Lindblom LJ in *R. (Lee Valley Regional Park Authority) v Epping Forest DC* [2016] EWCA Civ 404 at [65]:

> *It must be remembered, as Sullivan J. said in R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government [2008] 2 P. & C.R. 16 (in paragraph 72 of his judgment), that the Habitats Directive is "intended to be an aid to effective environmental decision making, not a legal obstacle course". Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional Wednesbury grounds (see the judgment of Sales L.J., with whom Richards and Lewison L.JJ. agreed, in R. (on the application of Dianne Smyth) v Secretary of State for Communities and Local Government [2015] EWCA Civ 174, at paragraphs 78 to 81).*

17. Mr Goodman accepts that a competent authority may lawfully decide to not even "bother to check" whether an appropriate assessment is required where it is obvious that the purpose of undertaking an appropriate assessment is already met. He also emphasises the nature of the "appropriate assessment" to be carried out, the high standard of investigation, and the application of the precautionary principle. He submits that the test pursuant to regulation 63 of the Habitats Regulations 2017 and article 6(3) of the Habitats Directive is whether scientific doubt could be excluded as to the possibility that the proposal could, in combination with other developments on site, have an adverse effect on the River Wye SAC.

18. The position is set out by Lord Carnwath in the second section of paragraph 41 of his judgment in *Champion* (see above).

> *'Appropriate' is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project 'will not adversely affect the integrity of the site concerned' taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in Waddenzee [2005] All E.R. (EC) 353 at [107]:*
>
> > *'the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be*

> *certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.'*
>
> *In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority.*

That provides some clear guidance as to the approach to such an assessment.

19. Mr Henderson submits that the standard of review when supervising compliance by the relevant competent authority with the legal requirements of the Habitats Directive is the *Wednesbury* rationality standard; see Sales LJ in *Smyth* @ [78]-[80]. The court is not required to apply a more intensive standard which means, in effect, that it should make its own assessment. I agree that the Committee's decision is to be considered in that way. The application of that approach is illustrated by the facts of *Smyth,* where the decision challenged was an Inspector's decision to the effect that the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on the relevant SAC; see the judgment at [97]. The development on its own was found not to give rise to any significant effects, and the evidence before the inspector was that the possible in-combination effects were in respect of future development which would require its own assessments by a relevant competent authority advised by Natural England. The Inspector was entitled to find that the uncertainties regarding these possible future in-combination effects were adequately catered for; see the judgment at [101]. It is not the role of the court to test the ecological and planning judgments made in the course of the Defendant's decision-making process; see Lindblom J in *R (Prideaux) v Buckinghamshire CC and anor* [2013] EWHC 1054 (Admin) @ [130].

Officer's Reports

20. The principles which apply to a challenge based on the advice in an officer's report were not in dispute. They were summarised by Lindblom LJ in *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314 at [42].

> *42(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in R. (on the application of Morge) v Hampshire County Council [2011] UKSC 2 at paragraph 36, and the judgment of Sullivan J., as he then was, in R. v Mendip District Council, ex parte Fabre (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in Palmer v Herefordshire Council [2016] EWCA Civ 1061, at paragraph 7).* ***The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.***

> *(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R. (on the application of Loader) v Rother District Council [2016] EWCA Civ 795, or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, Watermead Parish Council v Aylesbury Vale District Council [2017] EWCA Civ 152. **There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law** (see, for example, R. (on the application of Williams) v Powys County Council [2017] EWCA Civ 427. But unless there is some distinct and material defect in the officer's advice, the court will not interfere.*

21. Mr Henderson emphasised the second half of sub-paragraph (2) of Lindblom LJ's judgment (which I have set out in bold). The passage I have emphasised in sub-paragraph (3) of Lindblom LJ's judgment is also of potential relevance.

22. Mr Henderson also relied on this further passage from the judgment of Sullivan J in *ex parte Fabre* at [81]:

> *Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail.*

It is unnecessary for an Officer's report to set out in detail every single one of the legal obligations which are involved in any decision; see Baroness Hale in *Morge* at [44]. Or to put it another way, a Planning Officer does not need to spell out all the considerations they have gone into when reaching a view; see Lindblom J in *Prideaux* at [110].

23. On 17 June 2021, Mrs Justice Steyn handed down her judgment in *R (on the application of Danning) v Sedgemoor District Council* [2021] EWHC 1649 (Admin). Mr Goodman drew the authority to the attention of the Court, and given the importance of the issues surrounding the advice given by the Planning Officer in this case, I gave permission for further short (sequential) written submissions (filed on 28 June 2021 and 5 July 2021). The authority does not purport to change the principles which apply to Officers' Reports, but it is a helpful illustration of their application.

24. At paragraph [25] of her judgment Steyn J made reference to the judgment of Baroness Hale in *Morge* at [36]:

> *…in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, para 69: In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them. Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to*

> *them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the courts, to weigh the competing public and private interests involved.*

25. The relevant challenge in *Danning* was that the Council had failed to consider the Public Sector Equality Duty. There was no reference at all to that duty in any of materials given to the committee, and no evidence that the Planning Committee had asked itself whether the planning decision it was required to make could have any implications for the matters set out an section 149(1)(a) to (c) of the Equality Act 2010. The Council's case was that the clear answer to that question was "No". It relied upon the evidence of its Planning Officer, which was to the effect that he had considered the issue, and concluded that there was nothing in the development which had an impact upon those with a relevant protected characteristic.

26. The Claimant in *Danning* objected to the Council relying upon that evidence. Firstly because the officer was not the decision maker and that it was the Planning Committee who were under a duty to consider the implications of the proposal for the Public Sector Equality Duty. Secondly because the court should be slow to admit elucidatory remarks; judicial review generally proceeding on the basis of the material which was before the decision maker (for reasons set out in the cases referred to below).

27. In her judgment at [55] Steyn J says this:

> *First, this is ex post facto evidence that an officer had regard to a consideration which nowhere appears in the contemporaneous documents to have been considered. I am not prepared to give any weight to that evidence. Secondly, in any event, ex post facto evidence regarding what an officer had in mind (but never expressed) tells the court nothing about whether the Planning Committee had regard to the relevant matters in accordance with the public sector equality duty.*

Mrs Justice Steyn concluded that there was no evidence that the Planning Committee had considered whether this planning decision could have any implications for the Public Sector Equality Duty, and that consequently held that the Council had failed to comply with its duty.

28. Mr Goodman submits that the analogy with the present case is obvious. Mr Henderson submits that the case is different. I agree with Mr Henderson that the position in this case is different. In *Danning* the challenge related to the Committee's failure to deal with the Public Sector Equality Duty at all, and the purpose of the evidence from the Planning Officer was to fill that gap. The Council never considered the duty at all. The position in this case is different. Here it is apparent that the Committee was well aware of the duty under the Habitats Regulations and of the question of whether or not they should have an assessment before making a decision on the planning application. The challenge in this case is that they were materially misled by the Officers advice (or lack of it) when they came to make that decision. An analysis of *Danning* illustrates that important difference.

29. I also note that having found for the Claimant in *Danning* on this ground, Mrs Justice Steyn observed that if the only flaw in the decision making process had been the failure to comply with section 149 of the Equality Act 2010, she would have refused to grant relief on the basis that the requirements of section 31(2A) of the Senior Courts Act 1981 were met; see her judgment at [58]-[61].

The Planning Process

30. The planning application in this case was received by the Defendant on 30 July 2019 and considered by the Defendant's Planning Officer. The Planning Officer consulted with the Defendant's Ecology and Arboriculture Officer ("Mr Bisset") and asked for his comments. Mr Bisset's written response of 20 August 2020 is at [124]:

> *The additional cattle shed has a floor area of 465.5msq. This falls under any trigger sizes (500msq) for air pollution emissions in regards to any Sites of Special Scientific Interest as identified through [N]atural England's details SSSI Impact Risk Zone data set. Based on this information no detailed air emissions assessment is required for this specific development at this location. No likely significant effects on any relevant SSSI have been identified.*
>
> *There are no further ecology comments on this … development within an existing developed farm complex.*

31. Mr Bisset explains the process he went through in coming to these views in the witness statement dated 23 October 2020 made on behalf of the Defendant for the purposes of these proceedings (see below). Mr Henderson also took me through some of the guidance produced by Natural England.

32. The application was considered by the Planning Committee at a meeting on 3 June 2020. The Planning Officer produced a report for the Committee [75]-[88], and attended the meeting to answer questions from members and give further advice. The report deals with a range of issues. Section 1 describes the site and the proposal, section 2 refers to relevant policies, including at paragraphs 2.1 and 2.2 the relevant development plan policies on the environment. Those included:

    (i) policies SS6 and LD2 of the Herefordshire Local Plan - Core Strategy ("CS") which deal respectively with "Environmental quality and local distinctiveness" and "Biodiversity and geodiversity"; [LA/206 and 208]

    (ii) policies E1 and ENV1 of the Dorstone Neighbourhood Development Plan ("DNDP"), which respectively refer to "Small businesses, farming and employment" and "Conservation, heritage and landscape" [LA/201-3].

    Those are policies which the members of the Committee were no doubt familiar with.

33. The Planning History is summarised at paragraph 3 of the Officers Report. This included reference to an earlier application for an agricultural building for egg production on the applicant's farm which had been refused. An appeal had been dismissed on 16 March 2018, and a copy of the Inspector's report is at [LA/285].

34. At paragraph 4 the report deals with Transport (there was no objection), Ecology and Landscapes, and Environmental Health (no comments). The Ecology Officer did not attend the meeting, but his written comments of 20 August 2020 set out at paragraph [30] above were incorporated word for word into the Planning Officer's report at paragraph 4.2 under the heading "Conservation Manager (Ecology)" [77].

35. At paragraph 5 the report summarises the representations made by objectors and others, including the following under the heading "Ecology and Climate" [81]:

> *Foul sewerage would leak into the River Dore and this would be exacerbated by increasing periods of heavy rainfall and the intense use of the buildings for the housing of cattle and pigs*.

Other relevant objections referred to further intensive farming, and the greatly increased risk of disease and pollution.

36. The Planning Officer's Appraisal is at paragraph 6 [82]-[86]. At paragraph 6.10 he refers to his understanding that the applicants sought to expand the farming enterprise and so required additional agricultural storage space and livestock housing. At paragraph 6.11 the Officer identifies the main issues to consider in the determination of the application. These include the impact on biodiversity and ecological networks. These are dealt with in greater detail at paragraphs 6.23-6.26. I set out those paragraphs in full:

> *6.23 Concerns have been raised with regards to the proposal's impact on species and also the quality of river water within the River Dore; the tributary of which lying within close proximity north of the site and on the opposite side of Scar Lane.*
>
> *6.24 Policy E1 of the DNDP sets out that development proposals should not have any adverse impacts on the River Wye Special Area of Conservation (SAC) echoing the requirements set out in more detail at Policy SD3 and SD4 of the CS.*
>
> *6.25 The applicant has advised that given the building would be for the housing of cattle, all manure will be solid with no slurry given that the cattle would be on straw, as is standard practice.*
>
> *6.26 The Council's Ecologist has commented that the additional cattle shed would have a floor area of 464.5msq. This falls under any trigger sizes (500msq.) for air pollution emissions in regards to any Sites of Special Scientific Interest as identified through Natural England's details SSSI Impact Risk Zone data set. Based on this information, there is no detailed air emissions assessment required for this development at this location.* ***Noting that the site is outside the River Wye SAC, there are no other triggers for a Habitats Regulation Assessment (HRA) process and there are therefore no likely significant effects on any other relevant SSSI.***
>
> [my emphasis]

37. In the conclusion to the report at paragraph 6.30, the Planning Officer noted amongst other things that no harm to ecological networks was identified, and recommended the proposal for approval subject to conditions.

38. The Committee Meeting was recorded, and the bundle contains a transcript. I note the following passages:

(i) In the context of a need for the building, the Planning Officer told the committee that the applicant had increased the number of fattening pigs

which require housing in the existing buildings on the site, and wished to expand cattle numbers and required additional buildings to do so. The total land available to the applicant was 350 acres; [98]-[99].

(ii) The note at [100] records this advice:

Concerns with regards to ecology and biodiversity are noted. Policy E1, LD2 and SD4 set out that the proposal should not result in any adverse impacts on the River Wye special area of conservation. Given the scale of the site, the Council's planning ecologist has set out the proposal does not meet any triggers, in which ammonia screening is required or habitat regulations assessment is required. It is confirmed that the proposal has not raised any objection from the council's ecologist …

(iii) The local member, Councillor Hewitt opened the Committee's debate, although she was not a member of the Committee and did not have a vote. She referred to the site sitting at the head of the River Dore and to the issue of water quality [102] and questioned whether given the position of the site and its sensitivity it would (as she put it) "*have been wise to present the whole picture*" [103]. She referred to the need for the new building to house cattle because of the applicant's intention to increase pig numbers, and that there should have been a slurry management programme as there was with the previous application for the chicken shed. She went on to express concern about the presence of manure and the consequences of run off. Her concern was the effect of farm yard effluent on the river which (as she put it) *runs down the side of the farm.*[102]-[104].

(iv) Councillor Seldon asked the Planning Officer about water quality [106].

Mr. Jones, could you just recap the water quality of this development, please?

Yes … So I mean, as we obviously consulted with ecology, and they've returned no objection to the scale, the increase footprint of the building doesn't meet any thresholds for any screening in terms of HRA. And I would just point that obviously, the new cattle building wouldn't be contiguous with the extension of the storage building. They are two separate buildings. So the building to extend it would remain as storage and therefore the cattle building would remain under that 500 square metre. Obviously the housing of livestock would be straw during the winter, so the cattle would be housed on straw. So it wouldn't be sort of slurry and sort of wet waste, so to speak. So the ecologist hasn't returned any objection to that proposal.

(v) Councillor Seldon continued:

I'm sorry, Chairman, just to recap, so there is no cumulative impact assessment of what that site could produce?

The Planning officer replied:

The ecologist has taken the view that there is no objection to the proposal given the site at present. So you know, obviously, whilst there is an increased cumulative floor space would increase the ecologist hasn't objected in that regard.

(vi) Councillor Watson asked whether there was a possibility of putting a waste management plan in place. The Planning Officer's response was that given the comments from the ecologist, the size and increased footprint of the cattle building would not usually warrant that. And he repeated the point about the cattle being housed on straw in the winter so that it was:

> *…not considered that that would create run of by way of slurry that would require such [a] management plan to be imposed*

see at [111].

(vii) In her final comments Councillor Hewitt made the point that there was a cumulative effect in changing the use of the existing building to add livestock. She couldn't see why the two buildings were not considered as one footprint.

39. The proposal to grant planning permission was then passed by 13 votes to 2 and the formal grant issued the next day [72]. The grant of permission was made without making an appropriate assessment pursuant to the Habitats Regulations, and it follows that the committee are to be taken to have decided that there was no possibility of the development having a significant effect on the River Wye SAC for the reasons as set out in the advice given by Mr Bissett, as relayed to the meeting by the Officer's report and orally.

Mr Bisset's Evidence

40. Following the issue of proceedings, and the grant of permission, the Defendant filed Detailed Grounds of Resistance [47] and a witness statement from Mr Bisset. That statement provides some background, but more importantly it goes through the process Mr Bisset undertook when considering the question of whether there should be a Habitats Regulations Assessment. I set out the relevant parts of his witness statement below.

> *6. Planning ecology is a desk based exercise utilising information provided by the applicant and information available within the Council's systems, such as Exponare (the Council's core Geographical Information System or "GIS"), and within external sources, for example aerial images and other information like Google Earth and MAGIC.*
>
> *7. This GIS includes significant and relevant data from outside sources and statutory bodies such as Natural England and includes access to detailed data that is not available in the public domain due to licencing and copyright restrictions.*
>
> *8. The Natural England data appears as a "layer" on top of a base map and shows impact risk zones ("IRZs"), together with the triggers for those IRZs. I am able to browse the map and identify whether a particular proposed development falls within any IRZs and, if it does fall within an IRZ, interrogate the linked data to determine what Natural England consider the triggers to be for a potential ecological impact at that location. This data is very precise and allows a focussed and detailed assessment of a particular proposed development.*

9. *The IRZ data is described on the .gov website as providing "The Impact Risk Zones (IRZs) are a GIS tool developed by Natural England to make a rapid initial assessment of the potential risks posed by development proposals to: Sites of Special Scientific Interest (SSSIs), Special Areas of Conservation (SACs), Special Protection Areas (SPAs) and Ramsar sites. They define zones around each site which reflect the particular sensitivities of the features for which it is notified and indicate the types of development proposal which could potentially have adverse impacts."*

10. *By special consent from Natural England due to the sensitive nature of the County of Herefordshire District Council and the large number of designated SSSI sites, the actual IRZ data utilised by the Council and myself is a more detailed version of the 'public' IRZ dataset and is the same very detailed and point specific data as used internally by Natural England.*

11. *Amongst other matters, the non-public Natural England data shows IRZs as specific to a particular Special Area of Conservation or specified Site(s) of Special Scientific Interest – including the hydrological catchment area for the River Wye SAC where discharges may affect the SAC. As in the Council's earlier documents, I will refer to this latter area as "the NE hydrological catchment area".*

12. *Utilising the site location plan supplied with the planning application … I identified and pinpointed the site of the application, by which I mean the area lined in red on the plan … ("the Site"), within Exponare. In Exponare I was able to review Natural England's IRZ data against the Site.*

13. *This detailed IRZ provided the response for the location of the development as shown in (Exhibit JBB02). This response details the nature and scale of development that Natural England consider could affect the specified designated site in relation to specific types of potential effect. In this case, the response showed that the Site is outside of the NE hydrological catchment area, and therefore the information on the response relates to the River Wye's other designation as a SSSI.*

14. *This IRZ output provided a clear basis that allowed me to further assess any potential effects on the River Wye SAC/SSSI from the proposed development. The only relevant 'trigger' identified that might relate to the Site was for air pollution. The IRZ identifies that Natural England only consider livestock and poultry units with an area over 500m2 as requiring further consideration (this includes all aspects related to air emissions including the stock themselves and any manure created within the development). In the Application the actual floor area of the shed holding stock that could potentially create any relevant air emissions is clearly identified in the application information as being only 464.5m2.*

15. *Having given this information from the statutory nature conservation body significant weight in my considerations, and based on the IRZ guidance published by Natural England … that clearly identifies that in these circumstances no consultation with Natural England was appropriate or required, I was able to reach my own professional judgment that there was no effect on the River Wye SAC from the proposed development. I considered this to be clear and obvious.*

> *16. Having identified that there was no effect on the River Wye SAC from the proposed development, it was not necessary to consider any "in combination" or "cumulative" effects as the development had no identified effects when considered 'alone'. In short, there was no effect which could operate "in combination" or "cumulatively" with another project.*
>
> *17. On this basis I concluded that a more formal HRA screening process was not required. Given this, an appropriate assessment was also not required.*
>
> *18. In writing my formal consultation for the Development Management team to use in their decision process I also considered any potential effects on Protected Species and other habitats. The GIS system includes species records sourced from the Herefordshire Local Biological Records Centre. The development was noted as being within an existing busy operational agricultural building complex. Natural England's IRZ considers effects on all SSSI sites relevant at the development site location. Natural England also provide data on identified Habitats of Principal Importance through their Priority Habitat Index that the Council utilises as part of the Council and I utilise when making comments on planning applications. Considering this additional information, the SAC-SSSI comments above and my 30 years personal knowledge of the county and its ecology I concluded that the proposed development would have no effect upon protected species and local habitats including the River Dore and wider to include the River Monnow.*
>
> *19. I then completed my final consultation comments dated 20th August 2019 and provided them to the planning case officer*

41. Mr Bisset's evidence is to be read with the publicly available Guidance from Natural England as to the use to be made of the information its system provides. Mr Henderson drew attention to the User Guidance given by Natural England issued on 3 June 2019. The Guidance is said to be for use by Local Planning Authorities to assess planning applications for likely impacts on SSSs/SACs/SPAs and Ramsar sites and determine when to consult Natural England [149].

42. The Guidance begins by considering the purpose of Impact Risk Zones [150].

> *The Impact Risk Zones (IRZs) are a GIS tool developed by Natural England to make a rapid initial assessment of the potential risks to SSSIs posed by development proposals. They define zones around each SSSI which reflect the particular sensitivities of the features for which it is notified and indicate the types of development proposal which could potentially have adverse impacts. The IRZs also cover the interest features and sensitivities of European sites, which are underpinned by the SSSI designation and "Compensation Sites", which have been secured as compensation for impacts on European/Ramsar sites.*
>
> *Local planning authorities (LPAs) have a duty to consult Natural England before granting planning permission on any development that is in or likely to affect a SSSI. The SSSI IRZs can be used by LPAs to consider whether a proposed development is likely to affect a SSSI and determine whether they will need to consult Natural England to seek advice on the nature of any potential SSSI impacts and how they might be avoided or mitigated. The IRZs do not alter or*

> *remove the requirements to consult Natural England on other natural environment impacts or other types of development proposal under the Town and Country Planning (Development Management Procedure) (England) Order 2015 and other statutory requirements …*

43. The Guidance then gives a step by step guide to the use of the data [151]. This is what Mr Bisset says he did. The effect of the Guide is that if the data shows that the proposed development is unlikely to pose a risk to SSSIs, the local planning authority does not normally need to consult Natural England on the proposal regarding likely impacts on SSSIs. That is qualified by this "important note":

> *3. It is important to note that the SSSI IRZs only indicate Natural England's assessment of likely risk to the notified features of SSSIs. Where they indicate such a risk is unlikely, this does not mean that there are no potential impacts on biodiversity or the wider natural environment.*

44. The Guidance then has a series of Questions and Answers [152]. The following are of relevance:

> ***How can Local Planning Authorities use the SSSI IRZs?***
>
> *Local Planning Authorities (LPAs) have a duty to consult Natural England before granting planning permission on any development that is in or likely to affect a SSSI. The SSSI IRZs can be used by LPAs to consider whether a proposed development is likely to affect a SSSI and determine whether they will need to consult Natural England to seek advice on the nature of any potential SSSI impacts and how they might be avoided or mitigated. For a step-by-step guide to using the SSSI IRZs see the flow chart in Appendix 1.*

45. The Guidance confirms that:

> *Where the notified features of SSSIs and European sites are different, the SSSIs IRZs have been set so that they reflect both. The SSSI IRZs can therefore be used as part of a Habitats Regulations Assessment (HRA) to help determine whether there are likely to be significant effects from a particular development on the interest features of the European site.*
>
> ***What does it mean when a development is not indicated by the SSI IRZs?***
>
> *If the development descriptions in the SSI IRZs at a chosen location do not match the nature and scale of a proposed development, this signifies that the development, as proposed, is unlikely to pose a significant risk to the notified features of any SSSI(s) and normally no further consultation with Natural England regarding likely effects on SSSIs is required …*

The Guidance then repeats the caveat in an important note on page [151].

Admissibility

46. Mr Goodman accepts that Mr Bissett's evidence is admissible on the section 31(2A) argument, but otherwise objects to its admission. At paragraphs 30 to 45 of his skeleton argument, he critiques this evidence and in places refers to the evidence of Mr Morgan Taylor (the Claimant's Ecologist) and Mr Maiden-Brooks (the Claimant's Hydrologist) in support of that critique. It may be said that this illustrates one of the dangers of admitting any evidence at all in judicial review proceedings; the reasons for considering the matter on the basis of the material before the decision taker being both principled and pragmatic.

47. The objection is twofold. Firstly that Mr Bisset is not the decision taker, and secondly that the explanation of how he reached the views which informed his advice to the Committee falls foul of the well-established principles which prevent decision-makers from remedying weaknesses in their decisions by means of *ex post facto* evidence.

48. The principles to be applied to "after the event" evidence by decision-makers were set out by Green J (as he then was) in *Timmins v Gedling BC* [2014] EWHC 654 (Admin) @ [109]-[114] and relied upon recently by Lang J in her admissibility ruling in *R (United Trade Action Group Limited and ors) v (1) Transport for London (2) Mayor of London* [2021] EWHC 73 (Admin):

> *[110] … It seems to me that as a matter of first principle it should be rare indeed that a court will accept ex post facto explanations and justifications which risk conflicting with the reasons set out in the decision. The giving of such explanations will always risk the criticism that they constitute forensic "boot strapping". Moreover, by highlighting differences between the reasons given in the statement and those set out in the formal decision they often actually serve to highlight the deficiencies in the decision. Fundamentally, a judicial review focuses the spotlight upon the reasons given at the time of the decision. Subsequent second bites at the reasoning cherry are inherently likely to be viewed as self-serving.*
>
> *[111] In Ermakov v Westminster City Council … [at] page 315h-j Hutchison LJ stated:*
>
> > *"The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in ex parte Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence — as in this case — which indicates that the real reasons were wholly different from the stated reasons".*

[112] That judgment was endorsed by the Court of Appeal in Lanner Parish Council v The Cornwall Council [2013] EWCA Civ 1290 at paragraphs [61] in relation to contradictory evidence. At paragraph [64] the Court stated:

> *"Save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached. In the present case the officer's report, the minutes of the Planning Committee meeting and the stated reasons for the grant of planning permission all indicate a misunderstanding of policy H20. These are official documents upon which members of the public are entitled to rely. Mr Findlay's submission that this is not a "reasons" case like Ermakov misses the point. The Council should not have been permitted to rely upon evidence which contradicted those official documents. Alternatively, the judge should not have accepted such evidence in preference to the Council's own official records".*

[113] A further indication of the reluctance of the courts to permit elucidatory statements is found in the recent judgment of Ouseley J in Ioannou v Secretary of State for Communities and Local Government [2013] EWHC 3945. There, the Judge was confronted with a gap plugging witness statement from an inspector who gave evidence that he did consider a particular issue in circumstances where it was not apparent from the decision letter that he had in fact done so:

49. Similarly the court should exercise caution before admitting evidence elaborating on the advice given by a planning officer in his report to a committee; see Lindblom LJ in *R (Watermeand Parish Council) v Aylesbury Dale DC* [2017] EWCA Civ 152 @ [35].

> *As the authorities show, the court should always be cautious in admitting evidence which, in response to a challenge to a grant of planning permission, elaborates on the advice given by a planning officer in his report to committee – the more so when it expands at length on the advice in the report, or even differs from it. This is not simply because an attempt to reinforce the advice given in the report may only strengthen the argument that the advice fell short of what was required, or was such as to mislead the committee. It is also for the more basic and no less obvious reason that the committee considered the proposal in the light of the advice the officer gave, not the advice he might now wish to have given having seen the claim for judicial review. Of course, evidence in a planning officer's witness statement cannot correct an error of law in the assessment of the proposal on which the committee relied when it made its decision. In some cases, however, it can shed useful light on the advice he gave to the members in his report.*

50. Mr Bisset's advice to the Committee falls into three parts. Firstly that the cattle shed proposed is under Natural England's trigger size for air pollution emissions. Secondly that there are no other triggers for a Habitats Regulations Assessment. Thirdly that, noting that the site is outside the River Wye SAC and that there are no other triggers, there are no likely significant effects on any other relevant SSSI. I agree with Mr Henderson that Mr Bisset's evidence does not contradict that advice.

51. Nor is this really the sort of case to which the *Ermakov* line of authorities directly applies. The real purpose of this evidence is not to add to the advice given to the Committee in the Officer's report, but to respond to the allegation that that advice was misleading. The evidence demonstrates that the advice was the result of some detailed inquiries of Natural England. The results of those inquiries led Mr Bisset to certain conclusions which he set out in his advice. This evidence provides the "workings" for those conclusions. The Officer's report for what was a relatively small scale development was already some 14 pages, and for the Ecology Officer to have set out in the report all the steps he had taken in reaching his views would have been neither necessary nor obviously helpful for the Committee.

52, I am conscious of the need for caution, but I have concluded that I should admit this evidence on the issue of whether or not the advice Mr Bisset gave was misleading.

(i) The evidence about the inquiries Mr Bisset made with Natural England and the responses he received are of particular relevance to that issue. Natural England are an expert body, and the statutory consultee for a Habitats Regulation Assessment. Absent some good reason why not, the planning authority ought to give its views considerable weight; see for example Sales LJ in *Smyth @* [85] and Lindblom LJ in *Lea Valley* at [74]-[76].

(ii) The obvious step for Mr Bisset to take when faced with this application was to use the facility provided to his authority, and make these inquiries. I have no doubt that he did so; indeed that is apparent from the express reference to the Natural England's detailed SSSI Impact Risk Zone data set in paragraph 6.26 of the Officer's report.

(iii) This not a case of plugging a gap, as it was in *Danning*. Mr Bisset is not saying - this is the view I formed even though there is nothing about it in the advice I gave to the Committee. He is giving factual evidence of some of the detail which lay behind the advice he gave.

(iv) The passage from Mr Bisset's evidence set out above refers to the steps he took and the information he considered at the time he gave this advice. It is not some after the event elaboration or commentary.

(v) The information provided by Natural England in 2019 is directly relevant to the issue I am asked to determine. This is not a case where, for example, the allegation is that the Officer has misrepresented the terms or effect of a policy. But if it was, the Court would be able to consider the terms of that policy and decide the issue of whether the Officer had misled the Committee. To undertake that sort of task here requires some evidence about the results of the inquiries of Natural England. Mr Bisset's explanation of the steps he took and their outcome also assists that process. Turning the point on its head, I am unclear as to how that process would work if I did not admit some evidence about the Natural England inquiry.

(vi) The evidence he gives is not extensive.

(vii) Mr Bisset's evidence at paragraph 16 provides an explanation for why he made no further reference to in-combination or cumulative effects in the advice he gave. The argument in favour of admitting this part of his evidence is not as compelling as having some evidence of the information provided by Natural England. I admit it, but it is by no means determinative of the issue.

The Claimant's Submissions

53. In his skeleton argument Mr Goodman summarised the "core issue" in the claim in this way:

> *... the test pursuant to regulation 63 of the [Habitats Regulation] ... was whether scientific doubt could be excluded as to the possibility that the proposal could, in combination with other development on site, have an adverse effect on the River Wye SAC. The advice in the [Officer's Report] did not properly advise members of that test. The ... advice that because the site was not within the SAC, there were "therefore no likely significant effects" was wrong in law: developments outside an SAC can still have an effect on the SAC. ... It was also wrong in the particular circumstances: run off into the SAC from manure spreading outside the SAC is having significant effects on the integrity of the River Wye SAC.*

54. In the course of his oral submissions Mr Goodman structured his argument around a written summary which he handed up at the start of the hearing. Paragraph 5 of the summary identifies how it is said that the Committee was materially misled by the Officer's report, sub-dividing the argument into three:

(i) a failure to advise the committee of the proper test for a "bother to check" decision, or to apply such a test;

(ii) the insufficiency of the factors referred to at paragraph 6.26 of the Officer's report; and

(iii) a failure to advise the committee about whether this development would contribute to the nitrate and phosphate load on the River Wye.

55. Under this third limb of the argument Mr Goodman identified four matters he submits the Defendant failed to engage with:

(i) The extensive scientific recognition in the work of Natural England and the Environment Agency as to the risks to the SAC from phosphates and nitrates;

(ii) That livestock farming within the catchment is s cause of elevated phosphate and nitrate loans;

(iii) That the whole farm is in any event within the catchment of the River Wye such that run off is hydrologically connected to it; and

(iv) That the Position Statement acknowledges these risks, at least over most of the catchment of the Wye, and even on a technical application of the Position Statement, part of the farm is within the Purple Area.

56. The Committee knew where this site was, and were well aware of its proximity to the SAC and the river system. The exchanges in debate show that. Nor is there any issue as to the problems with phosphate and nitrate run off, and the effect the manure from cattle can have. Again, the debate shows a Committee which was alive to those matters. It was quite unnecessary for the Ecology Officer to draw those matters to the Committee's attention in his report.

57. The Position Statement referred to above is the Defendant's "Position Statement – Development in the River Lugg Catchment Area" dated February 2020 [157]. Ground 2 as originally drafted had two parts. The first part was that:

> "*the Committee was not advised on, and failed to consider, the relevance of the obviously material March 2020 Position Statement"*.

Permission was granted on ground 2, but the basis of that grant was identified in the order. That made no reference to the Position Statement allegation. It reflected the second part of that ground, which I set out at paragraph 2 above. As I understand it, the first part of ground 2 is not before me. But there was some reference to it in the written and oral argument, and so I deal with the point briefly.

58. Under the heading "Habitat Regulations Assessment" the Position Statement says this:

> *The Council … must carry out a Habitat Regulations Assessment" on any relevant planning application that falls within the red and purple areas shown on the plan. Where there is a "Likely Significant Effect" the council must carry out an Appropriate Assessment" in order to determine, with scientific certainty, that there would be no "Adverse Effect on Integrity" on the designated site from the plan or project, wither alone or in combination with other plans and projects. The council takes this into account when considering whether planning permission can be granted.*

That is a plain reference to the duty of the Defendant pursuant to section 63(1)(a) of the Habitats Regulations. It does not give rise to any freestanding obligation to undertake an appropriate assessment.

59. The red area referred to here is the River Lugg catchment, where the Defendant accepts phosphate levels exceed the relevant limits. The concerns of Natural England to which Mr Goodman refers (and which are reflected in parts of the Position Statement) relate to that red zone. The farm at which it is proposed to build this cattle shed is some considerable distance from the River Lugg catchment. 25 hectares of the farm lie within the purple area on the plan with the Position Statement (the NE hydrological catchment area), but the site of development is just outside. I do not regard the Position Statement as a material consideration. It is not a policy, but appears to be general guidance for the public on planning applications in the catchment of the River Lugg. If this part of ground 2 were still before me, I would dismiss it.

Discussion

60. The basis upon which permission was given related to a failure to consider cumulative impacts. At paragraph 65 of his skeleton argument Mr Goodman identifies three legal errors in the advice. Firstly that the issue was not whether the site was outside the SAC, but whether it had an impact on the SAC. Secondly that the exercise was not about assessing triggers, but assessing the possible impacts of the development. Thirdly

that the absence of triggers did not (necessarily) mean that there was no such possibility.

61. Reading the Officer's advice as a whole, and in the context of the practical questions which arose in this case, I do not regard the way the advice is framed failed to pose the right question, as Mr Goodman's written and oral argument suggests. There is a need for common sense and a danger in applying an overly legalistic approach. As with many pieces of advice, a court may hope for something fuller. But it is important to have in mind the audience for this advice, and the fact that the Committee would have had some familiarity with these matters. The advice refers expressly to triggers for a Habitat Regulations Assessment, and refers back to the "bother to check" test in its closing section; see the first sub-paragraph of 4.2 [77] and the closing words of paragraph 6.26. Notwithstanding Mr Goodman's criticisms, I regard that as quite sufficient in the circumstances.

62. The arguments at paragraph 54 (ii) and (iii) above represent the core of the Claimant's case. Whilst his evidence is not admissible on this point, the argument Mr Goodman deploys is perhaps best summed up by a reference to the way Mr Maiden-Brooks puts it in his report:

> *In simple terms, the whole issue is that when manure is spread within the hydrological catchment-area, the rain causes that to run off, in part as surface run off. The manure is nutrient-rich, and it is this increase in nutrients which causes the problem with the River Wye SAC.*

63. The Claimant says that the Committee were not positively alerted to potential problems, and that what they were told was not sufficient to justify the decision not to undertake an appropriate assessment. Consequently the advice was misleading. The central difficulty for the Claimant in mounting that challenge is the fact that Mr Bisset's advice was informed by and reflected the information provided by Natural England.

64. The site was not within the catchment area where there was a concern about nitrate and phosphate loads. Mr Maiden-Brooks may question the way Natural England define the relevant catchment area, and Mr Goodman may point to the fact that the site is only just outside that area, but it was Natural England's approach which Mr Bisset considered and adopted. In that context I note Mr Bisset's evidence at paragraph 11 of his witness statement. Having concluded that the site was not within the relevant catchment, the only potential trigger for a Habitats Regulation Assessment was air pollution. The size of the development fell below the relevant trigger size, consequently Natural England's data was to the effect that it was not likely that the development would have any significant effect on the River Wye SAC. That accorded with Mr Bisset's experience. He set out his conclusion in the advice.

65. The advice to the Committee was to the effect that because (i) the site was outside the SAC; and (ii) there were no other triggers for a Habitat Regulations Assessment "… there are therefore no likely significant effects …". Mr Bisset's position is that in those circumstances it was unnecessary to consider any in-combination effects. The development had no identified effects when considered alone, so there was no effect which could operate in combination with another project.

66. Mr Goodman's submission is the advice ignores the potential in-combination effects of manure being spread, running off the land and joining watercourses within the catchment of the River WYE SAC, so adding to the nutrient load in the River Wye

SAC. In particular he refers to the run off from manure created on other parts of the farm caused by the cattle who were to be housed in the shed as proposed; see paragraph 64 of his skeleton argument.

67. I regard this as Mr Goodman's best point, but I am not persuaded that it leads to a finding that the Committee were misled in a material way, such that their decision might have been different. The Committee explored the question of manure and run off in the yard, and were aware of the issues in respect of that. Mr Bisset's approach was correct. There was no possible adverse effect arising from the development to operate in combination with some other project. So that even if the increased grazing referred to amounted to a project for the purposes of regulation 63(1), there was no in-combination effect.

68. The purpose of the special access that Mr Bisset had to this "more detailed" version of the Natural England public IRZ data, was to enable him to undertake just this sort of inquiry. There was no requirement for a formal screening assessment. But if there was, the obvious means of identifying whether a Habitats Regulations Assessment was required was by consulting the Natural England data. That formed the basis of the advice Mr Bisset gave to the Committee. I regard that approach as a proper one to have taken, and have concluded that the advice was such that the Committee was not materially misled when making the decision challenged in these proceedings.

Section 31(2A)

69. The argument before me focussed on the merits of the claim rather than this defence. I was not addressed in any great detail about the operation of the section, although I note that Steyn J describes the "highly likely" hurdle as a high one in *Danning*.

70. In *Danning* there was no evidence to suggest that the Public Sector Equality Duty was engaged. In this case the Claimant has deployed reports from an Ecologist and a Hydrologist to explain why Mr Bisset was wrong. I have concluded that Mr Bisset's approach was a proper one, his reliance on Natural England was plainly right, and that the advice he gave was not misleading. But if I am wrong about there being no in-combination effect which might trigger an appropriate assessment, then it may not be possible to say that it is highly likely that the decision would be the same.

71. The claim is dismissed. I make an order in the terms of the minute agreed by Counsel.