Neutral Citation Number: [2019] EWHC 3574 (Admin)

Case No: CO/1561/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **on the application of**	**Claimant**
LONDON BOROUGH OF HILLINGDON **- and -** **(1) SECRETARY OF STATE FOR TRANSPORT** **(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT**	**Defendants**
HIGH SPEED TWO LIMITED	**Interested Party**

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- -

Melissa Murphy (instructed by **Legal Services**) for the **Claimant**
Tim Mould QC (instructed by the **Government Legal Department**) for the **Defendants**
Michael Fry (instructed by **DLA Piper**) for the **Interested Party**

Hearing date: 20 November 2019

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Approved Judgment

Mrs Justice Lang:

1. The Claimant applies for judicial review of the Defendants' decision, dated 4 March 2019, to allow the Interested Party's ("IP's") appeal against the Claimant's decision to refuse the IP's application for approval, under schedule 17 to the High Speed Rail (London - West Midlands) Act 2017 ("the HS2 Act"), for plans and specifications for proposed works ("the Works") associated with the creation of the Colne Valley Viaduct South Embankment wetland habitat ecological mitigation area ("the Site"), comprising earthworks and fencing. The Claimant's challenge is limited to the conclusions reached by the Defendants in respect of the archaeological importance of the Site.

2. The Claimant is the local planning authority for the area in which the Site is situated. The IP is a body established by the Department for Transport and it is the nominated undertaker appointed to deliver the HS2 project, and to exercise powers under the HS2 Act.

3. The issues raised in the claim are potentially of importance to the determination of other applications for approval under schedule 17 to the HS2 Act, both in this local authority area and other areas.

4. Permission to apply for judicial review was refused on the papers, but Sir Ross Cranston, sitting as a Judge of the High Court, subsequently granted the Claimant's application for a rolled-up hearing, to enable the renewed permission application and the substantive hearing to be listed on the same day.

Legislative scheme and guidance

5. The HS2 Act, which received Royal Assent on 23 February 2017, authorises development of a high-speed railway link between London and the West Midlands (Phase One of the HS2 line).

Deemed planning permission

6. Subsection 20(1) of the HS2 Act grants deemed planning permission under Part 3 of the Town and Country Planning Act 1990 ("TCPA 1990") for the carrying out of development authorised by the HS2 Act (subject to certain exceptions in subsection (2) which do not apply in this case).

7. By subsection 20(2) of the HS2 Act, such deemed planning permission is subject to the conditions contained in schedule 17 to the HS2 Act.

Schedule 17

8. Schedule 17 to the HS2 Act provides a scheme under which the nominated undertaker (the IP) is required to apply to local planning authorities for approval for its plans and specifications for proposed development.

9. Under paragraph 16 of schedule 17, an application for approval should be accompanied by a document from the nominated undertaker setting out its proposed programme, and

a document explaining how matters to which the request relates fit into the overall scheme of works authorised by the Act.

10. Schedule 17 distinguishes between qualifying and non-qualifying authorities. The Claimant has been appointed as a qualifying authority under paragraph 13 of schedule 17. All local authorities along the Phase One route were given the option to become qualifying authorities, provided that they gave the requisite undertakings to the Minister (the Secretary of State for Transport).

11. Schedule 17 makes separate provision for different types of development. The Works in this case come within paragraph 3 – "Conditions relating to other construction works". The construction works to which paragraph 3 relates are listed in paragraph 3(2), and they include "(b) earthworks" and "(e) fences or walls".

12. The scheme for approval under paragraph 3 provides as follows:

> "3 (1) If the relevant planning authority is a qualifying authority, development to which this paragraph applies must be carried out in accordance with plans and specifications for the time being approved by that authority.
>
> …
>
> (4) The relevant planning authority may, on approving a plan or specification for the purposes of this paragraph, specify any respect in which it requires there to be submitted for approval additional details of the operation or work which gives rise to the need for approval under sub-paragraph (1).
>
> (5) Where the relevant planning authority exercises the power conferred under sub-paragraph (4), the plans and specifications in accordance with which the development is required under sub-paragraph (1) to be carried out must, as regards the specified respect, include a plan or specification showing the additional details.
>
> (6) The relevant planning authority may only refuse to approve plans or specifications for the purposes of this paragraph on a ground specified in relation to the work in question in the following table."

13. The table sets out, in the case of earthworks, the specified, possible grounds for refusal as follows:

> "That the design or external appearance of the works ought to, and could reasonably be, modified –
>
> to preserve the local environment or local amenity,
>
> to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or

> to preserve a site of archaeological or historic interest or nature conservation value.
>
> If the development does not form part of a scheduled work, that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits."

14. The term "scheduled works" is defined in section 1(2) of the HS2 Act as the works specified in schedule 1 to the HS2 Act. The Works in this case are not listed in schedule 1.

15. For fences and walls (except for sight, noise and dust screens), the Table sets out the specified, possible grounds for refusal as follows-

> "That the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits".

Appeal

16. Paragraph 22 of schedule 17 provides a right of appeal, as follows:

> "Where the nominated undertaker is aggrieved by a decision of a planning authority on a request for approval under Part 1 (including a decision to require additional details), it may appeal to the appropriate Ministers by giving notice of the appeal in the prescribed form to them and to the authority whose decision is appealed against within 42 days of notification of the decision.

17. The appropriate Ministers for the purposes of paragraph 22 are the Secretary of State for Transport and the Secretary of State for Housing, Communities and Local Government. Under paragraph 23, the appropriate Ministers have delegated the appellate function to the Planning Inspectorate, whilst retaining the ability to "recover" the appeal should they deem it necessary, which they did in this case.

The statutory guidance

18. Paragraph 26(1) of schedule 17 to the HS2 Act empowers the Secretary of State to give guidance to planning authorities in the exercise of their functions under that schedule. Paragraph 26(2) states that a "planning authority must have regard to that guidance".

19. The Secretary of State for Transport has published the "Schedule 17 Statutory Guidance" (February 2017). Under the heading "Scope of Schedule 17", paragraph 4.4 of the Guidance states:

> "These approvals have been carefully defined to provide an appropriate level of local planning control over the works while not unduly delaying or adding cost to the project. Planning authorities should not through the exercise of the Schedule seek to:

- revisit matters settled through the parliamentary process;
- seek to extend or alter the scope of the project; or
- modify or replicate controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, or existing legislation such as the Control of Pollution Act or the regulatory requirements that apply to railways."

20. Under the heading "Grounds for determination", the Guidance states:

> "7.1 For all approvals under Schedule 17, the Schedule specifies the grounds that are relevant. When determining a request for approval a planning authority must only consider the grounds relevant to that approval. Therefore requests may only be refused, conditions be imposed, and modifications or additional information requested, where they relate to the grounds specified for determining the request for approval.
>
> …..
>
> 7.6 When considering requests for approval for which the grounds include the preservation of a site of archaeological or historic interest this ground should be taken to include the preservation of the setting of listed buildings. This ground should be applied in conjunction with other material considerations."

The Environmental Minimum Requirements

21. The Environmental Minimum Requirements ("EMRs") are explained and set out in the 'General Principles' document published by the Secretary of State for Transport in February 2017. It explains, at paragraph 1, that the objective of the EMRs is to ensure that Phase One is delivered in accordance with the Environmental Statement that was undertaken during the passage of the HS2 Act through Parliament. Under the terms of the Development Agreement between the IP and the Secretary of State for Transport, the IP is contractually obliged to comply with the EMRs.

22. The components of the EMRs are:

i) the Code of Construction Practice (Annex 1);

ii) the Planning Memorandum (Annex 2);

iii) the Heritage Memorandum (Annex 3);

iv) the Environmental Memorandum (Annex 4).

23. *The Code of Construction Practice* ("the CoCP") specifies at section 8 the measures that the nominated undertaker and its appointed contractors are obliged to apply for the purpose of managing the impact of HS2 construction works on cultural heritage assets,

including archaeological and palaeo-environmental remains that may contain evidence of the human past.

24. Paragraph 8.1.2 of the CoCP requires that all works be managed in accordance with the Heritage Memorandum and follow accepted archaeological practice and guidance, taking account of the relevant sections of the National Planning Policy Framework.

25. Paragraphs 8.1.3 and 8.1.4 of the CoCP require the lead contractor to prepare project plans in accordance with the Generic Written Scheme of Investigation: Historic Environment Research and Delivery Strategy ("GWSI: HERDS"), in consultation with Historic England and the relevant local authority.

26. Paragraph 8.2 of the CoCP sets out measures in relation to unexpected discoveries of heritage assets during the course of construction works.

27. GWSI: HERDS covers all aspects of the historic environment, including built heritage, archaeology and the historic landscape, affected by the HS2 Phase One project. Paragraph 1.1.2 states:

> "……GWSI: HERDS sets out the project mechanisms for designing works, undertaking evaluation, delivering investigations, undertaking post-investigation assessment, and archive deposition that will be adopted for the design and construction of Phase One of HS2".

28. Part 7 of GWSI: HERDS sets out the detailed arrangements which the nominated undertaker and his contractors are required to put in place and to follow for the purposes of specifying and delivering the historic environment works.

29. *The Planning Memorandum* sets out the undertakings given by qualifying authorities with respect to the grant of approvals under schedule 17 to the HS2 Act.

30. Paragraph 7.2.1 of the Planning Memorandum states:

> "7.2.1 HS2 is an infrastructure project of national importance. The qualifying authority shall accordingly have regard to construction, cost and programme implications, and shall not seek to impose any unreasonably stringent requirements on the requests for approval of…plans or specifications…which might frustrate or delay the project...".

31. Paragraphs 7.7.1 and 7.7.2 of the Planning Memorandum state:

> "7.7.1 Where an authority refuses approval of a request for approval, in addition to specifying the grounds under the Planning Conditions Schedule for its decision, it shall state clearly and precisely the full reasons for its decision.
>
> 7.7.2 Where the authority's decision in relation to the determination of plans and specifications has been reached on the ground that…the development ought to be and could reasonably be carried out elsewhere within the relevant limits,

> the authority shall include an explanation of why and how it considers the modifications should be made."

32. Paragraph 9.1.1 of the Planning Memorandum states:

> "9.1.1 In determining requests for approval, the qualifying authority shall take into account the assessments in the Environmental Statement, the arrangements in the CoCP, the Heritage Memorandum, the Environmental Memorandum, and any relevant undertakings and assurances concerning the project specified in the Register of Undertakings and Assurances".

33. Paragraph 9.3.1 of the Planning Memorandum states:

> "9.3.1 The qualifying authority must have regard to statutory guidance issued by the Secretary of State in accordance with paragraph 26 of Schedule 17 to the Bill".

34. *The Heritage Memorandum*, at Part 4, is headed "Investigation, recording and mitigation". Paragraphs 4.5.1 and 4.5.2 of the Heritage Memorandum require the nominated undertaker to develop and fully integrate into the overall construction programme "a programme to deliver the heritage investigation and recording works outlined in the Environmental Statement and as developed during the detailed design process".

35. Paragraph 4.6.1 records the preparation of a route-wide generic written scheme of investigation - GWSI: HERDS - which sets out the research framework and general principles for the design, evaluation, investigation, recording, analysis, reporting and archive deposition to be adopted for the design development and construction of the HS2 Phase One project.

36. Paragraphs 4.6.2 to 4.6.5 set out the approach that is to be followed for the purposes of location-specific investigation and recording of heritage assets (including archaeological assets), both prior to and during the construction of the HS2 Phase One project.

37. Paragraphs 4.6.6 and 4.6.7 of the Heritage Memorandum refer to the CoCP as the source of management measures, to be imposed on contractors, in order to control any adverse effect on heritage assets, and the procedures to be followed by contractors. The nominated undertaker will secure such measures through the works construction contracts.

38. Paragraphs 5.1.1 to 5.1.4 of the Heritage Memorandum set out the required procedure to be followed in the event of the unexpected discovery of heritage assets (including archaeological remains) of national importance.

History

The Site

39. The Site is situated approximately 1.1km to the south of the settlement of South Harefield, immediately north of the Chiltern Main Line railway. It is located within a field which was used as pasture for grazing cattle until it was acquired by the IP using powers of compulsory purchase under the HS2 Act.

40. The Site is located within the Colne Valley Archaeological Protection Zone ("Colne Valley APZ") which is an area of "acknowledged archaeological potential" (paragraph 5.8 of IP's Statement of Case in the appeal).

41. A third of the Site forms part of the Mid Colne Valley Site of Importance for Nature Conservation (Metropolitan Grade).

The Works

42. The Works are required as part of a suite of mitigation measures to facilitate the construction of a viaduct which will carry the Phase One railway line over the Colne Valley, as well as other associated development. After the construction phase, the Site will be located approximately 90 metres southwest of the new Colne Valley Viaduct.

43. The Works relate only to the relocation of a community of great crested newts and reptiles, whose current habitat will be affected by the Colne Valley Viaduct South Embankment Works. They are to be relocated to a newly-constructed habitat at the Site. The new habitat will include a mitigation pond, two hibernacula suitable for great crested newts, and one reptile bank suitable for basking reptiles. The project will entail about 360 sq. metres of earthworks. The Works also include permanent fencing to be erected around the boundary of the Site, with a gate for access.

44. Great crested newts are a protected species under the Conservation of Habitats and Species Regulations 2017 and so the IP has obtained a route-wide organisational licence from Natural England in respect of activities and operations involving great crested newts along the Phase One route.

45. The IP identified in the Environmental Statement that Phase One had the potential to cause an adverse impact on the local ecology in the Colne Valley area, although the Works themselves were not assessed as part of the Environmental Statement.

The application

46. On 20 October 2017, the IP submitted to the Claimant its application for approval of the plans and specifications for the Works at the Site, pursuant to schedule 17 to the HS2 Act. It provided the following documents in support:

    i) A completed form entitled "Application for approval of details reserved by condition".

ii) A completed form entitled "Plans and Specifications Proforma – High Speed Rail (London – West Midlands Act 2017 – Request for approval of PLANS AND SPECIFICATIONS".

iii) One plan submitted for approval - General Arrangement and Sections.

iv) Two plans submitted for information – Site Location Plan and General Arrangement.

v) A written statement.

vi) The Colne Valley Key Environmentally Sensitive Worksite Management Plan.

47. Paragraph 1.2 of the IP's written statement stated:

> "This written statement is compiled in accordance with the High Speed Two (HS2) Planning Memorandum and Forum Notes as required by the planning regime established under Schedule 17 of the High Speed Rail (London – West Midlands) Act 2017 (the Act).
>
> This statement provides the London Borough of Hillingdon with information to assist with the determination of the plans and specifications submission in relation to the above description of works. This statement is for information only and not for approval."

48. Section 2 of the written statement was headed "Location and Characteristics of the Area". Paragraph 2.1 described the application site. Paragraph 2.2 described the site's ecological features. Paragraph 2.3 was entitled "Heritage". It stated:

> "The site is located within the Colne Valley Archaeological Protection Zone (APZ) an area of acknowledged archaeological potential. The site has potential for Palaeolithic remains within Thames Terrace gravels associated with CVA044 and lies within the extent of CVA021, an area of Mesolithic activity at Dews Farm evidenced by finds of tranchet axes, cores and flakes, animal bones and teeth. Previous archaeological investigations in the surrounding area have also identified organic sediments of possible Mesolithic date.
>
> A cropmark indicative of a possible ring ditch is recorded to the northeast of the site. However, it is considered that the cropmark identified is quite small (at approximately 5m diameter) for a ring ditch and somewhat elongated. It is therefore possible that this is instead a small quarry.
>
> The find spot of an early Saxon spearhead has been recorded within the proximity of Dews Farm, which could indicate the previous existence of a Saxon burial ground within proximity of the site.

> Remote sensing surveys undertaken to inform the HS2 Phase 1 Environmental Statement have identified a curvilinear/ditched enclosure (GO2) and field boundary/bank (G13) features immediately east of the site.
>
> Geophysical surveys will be carried out at this site to inform the presence/absence, extent and significance of the potential archaeological resource and to identify the requirement for further archaeological investigation. If archaeological remains are identified, trial trench evaluation may be undertaken prior to construction of the habitat creation site. All archaeological works will be carried out by specialist contractors, focusing on the location of the pond and associated earthworks."

49. Section 3 of the written statement described the works and their relationship to the wider mitigation scheme for the HS2 Colne Valley South Embankment. Section 4 set out the design criteria and rationale for the proposed works. Paragraph 4.1 included the following statement:

> "The general constraints and drivers, which have informed the design of the mitigation site, include:
>
> ….
>
> - Taking into account the proposed mitigation in the HS2 Environmental Statement and the Environmental Minimum Requirements:
>
> …."

50. Sections 5 to 7 of the written statement dealt respectively with the programme and sequence of works, other main consents associated with the works and the plans and specifications that were submitted for approval and for information.

The Claimant's decision

51. Mr Thynne, who is the Claimant's Planning Specialists Team Leader, explained in his witness statement that the Claimant considered that detailed site investigations were needed as the Site was in a sensitive area, for ecological and archaeological reasons. Without this level of information it was not possible to determine the potential impact of the Works.

52. The Claimant disclosed its draft committee report to the IP, together with a request for further information. In response, the IP sent the Claimant emails and plans, which are listed in the IP's Statement of Case in the appeal, at paragraphs 7.26 to 7.28. In an email dated 31 January 2018, Mr Smith, Town Planning Manager, for Fusion, the IP's contractors, advised that the procedure in GWSI: HERDS would be followed, and if required, any further investigation and evaluation would be carried out. If the archaeological investigation identified assets which should be preserved in-situ, and

which clashed with the proposed Works, the Works would need to be re-designed, and potentially a new schedule 17 application for approval made.

53. Mr Iain Williamson, Historic Environment Manager at Fusion, on behalf of the IP, gave a more helpful explanation in an email sent to the Greater London Archaeological Advisory Service ("GLAAS") dated 29 January 2018 in which he said:

> "The geophysical survey of the Colne Valley Wetland site was planned for August 2017 as part of a wider programme of geophysics across the area … Due to various land ownership and access issues, and despite several attempts to undertake the survey, we have to date not been able to complete the works. It is this delay to our survey programme which has resulted in apparent lack of archaeological evidence to support the Schedule 17 submission.
>
> Do rest assured that the geophysical survey, trial trench evaluation, critical review of the results and any recommendation to move the pond or implement archaeological mitigation works will be completed before construction of the habitat site begins in 2019…"

54. On 12 March 2018, the Claimant's Major Applications Planning Sub-Committee (HS2) ("the Committee") received a report from its planning officer recommending refusal of the application.

55. In relation to archaeological interest, the officer advised the Committee of the consultation response from GLAAS which is part of Historic England. GLAAS noted that the proposed Works were in an area which may contain significant archaeological remains, and which the IP accepted required further evaluation. GLAAS was concerned that the application had been submitted before an archaeological evaluation had been carried out and without reference to it. Evaluation results should be available to inform the decision on whether the ponds were sensitively located. GLAAS had not withdrawn these objections after receiving the IP's additional emails. For these reasons, the officer recommended refusal of the application.

56. In relation to ecological sensitivity, the officer advised that the Committee was required to consider the impact of earthworks on a site of ecological value, which could be damaging. The information provided in the submission did not adequately address these concerns, and therefore the officer recommended refusal of the application.

57. The Committee accepted the officer's recommendations and resolved to refuse approval. The decision notice issued on 20 March 2018 stated that the application had been refused on the following grounds:–

> "1. The design or external appearance of the works ought to, and could reasonably, be modified to preserve a site of archaeological or historic interest or nature conservation value.

> 2. The development does not form part of a scheduled work, within the meaning of Schedule 1 of the HS2 Act, and that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits."

The appeal

58. The IP appealed under paragraph 22 of schedule 17 to the HS2 Act. The Ministers resolved to determine the appeal themselves, pursuant to paragraph 23(1) of schedule 17.

The Inspector's report

59. An Inspector appointed by the Ministers, Mr Alan Novitsky, held a hearing and made a report, dated 25 July 2018. He received submissions from the IP, the Claimant and Historic England. In relation to matters of archaeological interest, the Inspector concluded that the information available to the Claimant was not adequate (paragraph 78). There was scope to supply in the written statement the information reasonably necessary to allow an informed decision to be made. In this case, the written statement largely described actions which were expected to be taken in the future to assemble this information, rather than conveying the substantive information itself (paragraphs 67, 68). He questioned why the application had not been postponed until the full archaeological information was available. Although the IP relied upon the EMRs and GWSI: HERDS processes, the Claimant had no control over these (paragraphs 71, 72). If a further application proved necessary, the duplication of resources and programme disruption involved in redesigning the Site and delaying the works could well be significant (paragraph 72).

60. The Inspector's overall conclusions were as follows:

> "78. With regard to archaeology, I find that the information available to the Council was not adequate. The design of the works ought to, and could reasonably, be modified to preserve a site of archaeological interest, if found necessary once adequate information becomes available.
>
> 79. Moreover, if found necessary once adequate information becomes available, the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits. I find it unreasonable to expect the Council to approve an application, or to show how the works ought to be, and could reasonably, be modified or carried out elsewhere, on the basis of inadequate information.
>
> 80. Turning to ecology, I find that, although there were shortcomings in the assembly of the ES, adequate information was available to allow the Council to make a pragmatic but responsible judgment on the effect of the proposals on the ecological value of the Site."

61. In regard to matters of archaeological interest, the Inspector recommended that the IP's appeal be dismissed, and approval refused.

62. In regard to matters of ecological value, the Inspector recommended that the appeal be allowed and the application be approved.

The Defendants' decision

63. The Defendants' decision was made on 4 March 2019. The Defendants accepted the Inspector's recommendation to allow the appeal in respect of matters of ecological value. However, they disagreed with his recommendation, and some of his reasoning, in relation to matters of archaeological interest. Therefore, they decided to allow the appeal and grant approval for the application.

64. The Defendants identified two main issues, at paragraph 24 of the Decision Letter ("DL24"):

    i) whether the Claimant justified its refusal of approval on either of the stated grounds under paragraph 3(6) of schedule 17 to the HS2 Act; and

    ii) whether the Claimant's refusal of approval on the ground that the IP had failed to provide sufficient information on the impact of the proposed works to enable it to determine the application, was open to it under schedule 17 to the HS2 Act.

65. On the first main issue, the Defendants concluded that the Claimant had not submitted any evidence to justify refusing the application. The Claimant had not proposed that the works ought to and could reasonably be constructed in some other way so as to preserve a site of archaeological interest or nature conservation value, or that the development ought to and could reasonably be carried out elsewhere (DL28). They rejected the Inspector's qualification "if found necessary once adequate information becomes available" as this was not consistent with the wording of paragraph 3(6) of schedule 17 (DL29). The Defendants relied upon paragraph 7.7 of the Planning Memorandum which states that "the authority shall include an explanation of why and how it considers the modifications should be made and where".

66. On the second main issue, the Defendants found that the application met the requirements of Planning Forum Notes 1, 2, and 3 (DL32). They concluded that it was in accordance with the controls established by the EMRs for the IP to base its written statement on the programme of site investigation to be carried out at the site. They did not share the concerns raised by the Inspector about the lack of archaeological evidence concerning the location of the proposed pond because the EMRs would ensure that the necessary investigations would be carried out prior to the earthworks being undertaken (DL35, 36).

67. The Defendants concluded that, in accordance with the statutory guidance, schedule 17 to the HS2 Act did provide a means for local authorities to have an appropriate level of local planning control over the Works, whilst not modifying or replicating controls set out in the EMRs (DL37, 38).

68. The Defendants went on to find that the Claimant had adopted an incorrect approach to the schedule 17 procedure:

> "39. In this case, trial pit investigation of the site, including that part which is of most concern to the Council (the mitigation pond) will be undertaken in accordance with the EMRs (Heritage Memorandum and GWSI: HERDS) as explained in the Written Statement. In the event that the results of this investigation show the plans and other documents for the proposed works require modification, HS2 Ltd will be required to do so and, if necessary, make a further submission under Schedule 17. The Secretaries of State note, that in such circumstances, the Council's concerns at IR24 and IR32 (that the control provided by the Act would be frustrated) would be unfounded. It is not the purpose of the Schedule 17 procedure to replicate or police the process of investigation set out in the EMRs, but rather to complement it.
>
> 40. The Secretaries of State conclude that the correct approach here, therefore, was for the Council to determine the application on the basis of the controls already in place under the EMRs. The Secretaries of State consider that the Council, by refusing the application, and the Inspector in accepting the Council's arguments on this point … have incorrectly sought to replicate those controls through the Schedule 17 process."

Grounds of challenge

69. The Claimant challenged the Defendants' decision on three grounds.

70. First, in allowing the IP's appeal, the Defendants unlawfully misconstrued schedule 17 to the HS2 Act as:

    i) requiring or allowing the decision maker to grant consent for works with no substantive information as to the impact of those works;

    ii) imposing an obligation on local authorities to carry out their own investigations as to impact, in order to be able to rely on the grounds for refusal under schedule 17; and

    iii) offering qualifying authorities no meaningful control over works included within schedule 17.

71. Second, in allowing the IP's appeal, the Defendants unlawfully failed to take account of a material consideration, namely, the impact of the scheme on the archaeological interest of the site, in circumstances in which there was evidence of archaeological interest.

72. Third, in allowing the IP's appeal, the Defendants failed to provide any, or any adequate reasons to explain their disagreement with the Inspector that the parallel EMRs process did not give the Claimant the control intended by schedule 17 to the HS2 Act.

73. In response, the Defendants submitted that the Claimant's interpretation of the HS2 Act and Guidance was misconceived, and they invited the Court to uphold their decision, for the reasons set out in the decision letter.

Conclusions

Grounds 1 and 2

74. It is convenient to consider grounds 1 and 2 together, as they overlap.

75. The Claimant relied upon the well-known principles of public law that a decision maker must take into account all relevant considerations, exclude irrelevant considerations, and exercise his discretion in accordance with the policy and objects of the relevant statute, properly construed: *Padfield and Others v Minister of Agriculture, Fisheries and Food and Others* [1968] AC 997, per Lord Reid at 1020; per Lord Hodson at 1046; applied in *R (Gallastequi) v Westminster CC* [2013] 1 WLR 2377, per Lord Dyson MR at [18] – [21].

76. The Claimant submitted that a decision maker must have sufficient information before making his decision, as otherwise his decision may be challengeable. In support of this proposition, the Claimant referred to *R (Austin) v Wiltshire Council* [2017] EWHC 38 (Admin), in which Hickinbottom J. set out the principles applicable to the determination of planning applications by local authorities, saying at [16(iii)]:

> "The assessment of how much and what information should go into a report to enable the planning committee to perform its function is itself a matter for the officers, exercising their own expert judgment (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500 at page 509). However, of course, if the material included is insufficient to enable the committee to perform its function, or if it is misleading, the decision taken by the committee on the basis of a report may be challengeable."

77. These general principles were not in dispute, but their application necessarily depends upon the statutory context in which the decision is made. In my judgment, this case turns on the proper construction of schedule 17 to the HS2 Act. I consider that the HS2 Act has expressly constrained the decision-making function of an approved local planning authority, in a way which is unusually restrictive, in comparison with the determination of other types of planning applications, and that is the reason why the Claimant considers it has no meaningful control over the Works at the Site.

78. Under sub-paragraphs 3(4) and (5) of schedule 17, a local authority may, on approving a plan or specification, specify any respect in which it requires there to be submitted for approval additional details, but it must supply a plan or specification showing the additional details. Understandably, the Claimant did not seek to exercise this power.

79. Under paragraph 3(6) of schedule 17, the local planning authority may only refuse to approve plans or specifications for earthworks on the specified grounds, namely:

> "That the design or external appearance of the works ought to, and could reasonably be, modified –
>
> (a)to preserve the local environment or local amenity,
>
> (b)to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or
>
> (c)to preserve a site of archaeological or historic interest or nature conservation value."
>
> **Or**
>
> "If the development does not form part of a scheduled work, that the development ought to, and could reasonably, be carried out elsewhere within the development's permitted limits."

80. In my view, the Defendants were correct to hold that, on a proper construction of paragraph 3(6) of schedule 17, the onus is on the local planning authority to demonstrate that the design or external appearance of the earthworks ought to and could reasonably be modified to preserve the site of archaeological interest; or that the earthworks ought to and could reasonably be carried out elsewhere within the development's permitted limits (DL30). This is also confirmed in paragraph 7.7.2 of the Planning Memorandum.

81. The Defendants were entitled to go on to find that the Claimant's reasons for refusal did not put forward any evidence or submissions to address the criteria in paragraph 3(6) (DL28). The Claimant did not indicate how, in its view, the earthworks should be modified to preserve matters of archaeological interest, nor that the earthworks ought to, and could reasonably be, carried out elsewhere. In my view, the Claimant could not do so, on the state of the evidence before it, and therefore it erred in relying on paragraph 3(6) when the criteria were not made out. For reasons which I explain further below, the Defendants were not suggesting at DL28 that the Claimant should commission its own evidence, in addition to assessing the information provided by the IP.

82. The Defendants rightly rejected the Inspector's proposed qualification that the design should be modified or the development carried out elsewhere "if found necessary once adequate information becomes available" as an impermissible re-drafting of the statutory words (DL29).

83. As the Defendants explained at DL19 and DL31, the IP was under a statutory requirement to provide plans and specifications of the works and a context report. In addition, further supporting information was provided in accordance with the Planning Memorandum and the Planning Forum Notes 1, 2, and 3. The IP satisfied these requirements.

84. There is no express provision in schedule 17 empowering a local authority to seek further information from the IP. However, I consider that such a power can readily be implied as part of a local authority's decision-making function. In my view, the IP is also under an implied obligation to co-operate with reasonable requests for information from a local authority, as part of its role as the nominated undertaker who is statutorily required to seek approval from the local authority for its developments and to submit

the relevant information. In this case, the Claimant adopted a sensible approach in letting the IP know of its concerns and asking for more information prior to making its decision. The IP acted responsibly in seeking to address those concerns, by supplying further information. In my view, the further information was of real value and enabled the Claimant and GLAAS to understand the position at this particular Site, which was somewhat unusual, because essential investigatory work had not yet been done. If the Defendants were expressing the view, at DL36, that the initial information supplied was sufficient, without this further information, then I disagree with them.

85. In my judgment, the information which the Claimant received from the IP, taken as a whole, was sufficient to enable it to approve the application, having regard to the Claimant's limited role under the statutory scheme and guidance. The IP accepted that the Site was of archaeological importance, and that the guidance and procedures in the Heritage Memorandum, the relevant provisions of the CoCP, and GWSI: HERDS were all engaged. The IP's contractors intended to carry out a geophysical survey and trial trench evaluation; and then to conduct a critical review of the results, to see if it was necessary to move the pond or implement archaeological mitigation works. If it was necessary to make changes to the specification or plans, a further application to the Claimant would be made under schedule 17 of the HS2 Act.

86. The statutory guidance (paragraph 4.4) warns local planning authorities that they should not seek to modify or replicate the controls in the EMRs. As the Defendants said, at DL39, it was not the purpose of the schedule 17 procedure to replicate or police the process of investigation set out in the EMRs. In my view, it follows that it was not appropriate for the Claimant to seek to commission its own experts to carry out investigations and assessments. It should make its decision on the basis of the material provided by the IP. The Claimant has misunderstood the purport of DL28 in that regard. As a qualifying authority, and in accordance with its undertakings, the correct approach was for the Claimant to determine the application on the basis that the scheme of archaeological investigation, study and conservation created under the EMRs would be applied by the IP, as nominated undertaker, in accordance with the EMRs General Principles and its contractual obligations under the HS2 Development Agreement. If a change to the specifications or plans was required, a further application under schedule 17 would be made. It was not the Claimant's role to seek to enforce the controls in the EMRs by withholding approval.

87. Whilst the Claimant and the Inspector understandably took the view that the application should have been postponed until after the further archaeological investigations were concluded, ultimately it was not their decision to make. The IP was well aware of the position at this Site and could have chosen to postpone if it thought it appropriate to do so. The Defendants considered that the IP was best placed to oversee the programme of applications (DL41). It would have been a misuse of the Claimant's powers under paragraph 3(6) of schedule 17 to withhold approval because it believed that the application was premature, as this is not a permissible ground for refusal.

88. As to Ground 2, there was ample evidence before the Inspector and the Defendants about the archaeological significance of the Site and the potential adverse impacts of construction works. The IP explained in detail how these matters would be addressed in accordance with the guidance and procedures in the Heritage Memorandum, the relevant provisions of the CoCP, and GWSI: HERDS. The Defendants gave this evidence due consideration and "were satisfied in this case that the EMR processes,

which were approved by Parliament alongside the HS2 Act, will ensure that the appropriate surveys will be conducted at the appropriate time and that appropriate action will be taken in accordance with their findings, including a further schedule 17 application should that be required" (DL50).

89. For these reasons, Grounds 1 and 2 do not succeed.

Ground 3

90. The Defendants were under a duty to give intelligible and adequate reasons for their decision. In *Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, Lord Brown described the standard of reasons required, at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

91. Lord Brown's formulation was approved by the Supreme Court in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, per Lord Carnwath at [35].

92. In *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169, where the Secretary of State had departed from his inspector's recommendation when he confirmed a compulsory purchase order, the Court of Appeal found that the standard of reasoning in the Secretary of State's decision letter was inadequate. Lewison LJ reviewed the authorities at [34] to [40] and concluded that the Secretary of State did not give adequate reasons for disagreeing with the Inspector:

> "54. In short, although it is clear that the Secretary of State disagreed with the inspector's view that the guarantees and safeguards were inadequate he does not explain why he came to that conclusion. I do not consider that requiring a fuller explanation of his reasoning either amounts to requiring reasons for reasons or that it requires a paragraph by paragraph rebuttal of the Inspector's views. But it does require the Secretary of State to explain why he disagreed with the inspector, beyond merely stating his conclusion that he did. The two critical sentences in the decision letter are, in my judgment, little more than "bald assertions". The Secretary of State may have had perfectly good reasons for concluding that the guarantees and safeguards were adequate. The problem is that we do not know what they were…"

93. In my view, the Defendants' decision letter met the required standard of reasons. It gave clear reasons for the Defendants' conclusions on the main issues in the appeal. As a party to the appeal, the Claimant also had the benefit of seeing the fuller analysis in the IP's written statement of case upon which it appears that the Defendants' decision was based. This gave detailed cross-references to the parts of the EMRs and guidance relied upon. Although the Claimant said it was at a loss to understand why the Defendants disagreed with the Inspector's view that the parallel EMRs process did not give the Claimant sufficient control, I consider that this was because the Claimant did not accept, or fully comprehend, the way in which the approval scheme in schedule 17 to the HS2 Act operated. The scheme was not intended to give local planning authorities control over any of the matters included within the EMRs. They have a very limited function under schedule 17. In my view, the decision letter clearly explained why the Defendants disagreed with the Inspector's reasoning, as well as his conclusions.

Final conclusion

94. For the reasons set out above, I grant the Claimant permission to apply for judicial review, as the grounds were arguable, but the application for judicial review is dismissed on all three grounds.