*539 R. (on the application of Padden) v Maidstone BC

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
22 January 2014

Report Citation
[2014] EWHC 51 (Admin)
[2014] Env. L.R. 20

Queen's Bench Division (Administrative Court)

H.H. Judge Mackie QC :

22 January, 2014

Environmental impact assessments; Environmental statements; Floods; Groundwater; Planning permission; Retrospective permission; Unauthorised development; Waste materials;

H1 *Environmental Impact Assessment—retrospective planning permission—EIA development—whether exceptional circumstances existed to justify grant of retrospective permission—whether reasonable enquiries made by planning committee to inform decision to grant retrospective permission*

H2. In September 2003, the defendant local planning authority (MBC) granted planning permission for change of use and physical works to create an extension to a fish farm and to form an area for recreational fishing at land in Kent (the site). Subsequently, the owners of the site carried out unauthorised works involving the importation of very large amounts of construction waste material to create additional recreational fishing lakes. The claimant (P) lived in close proximity to the site and as a consequence of the unauthorised works, had suffered from groundwater flooding and other serious interferences with his own land.

H3. In 2009 and 2010, following the unauthorised works, MBC considered and granted applications for retrospective planning permission. A further application for retrospective planning permission was made in 2011 for the retention of two lakes furthest from the land affected by the flooding and the retention and completion of three reservoirs immediately to the east of the land affected. This application was accompanied by an Environmental Statement (ES), which took as its base point the position under the 2010 application rather than the position in 2003 before the unauthorised works commenced. In particular, the statement did not consider the issue of the groundwater flooding caused by the unauthorised works. Nor was there any scoping process to determine the content and extent of matters covered in the ES.

H4. P had objected to the application and made representations. In addition, the Environment Agency (EA) made representations, stating that the groundwater flooding at P's property was most likely caused by the waste deposits made during the unauthorised works. MBC granted retrospective permission in 2012 (the 2012 permission). P sought to challenge the grant of retrospective permission arguing that MBC had failed to: (1) consider whether there were exceptional circumstances justifying the grant of retrospective permission; and (2) make reasonable enquiries *540 to obtain the

information necessary to provide a proper basis for its decision and to inform the planning committee that concerns had been raised about the issue of groundwater flooding.

H5. **Held,** in granting the application and quashing the retrospective permission:

(1) The purpose of the 2011 application was to regularise the deplorable situation in which unauthorised work had been carried out for so long and to redeploy waste material, the retention of which would otherwise be unauthorised. The 2011 application, was, therefore, an application for the retrospective grant of planning permission for what was accepted as an EIA development and was the sort of "retention application" that the European Court of Justice had in mind in *Commission of the European Communities v Ireland (C-215/06) [2008] E.C.R. I-4911* . Following that decision, such a "retention application" could only be granted in exceptional circumstances. The ES was inadequate as it failed to deal with the environmental effects of the unauthorised development that had taken place before 2010 by adopting 2010 as a baseline for considering environmental impacts. The ES thus failed to address the issue of groundwater controls which might otherwise have been brought to the attention of the planning committee if a thorough document had been prepared. There was, therefore, no evidence before MBC's planning committee which granted the application, that the application involved an EIA development nor that it was a "retention application" which should only be granted in exceptional circumstances. The failure to consider the question of exceptional circumstances was unlawful.
(2) When granting the 2012 permission, MBC had unlawfully failed to make reasonable enquiries to try to obtain the factual information necessary for its decision on the application. The views of the EA had not been communicated to the members of MBC's planning committee and there was no other adequate information on which to evaluate the issue. MBC could have deferred consideration of the matter to await a report from the EA but had not done so. The transcript of the meeting suggested that the outcome of the application might have been different if the EA's concerns had been disclosed to the committee.

H6 Legislation referred to:

Senior Courts Act 1981 s.31(6)
Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) regs 2(1) , 3(4) , 22

H7 Cases referred to:

Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] 2 A.C. 603; [2001] Env L.R. 16
Commission of the European Communities v Ireland (C-215/06) [2008] E.C.R. I-4911; [2009] Env. L.R. D3
Gillespie v First Secretary of State [2003] EWCA Civ 400; [2003] Env. L.R. 30
R. (Ardagh Glass Ltd) v Chester City Council & Others [2010] EWCA Civ 172; [2010] Env. L.R. 32
R. (Baker) v Bath and North East Somerset Council [2013] EWHC 946 (Admin) ****541***
R. v Cornwall County Council Ex p. Hardy [2001] Env. L.R. 25
R. v Derbyshire CC; Ex p. Blewett [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29
R. (Usk Valley Conservation Group) v Brecon Beacons National Park Authority [2010] 2 P. & C.R. 14
Secretary of State for Education and Science v Tameside MBC [1977] A.C. 1014
Smith v Secretary of State for the Environment, Transport and the Regions [2003] Env. L.R. 32

H8 Representation

Mr J. Maurici QC , instructed by Dechert LLP appeared on behalf of the claimant
Mr S. Hockman QC *and* Ms M. Thomas , instructed by Maidstone Borough Council appeared on behalf of the defendant

Judgment

H.H. Judge Mackie QC:

1. This is a challenge to the lawfulness of a part retrospective planning permission. The Claimant, Mr David Padden, lives in Hertsfield Barn a 500 year old Grade II listed timber framed building situated 3km north of the village of Marden in Kent on the south side of the River Beult, a site of Special Scientific Interest. The Defendant ("The Council") is the local planning authority. The Interested Parties obtained the planning permission in issue ("the Permission") on land at Riverfield Fish Farm, Staplehurst Road, Marden, known as "Riverfield Fish Farm" or "Monk Lakes".

2. The Claimant applied for judicial review on 15 November 2012 and permission was granted by King J. on 18 February 2013. For the hearing I had four bundles including the following witness statements. There are three witness statements from the Claimant, one from his legal representative Mr True, one from his planning consultant Ms Lord and two from his geologist Dr Fox. There are three witness statements from Mr Hockney, the Council's Principal Planning Officer. There is also a witness statement from Mrs Emily Harrison, an Interested Party and director of Taytime Limited. She refers to the extent of her company's investment in the planning process, to the consequences of any enforcement process and to the fact that while the Claimant may wish the site to be strawberry fields as it once was it has been run as a fishery for almost twenty years. The Interested Parties have not otherwise participated in this case.

The background

3. On 17 September 2003 planning permission was granted by the Council, on the application of the then owners Mr & Mrs Hughes, for development at what is now known as Monk Lakes for:

> "Change of use of land and physical works to create an extension in the fish farm, to form an area for recreational fishing. The application involves the formation of ponds and lakes, the erection of a building and the formation of a car park, the existing access to Staplehurst Road is to be improved…"

4. The 2003 Permission was subject to various conditions including the submission for approval of various pre-commencement details. These details were not submitted ***542*** for approval. Instead the then owners of the land commenced, what it is common ground between the Claimant and the Council, were unauthorised works at Monk Lakes to create additional recreational fishing lakes not in a form that was in compliance with the 2003 Permission. The unauthorised works took place between 2003 and 2008 and involved the importation of very large amounts of construction waste material including glass, plastic and asbestos. The Environment Agency has estimated that about 650,000 cubic metres of waste material were deposited on the land between March 2003 and January 2008 with even more since. The material was formed into, amongst other things, massive 8 metre high retaining bunds close to neighbouring residential properties including Hertsfield Barn.

Facts agreed or not much in dispute

5. In 2008 the site was acquired by three of the Interested Parties, Emily and Guy Harrison and Monk Lakes Limited ("MLL") who have apparently continued, and intensified, the unauthorised works.

6. There is expert and circumstantial evidence that the unauthorised works and in particular the deposition of vast quantities of waste as part of them, have had damaging effects on Hertsfield Barn, including causing groundwater flooding. The Claimant

gives evidence of the serious interference which this flooding causes despite the work and cost of daily pumping. The challenged consent will, if it stands, regularise the deposition of the material.

7. After much delay and pressure from local residents, including the Claimant, the Council served an enforcement notice on 12 September 2008 ("the Enforcement Notice") following a temporary stop notice in April 2008. The large scale of the unauthorised work can be seen from the photographs produced by the Claimant and from the very serious breaches of planning control specified in the Enforcement Notice. The Interested Parties appealed against the Enforcement Notice and there has been litigation arising from that which, even now, is not finished. A public inquiry into an appeal against the Enforcement Notice was scheduled to commence on 6 November 2012 but, because of the grant of the Permission in these proceedings, it was vacated. So more than ten years after the unauthorised works began they are still going on.

8. On 26 September 2009 and 4 January 2010 retrospective permissions were granted by the Council for development at Monk Lakes. The further application which led to the Permission in issue in these proceedings was received by the Council on 9 December 2011. It sought part retrospective permission for *"the retention of completed lakes Bridges and Puma, the retention and completion of part completed raised reservoirs lakes 1, 2 and 3 …"* . The *"Bridges"* and *"Puma"* lakes are those furthest from Hertsfield Lane. The three additional reservoirs (which according to the application are to be retained and completed) are situated immediately to the east of Hertsfield Lane. The application was accompanied by an Environmental Statement.

9. The Claimant's planning consultants, Bell Cornwell, responded in detail to the application claiming amongst other things that the Environmental Statement was flawed because: ***543**

> "it uses the date of 2010 with significant unlawful development in place as its base point rather than the position in 2003, preceding the commencement of the unauthorised development a position which is the actual lawful base point" .

The letter made the point that other reports submitted with the application made the same error. The letter pointed out that at a meeting between members of the Hertsfield Residents Association and senior officers of the Defendant Council on 21 March 2011 it was confirmed by those officers that:

> "any application and accompanying Environmental Statement should compare the proposed development with the 2003 position"

That assertion is disputed by the Council. The letter also complained, correctly, that the Interested Parties had failed to undertake any scoping for the Environmental Statement. (Scoping is the process of determining the content and extent of the matters which should be covered in an Environmental Statement).

10. The Environment Agency ("the Agency") made representations on the application on 21 December 2011 saying:

"Environmental Impact Assessment

The application states that Maidstone Borough Council informed MLL in October 2010 that the proposal would need to be accompanied by an Environmental Statement, but we were not contacted with any scoping documentation

Although there is no legal requirement for scoping consultations, we are disappointed that MLL chose not to engage in this process, as it can help to clarify issues concerning key environmental issues and proposed methods for survey, evaluation and assessment."

11. On 25 May 2012 the Claimant's planning consultants further objected:

"We write to advise that following the site meeting on the 4th May 2012 with Barrie Neaves of the Environmental Agency ["EA"], a meeting you were invited to attend, we now have an explanation concerning the flooding at our client property. Mr Neaves had discussed the matter with a geologist from the EA who advised that the problems were most likely to be as a result of the unauthorised works on the neighbouring land due to the weight and compaction of unauthorised material. This has in effect reduced the capacity of the gravel aquifer layer, which is in the main contained by clay, so the water seeks the weakest path to escape and this appears to be the pond and immediate area at Hertsfield Barn. This is explained in the attached letter from an independent geologist.

We also understand that the EA will confirm their geologist's advice in writing, although we understand the EAs duty as a statutory consultee is limited to providing advice regarding river flooding.

On the facts it can reasonably be concluded that the unauthorised works have, and if the proposed were approved, will continue to have a direct impact on ground water levels at our client property such that unless the pond is continually pumped to remove the additional water that is being displaced ***544*** from the aquifier layer it will cause damage to his house which is located immediately adjacent to the pond. This problem is not as a result of river flooding, surface water or ditch drainage …

…we note that despite the problems of excessive ground water that has been experienced by our client since the unauthorised works, it is estimated that it will take nearly 7 years to fill the three lakes as proposed …

If the 2003 permission had been lawfully implemented, following the discharge of pre-commencement conditions, the approved plans did not provide for the significant importation of materials to site or for the lake floors to be 3 metres or more above natural ground level. The existing and proposed developments bear no resemblance to that which was approved in 2003.

> We do not accept the assertion that the application proposals would result in lesser impacts on our client than the 2003 permission … ”

12. The letter also observed that the reports submitted by the Interested Parties with the application did not deal with “*the geological impacts of the unauthorised importation of significant quantities of material …*” . It attached a letter from Dr Richard J. Fox Ph.D, a Geologist, who wrote on behalf of local residents, including the Claimant, in these terms:

> “RE: Recent excessive ingress of Ground Water into Hertsfield Barn Pond
>
> Dear Sir/Madam,
>
> The local geology, rocks and sediments of an area can have a significant impact on the local water-course and groundwater flow patterns. Human activity on the other hand can detrimentally and easily change the natural water-course balance or direction of groundwater flow.
>
> The geology of the southern area of Maidstone Borough, including Staplehurst, the River Beult and Hertsfield Barn is underlain by Weald Clay capped by ‘Drift’ deposits of sand and gravels (see Figure below).
>
> Weald Clay, like many other types of clay, is impermeable, which means that it acts as a vertical barrier to water flow. However, the sands and gravels of the overlying Drift are highly permeable and porous and can act as preferential flow paths for ground water into the local water-course. Commonly, the Drift deposits bordering the River Beult act a conduit for local drainage into the river. For many years this relationship has been in balance in the Hertsfield Barn area, until recently.
>
> It is hereby concluded that compaction of the porosity and permeability system of the Drift deposits around Hertsfield Barn, from activity at the local Waste Disposal site, has significantly damaged the drainage patterns of the Drift and its flow directionality. The net effect of this impact has resulted in the continual flooding of the Hertsfield Barn pond, which now requires electrical pump emptying into the River Beult to avoid flooding surrounding properties. Local groundwater flow now appears to be preferentially diverted into the pond, as the pond was originally filled manually for many years before the Waste Disposal site development.
>
> I believe that restoration work now needs to be carried out and drainage facilities put in place on the Waste Disposal site property to rectify this matter.”

13. Dr Fox is a highly qualified geologist but not a formal expert. He has a senior position in an energy company and is a friend of the Claimant who has known the Barn and the surrounding area for years.

14. The case officer for the application, Mr Peter Hockney, produced an officer report. This referred to the fact that the Agency originally objected to the application based on flooding from rivers but that it later withdrew that objection.

15. The case was referred to the Planning Committee because the application was opposed by the Parish Council. The agenda for the Committee, including the officer report on the application, was published on the Council's website on Friday 1 June 2012 prior to the meeting on 7 June.

16. The analysis in the officer report of flood risk is focused on river flooding and does not refer to groundwater flooding. It concluded that *"the Council has consulted with the Environment Agency who are the statutory consultee on flood matters and following receipt of a revised FRA the Environment Agency raised no objections to the proposal"* . The Flood Risk Assessment deals with river flooding but does not mention groundwater flooding or the view of the two experts referred to in the 25 May letter.

17. The officer report noted:

> **"5.3 Principle of the Development**
>
> 5.3.1 … the principle of the creation of lakes is accepted in the surrounding area. Whilst the site is covered by an Enforcement Notice the Council has to consider the current application on its own merits and in accordance with the Development Plan and any other material considerations.
>
> 5.3.2 The proposal is not dissimilar to that permitted under MA/03/0836. The principle of such a development on this site was considered acceptable in 2003 when the Council granted planning permission. It is the Council's view that the 2003 permission has not been implemented and is not a fallback position. However, the decision to approve the 2003 application was a decision of the Council and is a material consideration in the determination of this application to which I give some weight."

18. The officer report concluded:

> "6.1 The proposed scheme would result in a development for recreational fishing for the Monk Lake facility. It would sit alongside existing lawful recreational fishing at Mallard Lakes with an existing car park access and road.
>
> 6.2 The scheme would not result in any significant planning harm in particular in relation to flooding, biodiversity, landscape impact or residential amenity.
>
> 6.3 There are no objections from statutory consultees on the proposal and the Council will ensure full implementation within an agreed timescale through a Section 106 agreement"

19. Various conditions were recommended but none to deal with groundwater issues.

20. The commentary on the objections appended to the officer report said at para. 1.6 that:

> " …[w]hilst the Environmental Statement does not compare the proposed scheme with the 2003 position the Council has assessed the development against the 2003 position as outlined in the main report" . ***546**

21. By email on 6 June 2012 the Claimant's planning consultants again wrote to the Council expressing dismay at the recommendation in the officer report to grant the application. The letter was sent to all members of the Council's Planning Committee. Among other things the letter said:

> "The Environmental Statement [ES] that accompanies the current planning application does not use the 2003 pre-development base point for assessing the impacts of the development. This is a serious flaw in the ES process in that the starting point for assessing the impacts of this part-retrospective development should be the pre-development position. We therefore maintain that an ES which is based on a comparison between the current proposal and the onsite conditions in 2010 – including the unauthorised works- is misconceived and potentially challengeable in law…
>
> …the Council is being offered a fait accompli that significantly does not address the detrimental impacts of the unauthorised development specified in the Council's reasons for issuing the Enforcement Notice. In summary these are:
>
> > "….
> >
> > • Flooding of neighbouring properties."
>
> An additional letter—supported by a qualified geologist—has already been sent to the Planning Case Officer regarding the water levels at Hertsfield Barn, which have risen as a result of the compaction of the aquifer under the site and the consequent displacement of water to the weakest point of escape in the pond at Hertsfield Barn. The situation is deteriorating as the winter drought relents. [A photograph showing the flooding was attached]
>
> The Flood Risk Assessment and other material submitted by the applicant do not deal with this off-site impact or provide any mitigation for it. The water levels in the pond at Hertsfield Barn are only kept to a safe level by the constant operation of pumps, even through the summer months and the dry winters of 2010 -2012 …"

22. The Planning Committee met on the evening of 7 June 2012 to consider the officer report. At 10.22 am that day a further letter was sent by the Agency to the Council. This said, among other things:

> "…
>
> We believe you have received information from the Hertsfield residents expressing concern that groundwater flooding may be being exacerbated by the existence of the deposited material on the site.
>
> Our own hydrologist has looked into this and concurs with the resident's opinion. She is currently drawing up a sketch and brief examination of how this may happen. Unfortunately it is unlikely to be available in time to inform your Planning Committee tonight.
>
> Although we have a general supervisory duty over all forms of flooding we tend to concentrate on flooding from designated 'main' rivers, such as the River Beult. We will comment on surface water and ground water flooding where there are known pre-existing problems. In this instance it would appear ***547*** that the ground water flooding problem was not pre-existing and may have been caused by deposition of material. This was not identified as an issue in the submitted Flood Risk Assessment.…"

The Agency was referring to, and had seen, Dr Fox's letter.

23. Having e-mailed his letter of 7 June 2012 raising concerns about groundwater. Mr Neaves at the Agency had a telephone conversation with Mr Hockney about potential methods of mitigating against groundwater flooding and the possibility of addressing this issue by condition, in the course of which he expressed his doubt that a condition could be suitably worded.

24. At 12.28 am on that day Mr Hockney sent to the Agency an e-mail setting out the proposed wording of a condition he had devised, and that subsequently was included in the Permission along with an informative that the applicant was advised to contact the Environment Agency with regard to proposals for groundwater controls.

25. The Agency replied at 16.00 as follows:

> "Good afternoon Peter
>
> Thank you for forwarding this proposed condition and informative.
>
> We have the following concerns.
>
> There is an existing groundwater flooding problem possibly resulting from the material that has already been deposited on site. This matter needs to be investigated and remediated prior to any further material potentially being imported on site, especially as this is a part retrospective application.
>
> Regarding the wording of the condition itself, I understand that when referring to "groundwater controls" you have discussed with Barrie the option of abstracting groundwater to reduce the

> water level as one possible control, a further borehole being used to monitor water levels. It should be noted that this may be a short term solution, however it is unsustainable and there are risks, particularly if the abstraction ceases for whatever reason. It should also be noted that we believe that this activity could require an abstraction licence in the near future, and we cannot guarantee that a licence would be issued. If compliance with this proposed condition hinges on the applicant being able to put in place groundwater controls is there not the risk this condition may never be complied with, therefore is it a valid condition?Without further investigations into the groundwater flooding situation we cannot at this time identify if there are any other possible options for groundwater controls. This is something the applicant will have to look into. It is likely however that the potential deposition of additional material will only exacerbate the existing flooding of the nearby property."

26. Mr Hockney's reply invited the Environment Agency to offer a proposed solution. He then left for the Planning Committee meeting. He did not contact the Environment Agency before the Permission was issued some three months later on 6 September 2012. Neither did the Agency contact him.

27. At the meeting of the Planning Committee Mr Hockney, gave an oral urgent update in the light of correspondence received from the Environment Agency and suggested his condition as a way of dealing with groundwater issues. He acknowledged that the details of the Environment Agency's concerns were not available but advised that his proposed condition would deal with the matters even ***548** if it were proved to be correct that the unauthorised depositing of material was indeed causing groundwater flooding. In presenting his update he did not inform the Planning Committee of any of the concerns being expressed by the Environment Agency about his proposed condition.

28. In the course of the debate before the Planning Committee two of the local ward Councillors (not members of the Planning Committee) who spoke against the application referred to the groundwater flooding of Herstfield Barn and the views of the Agency reported that day. They suggested that the matter be deferred to allow receipt of and consideration of further information from the Agency on this issue.

29. The Planning Committee debated the application. One councillor indicated that on groundwater issues Kent County Council not the Environment Agency was the lead authority and it was important that they had not objected-but the County Council had not been consulted. Another councillor felt that the Agency's objection on groundwater was less important because that was a matter for the County Council.

30. In response Mr Hockney did not say anything material about groundwater but did say *"… following discussions with the Environment Agency, an additional condition and informative are proposed in relation to groundwater controls for the site to alleviate the concerns raised."*

31. I agree that that implied that the Agency supported the proposed condition. Mr Hockney disagrees and says in evidence that all the Agency's concerns were placed before the Planning Committee. He adds that it was in any event a matter solely for his planning judgment. The Claimant says that this was a highly technical matter on which Mr Hockney had no expertise and that he misled the Planning Committee about the proposed condition.

32. Mr Hockney also advised the Planning Committee at the meeting that:

> "[i]n terms of the Environment Agency … and the works undertaken by the hydrologist, the full details of that aren't available but … I have discussed this with the Environment Agency and the worst case scenario is that the hydrologist confirms that the groundwater is flooding on to the neighbours' property and that is a result of the imported material. To that end we have recommended the condition which requires the submissions of these ground water controls so the condition is there to alleviate those matters. So again, I don't think that there's any further information that's needed."

33. The Claimant criticises what he says is an implication that the Agency supported the use of a condition when they did not favour that solution and the Planning Committee was not advised of this. There was certainly no indication that the Agency had reservations about the condition proposed.

34. The Planning Committee resolved to grant conditional planning permission, 11 voting for with one against and one abstention, subject to the completion of a s.106 agreement with a requirement that the development be completed to a timetable.

35. On about 8 June the Agency released a document called "*Assessment of geology around Monk Lakes to determine potential reasons for sudden increase in flow of water from the pond at TQ 76569 47734* ". This was the hydrologist report referred to in their letter of 7 June 2012 to the Council. The author, Jan Hookey a hydrogeologist is the Senior Technical Specialist on Groundwater, Hydrology and Contaminated Land for Kent and the South London Area at the Agency. She said: ***549**

> **"Discussion regarding scenario**
>
> Given that the need to pump an increased amount of groundwater flow from the pond has coincided with:
>
> '• One of the driest periods of weather on record
>
> • Very low groundwater levels in aquifers in the South-East'
>
> It is unlikely that this issue is due to increased rainfall or a general increase in groundwater. It is more likely that the increased volume of flow is coming from a local change in the immediate vicinity of the pond.

…

It is quite likely that the pressure of over-burden, caused by the deposit of earth on the adjacent land, has lead to a localised compression of the river terrace gravels above the Weald Clay. This, in turn, may have resulted in the local change of flow regime and an impact on the pond.

…

Way Forward:

> ‘A full investigation of this site is required to ascertain what is happening to the flow regime and what is impacting it. This really requires a thorough local investigation of the water levels, flows and drainage. It is a very unusual thing to have happened, especially with the level of impact that it is having. It is for this reason that it will be very important to investigate it thoroughly before deciding on a way forward or a solution. A specialist drainage engineer, with good knowledge of interpreting groundwater level data, is likely to be required’” ..

36. The Agency e-mailed a copy of this report to the Claimant and others on 8 June 2012 but there is no evidence that it reached the Council and I accept that it did not.

37. In an e-mail on 28 June 2012 Mr Neaves at the Agency wrote to the Claimant:

> “I can confirm that I have spoken to Max Tant, the Flood Risk Management Officer at KCC. He was completely unaware of the Riverfield development – indeed, I had to describe the location of the site to him.
>
> I understand that you are still pumping water from the pond to prevent water ingress to your property; this despite river levels generally returning to normal summer water levels. This would reinforce our belief that the high water levels in the pond area a result of groundwater ingress, possibly as a result of changes to landform on Riverfield as detailed in the report of our hydrologist. As yet we have not seen the details of any conditions that [the Council] have applied to the planning permission.

> Furthermore, I can confirm that, to my knowledge, we have received no approach for an Environment Agency Permit …"

38. The development requires an environmental permit from the Agency if, as appears from the application, it is intended to deposit additional material. There are also requirements to be satisfied under the Reservoirs Act.

39. On 6 September 2012, following the execution of a s.106 Agreement, the Permission was issued by the Defendant Council. It included a condition ("Condition 24") dealing with groundwater flooding issues. This said: ***550**

> "24. Prior to the importation of any material full details of proposed groundwater controls shall be submitted to and approved in writing by the Local Planning Authority and the scheme shall be completed in accordance with the approved details
>
> Reason: In the interests of residential amenity in accordance with policy ENV28 of the Maidstone Borough- Wide Local Plan (2000)."

40. This was the condition wording which had concerned the Agency both about the feasibility of groundwater controls and the general wisdom of proceeding without further investigations. Further such controls would only be imposed on the Interested Parties once further materials were to be imported. There is disagreement between the parties about whether, and if so how far, the Permission could be implemented without bringing in more material.

41. The s.106 Agreement requires that the Permission be implemented according to a timetable. An application for an Environmental Permit had to be made to the Environment Agency by early December 2012. The Interested Parties have still made no application- perhaps not surprisingly since this action was brought in November 2012.

42. Mr Seed, an environmental consultant recently instructed by the Interested Parties, submitted an Environmental Permit scoping document on 17 November 2012. In response the Agency noted:

> "The groundwater at Hertsfield Barn does not appear to have been considered.
>
> It is our opinion that groundwater flooding at Hertsfield Barn is more than likely caused by the excavations and waste deposited at Monks Lakes"

43. It is also noted by the Environment Agency that to deal with this issue one of the options would be removing the waste deposited at Monk Lakes but there might be a drainage solution, a matter to be investigated. It remains unclear whether that solution is available. Condition 24 assumes there is a drainage solution.

44. Mr Hockney's third witness statement dated 21 November discloses that on 30 October the Interested Parties applied to discharge two conditions, one of which is Condition 24 dealing with groundwater. This is the condition that the Council says will protect the Claimant's groundwater problem.

Disputed facts and legitimate expectation

45. I have referred to a meeting on 21 March 2011. The Claimant and others recall that senior officers of the Council affirmed at that meeting that the approach to be taken by the Environmental Statement would use 2003 as its base. Mr Maurici QC for the Claimant argues that no justification for going back on this assurance has ever been offered. He says that the Claimant thus had a legitimate expectation that the Council would require the Environmental Statement to assess matters as against the situation as at 2003 and prior to unlawful works commencing. He says that the Council acted unlawfully in frustrating that expectation.

46. The Claimant's recollection, supported to a degree by contemporaneous documents is disputed by Mr Hockney, supported to a degree by his own note of the meeting. It is unfortunate that Mr Hockney's witness statement of 21 November 2013 dealing amongst other things with this meeting was only served on the Friday before the hearing. Despite Mr Maurici's submission that I should make findings of fact on the material available it would be unjust to decide whose recollection of ***551** a meeting in March 2011 is most likely to be correct without hearing live evidence. The position would also have to be clear to found a legitimate expectation claim. I will therefore consider this aspect of the claim no further.

Claimant's Grounds

47. I will deal with these in more detail below but summarise them briefly here so that it is clear why the law referred to next is relevant. Ground 1 alleges a failure by the Council to consider whether there were exceptional circumstances justifying the grant of retrospective permission for EIA development. Ground 2 alleges a failure by the Council to consider whether the retrospective application for EIA gave MLL any unfair or improper advantage. Ground 3 alleges that the Council unlawfully failed to have regard to groundwater flooding within the EIA process. Ground 4 alleges that the Council unlawfully purported to deal with groundwater flooding by an ill considered condition. The Council denies all these allegations.

The law- general and Grounds 1 and 2

48. I deal in detail only with those points of law referred to by the parties which seem to me to be directly relevant.

49. A public authority has a duty to make reasonable enquiries to try to obtain the factual information necessary to provide a rational basis for a decision on the application before it, especially where it depends on a factual issue: *Secretary of State for Education and Science v Tameside MBC [1977] A.C. 1014* . In the case of a planning application, the local authority has power to issue a direction under reg.4 of the Town and Country Planning Applications Regulations 1988 requiring an applicant to supply any further information necessary to enable the authority to reach a decision, and to provide evidence to verify particulars: see *R. (Usk Valley Conservation Group) v Brecon Beacons National Park Authority [2010] 2 P. & C.R. 14* per Ouseley J.

50. An Environmental Impact Assessment or "EIA" is a requirement derived from EU law which it is common ground applies to the disputed planning consent. The aim of the EIA regime is to ensure that the authority giving the primary consent for a particular project makes its decision in the knowledge of any likely significant effects on the environment. EIA is a process of drawing together, in a systematic way, an assessment of a project's likely significant environmental effects. This allows the decision-maker to properly consider whether or not to grant consent, and if so to provide any necessary mitigation.

51. Public participation in environmental decision-making is of central importance to EIA- see the well known statement of Lord Hoffmann in *Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] 2 A.C. 603* at [615]–[616].

52. The EIA Directive is law in England by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the Regulations"). The EIA Regulations require that a planning decision-maker *"shall not grant planning permission … 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"* (reg.3(4)). The Regulations apply to "EIA development". *"environmental information"* means (see reg. 2(1)) *"the environmental statement, including any further information and any other* ****552*** *information, any representations made by anybody required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development"*.

53. An *"environmental statement"* includes, in effect, *"[a] description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors";…"[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, resulting from: (a) the existence of the development; (b) the use of natural resources; (c) the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the applicant of the forecasting methods used to assess the effects on the environment"*.

54. Regulation 22 provides that, in effect, a planning authority, if of the opinion that the statement should contain additional information in order to be an environmental statement, shall require and the applicant will supply that information.

55. Environmental information may comprise material beyond the Environmental Statement produced by the applicant. Mr Hockman QC for the Council places emphasis on *R. v Derbyshire CC; Ex p. Blewett [2003] EWHC 2775 (Admin)* where the then Sullivan J. said:

> "38. The Regulations envisage that the applicant for planning permission will produce the environmental statement. It follows that the document will contain the applicant's own assessment of the environmental impact of his proposal and the necessary mitigation measures. The Regulations recognise that the applicant's assessment of these issues may well be inaccurate, inadequate or incomplete. Hence the requirements in Regulation 13 to submit copies of the environmental statement to the Secretary of State and to any body which the local planning authority is required to consult. Members of the public will be informed by site notice and by local advertisement of the existence of the environmental statement and able to obtain or inspect

a copy: see Regulation 17 of the Regulations and Article 8 of the Town and Country Planning (General Development Procedure) Order 1995 .

39. This process of publicity and public consultation gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies. Under Regulation 3(2) the local planning authority must, before granting planning permission, consider not merely the environmental statement, but 'the environmental information', which is defined by Regulation 2 as 'the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development'.

40. In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the ***553*** mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission… and

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

56. The decisions of the European Court of Justice ("ECJ") in Case C-215/06 *Commission v Ireland [2008] ECR I-4911* and the Court of Appeal in *R. (Ardagh Glass Ltd) v Chester City Council & Others [2011] P.T.S.R. 1498* emphasise that it is only exceptionally that retrospective planning permission can lawfully be granted for EIA development. In *Commission* the ECJ said that:

"56. In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.

57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

…

"61. By giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of the Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then –before the grant of development consent, and, therefore necessarily

> before they are carried out- must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirement of that directive" .

57. Mr Hockman submits that the reach of *Commission* is more restricted than this would suggest. He says that planning law in Ireland is different from that of England. In *Commission* it was held that community law could not preclude applicable national rules from allowing in certain cases the regularisation of operations or measures which were unlawful in the light of community law, though such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent community rules or to dispense with applying them, and that it should remain the exception. These conditions can be fulfilled in the domestic planning system, since operations carried out in breach ***554** of planning control are susceptible to enforcement proceedings, and once such proceedings have been instituted then the operations can be regularised only by a successful appeal. This submission does not seem to me to detract from the central point emphasised by the ECJ as one sees from the later cases in England.

58. In Ardagh Glass case the Court of Appeal endorsed the following from the judgment of the trial judge:

> "The [decision-taker] can and in my view should also consider, in order to uphold the Directive, whether granting permission would give the developer an advantage he ought to be denied, whether the public can be given an equal opportunity to form and advance their views and whether the circumstances can be said to be exceptional. There will be no encouragement to the pre-emptive developer where the [decision-taker] ensures that he gains no improper advantage and he knows he will be required to remove his development unless [he] can demonstrate that exceptional circumstances justify its retention."

59. Parker J. summarised this in *R. (Baker) v Bath and North East Somerset Council [2013] EWHC 946 (Admin)* at [15]:

> "EU law permitted the grant of retrospective planning permission in respect of EIA development (with the environmental assessment carried out after the development had started), but only in exceptional circumstances …"

60. The Claimant thus submits that retrospective permission for EIA development should only be granted first in exceptional circumstances and secondly if the developer does not obtain any improper advantage from the pre-emptive development. That seems to me to be a fair summary.

61. Counsel for the Council point out that in *Ardagh* the first instance judge, greatly experienced in planning, said that an Environmental Impact Assessment carried out post development can be done on exactly the same basis, in terms of assessing the pre development position, as a pre development EIA, and can be equivalent to it in that sense. The Court added that

given that the purpose of the EIA is to assess the impact on the environment, a post development assessment is likely to be more comprehensive and more accurate, since it will rely more on observation and measurement and less on hypothesis and judgment.

Grounds 1 and 2– is the application for retrospective permission of pre-existing development?

62. Mr Maurici submits that this is clearly an application for retrospective permission. The application says it is for *"retention of completed lakes Bridges and Puma, the retention and completion of part completed raised reservoirs lakes 1, 2 and 3"* . The Permission describes what is being granted as *"part retrospective"* . The part said to be retrospective is said by the Council to be the *"retention of two lakes known as Bridges and Puma"* . The lakes furthest from Hertsfield Barn and are not the subject of complaint by the Claimant, which is correct. However the whole of the proposal the subject of the Permission (including that for the lakes and which the Council acknowledges is retrospective) is EIA development. The proposal seeks the retention of the significant quantities of imported material, which would otherwise be unauthorised. The Permission does not provide for, or require, the ***555** vast quantities of unauthorised materials deposited at Monk Lakes to be removed but rather their remodeling on site. Their retention is thus authorised by the Permission if it is allowed to stand. The officer report proceeds on that express basis.

63. Mr Hockman accepts that the planning application made in December 2011 was partly retrospective but only as regards lakes Bridges and Puma. Whilst entailing the re-use of materials already on site the application involved a different completed landform and could therefore be viewed in a different light in terms of its impact on local amenity. The remainder of the site is to be redeveloped into 3 new lakes as opposed to the 7 lakes which were permitted by the 2003 permission. Material is to be redistributed on site and some new material is to be imported and be used to fill in the substantial void left from mining clay used to line Puma and Bridges lakes.

64. As I see it this in substance and at least to a considerable degree retrospective development. If not how does the 650,000 cubic metres of material come to stay on the site? The purpose of the application, which has to be looked at as a whole and with common sense, is to regularise the deplorable situation in which unauthorised work has been carried out for so long and to redeploy the waste material in a different configuration- for example to make the bank facing the Claimant's land less intrusive. In my view the application is for the retrospective grant of planning permission for what is accepted to be EIA development and is the sort of "retention application" that the ECJ had in mind in *Commission* .

Grounds 1 and 2– exceptional circumstances

65. Mr Maurici submits that the officer report fails to give consideration to whether there were "exceptional circumstances" justifying the retrospective grant of planning permission. In 24 pages the word "exceptional" does not appear in the report and there is no discussion at all of the issue of retrospective permission in relation to EIA development. The relevant cases are not referred to. He submits that the Council wholly failed to assess whether there were exceptional circumstances justifying the application and in so doing adopted the unlawful approach identified by the ECJ in *Commission* .

66. Mr Hockman points out that there is no requirement for the words "exceptional circumstances" to be parroted throughout the report or at the meeting. To the extent that exceptional circumstances were to be considered they were. Thus it was recommended (and decided) that permission should be obtained only on the basis of a s.106 agreement, which obligated the developer to implement the permission, and thereby necessarily to remove all elements of the pre-existing operations, save in so far as in exact conformity with the form of development authorised by the permission. Mr Hockman also cites as exceptional circumstances the scale of the unauthorised development and the fact that it would have involved lengthy and complex enforcement action but for the grant of the Permission. Quite apart from the fact that the Committee were not asked to consider this in the context of exceptional circumstance the factor is an unpromising one for exceptionality when the greater the degree and scale of retrospectivity the more likely that such factor is going to be present. I remind myself that the issue is not so much whether there were exceptional circumstances but whether the point was considered. ***556**

67. The Claimant responds that the s.106 agreement fails to ensure that the most severe environmental effect, so far as the Claimant is concerned, namely groundwater flooding is dealt with (an issue which I will address when dealing with Grounds 3 and 4).

68. The Claimant argues that this retrospective application for EIA development also provided the Interested Parties with unfair advantages. The Environmental Statement stated that it was taking the baseline for the assessment to be October 2010, with the substantial unauthorised development in place. The Non-Technical Summary says:

> "This report has, from necessity, taken as its baseline, October 2010, when Maidstone Borough Council informed MLL of the need for an Environmental Statement to support a fresh planning application. It has not been possible to assess the situation 'on the ground' at a point before this date. The consultants preparing the Environmental Statement were instructed from that date forward. The Environmental Statement therefore looks forward, at the benefits overall of completing the project, taking into account the work that has already been undertaken on site, assessing the manner in which it can be made acceptable and providing an overall environmental benefit."

69. The Claimant says that in order to prevent the Interested Parties gaining an unfair advantage the Council should have insisted that the Environmental Statement assess the environmental effects as against a baseline of 2003 before the unauthorised development commenced, as the Claimant's advisers had urged it to in December 2011. The Environmental Statement concludes that with *"mitigation"* in terms of landscape and visual impact there would be a *"moderate positive change on the landscape"* . That conclusion is only reached by ignoring the huge scale of unlawful development since 2003 in the analysis and thus not subjecting it to public participation in accordance with the relevant EU requirements.

70. The Council accepts that the Environmental Statement took as its baseline the state of affairs as at October 2010. The Council says that it could still determine the application provided that it considered that it had sufficient environmental information to enable it to do so. The representations made by the Claimant and his professional advisors about alleged groundwater ingress to the pond and his land were part of the environmental information gathered and considered by the Defendant prior to its decision to grant planning permission. So too was the information contained in emails and letters from the Environment Agency over the course of the public consultation exercise including the day of the committee meeting. The Council had to ensure that it has been provided with an Environmental Statement and to take into account its content together with all other relevant environmental information, including further information and any representations made by a consultee, other body or local resident. That is what it did. The Council considered the planning application against the appearance and condition of the land in 2003. The committee report and its annexes dealing directly with local residents' representations state that repeatedly. I accept that they do but the papers do, in places identified by Mr Maurici in his skeleton, fall into the trap of comparing the application with the situation on the ground post 2003.

71. The Council says that members knew that the drawings approved in the 2003 permission could not be lawfully implemented on the site and that the existing contours and configuration of the site were not an authorised 'fallback' position. ***557** Mr Hockman adds that even if a baseline of 2003 had been taken in the environmental statement it is unlikely that groundwater flooding of nearby land would have been identified by the authors as a potential effect of the proposed development. Mr Maurici disagrees pointing to the e-mail from Kent County Council dated 27 June 2012 which he says shows that an Environmental Statement should have looked at groundwater flooding.

72. The Council argues that Environmental statements cannot identify every environmental effect as Sullivan J. said in *Blewett* . If there is a cause and effect here the groundwater issue has come to light because material has already been deposited on the land. So the fact that some partial development of the land has already taken place is a disadvantage rather than an advantage to the Interested Parties.

73. The parties make further and very detailed submissions about these issues. I have regard to these but do not set them out because otherwise this judgment would become too long.

Grounds 1 and 2–Decision

74. I repeat that Ground 1 alleges a failure by the Council to consider whether there were exceptional circumstances justifying the grant of retrospective permission for EIA development. Ground 2 alleges a failure by the Council to consider whether the retrospective application for EIA gave MLL any unfair or improper advantage.

75. The Environmental Statement was inadequate. There had been no scoping (not of itself a legal requirement). The Environmental Statement failed to deal with the environmental effects of the unauthorised development that had taken place before October 2010, by adopting that point as a baseline. The Statement took the wrong baseline and thus gave the readers, crucially the members of the Committee, a false picture and it failed to address groundwater controls which might well have come to light if a thorough document had been prepared. That false picture was redressed by the Claimant's representations and to a degree by the report and the officer's briefing at the meeting. The inadequacies in the report do not for the reasons given in *Blewett* invalidate the exercise or render it unlawful. Obviously there must come a point where an inadequate Statement is not in truth a Statement at all. Otherwise, as Mr Maurici points out, a developer could simply decline to include certain matters in an Environmental Statement submitted with an application and make the point that these issues can be raised instead by third parties. But as I see it that is not this case. The Council had power to compel additional information but chose not to do so for reasons wrapped up in the fact that in practice the officers were aware that 2010 was not the date and drew attention to this in their briefing. The references in the briefings to 2003 being the date seem to me to outweigh the indications to the contrary identified by Mr Maurici. Nonetheless the picture presented to the Committee is a more confusing one than would have been the case if the Environmental Statement had contained, or been required to contain, the right date. While not unlawful in itself this feature contributed to what overall was an unsatisfactory state of affairs. As I see it these inadequacies alone are not such as to convert, by reason of the obligation on the Council not to permit the applicant for retrospective permission to obtain an improper advantage, an unsatisfactory situation into an unlawful one. ***558**

76. Neither the report to the Committee nor the briefing by the officers at the meeting gave the Members any idea that this was an EIA development, and that consequently approval should be the exception and that the question of unfair advantage arose. Slavish repetition of a mantra is not required but the issue was simply not before the Committee. Imposition of a timetable in a s.106 Agreement may well be an exceptional measure (there was a difference at the Bar about that which I cannot resolve) and it was clearly an appropriate one given the years of unauthorised works and the wider history. But there is no sign that the Agreement had anything to do with the fact that this was EIA development and that approval should be exceptional. If the matter had been explained properly to the Committee the discussion would have taken a different course and the outcome might well have been different.

77. Overall I judge this to mean that the case on Ground 1 succeeds. The Council unlawfully failed to consider the question of exceptional circumstances. Although the Council apparently had no regard to the question of unfair or improper advantage the Claimant's case on Ground 2 turns on the baseline point where he does not succeed.

Grounds 3 and 4– additional points of law

78. In *R v Cornwall County Council ex parte Hardy [2001] Env L.R 25* planning permission was sought for the extension of a landfill site. The application was accompanied by an Environmental Statement submitted under a materially identical regime. The ecological part of the Statement identified the possibility of bats and other important creatures indicating that further surveys were required. The planning committee decided that further surveys should be carried out. The planning permission granted prohibited the commencement of development until additional surveys were carried out. Harrison J. held, in an extract which I have shortened, as follows:

> "41 Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions, it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. …
>
> **(a) Legality of decision**
>
> 56 …

> 62 Having decided that those surveys should be carried out, the Planning Committee simply were not in a position to conclude that there were no significant nature conservation issues until they had the results of the surveys. The surveys may have revealed significant adverse effects on the bats or their resting places in which case measures to deal with those effects would have had to be included in the environmental statement … Having decided that the surveys should be carried out, it was, in my view, incumbent on the respondent to await the results of the surveys before deciding whether to grant planning permission so as to ensure that they had the full environmental information before them before deciding whether or not planning permission should be granted. ***559**

> 64 In my judgment, the grant of planning permission in this case was not lawful because the respondent could not rationally conclude that there were no significant nature conservation effects until they had the data from the surveys. They were not in a position to know whether they had the full environmental information required by reg.3 before granting planning permission. I would therefore quash the planning permission …"

79. In *Smith v Secretary of State for the Environment, Transport and the Regions [2003] Env. L.R. 32* Waller LJ (with whom Sedley and Black L.JJ. agreed) said at [27] that:

> "… the planning authority or the Inspector will have failed to comply with [their duties under the then Environmental Impact Assessment Regulations] if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given …"

80. The *Court of Appeal in Gillespie v First Secretary of State [2003] Env. L.R. 30* held that the Secretary of State erred in granting permission in assuming that a planning condition which required comprehensive investigation of the condition of the land (which was severely contaminated) provides "a complete answer to the question whether significant effects on the environment [are] likely." The planning condition "itself demonstrates the contingencies and uncertainties involved in the development proposal" (para. 40) and "when making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved" (para. 41).

Grounds 3 and 4

81. I repeat that Ground 3 alleges that the Council unlawfully failed to have regard to groundwater flooding within the EIA process. Ground 4 alleges that the Council unlawfully purported to deal with groundwater flooding by an ill considered condition.

82. The Council had known since June 2008 that there was a flooding problem at the Barn and that Mr Padden was pumping full time. This was not however known to the Council to be a groundwater problem until the Claimant's representative met the Agency in May 2012 and then wrote to Mr Hockney.

83. The Environmental Statement did not deal with the issue of groundwater flooding.

84. The Council accepts that there is *"a potential groundwater effect arising from the pre-existing operations"* which was required to be considered before the Permission was granted but Mr Hockney questions *"whether any groundwater effect on the pond at Hertsfield Barn could be attributed to the pre-existing operations"* . He criticizes the expert judgment of Ms Hookey and Dr Fox, as I see it unconvincingly, given that neither he nor the Council have, or sought any expertise in the area and that a suggestion that Ms Hookey has changed her mind does not seem correct. Mr Hockney's suggestion that, having now seen various documents not available to him at the time the Permission was granted, he would ***560*** still have given these expert views *"negligible weight"* does not assist the Council. If he would have discounted these views perhaps he should not have done. Mr Maurici's skeleton contains detailed reasons why Mr Hockney's criticisms are over confident if not misplaced. From the material I have read I consider that his submissions are fair and correct.

85. The Council had the Agency's 7 June 2012 letter which indicated that Ms Hookey's report was imminent but would not be available for the Planning Committee that night. The Council could have deferred consideration of the application but did not. The letter said that *"the ground water flooding problem was not pre-existing and may have been caused by the deposition of material"* . The Council, but not the Members, knew (through telephone conversations and e-mails) that the Agency was dissatisfied with the condition proposed to be attached to the Permission to deal with groundwater flooding. The Agency had said *"If compliance with this proposed condition hinges on the applicant being able to put in place groundwater controls is there not the risk this condition may never be complied with, therefore is it a valid condition?"*. The Council did not follow these matters up.

86. In the light of these facts Mr Maurici submits that in granting the Permission the Council made two legal errors.

87. First, the Council failed to make reasonable enquiries to try to obtain the information necessary to provide a proper basis for a decision on the application before it.

88. Secondly, Mr Hockney failed properly or at all to inform Members of the Environment Agency's position on groundwater flooding or that they had raised concerns as to the condition he was proposing be imposed to deal with the issue. That was a material matter and one that Members should have been informed of. Members were misled into thinking that the Agency was content with the condition he proposed.

89. Mr Hockman responds on these first two points as follows. He says that the alleged groundwater effects were a matter for the planning judgement of the Council, and in particular, of the planning officer advising the committee, whose advice was plainly accepted. At the time of the committee's decision, the Council through its planning officer had been aware of and therefore took into account the suggestion that there was a potential groundwater effect and that in the context of the planning proposal an assessment of the potential implications of this issue was necessary. The Council, through its planning officer, undertook such assessment and concluded that a condition in the form of Condition 24 was required.

90. The planning officer questioned whether any groundwater effect on the pond at Hertsfield Barn could be attributed to the pre-existing operations, given the lapse of time between the carrying out of those operations and the occurrence of the alleged groundwater ingress. The planning officer's judgment was that in any event, since on the ground any groundwater ingress to the pond was currently being alleviated by pumping to the river, a technical measure for such alleviation was available and could be achieved within the land controlled by the applicants. Furthermore, it is argued that the planning officer also bore in mind that the geologist's letter (submitted by the Claimant) stated that *"I believe that restoration work now needs to be carried out and drainage facilities put in place on the Waste Disposal site property to rectify this matter."* ***545*** (Given the view adopted by Mr Hockney in evidence about the value of Dr Fox's views-for example that it does ***561*** not contain an *" informed opinion of the merits of the proposal"* , it seems unlikely that he placed much weight upon it).

91. Mr Maurici responds that the Council was under an obligation to make further enquires for the reasons given by the Agency. A further delay for the Interested Party, in the context of all that had gone on at the site and for so long, would have been a minor inconvenience. Issues of potential groundwater flooding are not matters of 'planning judgment' but complex technical issues, particularly in this case where diagnosis took so long. The Committee should have been told the up to date position and that the condition which the officer considered would cure the potential problem was seen by the Agency as doubly inadequate.

92. I am concerned with the position at the time the Permission was granted. There is however evidence about subsequent events put forward by Mr Hockney to suggest that deferral of the matter would have made no difference. This appears to go to questions of remedy. He criticizes the *"fundamentally flawed"* report of Ms Hookey of the Agency to which he would now give *"negligible weight"* . He does this by reference to material obtained by a Freedom of Information request but presents

an incomplete picture—see for example para.33 of Ms Lord's witness statement. Mr Hockney's use of such critical language to dismiss the views of Ms Hookey, in an area where she is expert and he is not, is unhelpful. The Council also relies on subsequent statements from the Agency and others made as recently as the summer of 2013 to suggest that the form of words used in the condition is satisfactory. Those statements are said by the Claimant to be out of context and offset by others, an issue I need not explore.

93. Disclosure by the Council of the Interested Party's application to discharge Condition 24 was made to address the Claimant's point that the Council had no expert advice comparable to that of Dr Fox and Ms Hookey. Mr Hockney exhibits and, despite the fact that the application is out for consultation, apparently adopts the report of Peter Brett Associates obtained by the Interested Parties, which he submits is more comprehensive and based on a much wider range of materials. The validity of that submission and of the report itself is challenged in the second witness statement of Dr Fox. This material, like some of that produced on behalf of the Claimant, does not assist an assessment of the consideration given in June 2012. The Claimant may feel that use of the report by Mr Hockney to defend the position of the Council in this case may prejudice the authority's ability to give it fair and objective evaluation in the coming application.

94. The Council also relies upon this application to suggest that Condition 24 does indeed have teeth, for why else would the Interested Party apply to have it set aside?

Grounds 3 and 4– Decision.

95. When granting permission the Council had unlawfully failed to make reasonable enquiries to try to obtain the factual information necessary for its decision on the application. The views of the Agency and its concerns about the proposed condition were not communicated to the Members. The Council had no expert or other adequate information to evaluate the issue for itself or to enable it to disregard the views of the Agency. The Council could have deferred consideration of the matter to await the report from the Agency but did not do so. As I read the transcript of the meeting the attitude of the Members might well have been very different if ***562** disclosure of the Agency's position and its concern about the condition had been made clear- leaving aside what the Members should have been informed about Grounds 1 and 2 above. Mr Hockney, in the to and fro of live discussion, may well have inadvertently given the Members the impression that the Agency approved Condition 24 when in fact it had real doubts about it. The evidence about subsequent events seems to me of little assistance to evaluation of the lawfulness of the Decision. The first two submissions of Mr Maurici are, as I see it, made good and on these grounds alone the Decision was unlawful. It follows that the Claimant succeeds on Ground 3, as to Ground 4 success depends on how one classifies these points, perhaps an unnecessary task. I shall therefore deal only briefly with the third and fourth limbs of these Grounds.

Hardy

96. Thirdly the Claimant argues that the imposition of a condition to deal with this matter was itself unlawful on the basis of *Hardy* . Mr Maurici says that Condition 24 requires groundwater controls to be put in place but it was clear that further investigations were required not just as to what such controls should be but whether they could be effective. The Council, like the defendant in *Hardy* , was not in a position to know that it had the necessary environmental information to make a decision.

97. Mr Hockman responds that in *Hardy* no bat surveys at all had been done and whether there would be significant effects on bats was not known. In this case, the condition presupposes a significant effect on the Claimant's land from increased ground water and requires a scheme to be submitted and approved before any more material is brought onto the site. Further the question for the Council was whether the development sought was likely to have significant effects on the Claimants land by causing flooding and in making that judgement it could (and did) consider the potential for any mitigation measures to reduce detrimental flooding impacts. The condition assumes the worst case scenario. Mr Maurici rejects what he sees as an attempt to distinguish the facts from *Hardy* .

98. In this case the Council had formed the view that there might well be a problem and that if it materialised the condition would address it. It was not consciously recognising that something was not known and leaving it to be worked out, unscrutinised, in the condition. I am inclined to accept that Mr Hockman's submission is to be preferred but since this point is

unnecessary for my overall decision and it is unhelpful for me to express views about *Hardy* which may complicate matters for expert planning judges in other cases, I express no considered view about it.

Condition 24 and the importation of material.

99. Fourthly the Claimant points out that the requirement to submit groundwater control details is not engaged unless the further importation of any material is to take place, the wording being *"prior to the importation of any material"*. He says that if the permitted development can proceed without importation of material the condition will not bite. The Claimant says that this removes the force of the Council's point that *"the developer cannot create a development which accords with the approved plans unless further material is imported"* . There is evidence from the Claimant and Ms Lord, who refers to documents from the Environmental ***563*** Agency produced by Mr Hockney, that work has started without importation of material—but it is unclear how much work is feasible without importation and triggering the condition. The Council also submits that the *"trigger"* for the condition had to be the importation of further material because it could not say *"prior to the commencement of the development"* as *"part of the development sought in the application had already taken place"* . There is a debate between the planners about the correctness of that but if there were a difficulty it would be one capable of being overcome by drafting skills. This issue too is one I do not have to decide and I would be reluctant to try to resolve it without more evidence.

Remedy

100. The Council submits that if the Claimant succeeds on liability the Court should withhold relief in its discretion, and/or under s.31 (6) of the Senior Courts Act 1981 . Mr Hockman submits that if, following the quashing of the permission the matter is reconsidered, there will be no basis for departing from the earlier view as to the planning merits. Even with the suggested need for members to be advised that the case is exceptional, and with re-wording of condition 24, the committee would in practice almost certain to take the same view as before of the essential planning merits. The Council submits that there is no realistic prospect that the committee would resolve to refuse the application.

101. I do not accept that submission. Quashing is the usual remedy and there have to be good reasons to take a different approach. As I see it there are no such reasons here. Further it does not seem to me from the evidence that reconsideration would necessarily lead to the same or a similar decision.

Conclusion

102. The application succeeds and the Permission will be quashed.

103. I shall be grateful if Counsel will let me have not less than 72 hours before the hand down of this judgment a list of corrections of the usual kind and a draft order, both preferably agreed, and a note of any matters to be raised at the hearing. ***564***

