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Case No: CO/10056/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL
(Judgment handed down at
Cardiff Crown Court)

Date: 17th November 2009

Before :His Honour Judge Bidder Q.C. sitting as a deputy High Court Judge

Between :

VIVIENNE MORGE	Claimant
- and -	
HAMPSHIRE COUNTY COUNCIL	Defendant

(Transcript of the Handed Down Judgment of
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Charles George QC with Sarah Sackman (instructed by **Swain & Co.**) for the **Claimant**
Neil Cameron QC with Sasha White (instructed by **Legal Services, Hampshire County Council**) for the **Defendant**

Hearing dates: 14th and 15th October 2009

Judgment
As Approved by the Court

His Honour Judge Bidder QC :

1. In this claim the claimant seeks to apply for judicial review of a decision by the Defendant to grant planning permission for the "proposed South East Hampshire Bus Rapid Transit Phase 1 Fareham to Gosport from Redlands Lane Fareham south via disused railway corridor to Military Road, Gosport " ("the planning permission"). At the outset of this rolled up hearing I granted permission to apply.

2. In brief summary, the grounds of the challenge are that the Council acted unlawfully in that:

    a) It breached the requirements under EC Habitats Directive (92/43/EEC) and the Habitats Regulations which transpose the Habitats Directive into English law in relation to protection of bats which are strictly protected under European law being a European Protected Species;

    b) it erred in law and/or acted irrationally in deciding not to treat the proposal as an "EIA development" under the EIA Regulations 1999 on the basis that the schedule 2 development was unlikely to have significant environmental effects.;

    c) It failed to take account of the extent of harm caused by the proposed development to the large population of badgers which are a protected species (a National Protected Species) under the Protection of Badgers Act 1992.

3. Sub paragraphs a and b above are equivalent to grounds 1 and 2 in the application, which grounds are subdivided. Ground three was not pursued and sub paragraph c is the equivalent of ground 4.

The background to the challenge

4. South East Hampshire Bus Rapid Transit Phase 1 Fareham to Gosport from Redlands Lane Fareham (“the BRT scheme”) is intended to create a new bus rapid transport in Gosport and Fareham, South Hampshire along 4.7 kilometres of a disused railway line. The intention is that a busway will be created that runs along the path of the old railway line with non-guided buses able to join the existing roads at various points along the route. The railway line was last used in 1969. Since then it has become overgrown and substantial vegetation has grown up on and along the line.

5. The scheme will create a new, efficient, modern and highly sustainable form of public transport to the benefit of many residents, workers and visitors to the region.

6. The Defendant is the local planning authority for the administrative area in which the proposal is situated. The Defendant is also the applicant for planning permission through its agent Transport for South Hampshire ("TfSH ”) who submitted a planning application on 31st March 2009.

7. TfSH is the local transport bidding and delivery agency for the South Hampshire sub region working in conjunction with the three highway authorities in the region (Portsmouth CC, Southampton CC and Hampshire CC) and is responsible for delivering transport requirements to implement the regional spatial strategy as contained in the South East Plan.

8. The highway network that currently exists in South East Hampshire is constrained by two critical factors, namely, the geographical layout of the area which results in severe access restrictions and the access into the peninsula, which is largely single carriageway and, at present, is extremely congested. By 2011 it is expected that 66% of the route will be over capacity. In order to improve access to the area the Defendant has sought to provide an alternative form of transport to the private car.

9. The Defendant believes that this scheme will greatly improve the transport options for the communities and population of Gosport and Fareham. Providing an alternative to the private car accords with the aims and policy of central government.

10. The land proposed for the scheme was used as a railway line for 128 years prior to its closure. The proposed busway uses almost totally the existing footprint, except for where buses are to be connected to the present roads by new or altered junctions. Most of the scheme lies within a built-up area. Some, however, passes close to wooded areas.

11. The application site is surrounded by designated nature conservation sites, namely the Portsmouth Harbour Site of Special Scientific Interest (SSSI) which forms part of the Portsmouth Harbour Special Protection Area (SPA) the Oakdene Woods Site of Importance for Nature Conservation (SINC) and the Fareham Grassland SINC. The site has also been found to contain a large population of badgers and a number of bat species roost and forage along the corridor.

12. Previous schemes for providing alternatives to the private car have foundered for lack of central government funding. This scheme, however, has received a commitment of £20 million from central government. The Defendants contend that if planning permission is quashed the scheme will be delayed by many months if not years. The whole question of funding will also be in debate as the funding currently secured requires a project to be completed by 31 March 2011.

13. The scheme is supported by the Fareham Borough Council and the Gosport Borough Council. It was the subject of extensive consultation and questionnaires returned following initial consultation in October 2008 showed that public reaction was mainly positive. There were, however, 291 objections to the scheme. One of the objectors is the Claimant who lives in a property which is close to the junction of one of the best access roads with the new rapid transport road. She has the benefit of legal aid to bring these proceedings.

The planning history

14. The majority of points in issue in this application relate to the impact of the scheme on local ecology.

15. The Defendant was obliged to consider the application of articles 12 and 16 of the EC Habitats Directive, the Habitats Regulations, the Environment Impact Assessment Directive and the Environment Impact Assessment Regulations 1999.

16. In November 2008 planning consultants Mott Gifford submitted a screening report on behalf of the Defendant. On 9 December 2008 a screening opinion that the development was not EIA development was adopted by the Defendant. On 27 March 2009 the Defendant received notification of Community Infrastructure Fund funding allocation for Phase 1 A of the busway. On 31 March 2009 an application for planning permission, which was for both Phase 1A and B, was submitted together with a Planning Statement, a Detailed Environmental Assessment (DEA) (which is, of course, not the same as an EIA) and an Appropriate Assessment Screening Matrix ("AASM").

17. An AASM was conducted because the works proposed under the scheme were some 30 m at their closest point from Portsmouth Harbour which is designated a Specially Protected Area ("SPA"). Before works are carried out that might affect this highest European designation of area, a developer (and a planning authority - in this case identical) have very carefully to look at the potential impact on the SPA. The AASM looks at whether, for example, the Birds Directive and the Habitats Directive are engaged. If they are, a detailed Appropriate Assessment ("AA") is required.

18. On 20 April 2009 a second screening opinion that the development was not EIA development was adopted by the Defendant.

19. On 30 April 2009 Natural England (the Government's advisor on nature conservation) objected to the planning application due to their concerns about the impact of the development on bats and great crested newts. On 29 June 2009 Natural England reiterated their objection. As a result, the Defendant commissioned an Updated Bat Survey ("UBS") which was submitted on 9 July 2009. On 13 July 2009 the regulatory committee of the defendant visited the site.

20. On the 17 July 2009, as a direct result of receipt of the UBS, Natural England withdrew their objection.

21. At some stage probably prior to 23 July 2009 the Defendant's planning officers prepared a Decision Report ("DR" DB2/530). On 23 July 2009 Natural England sent a further letter which almost certainly triggered an Addendum Decision Report ("ADR" DB2/561). On 29 July 2009 the Regulatory Committee met to determine whether or not to grant permission for the scheme. The question of permission was the only item in their morning meeting and discussion lasted between 10.30 a.m. and 1.30 p.m. (minutes of

the meeting are at DB2/563-564). Their decision (CB1/3.1-3.17) was issued on 31 July 2009. Permission was granted.

22. The parties to this application complied with the pre-action protocol and an application for judicial review (my copy is undated) together with an application for urgent consideration and interim relief was issued. On 9 September 2009 Mr Justice Silber granted interim relief and made an order preventing the Defendant from proceeding with any works in connection with a planning permission. The parties agreed to a variation of that order and detailed directions for this rolled up hearing.

Ground 1 – the legal framework

23. Article 12(1) of the Habitats Directive provides:

"*Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:*

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.

24. Bats of all varieties are protected by this directive.

25. Article 16(1) of the Habitats Directive provides:

"*Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13,14 and 15 (a) and (b):*

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities."

26. Following agreed directions, the parties have, most helpfully, agreed propositions of law and in relation to ground 1 they have agreed that the critical issue is whether the proposed development would, directly or indirectly (see the shared view of the ECJ, the Commission and the UK in Case C-6/04 *Commission v UK*), affect the bats in the sense of deliberately disturbing them as set out in article 12 (1) (b) or in the deterioration or destruction of their breeding sites or resting places (article 12 (1) (d)).

27. The word "deliberate" was considered in Commission v Spain C-221/04 in the context of Article 12 (1) (a) and it is common ground that the same interpretation should apply throughout article 12 namely that:

"*it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species, or, at the very least, the accepted possibility of such capture or killing"*.

28. While the parties are agreed on the meaning of deliberate, they are not, however, at one as to the correct interpretation of "disturbance" in 12 (1) (b).

29. The Conservation (Natural Habitats etc.) Regulations 1994 (SI 1994/2716) transpose the requirements of the Habitats Directive into the law of England and Wales.

30. Regulation 3(4) of the Habitats Regulations provides:

"(4) Without prejudice to the preceding provisions, every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

31. It is accepted that the Defendant is a "*competent authority"* for the purposes of section 3(4) and that the exercise of their planning functions are caught by the section. Thus the operation of the Regulations is dependent on whether the requirements are affected by the proposal before the Defendant.

32. Regulations 39 (1) and 1A state, so far as relevant:

"*39 (1) It is an offence-…*

(b) deliberately to disturb any [European protected species]

(d) to damage or destroy a breeding site or resting place of such an animal.

(1A) For the purposes of paragraph (1) (b), disturbance of animals includes in particular any disturbance which is likely-

(a) to impair their ability-

(i) to survive, to breed or reproduce, or to rear or nurture their young; or

(ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or

(b) to affect significantly the local distribution or abundance of the species to which they belong."

33. The effect of the Conservation (Natural Habitats, etc) (Amendment) Regulations 2007 (operative from 21st August 2007) is to make clear, following the ruling in Commission v UK that the implementation of a planning permission is not a defence to a Regulation 39 offence.

34. Regulation 44 (as amended) establishes a licensing regime which seeks to implement the contents of Article 16 into English Law. Under regulation 44(3) it includes the preconditions for the grant of a licence. The appropriate authority is Natural England who have been given delegated authority by the Secretary of State for Environment, Food and Rural Affairs for this purpose.

35. Regulation 39 (1A) was added to the regulations by amendment, it seems clear, so as to ensure the more accurate transposition of Article 12 (1) (b) of the Directive following the decision in Commission v UK C-6/04.

36. Commission guidance on the correct interpretation and application of the Habitats Directive is to be found in the "Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC" (Final Version, February 2007)(tab 9 – agreed bundle of authorities). The Guidance states:

"(38)……On the other hand, while "disturbance" under Article 6 (2) [relating to the preservation of special areas of conservation, such as SPAs] must be significant, this is not the case in Article 12 (1), where the legislator did not specifically add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.

(39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a Member State…..For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a "disturbance" in terms of Article 12. ***On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example, scaring away a wolf from entering a sheep inclosure in order to prevent damage, should not be considered as disturbance under Article 12.*** *Once again, it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect*

carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above"

37. In Case C-6/04 Commission v UK the ECJ emphasised the strict and restrictive way in which the Habitats Directive should be implemented and applied (see in particular paras. 74, 80-81,111-112).

38. The requirements of the Habitats Directive were considered in R (Simon Woolley v Cheshire East BC [2009] EWHC 1227. In that decision His Honour Judge Waksman QC quashed a grant of planning permission on the ground that the grant of planning permission by Cheshire East BC was in breach of the requirements of Regulation 3(4) namely the failure of the LPA to consider the importance of the bats as a protected European species. That decision seeks to make clear that the LPA needs to engage with the provisions of the Habitats Directive in the sense that it needs to consider the protection afforded to EPS and to consider whether the derogation requirements can be met.

39. Paragraphs 27 and 28 of Woolley provide:

"27...the very clear guidance set out in paragraph 116 of ODPM Circular 06/05 which (a) refers to the giving of weight "to reflect these requirements" and (b) contemplates that as a result of taking account of the Directive the authority might refuse permission altogether. Indeed, Mr. Carter conceded, as he was bound to do in order to give any meaning to the last part of paragraph 116, that in a serious enough case, like an application to build a supermarket on a brown field site which would involve considerable disruption to a local bat population, the authority might refuse permission where there was adequate space somewhere else on the brown field site. But if that is right, it recognises that the local authority should engage with the provisions of the Directive. In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable "other' imperative reasons of overriding public interest" then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the Directive. The very attenuated duty suggested by Mr. Carter for the Council is in truth, no duty at all.

28. I have considered whether the Council could discharge its duty simply by making the obtaining of a licence a condition of the grant of permission. But that is not sufficient. After all, if no licence is obtained it is a criminal offence

so there is a clear incentive to obtain one anyway. And the making of a condition is not in truth engaging with the Directive."

Ground 1 – the breaches of the Habitats Directive and the Habitats Regulations

Ground 1 (i) – Failure to consider the deliberate disturbance of the bats

40. The Decision Report (DR), the Detailed Environmental Assessment (DEA) and the Updated Bat Survey all recognise the extensive presence of bats on the application site. The DR provides that "a number of bat species roost and forage along the corridor" (DB2/533, DR paragraph 3.7) and "the surveys also identified the presence of a diversity of bat species, which are protected, using the trees alongside the [rail] track for foraging" (DR paragraph 8.19). 5 different species of bats had been found regularly at the application site.

41. The development involves plans to clear vegetation where bats currently forage including a loss over some 9 years of some 4.6 hectares of vegetation. There will be mitigation planting but for the 18 months of construction, loss along the corridor will be total and it will then take at least 7 years for the mitigation planting to become established (although no doubt there will be a gradual increase over those 7 years in available vegetation for foraging). Although the scheme does not involve the felling of any tree within the envelope of the scheme which has been identified as a bat roost.

42. Although funding has not yet been obtained for the Phase 1B scheme, the planning permission was given for Phase 1B and it is again common ground that the effects on the environment of Phase 1B should have been considered by the Defendant. Phase 1B will result in partial severance of vegetation between Oakdene Wood and a bat roost that has been identified in the UBS some 40m east of the works at Tichborne Way across the width of the new road. That will result in an increased risk of collision with vehicles for bats commuting between the roost and Oakdene Wood. The UBS recommended the implementation of additional mitigation to minimise the risk of road casualties in that locality (DB 466). The Claimant contends that, having regard to the EC guidance, the continued disturbance represented by the busway, potentially lasting over many years, cannot be described as "sporadic".

43. Noise impact of certain parts of the works was anticipated to be large and would be felt over distances of 10 m over an 18 month period of construction. The UBS indicated that there was potential for species of bat which might be affected by increased noise levels. However, while recognising the adverse effect picked up by the Claimant's representatives at DB2 page 466 it should also be noted that in the same section the UBS indicates that "*With mitigation to minimise construction noise and vibration, it is certain that there will be no significant impact on bats from construction related noise and vibration*".

44. The UBS identified a loss of vegetation corridors which were used by bats for commuting between habitats. The short-term impact was anticipated to be negative at a local scale, with the implementation of mitigation (DB 469). The UBS also states that the implementation of mitigation to provide temporary artificial flight lines would reduce the impact to short-term slight adverse.

Again, though it is correct for the Claimant's representatives to pick up that adverse impact, it should also be noted that in the same section, the UBS indicates that in the long term "once replanting has become established, it is probable that all significant gaps in vegetation connectivity would be filled in and that there would be no residual impact of significance on bats from the fragmentation of habitats."

45. The Claimant also points out that the UBS recognises that light pollution may cause a moderate adverse impact on bats (DB 2/467). In fact, the picture was a mixed one, as the section dealing with lighting indicated. It stated: "the majority of bats recorded on the site ... are known to be tolerant of street lighting for foraging but not for commuting ... lighting can attract insects and provide a focus of foraging activity for bats that are tolerant of light. However, this can also result in adjacent habitats containing reduced invertebrate numbers, degrading the quality of the foraging habitat for less light tolerant species, such as Myotis sp. of which low numbers have been recorded on-site." The conclusion of the section is that with mitigation the likely impact upon bats of construction lighting (for the 18 month construction period) would be slight adverse.

46. In contrast to the adverse effects highlighted by the Claimant, the Defendant points out that suitable mitigation measures were provided for protected species including bats and policies in the Fareham and Gosport Borough Local plans, relating to protected species were complied with.

47. My summary of the points highlighted by the parties from the UBS (not intended to be comprehensive) should not be taken to minimise the great detail that is contained in the UBS. There can be no doubt that the Defendant considered the potential impact on bats most carefully through the investigations contained in that survey. The DR and ADR attempted to summarise that material for the members of the Regulatory Committee. In addition the members would have been aware that the UBS as well as all the other materials in connection with the application were placed on the Defendant's internet web site.

48. The Defendant acknowledge and accept that they failed to comply with the provisions of section 100 (B) of the Local Government Act 1972 (Authorities bundle 1 divider 8) which provides that :

"*Copies of the agenda for a meeting of a principal council and, subject to subsection (2) below, copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below*."

49. It is accepted that this must mean hard copies. The Claimant did not, at the relevant time, have an internet connection and so would not, unless she went to a public library, have had access to the many reports and other materials which accompanied the application. Letters sent to affected householders, as well as to members and interested parties, contained web links directing them to the web site but, while that, for many computer literate people with access to the web, would increase access to that material, it is conceded that the web

access did not amount to compliance with the section. However, the breach of section 100 (B) is not a ground of the application for judicial review and there is no evidence that the members of the committee were unable, if they wished, to get access to the source material summarised in the DR and ADR.

Content of Officers' Reports

50. It is the contention of the Claimant in relation to the issue of disturbance to bats, in relation to the Habitats Directive and indeed more generally, that the DR and ADR were inadequate, not a fair summary of the application and supporting reports and material and, indeed, were positively misleading. It may be appropriate at this juncture, therefore, to consider the legal requirements for a Planning Officer's Report (POR) and the general submissions of the parties on this issue before looking at the specific issues relating to disturbance of bats and its treatment in the DR and ADR.

51. Again the parties agreement on propositions of law is most useful. I have had an opportunity as well, both during the hearing and afterwards, to look at the original sources for the following propositions, which I consider to be accurate.

52. A planning officers' report:

i) Is not to be construed as if it were a statute

ii) The overall effect and fairness of the report must be considered.

iii) Members of planning committees can be assumed to have substantial background and local knowledge.

iv) The purpose of a report is to inform members of the relevant considerations relating to the application.

v) The duty on the planning officer is to provide sufficient information and guidance to enable members to reach a decision applying the relevant statutory criteria.

vi) Members rely on officers to produce fair, accurate and objective summaries and are not expected to discover imbalances in the report from studying other documents.

vii) In the same way that a planning officer cannot be expected to draw attention to every fact, it is not necessary for him to refer to each and every statutory duty. For example, there is no need to make express reference to section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004.

viii) An application for JR will not normally merit consideration unless the overall effect of the report significantly misleads the committee about material matters.

53. I also gained considerable assistance in dealing with this aspect of the case from the judgment of Lord Justice Pill in Oxton Farms v Selby District Council (unreported – Court of Appeal 18th April 1997):

"*It is important that those who make determinations under the planning acts are familiar with sections 70(2) and 54A of the 1990 Act and apply the test imposed by Parliament. It follows that a planning officer reporting to and advising council members who are to make a relevant decision must keep the test in mind in the information and advice he provides and in the manner in which he provides it.*

Clear mindedness and clarity of expression are obviously important. However that is not to say that a report is to be construed as if it were a statute or that defects of presentation can often render a decision made following its submission to the council liable to be quashed. The overall fairness of the report, in the context of the statutory test, must be considered.

It has also to be borne in mind that there is usually further opportunity for advice and debate at the relevant council meeting and that the members themselves can be expected to acquire a working knowledge of the statutory test. In my view the report itself in the present case was not only comprehensive in its treatment of the facts but sufficiently advised the Committee upon the statutory and policy framework within which the decision was to be taken. The Committee were adequately advised and their decision should stand. I would dismiss these appeals."

54. Judge LJ (who agreed with Pill LJ) stated:

"In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

55. Assistance is also to be gained from the judgment of Sullivan J. in R v. Mendip ex parte Fabre (2000) 80 P & CR 500(at page 509):

"Whilst planning officers' reports should not be equated with inspectors' decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that

material. 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.

56. I also had regard to the practical guidance of Hickinbottom J. in R (Miller) v. North Yorkshire [2009] EWHC 2172 (Admin) at paragraph 49, considering Judge LJ's approach in Oxton Farms:

In my respectful judgment, the duty on a Planning Officer goes beyond a duty simply not to mislead the Committee - but rather "includes a positive duty to provide sufficient information and guidance to enable members to reach a decision applying the relevant statutory criteria" (R (Lowther) v Durham County Council [2001] EWCA 781 at [98] per Pill LJ: see also the formulation of Sullivan J as to the purpose of a POR in Fabre above, namely to "...inform the members of the relevant considerations relating to the application"). However, Judge LJ was certainly (and, in my respectful view, properly) not encouraging to those who contend that deficiencies in a POR led to an unlawful planning decision by the relevant authority.

57. Finally, my attention was drawn to the judgment of McCullough J in Cran and others v London Borough of Camden [1995] RTR 346:

"Taken in isolation the reports to members appear to be balanced and objective, but the more familiar one becomes with the papers as a whole the more is this impression dispelled. Council members are busy; meetings are held in the evening and last, so far as the evidence goes, two or three hours. There are large agenda to get through. Reports are many (20 or more in most of the meetings with which this case is concerned), often accompanied by even longer appendices. Members rely on officers to produce fair, accurate and objective summaries. It is not sufficient to leave members to ferret out some point of significance or to discover some imbalance in the report from studying an appendix. One cannot expect perfection in the field of local government administration - or in any other - but affected citizens and representative organisations are entitled to expect objectivity in those whose duty it is to convey to decision - makers what they have suggested."

58. The Claimant contends that, despite the evidence in the UBS, members were not invited to consider the disturbance to bats. Instead, at paragraph 8.19 of the DR the Claimant contends that the members were simply told that the UBS had "been submitted with measures to ensure that there was no significant adverse impact to [the bats] from these proposals". To be accurate, that passage from 8.19 reads in full: "*The surveys also identified the presence of a diversity of bat species, which are protected, using the trees alongside the track for foraging. An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them from these proposals."*

59. It was also the case that in the ADR the members were told, as stated in the DR that Natural England had initially raised a holding objection to the application "*requiring additional survey information concerning potential for*

the presence of … bats, which are protected species. This survey work was undertaken and sent to Natural England, who are now satisfied and subsequently withdrew their objection."

60. Although it is correct to say that the DR and ADR both referred to bats as protected species and not European protected species, that omission and the limited detail in relation to bats is balanced by drawing the attention of the members to the Updated Bat Survey, to which the members had easy access and, most importantly, to the withdrawal of the objection of Natural England. The significance of that withdrawal is that it might be confidently expected that Natural England were aware of the terms of the Habitats Directive, the Commission Guidance and the Habitats Regulations, given that they were the authority responsible under the Regulations for granting licences under regulation 44 for anything done for the purposes listed in regulation 44 (2) which include "other imperative reasons of overriding public interest". By regulation 44 (3) Natural England ("the appropriate authority")

"shall not grant a licence under this regulation unless they are satisfied:

a) that there is no satisfactory alternative, and

b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range."

61. Regulation 44 transposes into the law of England and Wales the provisions of Article 16 of the Habitats Directive with its strict derogation provisions.

62. The Claimant contends that, as the DR and ADR make no further reference to the deliberate disturbance of the bats and their habitat nor do they refer to the duration of such disturbance, there was not an accurate summary of the findings of the UBS and, thus, the members' attention was not drawn to the relevant facts to enable them to reach a decision applying the relevant statutory criteria. Although the Claimant concedes that members were entitled to take into account mitigation measures, where an EPS will be deliberately disturbed for a period of up to 9 years, the Defendant was, following Woolley, under a duty to engage with the provisions of the Directive and afford it substantial weight in their decision making.

63. The Claimant further contends that, contrary to regulation 3 (4), the members failed to have regard to the requirements of the Habitats Directive in so far as they might be affected by the exercise of their functions, in particular, in failing to address their minds to the requirement under the Directive to the strict protection of bats against disturbance (in relation to which the DR and ADR failed to alert the members to their obligation by references only to bats as "protected species" as opposed to EPS), to the fact that, as there was a disturbance of bats, that a derogation from article 12 was required, and to the fact that the Article 16 derogation requirements could not be met. Indeed, the Claimant goes so far as to maintain that Natural England themselves appeared to be ignorant of the need for a derogation in these circumstances.

64. As to the latter point, Mr Chadwick, the Development Control Manager in Planning and Development in the Environmental Department of the Defendant Council, produces the letter from Natural England of 30th April 2009 (DB1/523) objecting to the grant of planning permission and calling for surveys to determine whether bats would be adversely affected by the proposals, a short letter of the 29th June 2009 reiterating Natural England's opposition and then, following the UBS a letter of 17th July 2009 withdrawing their objection, while making certain recommendations for mitigation of effects on the environment (such as restricting night time working). A further letter of the 23rd July 2009 was produced to me at the hearing which gives their advice in relation to the impact on the Portsmouth SPA and indicating that they had no objection to that either. It is true that detailed reasons for the stance that Natural England took were not contained in these letters and the Defendant's legal services department sought some clarification from Natural England of their stance in the light of the allegation in the Claimant's skeleton argument for this hearing that Natural England had been unaware of the requirements of the Directive.

65. A somewhat tart response was received to that request from Natural England in a letter of 13th October 2009 (D2/603) setting out Natural England's status as the government's statutory advisor in relation to nature conservation matters. It was created by the Natural Environment and Rural Communities Act 2006 (NERC) and its purposes set out in section 2 of NERC which states that "Natural England's general purpose is to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations thereby contributing to sustainable development." It confirms that they are the proper licensing authority in relation to EPS for the purposes of the Habitats Regulations. Later in the letter they state:

"*We are slightly dumbfounded by the unfounded suggestion in the Claimant's skeleton argument (paragraph 17) that Natural England does not understand the ramifications of the Habitats Directive or the Habitats Regulations (as amended) for EPS. Natural England is the government's statutory advisor on such matters. Its officers work on a daily basis with both the European and UK legislation and associated guidance, many are experts in this area, all are more than familiar with the statutory duties and tests that need to be applied when it is consulted in relation to a planning application for development and we would strongly refute any suggestion to the contrary.*"

66. The Claimant also points out that nowhere in the DR or ADR is there mention of section 40 of NERC. Section 40 states:

"*Every public authority must, in exercising its functions, have regard, so far as is consistent with a proper exercise of those functions to the purpose of conserving biodiversity*"

67. As to the meaning of disturbance, Mr. George QC for the Claimant points out, first, that the definition of disturbance under section 39 (1A) of the Regulations does not restrict disturbance to the particular types of disturbance set out in (1A) (a) and (b) and that there can be disturbance in breach of the Regulations (and, thus, of the Directive) where that disturbance was not

detrimental to the maintenance of the species, otherwise regulation 44 (3) (b) – the second matter of which the licensing authority must be satisfied before granting a licence to do work (i.e. the derogation provision) – would be redundant.

68. Mr. George also points out that it was government policy (Planning Policy Statement (PPS) 9, Nature Conservation) that "*Planning authorities should ensure that protected species are protected from the adverse effects of development, where appropriate, by using planning conditions or obligations. Planning authorities should refuse permission where harm to the species or their habitats would result, unless the need for, and benefits of the development clearly outweigh the harm*". There is no doubt, however, that the UBS considered PPS 9 (see DB2/458).

69. Mr George refers to paragraph 37 of the EC guidance and its reference to "negative impact" and contends that in the reports, particularly the UBS, it is absolutely clear that there is negative impact for bats.

70. Finally, Mr George invites me to consider making a reference to the ECJ under Article 234 of the EC Treaty, in relation to the interpretation of "disturbance". I should only refer if I cannot with complete confidence resolve the issue myself (R. v International Stock Exchange, ex p Else [1993] QB 534).

71. The Defendant's case is that there was no requirement to make specific reference to article 12 of the Habitats Directive in the DR or ADR as the works proposed would not cause deliberate disturbance to bats. Thus there would be no need to consider derogation. It stresses the conclusion of the bat survey:

"These surveys identified the presence of additional species of bats compared to the 2008 surveys, including Nathusius' pipistrelle and Myosotis sp. The surveys also identified greater levels of foraging and commuting activity along the disused railway. No roost sites were identified that are likely to be impacted by the scheme, although the presence of a Common pipistrelle roost was confirmed adjacent to the works.

As a result of the additional surveys, a greater level of confidence can be given to the predicted impact on bats. It is probable that there will be a short term moderate adverse impact on bats which can be reduced to slight adverse through mitigation. With successful mitigation, the long-term impact on bats of the works is anticipated to be slight adverse, and no significant impacts to bats are anticipated."

72. The conclusion of the bat survey and the response of Natural England in withdrawing their objection to the planning permission were, in the Defendant's contention, facts that demonstrate as clearly as possible that the Claimant's claim in ground 1 has no merit.

73. The Defendant contends that the case of Woolley can be distinguished in that there, despite the fact that a bat roost was actually to be demolished if the

planning permission were granted, the planning authority did not engage with the provisions of the directive. In this case, if the Defendant's submission that neither article 12 (1) (b) or (d) is engaged is correct, then consideration of derogation does not arise. Moreover, having regard to the detailed consideration of the impact of the development on bats, both in the screening report, the Detailed Environmental Assessment (DEA) and in the UBS, there can be no doubt that the Habitats Directive was engaged.

74. The Defendant also points out that the DR indicated that a condition would have to be imposed to secure a method statement concerning the mitigation for bats.

75. Mr Cameron QC for the Defendant maintains that the DR was not misleading and was a fair summary in that it reported to the members on the outcome of the process of consulting with Natural England, referred to the fact that bats both roost and forage, made express reference in paragraph 5.6 to the further work was carried out to assess the impact on bats and in paragraph 8.19 referred members to the fact that surveys identified a diversity of bat species (which were protected) using the trees alongside the track for foraging, that the UBS had been submitted and that measures were proposed to ensure that there was no significant adverse impact on bats.

76. In relation to the allegation of disturbance, Mr Cameron argues that if regulation 39 (1) (b) is read with 39 (1A) the fact that (1A) does not attempt to achieve inclusion by referring to a minimum level of disturbance, but to particular forms of material disturbance it can be concluded that there is some restriction on the extent that can be given to the meaning of that word in this context. He maintains that a proposal to carry out works in an area where bats have been seen to forage and commute does not affect survival chances, breeding success, or the reproductive ability of the animal and does not amount to deliberate disturbance of the wild animal. It was stated in Commission v UK that articles 12 and 16 were intended to protect the population of the species concerned. However, in oral argument he accepted that the concept of disturbance is not limited to disturbance that would be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

77. He also contends that the wide ambit of disturbance argued for by the Claimant would open up many people to prosecution or would cause Natural England to be inundated with applications for licences. Mr Cameron argues that the mere fact that there is a slight adverse impact on bats does not mean that there is disturbance within the meaning of that term in the directive. The Guidance strongly suggests that there must be a certain negative impact. The risk of collision with vehicles, mitigated so as to minimise the risk, cannot be said to be deliberate disturbance.

78. Mr Cameron does not invite me to make a reference to the ECJ.

Ground 1(ii) – Failure to consider the destruction of bat breeding sites and resting places

79. The Defendant's case is relatively simple in relation to this sub ground. The requirements of Article 12 (1) (d) of the Directive did not apply as the application proposals would not result in the deterioration or destruction of breeding sites or resting places so that there was no need to consider the derogation provisions in Article 16, transposed into the law of England and Wales by regulation 44 of the Habitat Regulations.

80. The Claimant contends that it is insufficient to rely on the conclusion of the UBS which states that "no roost sites were identified as likely to be impacted by the scheme, although the presence of the Common Pipistrelle roost was confirmed adjacent to the works".

81. The Claimant contends that the UBS acknowledges the limitations of the bats surveys and the high degree of uncertainty about its conclusions that there are no bat roost. In particular it is contended that the UBS focused only on the trees affected by Phase 1A of the scheme and that no additional surveys were undertaken on the trees with moderate to high potential for bats roost along the lengthy Phase 1B section of the scheme. The UBS also cites the statement of the Bat Conservation Trust which provides that trees with high potential for bat roosts should be assumed to be used at some part of the year or in the future. The UBS acknowledges that bats move roosts frequently. It is therefore contended that the surveyed trees may be used as roosts at different times of the year and are plainly at risk of being destroyed or damaged.

82. The Claimant also argues that members were never asked to consider whether the development would lead to the deterioration or destruction of sites concerned nor to consider the potential for indirect impairment. There is a significant risk that the Defendant's plans for the felling of trees with high "bat potential" are in breach of article 12 (1) (d).

83. The original contentions of the Claimant have, it is acknowledged by Mr George, to be taken with the caveat that, as a result of consideration of the Claimant's skeleton argument Mr Chadwick produced a third witness statement in which he referred to the bat survey maps which are an appendix to the UBS. Those do indeed identify trees with medium to high potential for roosting within Phase 1B. Mr Chadwick states (DB 1/A124):

" *There were trees of high and medium potential along the eastern end of Oakdene Wood. Although this extended into Phase 1B these were surveyed for the purposes of the UBS and considered in paragraph 6.7 of the UBS which states "no bats were seen swarming or entering any roost sites within the trees along the eastern end of Oakdene Wood""*

84. Mr George argued that in any event there were lots of trees identified by the survey which had high potential for roosting and at some time he contended that they would be used. Moreover, he contends that the reference in the bat survey to the Common pipistrelle roost not being directly affected by the

works ignores that there is equal concern under Article 12 (1) (d) for "indirect" impact.

85. Here reliance is placed on paragraph 17 of the parties "Agreed Propositions of Law" which states: "*In the present case the critical issue is whether the proposed development would, directly or indirectly, affect the bats in the sense of deliberately disturbing them as set out in 12 (1) (b) or in the deterioration or destruction of their breeding sites or resting places [in 12 (1) (d)]*" (the bracketed addition was at the invitation of Mr. George at the hearing). It is argued in paragraph 22 of the original Claimant's Skeleton Argument (CSA) that "*It was the shared view of the Commission, UK and ECJ that Article 12 (1) (d) protected breeding sites and resting places not only against activities having a direct effect on them but also indirect impairment*". Paragraphs 80-81 of Commission v UK Case C-6/04 is cited as authority for that proposition, which clearly founds the basis of the above cited "Agreed Proposition" but, while I differ from a proposition of law agreed between the parties with some hesitation, I doubt whether the proposition as drafted is supported by either the Directive, the Guidance or the cited passage from Commission v UK. The passage in the judgment reads:

"*80. Third, the Commission stated that the United Kingdom legislation as currently drafted would protect breeding sites and resting places only against activities having a direct effect on them, and does not take account of indirect impairment in accordance with the requirements of article 12 (1) (d) of the Habitats Directive.*

81. This argument cannot be upheld. The Commission has adduced no evidence capable of proving that the United Kingdom has failed to fulfil its obligations in this regard."

86. Regulation 39 (1) (d) of the Habitat Regulations, which transposes the directive into English and Welsh law has not been amended as a result of Commission v UK. Moreover, there is no explicit reference in Article 12 to the prohibition of "direct or indirect" deterioration or destruction of breeding sites or resting places. The term "deterioration" suggests the degradation of sites on the way to destruction and the transposition by the Regulations has utilised "damage" for "deterioration". The ECJ did not consider that there was any evidence that the UK had failed in its obligations to transpose.

87. It is also to be noted that the Commission Guidance to article 12 (1) (d) distinguishes it from the other prohibitions of Article 12 in that it does not "concern directly the species but protects important part of their habitats".

88. Thus, it seems to me that, contrary to the agreed proposition of law, it is unnecessary to read in to 12 (1) (d) or 39 (1) (d) any concept of "indirect" effect.

89. Thus, it seems to me that the argument of Mr. George that the existence of the busway which obstructs commuting of bats to and from the roost situated outside the area of works does not involve a breach of article 12 (1) (d) which is concerned not directly with the species but with its habitat.

90. The Defendant points out that the Detailed Environmental Assessment reported that a Phase 1 habitat survey was conducted (CB2-3/280) and that no roosts were identified in the bridges or in trees (CB2-3/331) and that Phase 1B was considered at CB2 – 3/379-380. There is detailed analysis of these sections of the DEA in paragraph 58 of Mr. George's Skeleton Argument in Reply but that analysis is undercut by the evidence of Mr. Chadwick that trees of moderate and high potential in Phase 1B had been surveyed to establish if they held roosts and none had been found. It is, of course, right, that the potential for roosts was a factor to be taken into account when "disturbance" was considered but it has limited relevance to an alleged breach of 12 (1) (d).

91. In any event, the DEA was to a great extent superseded by the UBS prepared in response to Natural England's objection. That survey did focus both on trees affected by Phase 1A and also included trees with high or moderate roost potential lying within Phase 1B which are restricted to Oakdene Wood. The only other trees with high or moderate potential in Phase 1B are not within the works corridor (DB1: A127). There was one tree which was initially assessed in the DEA as having high potential and which was subsequently, in the UBS, assessed as having low potential. The additional surveys did not identify any bat roosts within the trees or structures affected by the works and no roost sites were identified within the works footprint. Thus the Defendant contends, as a matter of fact, on the basis of original and updated detailed surveys by a team of trained ecologists, no known roosts would be lost during the works. That satisfied Natural England. There will, contends the Defendant, be no deterioration or destruction of any breeding site or resting place and, as a result Article 12 (1) (d) was not engaged.

Ground 4 – Failure to take into account the extent of harm caused by the proposals to badgers

92. It will be convenient to deal next with ground 4, ground 3 having been abandoned by the Claimant, before moving on to ground 2 as one of the sub-grounds of ground 2 also relates to badgers and much of the factual material is common to both.

93. The Protection of Badgers Act 1992 section 3 establishes a criminal offence if badgers' setts are damaged, destroyed or obstructed.

94. Under section 10 (1) a licence may be granted by the appropriate Conservancy Council authorising interference with a badger sett but imposing conditions on the licence.

95. Circular 06/05 advises that the effect of a development upon badgers is capable of being a material consideration in planning decisions.

96. It is common ground between the parties that the effect of a proposal on badgers is capable of being, and in this case was, a material planning consideration.

97. In the Claimant's skeleton argument it is indicated that "*Members were told, in the DR, that there was "a large population of badgers along the railway*

corridor (three main setts, two subsidiary setts and one outlier sett in the vicinity)" and that there were "*a large number of badger setts and large numbers of badgers along the route, some of which would need to be moved"*.

98. To be entirely accurate, that passage at 3.7 of the DR begins "*Detailed ecological surveys have been undertaken across the site over the last 18 months*". Given that the Claimant's case involves an allegation that the officers' reports were inadequate and misleading, it seems to me to be right to note that members' attention was drawn to the fact of surveys which were (in contrast to the belief of the Claimant when the first skeleton argument was drafted) published on the Defendant's website and were easily available to members.

99. The Claimant maintains that the members should have been told, but were not, the extent of the harm that would be involved to badgers and at paragraph 49 of the main skeleton argument quotes in detail from the DEA. In particular, the DEA indicated that loss of main setts was likely to cause significant impacts on the local badger population and to result in the killing and injuring of badgers in the affected setts and that it was only probable, not certain, that a major negative impact could be reduced by mitigation measures to a "slight adverse" impact. Neither were the members told, according to the Claimant, that Natural England considered that "*good protected species…will be lost as a result of the development*" and that it considered that there should be additional compensation habitat, so as to ensure a total net gain (DB2/529, letter of 23rd July 2009).

100. The Claimant contends it was insufficient simply to have told the members, at paragraph 3.7 of the DR that "*Accordingly, a strategy to mitigate the impact on these species [including badgers] has been developed. The main principles of the strategy are implementation of a badger sett exclusion and creation regime…and enhancement of the habitat of the retained embankment to provide continued habitat for displaced species"*.

101. It is contended that the Defendant erred in failing to take into account and affording at least some weight to the harm to badgers as a material planning consideration. Had members been made aware of the extent of the harm to badgers it is likely that at least one further member would have voted against the grant of permission in which case permission would have been refused.

102. The Claimant again complains of the failure to refer in the DR to NERC section 40 and contends that instead of being told that there would be dead badgers, the members were given an anodyne and misleading summary.

103. The Defendant contends that there was again very careful consideration of the impact of the proposals on badgers, not only in the DEA but also in a confidential mitigation strategy (to prevent wide knowledge of the whereabouts of relocated badgers) which was submitted to the Defendant and considered by officers.

104. The Defendant also points out that the DR at 8.19 refers in detail to the mitigation measures which were set out in the Environmental Report

(specifically referred to) and that the design and methodology of the proposals had been agreed with Natural England. Suggested condition 13 dealt expressly with the mitigation and the translocation of badgers. There was also reference to legal consents being required.

105. Mr. Cameron argues that if the detail required of the officers in relation to the examples of harm listed in the Claimant's skeleton were to be reflected generally in the DR that report would have been hundreds of pages long. He contends that the DR contained a proper summary of the effect on badgers and how that would be mitigated. It is accepted that at 3.7 of the DR the number of setts is not consistent with the DEA (3.10.70 – CB 3-334) but that is not enough significantly to mislead the members.

106. The Defendant had all the information it needed (particularly the DEA) to adopt a screening opinion in April 2009.

Ground 2 – failure to treat the proposal as an "EIA" development under the EIA Regulations 1999

107. Ground 2 is based upon a contention that the Defendant erred in law and/or acted irrationally in concluding that the proposed development was not EIA development.

108. The construction of a road where the area of works exceeds 1 hectare is a Schedule 2 development for the purposes of the 1999 EIA Regulations. The screening report submitted in November 2008 acknowledged (at paragraph 1.2.6) that the proposal was Schedule 2 development. The status of the development is agreed between the parties.

109. The issue for the Defendant was whether the proposed development was EIA development within the meaning given to that term by regulation 2(1) of the 1999 EIA Regulations namely:

"*Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location*".

110. Regulation 3 (2) provides:

" *The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."*

111. Regulation 4(5) of the 1999 EIA Regulations provides:

"Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development."

112. Where an EIA is required, Schedule 4 Part 1 para 4 of the EIA Regulations 1999 provides that the environmental statement must include "*A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development...".*

113. In R (Jones) v Mansfield DC [2003] EWCA Civ 1408, Dyson LJ (with whom Carnwath and Laws LJJ agreed) stated, at paragraph 17:

"Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case. The use of the word " opinion" in reg.2(2) is, therefore, entirely apt. In my view, that is in itself a sufficient reason for concluding that the role of the court should be limited to one of review on Wednesbury grounds."

114. In R (Anderson) v. York City Council [2005] EWHC 1531 (Admin), Elias J (at paragraph 52) considered the distinction between significant adverse effects and adverse effects:

"Again it seems to me that this is not a sustainable criticism. It is perfectly reasonable for the officer to conclude that there will be no significant adverse environmental impact yet, at the same time, for it to be thought desirable there should be some further investigation in order to ensure that such impact as there is, is reduced as far as possible.

115. At paragraph 60, Elias J considered the consideration that can be given to mitigation at the screening stage:

"Again, it seems to me that it is perfectly proper for an officer to conclude that a particular development will have no significant adverse environmental effects and rely upon the fact that there will be mitigating measures. It always will depend on the circumstances. In this case, the mitigating measures were tried and tested measures commonly adopted for difficulties of this kind."

116. In R (Dicken) v. Aylesbury Vale DC [2007] EWCA Civ 851 Laws LJ (with whom Richards and Mummery LJJ) agreed) stated (at paragraph 16):

"It is to be borne in mind that the test for the judicial review court is the irrationality test. Provided the local planning authority asked themselves the right question and arrived at an answer within the bounds of reason and the four corners of the evidence before them, then it seems to me their decision cannot be categorised as unlawful. Mr Clayton has been at pains to emphasise that the context of the issue here is one that engages the law of the European Union; that is of course right. But there are boundaries to the requirement for an EIA, set as surely by the Directive as by the Regulations. Much has been made of the suggested impact of EU law, but in my opinion I think there is a real risk of over-complicating what in essence is a relatively straightforward matter. If on the question whether the proposed development is likely to have significant environmental effects there is anything of substance to argue, then

the process of the Directive and the Regulations requires democratic public participation in that argument. This is, of course, a very important legal requirement as Lord Hoffman's opinion in Berkeley demonstrates. But if in truth there is nothing of substance to dispute, having regard, it may be, to plainly effective remedial measures, whether or not part and parcel of the development itself, then as I see it there is no requirement for an EIA. This case, as the LPA were entitled to find, is in the latter category. In short, they were entitled to conclude that there were no issues that required determination through the EIA process."

117. In R (Catt) v. Brighton and Hove [20091 EWHC 1639 (Admin) Sir Thayne Forbes summarised the position in this way (at paragraph 18):

" As it seems to me, it is clear that each case is fact-sensitive: Thus, in Lebus and in Gillespie , the particular facts of those cases justified the quashing of the planning permission in each case. They also concern, in contrast with the present case, prospective measures, rather than controls that had been tried and tested in relation to the very development under consideration. That distinction is an important one, because the development that was the subject of the screening opinion in this case was a continuation of an existing use, with no significant or other additional features making the environmental considerations more serious than those that were the subject-matter of the 2005 permission."

118. In R (Miller) v. North Yorkshire County Council [2009] EWHC 2172 (Admin), Hickinbottom J summarised the position as follows (at paragraph 30 - 31):

"..."likely" was considered in a different European environmental context (namely EC Directive No 79/407, the "Birds Directive") by Sullivan J in R (Hart District Council) v The Secretary of State for Communities and Local Government [2008] EWHC 1204. There he said (at [78]):"To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish risk. The concept of a 'standard of proof is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability (more likely than not) and the real risk standards of proof...." Although concerned with a different directive, that at least confirms and explains that, in a European environmental context, "likely" does not necessarily mean "more probable than not".

In the context of the ElA Directive and Regulations, "likely to have significant effects on the environment" is a phrase that has to be construed as a whole: and I respectfully agree with Dyson LJ in]ones that, rather than a hard-edged question of fact, it involves a question of planning judgment and opinion such that, in any set of circumstances, there is a range of valid answers. For a development to be likely to have significant environmental effects, it is certainly not necessary for it to be more likely than not that the development will have particular environmental consequences. For example, if a development has the potential for an environmental catastrophe, before the relevant provisions are brought into play it does not have to be more probable than not that such an event will occur in the future. As well as any inevitable

environmental consequences that will flow from a development, the phrase requires consideration of future environmental hazards or risks. That in turn requires consideration of both the chance of an effect occurring, and also the consequences if it were to occur."

119. It is also agreed by the parties as propositions of law (and I accept), that the scope of the EIA directive is wide, its purpose is very broad and it must be implemented in that spirit. Moreover, the fact that a project will have beneficial effects on the environment is not relevant in determining whether it is necessary to make that project subject to an assessment of its environmental impact. Circular 02/99 which gives guidance on EIAs indicates that in relation to the question of whether a development which falls within Schedule 2 should require an EIA "it is not possible to formulate criteria or thresholds which will provide a universal test of whether or not an EIA is required. The question must be considered on a case by case basis" [paragraph 43 of the Circular]

120. However Annex A to the Circular provides criteria on which EIAs are more likely to be required. In relation to roads it is stated that an EIA is more likely to be required for new development over 2 km in length [paragraph A22 of Annex A]. The busway is 4.7 km in length.

121. In order to set the background for his submissions Mr George quotes from the screening report (DB 1/32):

"*Since the railway fell out of use [in 1969], most of the railway corridor has become overgrown with vegetation. The section of the corridor taken up by the old railway tracks has been invaded by brambles, young trees and general scrub vegetation. On the outer side of this corridor the embankment and cuttings are now thickly vegetated with shrubs and trees, some of which are quite mature. This vegetation currently contributes positively to these surrounding urban (sic). It provides an amenity value to the surrounding residential and industrial areas as a linear green space dividing and softening the surrounding built environment. Consisting largely of native species, it is a useful wildlife habitat and ecological corridor for various flora and fauna. The scheme would require a corridor approximately 8 m wide to be cleared of vegetation to allow for the new hard surfacing and associated linear drainage.*"

122. The Claimant contends that even with mitigation it is difficult to see that there is not at least a risk that the project would have "*significant effects on the environment by virtue of factors such as its nature size or location*".

123. Although he does not shrink from arguing that the Defendant's decision that the proposed development was not EIA development was Wednesbury unreasonable, he acknowledges the height of the hurdle that he would have to leap (summarised by Laws LJ in Dicken, above), and couples with that argument, and at the front of it, his contention that the approach of the Defendant to the consideration of EIA development status was wrong in law on 6 subsidiary grounds, namely, that the Defendant failed to consider, properly or at all,

i) The presence of European Protected Species;

ii) the environmental impact of the Phase 1 proposal in the context of the whole of the South East Hampshire Bus Transit Scheme – in other words, they were guilty of "splitting" a larger scheme so that it was not caught by the EIA regulations;

iii) the potential for significant effects on the Portsmouth Harbour SPA;

iv) the extent of the impacts on bats, an EPS;

v) the extent of the impact on badgers, a National Protected Species (NPS);

vi) the visual, noise and contamination impacts of the scheme on the environment

124. Associated with sub-ground (vi) is a submission that the Defendant concentrated on the overall net impact of the scheme.

125. Sub-ground (i) is not, so far as I can see, contained in the Amended Grounds. Mr. Cameron, for the Defendant, took no point on that (indeed I suspect that its absence had not been noticed). On the assumption that Mr. George seeks further to amend the grounds to add it, I am content to give him permission.

Sub-Ground (i) – the presence of EPS

126. The Claimant argues that where there is a risk of, or potential for, any, save an absolutely minimal impact on EPS, there is (as a matter of law) a "significant effect on the environment".

127. Mr George acknowledges that a similar submission was rejected in R v St Edmundsbury BC ex p Walton [1999] JPL 805 at 813 but contends that this was in the context of significantly different provisions in the Habitats Regulations, which appeared to permit damage to EPS if planning permission was granted. It is of course correct that that no longer is the case as a result of the Conservation (Natural Habitats) Amendment Regulations 2007. He also argues that Walton was decided before the broad remit of EIA had become clear, and before the proper meaning of "likely" (as explained by Hickinbottom J in Miller) had been established.

128. In R v Cornwall County Council ex parte Hardy [2001] Env. L R 25, the Defendant Council produced an environmental statement which suggested the potential presence on bats on badgers. Mr Justice Harrison held at paragraph 61:

"*Our bats are European protected species. They and their roosts or resting places are subject to strict protection under the Habitats Directive. There was evidence in the ecological report that bats or their resting places may be found in the mine shafts if surveys were carried out. The strong advice of English Nature, Cornish Wildlife Trust and the Cornwall Bat Group was that those surveys should be carried out. The respondent concluded that those*

surveys should be carried out. They could only have concluded that those surveys should be carried out if they thought that bats or their resting places might, or were likely, to be found in the mine shafts. If their presence were found by the surveys and if it were found that they were likely to be adversely affected by the proposed development, it is, in my view, an inescapable conclusion, having regard to the system of strict protection for these European protected species, that such a finding would constitute a "significant adverse effect" and a "main effect" within the meaning of paragraphs 2 and 3 of Part II of Schedule 4 to the Regulations, with the result that the information required by those two paragraphs would have to be contained in the environmental statement and considered by the Planning Committee before deciding whether to grant planning permission." (Claimant's stress)

129. Mr. George also invites me to consider an Article 234 reference in relation to this point as well.

130. The Defendant contends that the reasoning in St Edmundsbury should stand. The submission made in that case was based upon a contention that there was an absolute bar on any deliberate disturbance of the species and destruction of breeding sites. That submission was rejected as (in part) the Habitats Regulations did not impose such an absolute bar. It is correct that the Regulations have since been amended but the effect of regulations 39 and 40 are not to impose an absolute bar on deliberate disturbance or destruction.

131. Hardy, on the other hand, concerned the interpretation of paragraphs 2 and 3 of Part II of Schedule 4 to the EIA regulations and not the definition of EIA development in regulation 2(1). The "inescapable conclusion" referred to by Harrison J relates to the need to include an assessment of the effect on bats in an ES, not to the question of whether an ES is required.

132. Thus, Mr. Cameron argues that Mr. George's contention based on Hardy is not supported by authority and is not supported by a clear reading of the definition of EIA development.

133. He accepts however that the presence of EPS is a factor to take into account when considering if Schedule 2 development is EIA development. However, the statutory test is quite clear, namely whether the development is likely to have significant effects on the environment by virtue of factors such as its nature size or location. He contends that the Defendant, in this case, had sufficient information, including a screening report, a DEA and the DR (based on the UBS) to enable it to consider whether the development was likely to have significant effects on the environment, and on bats in particular. He stresses the conclusion to the executive summary of the UBS ("no significant impacts to bats are anticipated"). Woolley is distinguished in relation to the inclusion of conditions 2 and 15 on the planning permission, in that, in contrast to Woolley, those conditions required specific and known mitigation measures to be implemented.

Sub-Ground (ii) – Should the impact of a wider scheme have been considered?

134. The proposition that developers should not be allowed to split up a larger project in order to avoid the requirements of the EIA Directive was set out by the ECJ in Commission v. Spain [2005] Env LR 20 at paragraph 53 :

> *"If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division."*

135. Advocate General Kokott noted in her Opinion in Ecologistas at paragraph 51 (and was upheld by the ECJ at paragraph 44):

> *"Lastly, the objective of the EIA Directive cannot be circumvented by the splitting of projects. Where several projects, taken together, may have significant effects on the environment within the meaning of Article 2(1), their environmental impact should be assessed as a whole. It is necessary to consider projects jointly in particular where they are connected, follow on from one another, or their environmental effects overlap (see Case C-392/96 Commission v Ireland, paragraph 76 and Case C-2/07 Abraham and Others, paragraph 27)."*

136. In a very early EIA case, R v Swale BC ex p RSPB [1991] 1PLR 6, at 16 it was said:

> "*…the question of whether "it would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location" should, in my judgment, be answered rather differently. The proposals should not then be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development."* (my stress).

137. Swale was the stated basis for the statement in Circular 02/99 paragraph 46 (which I assume to be the most up to date Government Guidance on EIA development) :

> "*For the purposes of determining whether EIA is required, a particular planning application should not be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development. In such cases, the need for EIA … must be considered in respect of the total development."*

138. Mr. George argues that Swale was decided before the meaning of "likely" had been elucidated (in 2008, as far as the UK was concerned, but that did not lead to the Circular being amended) and that its test of "inevitability" is inconsistent with more recent case law in relation to the precautionary aspects of the EIA directive. He, thus, argues, that if more substantial development cannot be said to be inevitable, but merely likely, it ought to be assessed as

part of the effects of the project. If I have any doubt about the proper approach to this issue he again invites me to consider an Article 234 reference.

139. He refers also to the Advocate General's opinion in Case C-396/92, Bund Naturschutz in Bayern eV v Freistat Bayern [1994] ECR I-3717 ("the Bavarian Roads case"). The AG reinforced the purposive and precautionary approach to the environmental assessment of Phased projects:

" the subject matter and content of the environmental impact assessment must be established in the light of the purpose of the Directive, which is, at the earliest possible stage in all technical planning and decision making processes, to obtain an overview of the effects of the project on the environment and have projects designed in such a way that they have the least possible effect on the environment. That project entails as far as practically possible account should also be taken of any current plans to extend the project at hand"

140. He further contends that it was practicable for the effects of potential later Phases to be assessed, relying on the Mott Gifford draft route selection report which assessed a large number of routing options and provided a basis for the Phases and the options which need then to be considered, to a response to the DfT at the end of 2008 referring to the inclusion of a major interchange at Fareham Railway Station and improvements to on street sections in Gosport and towards Fareham on which work was underway at the end of 2008 and to a Mott Gifford report of May 2009 which anticipated further "off road" schemes.

141. Mr. Cameron contends that the mere fact that the busway is 4.7km in length does not inevitably mean that it should be found to be EIA development or such projects would have been included as Schedule 1 developments for which EIAs are required.

142. The Defendant adopted a screening opinion on the 9th December 2008 (DB 182) as a result of a November 2008 screening report (DB1). The screening opinion adopted on 20th April 2009 (DB 338) referred to the proposal submitted for planning permission and on the 29th July 2009 the Regulatory Committee adopted a screening opinion to the effect that the proposed development was not EIA development (DB 564).

143. Paragraphs 8.7 to 8.10 of the DR (DB1/545-546) contained detailed advice on screening and correctly set out the criteria in Schedule 3 to the Regulations and the advice given in the Circular.

144. Moreover, the Defendant contends that to the extent that it was able to do so and to the extent that it was relevant, the Defendant did consider the effect of the wider South East Hampshire Bus Transit Scheme (SEHBTS). It is, in any event, not clear factually that the development is plainly part of a wider scheme. The business case submission makes clear that the application scheme is capable of and designed to join with existing services and is not dependent on any further or wider scheme. In that respect, it differs from a number of the European authorities where it is plain that what was firmly

planned was, indeed, a larger scheme which was being built in parts. Here, the Defendant contends that there is no developed wider scheme; rather, at best, there is a "vision" for such a scheme (Screening report paragraph 4.1: DB 1-21).

145. The Defendant also argues that there is no evidence to support the contention that any wider scheme would have significant environmental effects as asserted by the Claimant.

146. The screening report submitted in November 2008 upon which the first screening opinion was adopted described the "vision" for the BRT system as being for an extensive network of high quality services connecting Gosport and Fareham eastwards to Portsmouth, Waterlooville, Havant and the QA Hospital and westwards to Whiteley, Segensworth and beyond. The cumulative effect together with a wider BRT scheme was considered in section 15.7 of the report and Table 15.5. That table was the subject of considerable criticism in oral argument from Mr. George, who complained that it was criticisable for "netting" the adverse effects of the scheme with its wider benefits for the community and the environment but I was satisfied when it was explained to me orally by Mr. Cameron that the adverse effects could still be distinguished but that the report also looked, as was essential it did, at the cumulative effects of the wider scheme coupled with the application scheme.

147. A further screening opinion was adopted on 20th April 2009 which also referred to the vision for a wider scheme. There is no doubt that the effects of both Phase 1A and 1B were considered.

148. As far as the advice given in the DR and its reference to whether the scheme should properly be regarded as an integral part of an inevitably more substantial development, which led to the advice to the members that the screening should only be for the proposal submitted, Mr. Cameron relies on the fact that the wording in Swale was adopted in the 1999 Circular and contends that the Defendant cannot be criticised through its officers from relying on the advice in an extant circular.

149. However, he points out that the DR does not advise members that the question of whether the proposal was inevitably part of a more substantial development was the sole test to be applied – it made it clear that that was one issue and not the sole issue. He refers to the minutes of the meeting of the Regulatory Committee which record that "*Members were advised that an EIA was not required as the proposal was a free standing project that did not give rise to "significant environmental effects*".

Sub-ground (iii) – did the Defendant fail to consider the potential for significant effects on the Portsmouth Harbour SPA

150. The Portsmouth SPA lies, at its closest, within 30 m of the application site. Condition 7 was imposed on the permission for the reason that "there is potential for unexpected contamination to be identified which may pose a risk for controlled waters". As, in general, monitoring conditions should not be

imposed unless it is necessary to do so (see Hereford Waste Watchers Ltd. v Hereford Council [2005] EWHC Admin 191) the Claimant contends there is a risk of contaminated run off and thus telling the members in the DR that there was "zero probability or risk" to the SPA meant that they failed to take account of that risk to the SPA and were, thus, in breach of the EIA Directive and Regulations. The Claimant also contends that the Full Business Case (FBC) and Appropriate Assessment Screening Matrix (AASM) accepted that the works had the potential for disturbing the foraging of overwintering birds.

151. The Defendant points out that the DEA considered effects on nature conservation and biodiversity and noted that it was anticipated that the proposed works wound not have an impact on the SPA. Moreover, mitigation measures can be taken into account when screening for EIA and for appropriate assessment. The AASM assessed the effects of pollution due to run off as "negligible".

152. Additionally, the members were entitled to take account of the views of Natural England, whose advice was that subject to avoidance measures being fully implemented the proposal would not be likely to have a significant effect on the SPA. There was no need for the planning officer to set out reasons for the adoption of the screening opinions when reporting the Planning Application to the Regulatory Committee as long as his report was a fair and accurate summary. The DR in fact refers to the AASM, correctly records that the impact of the proposals on the important sites in the vicinity was negligible. That advice was consistent both with the DEA and the AASM. The ADR drew the members' attention to the advice of Natural England. The fact that a condition was imposed does not undermine the conclusion that the development would not be likely to have significant effects on the environment – it simply ensured that necessary mitigation measures would be put in place.

Sub-ground (iv) – did the Defendant fail to take account of the significant effect on bats?

153. Mr. George again relies on Hardy and the significance of the presence of an EPS. He also contends that the DR and ADR failed properly to summarise the adverse effects on bats. I have already tried to summarise his arguments on bats and his original skeleton and reply need not be further summarised by me.

154. The Defendant reiterates that the conclusion of the UBS was that no significant impacts to bats were anticipated.

Sub-ground (v) – failure to take account of the extent of the impact on badgers, a National Protected Species (NPS);

155. The Claimant contends that the advice in the DR at paragraph 8.19 that "suitable mitigation measures are proposed for badgers" and that there would be a "badger sett exclusion and creation regime" together with the inclusion of the condition (14) relating to "*precautionary measures…to protect badger setts that remain*" failed to address the issue of whether the development might cause a significant environmental effect on the badgers.

156. Moreover, she argues that it would be irrational to suppose that conditions on the permission or licences obtained under section 10 of the Protection of Badgers Act 1992 could or would prevent a significant impact on the badgers.

157. Mr. George contends that the DEA references in his main skeleton argument relating to specific impact on badgers could not rationally be considered not to constitute a significant effect on the environment

158. The Defendant indicates that at the time of adopting the December 2008 screening opinion the Defendant took into account the information in the November screening report which contained information on the extent of the impact on badgers and when they adopted the April 2009 screening opinion they also took account of detailed information in the DEA as well as taking account of the confidential mitigation strategy.

159. The potential impact on badgers was also summarised in the DR.

160. Thus it simply cannot be said that the Defendant failed to take account of the extent of the impact on badgers when it determined that the proposal was not EIA development. The DEA concluded that with mitigation measures the effect on badgers would be, at worst, slight adverse, i.e. not significant.

Sub-ground (vi)- failure properly to consider the visual, noise and contamination impacts of the scheme on the environment – did the Defendant concentrate on the overall net impact of the scheme?

161. The Claimant relies on the dictum of Hooper J. in R v St. Edmundsbury BC ex p Walton (op cit):

> "*[the planning officer] was attaching too much weight in deciding whether the effect is "significant" to the fact that the road is, in one sense, only of local importance, that is to the inhabitants of Bury St. Edmunds. A road may have a significant effect albeit that its effect is local in this sense"(Claimant's stress)*

162. The Claimant first contends, again, that the DR was misleading in that it made material omissions from the DEA. As far as construction noise was concerned, it omitted that there was likely to be "significant impact" (after mitigation) at one residential property in Phase 1A and "significant impacts" in Phase 1B (CB2/3-474 paras 6.8.3 and 6.8.5). In relation to construction vibration, there was likely to be "s*ignificant vibration impacts…at seven dwellings*" in Phase 1A and "Eight dwellings…would be impacted significantly by vibration" in Phase 1B (CB2/374 paras. 6.8.4 and 6.8.7). The DEA also indicated that "*37 dwellings would experience a significant residual adverse noise impact*" in Phase 1A and a further 1 additional building (a school), would experience a significant residual impact in Phase 1B(CB2/3-474-5, paras.6.8.9 and .15) (paragraph 106 (c) of the original Claimant's skeleton is in error, as was pointed out by Mr. Cameron and accepted by Mr. George at the hearing). As far as operational vibration was concerned, 1 dwelling in Phase 1A and one in 1B would be affected. Finally, in relation to visual impact, the DEA refers to "*significant adverse visual impacts for the majority of receptors close to the scheme*".

163. In the DR, in contrast, members were told that major adverse impacts from construction noise, after mitigation, were only likely at 2 locations (which, Mr. George contends, left out of account Phase 1B), and that 37 houses would suffer an increase of in excess of 3dB, and that the impact on the school in Phase 1B was ignored. As to visual impact, the DR described the impact as "locally intrusive". The opinion in the DR that "*any impacts would be negligible or within accepted standards*" is described by Mr. George as without justification, as is the failure in the DR opinion to accept the finding in the DEA that there *would* be numerous residual significant effects.

164. The DEA showed that the scheme was likely to result in a "*significant adverse effect for most visual receptors with close to middle distance views towards the scheme*". In contrast the DR provides that "*once operational the development's visual impact would still be apparent for those who live close by the site but the impact would be mitigated by additional planting and landscaping*". In the DEA it is stated that the majority of the significant adverse effects would reduce to "slight adverse" only once the mitigation planting forms a screen "15 years after the opening of the scheme". That is not mentioned in the DR. In Phase 1B the majority of residential properties along the route out of a total of 170 dwellings would experience "moderate adverse" effects on visual amenity even 15 years after the opening of the busway.

165. Mr. George takes issue with Mr. Cameron's denomination of the works as "relatively minor" (in the sense, presumably, that there was already a route prepared for the bus way which had simply to be converted) and contends that they were "significant engineering works". It seems to me that the members were experienced enough to be able to judge the extent of the works themselves.

166. Mr. George argues that the mere fact that an impact is temporary does not mean that it cannot be significant and I accept that Schedule 4, Part 1 para 4 of the EIA Regulations 1999 (accurately transposing the directive) provides that an environmental statement must include "*A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development"*.

167. Some effects, clearly, in relation to significant residual adverse noise impacts to 75 dwellings and significant adverse visual impacts for the majority of receptors close to the scheme, were not temporary. Mr. George also contends that those impacts did not affect a small number of receptors.

168. Mr. George contends that had these omissions not occurred and had the members taken into account and been properly directed on the real local effects of the development, it would not have been possible for them to have concluded that there was not, at least, a "risk" that the project would have "significant effects on the environment". If they did take the impacts noted in the DEA into account then their decision was irrational

169. In relation to the accuracy and fairness of the DR, Mr. Cameron again maintains that it cannot be right that every possible impact should be set out in the DR. The material impacts were fully considered in the DEA and screening report and those documents were available as background reports for the members It was necessary for the members to be aware of the material impacts and whether they would have a significant effect on the environment. The DR accurately summarised the effect of the impacts which had been correctly identified in the background documents.

170. If the reports to the members were not misleading, then Mr. Cameron contends that there is nothing to indicate that the opinion reached by the Defendant was irrational. The construction impacts identified were temporary (albeit lasting over a reasonably long term period) and they and the visual impacts affected a limited number of receptors.

171. It is also convenient at this stage to consider a more general point made by the Claimant in relation to what she alleges is the Defendant's failure to comply with its obligations under the EIA Regulations and the Directive. It is contended that the Defendant erred in concentrating on the overall net impact of the scheme; in other words, in its screening process, the Defendant identified the overall or net environmental effects of the scheme rather than seeking to assess whether there were *any* significant effects of the scheme.

172. A scheme might bring overall environmental benefits which might outweigh its potentially adverse environmental effects; that is a very material consideration for the decision maker when making the final decision to grant planning permission but that does not mean that the potentially adverse environmental benefits should not themselves be subject to the EIA process, which itself contains an important element of public consultation.

173. Mr. George relies heavily on the ECJ ruling in Ecologistas en Accion-CODA v. Ayuntamiento de Madrid- Case C-142/07 making it clear that the fact that a project will have beneficial effects on the environment is not relevant in determining whether it is necessary to make that project subject to an assessment of its environmental impact

174. Mr. George submitted that the incorrect approach of the Defendant was exemplified by the title of chapter 15 of the Screening Report (DB1/145) "Combined and Cumulative Effects") and the conclusions in that chapter such as "*the "slight adverse" noise and visual impacts are more than offset by the beneficial effects of relieved severance, improved journey time and improved accessibility to socio-economic community resources*". He also suggested that the "netting" procedure could be seen in table 15 to that chapter and other references in that chapter which he sets out in his skeleton arguments and also in oral argument.

175. He contends in summary that while the DR correctly identified the 5 issues which had required further detailed information in the DEA (DR para. 8.10) it nowhere directed members to consider whether there were *any* potential significant environmental effects, as opposed to applying an overall approach, which approach, he contends virtually assured the conclusion by the members

that the proposals were not EIA development, albeit by a small majority (see minutes of the critical meeting of the Regulatory Committee at DB2/ 563-564 – the screening opinion that the proposed development was EIA development was adopted by 7 votes for and 2 against with one abstention; the proposal that no appropriate assessment was required in relation to the effect of the proposal on the SPA was adopted by 10 votes to 1 with 2 abstentions; the grant of planning permission for the scheme (Phase 1) was passed by 6 votes to 5 with 2 abstentions).

176. Mr. Cameron submits that the Claimant has confused chapter 15 with a conclusion. He pointed out that, in line with the guidance in the Directive and the Schedule to the EIA regulations, the Screening Report follows a conventional layout for environmental assessment. Individual earlier chapters consider construction and operational effects on various aspects of the environment and then there is a chapter (15) on combined and cumulative effects which can include consideration of impact interactions. It is not intended to be a summary of the previous chapters but performs an entirely different function.

177. He pithily concludes "neither a combined nor a cumulative effect is a net effect."

Conclusions

Ground 1 – Habitat Directive- sub ground (i) -Disturbance to Bats

178. Having regard to the agreed propositions of law and the guidance in Oxton Farms, Fabre, Miller and Cran, I am not persuaded that the DR and ADR were inadequate, inaccurate, unfair or misleading. In relation to disturbance of bats, given that the conclusion of the bat survey was that: "*With successful mitigation, the long-term impact on bats of the works is anticipated to be slight adverse, and no significant impacts to bats are in anticipated"* and that Natural England had withdrawn its objection, a fact referred to by the officers, the references in 3.7 of the DR are in my judgement a short but adequate summary of the position.

179. I do not consider the absence of a reference to section 40 of NERC renders the report defective. I do consider that awareness of that section can be assumed in members of the Regulatory Committee. In any event, in my judgement, the point of section 40 is that every public authority shall have regard to the purpose of conserving biodiversity in practical terms and not pay lip service to it. Here, in the screening opinion, the DEA and in the UBS, the authority was in a very practical and detailed way, having regard to the section.

180. Equally, the reference to bats as a protected species, rather than an EPS did not make the report significantly misleading, particularly when directed to the Regulatory Committee.

181. It seems to me to be correct that if the conclusion was correctly drawn by the officers, as a result of their detailed investigations, culminating in the bat survey and as a result of the withdrawal of the objection by Natural England,

that there would be no disturbance of the bats, within the meaning of the Habitat Regulations and the Directive, then no question of derogation under Article 16 arose and it was quite unnecessary to make reference to Article 12 of the Directive. Equally, if their conclusion that there was no such disturbance was incorrect, then, patently, the members should have been advised that a derogation should be sought, the DR and ADR would have been inadequate, and there would have been insufficient engagement with the Directive and the granting of planning permission would have been clearly unlawful.

182. The fundamental issue, therefore, recognised as such by both parties to be a central issue in this case, is whether the proposals **did** lead, directly or indirectly, to disturbance of bats within the meaning of Article 12.

183. In my judgment, having regard to the inclusive definition of disturbance in Article 12 (1) transposed precisely by regulation 39 further definition by the Court is both unnecessary and unlikely to be helpful, particularly in the light of the Commission Guidance. It is, however, in my judgment, important that any authority should approach the question in the correct way. In relation to a substantial project such as this, detailed expert evidence and a thorough survey of the area affected will almost certainly be essential and the planning officers of an authority which insists on such evidence and survey must accurately and fairly summarise the conclusions of the report in which the evidence is contained.

184. Once the evidence is available to the authority and its officers, the authority and officers must have regard to the aims of the Directive set out in the preamble, namely, the maintenance of biodiversity and the need to take measures to conserve certain threatened species.

185. Thus, as Article 12 (1) (b) makes clear, any authority considering whether proposals for works may involve disturbance to an EPS will first need to consider whether there is evidence that the disturbance affects adversely the breeding, rearing, hibernation or migration of the EPS concerned. In this case, the detailed findings of the UBS do not support any such adverse effects and none is argued on behalf of the Claimant.

186. Third, the authority should have regard to the Commission Guidance.

i) In particular, it should first be mindful that disturbance may have indirect as well as direct negative effects on the species concerned as explained in paragraph 37 of the Guidance. There is no doubt that the UBS considered such indirect negative effects (see, for example, the first paragraph of section 9.2.6 – Potential Impacts to Bats from Noise and Vibration – the waking of bats in hibernation may result in the use of fat reserves, reducing the condition of the bats; disturbance during daylight hours increases the risk of predation).

ii) Second, it must bear in mind that while “disturbance” under article 6 (2) (which is concerned with the preservation of special areas of conservation) must be significant, the legislator did not explicitly add

that qualification to Article 12 (1) (b). However, logically, having regard to the aims of the Directive, for disturbance of a protected species to occur a "certain negative impact likely to be detrimental" must be involved.

iii) Third, in order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population and biogeographic level in a Member State. Because it is necessary to look at that level of threat, it is inevitable that a planning authority will be reliant on expert advice, and understandable that it will be particularly concerned to ascertain the views on Natural England, which body is in a better position than a local planning authority to take an overview of the impact of a project on an EPS.

187. The 2 examples given in the Guidance represent close to 2 extremes of what might or might not constitute disturbance; scaring away a wolf from a sheep enclosure to avoid damage, though deliberate, does not amount to disturbance. It is obvious that there is no negative impact likely to be detrimental to the species involved. On the other extreme, disturbance of egg laying turtles by the driving of mopeds on their breeding beaches, was very likely to have a negative impact likely to be detrimental to the species. The Guidance recommends a careful case by case approach to consideration of the level of harmful disturbance taking into account the specific characteristics of the species involved.

188. Here the Defendant notified Natural England of the proposals and responded to their specific objections by commissioning the detailed and expert UBS. The detail of the survey shows the careful consideration of potential direct and indirect harm to the EPS, considering, as the authority is entitled to do, the methods of mitigation which could reduce the potential for harm. The executive summary (DB2/456) makes it clear, in my judgment, that the proposals did not involve deliberate disturbance of this EPS within the meaning of Article 12 (1) (b) or regulation 39 of the Habitat Regulations. The officers' conclusions on that issue were supported, most importantly, by the withdrawal of the objection of Natural England. They were right not to invite the members to consider derogation because the proposals did not involve deliberate disturbance. On this issue I should not consider questions of Wednesbury unreasonableness but the issue of whether Article 12 (1) (b) and regulation 39 (1) (b) would be contravened by the proposals. I am satisfied that they would not and that the decision of the Defendant on this issue cannot be regarded as unlawful.

Sub Ground (ii) – damage or destruction of a breeding site or resting place of bats

189. In my judgment, this is a pure question of fact which has been decided by the updated bat surveys. The Claimant's representatives were misled into thinking that trees in Phase 1B had not been surveyed whereas, as Mr. Chadwick's third statement makes clear, they had been. No breeding sites or resting places were found within the footprint of the works.

190. I do not accept that Article 12 (1) (d) is concerned with an "indirect" effect such as the obstruction of bats commuting to and from a roost not within the works footprint. Such obstruction does not amount to deterioration or damage or destruction of a breeding site or resting place.

191. Of course bats move their roosts from time to time. It may be that during construction a tree within the footprint of the works will be found to have bats roosting in it. If that is the case, those undertaking the works will have to comply with the licensing regime under the Habitat Regulations, if they can. That does not mean that the grant of planning permission for the scheme is unlawful for a breach of Article 12 (1) (d).

192. In my judgment, therefore, Ground 1 of the Claimant's Amended Grounds (I granted permission to amend at the hearing) is not made out.

Ground 4 – Failure to take account of the extent of harm caused by the proposals to badgers

193. The preliminary issue here is whether the DR was a fair and accurate summary of the background information and whether it was misleading. The Defendant has accepted an inconsistency between the DR and the DEA in relation to the number of setts but in my judgment, in context, that, in itself would not render the DR significantly misleading about a material matter.

194. I have re-read the entire sections of the DEA dealing with badgers, the letter from Natural England referred to by the Claimant and also the sections of the DR. With mitigation, which is specifically explained in the DEA, the effect on the badger population overall is considered in the DEA to be "slight adverse". The Natural England letter stresses that the mitigation in the DEA must be completely effected, but then accepts the proposals. The DR, in my judgment, produces a short but substantially accurate summary of several pages of the DEA and while there remained a risk to individual badgers even with the mitigation measures, I consider that the DR provided sufficient information and guidance to be able to reach a decision applying the relevant statutory criteria and did not mislead. The source material was, in any event, readily available to the Regulatory Committee and was flagged up in the DR

195. As to the decision, the Claimant must establish that it was Wednesbury unreasonable. Having regard to the conclusions of the DEA, the mitigation measures adopted, the contents of the DR and the acceptance of the proposals by Natural England referred to in the DR, in my judgment, the Defendant had adequate material upon which to base their decision on this issue and that decision cannot be regarded as an irrational one.

Ground 2 – failure to treat the proposal as an "EIA" development under the EIA Regulations 1999

Sub-ground (i) – failure to consider the effect on bats

196. The passage in Hooper J's judgment in the St. Edmundsbury case (page 891 from "*Mr. McCracken submitted*" to "*whether an environmental statement*

should be required" does, in my judgment, make it clear that His Lordship was rejecting an almost identical submission about the effect of the presence of an EPS on the necessity for an environmental statement as is being made by Mr. George in the current case. It does not seem to me that the later amendment of the Regulations to comply with Commission v UK in any sense undercuts the reasoning of Hooper J which appears to me to be based on his construction of the 1988 Regulations, in particular the issue of whether the presence of an EPA must mean that the development would have significant effects on the environment.

197. As to Hardy, if one reads the judgment of Harrison J. from paragraph 56 to the passage quoted by the Claimant (paragraph 61) it is absolutely clear that Mr. Cameron is correct in his submission that Harrison J. was referring, not to the issue of whether an EIA was required, but to the issue of whether its contents, if required, should include an assessment of the effect of the development on bats. The passage does not, therefore, assist Mr. George.

198. That said, St. Edmundsbury is only persuasive authority on me, but, I should indicate that, on the issue of the construction of Regulation 2(1) of the 1999 Regulations and the phrase "*likely to have significant effects on the environment by virtue of factors such as its nature, size or location*" I respectfully agree with Hooper J's construction of those identical words in the 1988 Regulations. It was open to the legislator to make the presence of EPS a trigger for an EIA. That was not done. I entirely accept that the presence of EPS is a weighty factor for the authority to take into account, but I do not accept, as a matter of law, that where there is a risk of, or potential for any, save an absolutely minimal impact on EPS, there must be the likelihood of a "significant effect on the environment".

199. Thus, I do not consider that the authority were, as a matter of law, obliged to consider the scheme as EIA development. In my judgment, they had ample detailed information available to them, in the screening report, the DEA and, in particular, in the UBS to make their judgment on regulation 2 in relation to bats. They were entitled to take account of clear and tested mitigation measures. The conclusion of the executive summary to the UBS was a clear one. That survey satisfied Natural England. As I have already indicated, I do not consider that the DR and ADR misled the members or were not fair summaries of the background material, which was, in any event, easily available to the members. On this issue and taking the approach enunciated by Laws LJ in Dicken, I consider it is impossible to conclude that the decision made by the members was not within the bounds of reason and within the four corners of the evidence before them and I am unable to categorise their decision as unlawful.

Sub-ground (ii) – failure to consider the environmental impact of the wider bus transit scheme – "splitting"

200. I agree with Mr. Cameron's submissions that the heart of the challenge on this issue is to the Defendant's judgment when carrying out its screening of the development. Schedule 3 paragraph 1 (b) requires that the "*cumulation with other development*" must be considered as one of the selection criteria for

screening Schedule 2 development. He gives the example of a proposal for a tall building in the City of London. An environmental statement would be likely to include a photomontage showing the proposed building together with other such proposed buildings for which planning permission had been granted, so as to allow cumulative effects to be considered. Schemes which were no more than a "glimmer in the eye" would not be included.

201. I accept his contention that, while the principles enunciated by the European cases cited by Mr. George are important, the actual facts of those cases are very different from the current case.

202. While Swale is now an elderly case, the proposition in Swale that a proposal should not be regarded in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development has been adopted in the 1999 Circular which is still extant. In my judgment, it is wrong to criticise the Defendant for relying on that Circular's advice when adopting the screening opinion. Indeed, even if the more precautionary "likelihood" was adopted it still seems to me that the evidence is genuinely of mere projections for a more extensive scheme as opposed to a clearly discernible and defined project which has been divided into separate smaller projects. As Mr. Cameron pointed out, there is no money for any wider scheme, no decision had been made as to future routes of which a large number of route options had been floated. There were no proposals from any responsible authorities nor any proposals from Transport for South Hampshire. The references to future Phases and an interchange at Fareham Station were no more than aspirations for which there were no plans. In my judgment, there was no wider scheme which was practically capable of assessment, distinguishing this case from the various European authorities. In those circumstances this does not seem to me to be a finely balanced case where an article 234 reference would be helpful.

203. There is also force , in my judgment, in the Defendant's contention that there is no evidence to support the Claimant's contention that any wider scheme would have significant environmental effects. It does not seem to me that that can be assumed. One might, for example, predict a similar level of environmental effects along any extended corridor.

204. I am satisfied, moreover, that when the screening report is properly considered, the adverse effects of a wider scheme, as well as the cumulative impact with the current scheme of the wider scheme were considered, so far as it was practicable to do.

205. Members' attention was drawn to the advice in the screening report in the DR which followed the Circular and fairly summarised the advice. It also referred to the particular facts of this case.

206. Thus I am satisfied that there was no error of law in the approach of the Defendant on this issue and that there was material upon which they could have reached the decision they did and that that decision simply cannot be described as irrational.

Sub-Ground (iii) - did the Defendant fail to consider the potential for significant effects on the Portsmouth Harbour SPA

207. Despite the expansion of his argument set out in Mr. George's original skeleton, in his reply and oral submissions my clear view is that the DEA and AASM fully considered the risks to the SPA and found them not to be significant. The DR summarised the conclusions of that research fairly and accurately and the ADR properly notified the members of the very important advice from Natural England which entirely supported the advice of their officers. The mere fact of the imposition of a condition does not mean that with mitigation measures there was likely to be a significant effect on the SPA. The correct test was set out in the DR (8.18) and was applied by Natural England. There was ample material for the Defendant to have come to its conclusion in relation to the SPA and it cannot be said to be irrational.

Sub-ground (iv) – did the Defendant fail to take account of the significant effect on bats?

208. The dicta in Hardy are clearly not wholly appropriate to this case in that, as the summary to the UBS makes clear, it was not the case that bats were likely to be significantly "adversely" affected by the proposals. I have already ruled that, in my judgment, the DR and ADR were a fair and accurate summary of the UBS and were not misleading to the members of the Regulatory Committee.

209. There is no doubt that the DR omitted many of the findings of the UBS but if a Planning Officer's Report is to be of real utility to busy members of a regulatory committee it has to be selective. As it is the case that at the screening stage mitigation measures can be taken into effect, the summary of the officers in the DR of the effects of the UBS is even more appropriate. It should also be noted that the minutes of the meeting record that the reports had been taken into account (DB2:563).

210. There is, on this sub-ground, in my judgment, no arguable basis for any error of law by the Defendant.

Sub-ground (v) – failure to take account of the extent of the impact on badgers, a National Protected Species (NPS);

211. I am afraid I cannot agree with Mr. George that members were not provided with sufficient information to allow them to consider whether there was no likely significant effect on the environment as a result of the proposal's impact on badgers. The contents of the DEA were available to the Defendant's officers so as to allow the Defendant to adopt a screening opinion in April 2009 and the conclusion of the DEA was that the overall impact would be slight adverse, i.e. not significant. Given that there was that available information (to which I have already made reference) it seems to me that it is impossible for the Claimant to argue that, in relation to the impact on badgers, the decision to conclude that the proposals did not constitute EIA development even approached irrationality.

Sub-ground (vi)- failure properly to consider the visual, noise and contamination impacts of the scheme on the environment – did the Defendant concentrate on the overall net impact of the scheme.

212. Again, given that it is permissible, when considering whether the impacts of a proposal will or will not have significant effects on the environment, to have regard to mitigating measures, I am not persuaded, on an overview of the background material which both parties have helpfully summarised and pinpointed in their skeletons and to which they took me in oral argument, that the DR is anything other than a fair and accurate, though concise, summary of that background material. Neither that material nor the DR suggest that because impacts are local they may not be significant, but the fact that they are localised in effect is clearly a very relevant factor to consider when looking at a schedule 2 development.

213. I do not understand Mr. Cameron to be contending that, merely because many of the local impacts of the scheme are temporary (and he himself accepts that they are long-term, though temporary) they could not have been regarded as significant. Here, it seems to me that Mr. George was erecting an Aunt Sally in order to knock it down. On the other hand, it must surely be very relevant for the members to distinguish between temporary and permanent effects when considering significance.

214. Mr. Cameron summarises in his skeleton, in my judgment, correctly, the way in which individual chapters of the screening report for environmental effects of the scheme identify the effects of different constructional and operational effects of the project. It is not really alleged by the Claimant that those chapters are guilty of "netting off" those effects and I am satisfied that they do not. I am equally satisfied that the Claimant did, indeed, misunderstand the purpose of the heading and contents of chapter 15 of the Screening Report which is intended to summarise cumulative and combined effects of earlier mentioned net effects. That is in line with the Schedule to the EIA Regulations. Unless those combined and cumulative effects are considered the members would not be able to consider whether the project had a significant impact on the environment. I agree with Mr. Cameron that the SR as a whole considers quite clearly impact and then mitigation in relation to each aspect of the environment,

215. That, I agree, is also true of the DEA, which clearly separates impact from mitigation. I am satisfied, finally, that the DR, read in its entirety, summarises in an accessible, fair and accurate way what the background reports in detail indicated was the impact on the environment, in particular, at paragraph 3.11 of the DR:

"*The applicant comments that the proposal has been screened under the Environmental Impact Assessment Regulations and it was concluded the proposal is not an EIA development as it is not likely to cause significant effects on the environment. The screening opinion was requested before the application was submitted and was accompanied by a comprehensive Screening Report which concluded that there would not be significant environmental effects, but also identified the specific area where detailed*

environmental information was required to accompany the planning application. These specific areas were nature conservation and biodiversity, landscape and visual impact, contaminated land, noise and air quality. The proposals subject to this planning application are not significantly different to the proposals put forward in the Screening Report and the application is accompanied by an environmental report covering the areas identified."

216. Not only does that paragraph accurately, in my judgment, summarise the background material, it indicates the statutory test to be applied by the members, draws their attention to the specific areas of concern and also to the background reports, which reports were easily available to them.

217. As the authorities make clear, the decision as to whether a project is EIA development is not a question of hard fact but involves an exercise of judgment or opinion. On the issue of local impacts, I am satisfied that there was ample material for the members to make the judgment they did and they were entitled to reach the conclusion that they did, which conclusion was not, in my judgment, irrational.

218. I have dealt above with each individual aspect of the EIA development issue, finding in each case that the members were not misled by the officers' reports, nor were those reports other than concise but accurate and fair summaries of most detailed and careful background material which were easily available to members. I have also found that the members were entitled to reach their conclusions on the available material and that those conclusions were not irrational.

219. I have, however, stepped back and taken an overview of the decision on whether or not the proposal was EIA development. It is right , as Mr. Cameron contends in his skeleton argument, that the Claimant does not contend that the Defendant had insufficient information to allow its members to adopt the screening opinion. Indeed, having considered the screening report and the other background reports, I consider any other position would have been unsustainable. If the DR cannot, as I judge it cannot, be criticised as a fair and adequate summary, the issue must be whether the members exercised their judgment, on a matter that is not a "hard-edged question of fact" completely unreasonably. Mr. Cameron is right to describe that as a high hurdle for the Claimant to clear and I consider she has not cleared it.

220. As I have come to the conclusion that the Defendant did not err in law in making the decision to grant planning permission nor did it act irrationally in doing so, I am of the view that it is both unnecessary and inappropriate for me to speculate how I might have exercised my discretion had the Claimant persuade me that the Defendant had made an error of law, particularly had that involved a breach of either of the critical European Directives. I need only say that, having regard to the judgments of the House of Lords in Berkeley v Secretary of State for the Environment [2001] 2 AC 603 it is clear to me that any discretion I may have had would have to be confined within the narrowest possible bounds and that I would have found very great difficulty in coming to the conclusion that this would have been an appropriate case to exercise the discretion in favour of the Defendant.

221. As it is, however, I find no error of law or irrationality and I dismiss the application.