Case No: CO/2459/2017

Neutral Citation Number: [2018] EWHC 195 (Admin)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Leeds Combined Court Centre,
1, Oxford Row, Leeds LS1 3BG

Date: 08/02/2018

**Before** :

**THE HON MR JUSTICE KERR**

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**Between :**

**THE QUEEN ON THE APPLICATION OF SIMON SHIMBLES** — **Claimant**

**- and -**

**CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL** — **Defendant**

**- and –**

**(1) ENDLESS ENERGY LIMITED**
**(2) THE NATIONAL TRUST**

**Interested Parties**

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**Duncan Sinclair** (instructed by **Richard Buxton Environmental and Public Law**) for the **Claimant**
**John Barrett** (instructed by **Legal and Democratic Services, City of Bradford MDC**) for the **Defendant**
**Philip Coppel QC** and **Jack Parker** instructed via **Direct Access** for the **First Interested Party**
No appearance for the **Second Interested Party**

Hearing dates: 15th-16th January 2018

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# Judgment

**The Hon Mr Justice Kerr:**

Introduction

1. On 11 April 2017, the Regulatory and Appeals Committee (the committee) of the defendant local planning authority (the LPA) approved an application for planning permission by the first interested party (the developer) to construct two plants to recover energy from waste, with associated development. One plant is intended to burn commercial waste and produce electricity from it. The other plant is for melting plastic waste and turning it into biofuel.

2. The claimant is a local resident and is among those who object to the application. An important historic building, East Riddlesden Hall and surrounding grounds near the application site are owned by the second interested party, which objected to the application but has taken no part in the case. The Hall is a popular venue for weddings, ideal for television period drama and was used for a film version of *Wuthering Heights*.

3. The site of East Riddlesden Hall was described in 2016 by an officer of the LPA thus:

> "… a group of listed buildings located 500m north of the proposed development site. The Hall is a 17th century gentry house listed Grade I, and is associated with a Grade I 17th century aisled barn and other barns, outbuildings, walls, gatepiers and a mounting block all listed at Grade II. The whole assemblage is set in generally landscaped grounds, but with a more formal garden on the southern side. …. The Grade I buildings are of exceptional interest and the whole of the site is of national significance."

4. There are five grounds of challenge, all permitted by Lang J to go to a full hearing. The first two relate to "heritage" issues in the relevant officer's report. It is agreed that some harm will result to the setting of East Riddlesden Hall. A chimney and sometimes a plume of vapour will be in plain sight from it. The other three grounds relate to the impact on two sites designated under EU legislation, the South Pennine Moors Special Protection Area (the SPA) and a Special Area of Conservation (SAC) known locally as Rombald's Moor.

The Law

5. It is agreed that section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Act) is engaged in this case:

> "In considering whether to grant planning permission … for development which affects a listed building or its setting, the local planning authority … shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

6. It is also common ground that the National Planning Policy Framework (NPPF) section 12 entitled "Conserving and enhancing the historic environment" is also relevant. Within that section, paragraph 132 requires "great weight" to be given to the asset's conservation and makes clear that harm to the significance of a heritage asset can result from development within the asset's setting as well as by harm to the asset itself. Any harm or loss requires "clear and convincing justification".

7. Substantial harm to grade II listed buildings should be "exceptional"; substantial harm to grade I and II listed buildings should be "wholly exceptional" (paragraph 132) and can only be justified (for present purposes) if outweighed by "substantial public benefits" (paragraph 133). If the harm to the significance of the heritage asset is "less than substantial", then "this harm should be weighed against the public benefits of the proposal, including securing its [the asset's] optimum use" (paragraph 134).

8. Where a development proposal would affect a non-designated heritage asset, the requirement under paragraph 132 to give "great weight" to the asset's conservation does not apply but, by paragraph 135, the effect on the significance of the asset should be taken into account and in weighing such an application a "balanced judgement" is required "having regard to the scale of any harm or loss and the significance of the heritage asset".

9. All the above was common ground. The parties also agreed that this was a case where the committee may be taken to have adopted the reasoning in the report of the relevant officer; that, therefore, it is that report which must be scrutinised; and that in assessing the report the court must not apply too exacting a standard to the language used and should adopt the approach of Lewison LJ in *R (Palmer) v. Herefordshire Council* [2017] 1 WLR 411, at paragraphs 7-8.

10. I also bear in mind the reasoning of Sales LJ in *Jones v. Mordue* [2016] 1 WLR 282, at paragraph 28: where reference is properly made to the paragraphs of the NPPF corresponding to the duty under section 66(1) of the 1990 Act, a decision maker who works through those paragraphs in accordance with their terms (or adopts the reasoning of a report writer who has done so) will, generally, have complied with the section 66(1) duty.

11. Reference was made at the hearing to the need for the decision maker to undertake what has been described as a weighted balancing exercise. The parties differed about the correct approach to this exercise, but agreed that the committee must not, in the context of harm to a heritage asset or its setting, merely carry out "a simple unweighted balancing exercise" (per Holgate J in *R (Leckhampton Green Land Action Group Ltd) v. Tewkesbury BC* [2017] EWHC 198 (Admin), [2017] Env. LR 28, at paragraph 40).

12. Various metaphors were used in oral argument to describe the correct way of conducting the exercise. The explanation of Lindblom J (as he then was) in *R (Forge Field Society) v. Sevenoaks DC* [2014] EWHC 1895 (Admin), at paragraphs 48-49, is one I find most helpful:

> "48 … the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in Barnwell it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.
>
> 49 This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning

> judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in Barnwell, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

13. As to the law relevant to the third to fifth grounds, it is agreed that the LPA is the "competent authority" under the Conservation of Habitats and Species Regulations 2010 (the 2010 Regulations, mainly revoked and replaced from 30 November 2017 by 2017 Regulations of the same name), the successor to certain 1994 regulations enacted to transpose the Habitats Directive (Council Directive 92/43/EEC) into domestic law; and that the SPA and the SAC are designated "European sites" within regulation 8 of the 2010 Regulations.

14. Regulation 61 of the 2010 Regulations provided at the relevant time in material part as follows:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.
>
> …
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site …. ."

15. Mr Sinclair, for the claimant, relied on the "precautionary principle" derived from the Habitats Directive and the 2010 Regulations and explained in the judgment of the Court of Justice in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02), [2004] E.C.R. I-7405; [2005] 2 CMLR 31. It is convenient here to express the relevant law through the words of Owen J in *R (Akester) v. Department for Environment, Food and Rural Affairs* [2010] Env LR 33 (decided under the 1994 regulations), at paragraph 15:

> "The following propositions can be drawn from the Directive as clarified by *Waddenzee*:

1. The Habitats Directive must be interpreted and applied by reference to the precautionary principle, which reflects the high level of protection pursued by Community policy on the environment—see *Waddenzee* [44] and [58];

2. A competent national authority may only authorise a plan or project after having determined that it will not adversely affect the integrity of the protected site in question— art.6(3) and *Waddenzee* [56] and [57];

3. Unless the risk of significant adverse effects on the site in question can be excluded by the competent authority on the basis of objective information, the plan or project must be the subject of an appropriate assessment of its implications for the site;

4. If, following an appropriate assessment, doubt remains as to whether or not there will be significant adverse effects on the integrity of the site, the competent authority must refuse authorisation of the plan or project, unless art.6(4) applies;

5. If in spite of a negative assessment of the implications for the site, and in the absence of alternative solutions, a plan or project must be carried out for imperative reasons overriding public interest (including those of a social or economic nature), the competent national authorities must,

   "take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected"

   and notify the Commission of such measures (art.6(4))."

16. In the course of a more detailed exposition of the legal principles in his judgment in *Wealden DC v. Secretary of State for Communities and Local Government* [2017] Env LR 31 at paragraph 44, Jay J reviewed and cited from other more recent authorities and added the following further propositions among others.

17. He noted that "appropriate", in the context of an "appropriate assessment", is not a technical term but means such as is "appropriate to satisfy the [LPA] that the project will not adversely affect the integrity of the site concerned, to a 'high standard of investigation'". The issue of whether an assessment is appropriate is "a matter of judgment for the [LPA]".

18. Furthermore, applying "a strict precautionary approach", there should be "no reasonable scientific doubt" about the absence of adverse effect. The assessment "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubts" about the absence of adverse effects.

19. A third party alleging that there is a risk of adverse effects on the protected site must produce credible evidence that the risk is real as opposed to hypothetical. The LPA should give the views of statutory consultees considerable weight, although their advice is not binding on the LPA. The court should not substitute its own factual and evaluative assessment for those of an expert decision maker, supported by tenable expert opinion.

<u>The Facts</u>

20. During 2012, the LPA was carrying out an appropriate assessment under the 2010 Regulations for the purpose of the evolving Bradford Waste Management Development Plan Document (the waste management DPD). At about the same time, the developer was making plans to submit what became the first of three planning applications for the construction of plants at the site for the purpose of recovering energy from waste.

21. The appropriate assessment was carried out on behalf the LPA by a company called Environ UK Limited (Environ). The purpose was to identify and measure "Likely Significant Effects" or LSEs, on any designated European sites. To that end, an air quality modelling exercise was carried out to ascertain any likely increase in emissions that would result from constructing a waste management plant at "Site 78", which is now the site of the proposed development.

22. Environ began by establishing a hypothetical plant with an annual waste handling capacity of 100,000 tonnes per annum. Using recent planning applications, input data were selected from within a chosen range for the characteristics of such a plant, namely chimney stack height and diameter, temperature and exit velocity of emissions from the chimney, the actual gas flow rate in metres per second and the "normalised" flow rate.

23. Using those hypothetical parameters, and assuming that the hypothetical plant would just comply with EU law emission limits, the selected parameters were then used to calculate pollutant emission rates for exhaust gases including sulphur dioxide, oxides of nitrogen and other gases and metals. The modelled emissions were then run to predict concentrations of acid deposition at "receptor" locations at various parts of the SPA, the SAC and elsewhere.

24. Environ found and reported in November 2012 (the Environ report), that "the impact from acidification is at a maximum 2% of the critical load". Since at the receptor locations "the existing background acid deposition is already significantly above the critical load" (198% thereof), the additional "2% of the critical load" attributable to the hypothetical waste facility, though small, would result in a "Predicted Environmental Concentration" (or PEC) amounting to "at least 200% of the critical load".

25. According to established measurement tools, an excess in PECs of more than one per cent over the critical load calls for further investigation, though it does not necessarily mean there would be a "LSE" on the relevant designated European site. Accordingly, the conclusion was expressed as follows:

> "… although the addition of the emissions from a waste facility would be relatively small, acid deposition is already in excess of the critical load for this part of the South Pennine Moors SPA/SAC (Rombald's Moor) and therefore a waste management use involving combustion processes on proposed Site 78 … would potentially exacerbate an existing situation. …. [I]t is therefore suggested that proposed Site 78 … may not be suitable for a waste management use which uses combustion processes and it is recommended that the [waste management DPD] is amended to reflect that this use should not be identified as suitable for Site 78. Alternative sites within the Plan Area should instead be identified … ."

26. The Environ report recorded that Natural England had been consulted during the course of its air quality modelling process, was "broadly in agreement with the findings" and "agree[d] that a significant effect on the South Pennine Moors SPA/SAC cannot be ruled out". Elsewhere in the Environ report, the comment was attributed to Natural England that:

> "… the addition of the emissions from a waste facility would be relatively small but would not be welcome given that acid deposition is already so far in excess of the critical load for this part of the European designated site. The aim should be for an incremental reduction in acid deposition to below the critical load rather than potentially exacerbating an unsatisfactory situation."

27. In May 2013, the developer made a pre-application and scoping opinion request in respect of the proposed development of three plants to recover energy from waste, with associated buildings and landscaping. The proposed site was the same as "Site 78", i.e. the brownfield site of a former gasworks which is also the proposed site of the current planning permission.

28. In pre-application advice given in a letter of 16 July 2013, the LPA advised that Environ's report in the waste management DPD process had "highlighted a potential adverse impact" and that the Environmental Statement would need "to demonstrate that it is feasible to reduce emissions [from] the proposed facility to the extent that no significant adverse impact on the SPA would occur".

29. Natural England was consulted on the proposed and responded in a letter of 6 November 2013 that the proposal, if "undertaken in strict accordance with the details submitted, is not likely to have a significant effect on the interest features for which South Pennine Moors SAC and SPA has been classified". I do not have evidence of what the "details submitted" were, but Natural England was persuaded that the LPA was "not required to undertake an Appropriate Assessment ….".

30. The developer's planning application for the three plants was granted in April 2014, without challenge. It is still extant and some foundation works have been carried out, sufficient to amount to commencement of development preserving the validity of that permission. However, the developer now proposes to construct only two plants and not the three plants authorised by the 2014 planning permission.

31. Indeed, the developer obtained a report dated 25 March 2015 from an organisation called Ricardo-AEA (the R-AEA report) assessing as "negligible" the impact on air quality of the proposed new waste facility with two plants. It is apparent from the data modelling used to reach that conclusion that the R-AEA proceeded from a dataset of much lower emissions than did the Environ report, and thus a much cleaner energy plant. Indeed, the title of the report is *Proposed Clean Energy Facility, Aire Valley Road Keighley*; the subtitle is *Air quality, odour, dust and health impact assessment*.

32. The tabulated results showed that the parameters used by R-AEA for the chimney stack height, exit velocity of emitted gases, discharge temperature and so forth, were different from those used by Environ. These were said by Mr Coppel QC, for the developer, to have emanated from the actual design plans for the two new plants. The result was predicted emissions of sulphur dioxide about four times lower than the

level predicted by Environ and, of oxides of nitrogen, about ten times lower than Environ had predicted.

33. A further application for planning permission was made in 2015, providing for a reduction from three plants to two, a 5 metre increase in the height of the main plant building, a reduction in the diameter of the chimney stack from 4 metres to 2.2 metres and a change in the layout of the buildings. The LPA refused that application on landscape and visual amenity grounds.

34. During this time, the process for determining the final form of the waste management DPD was continuing. Natural England was again consulted on this in December 2015. It responded through Mr Tom Keatley, a team leader, by letter of 25 April 2016, referring back to comments previously made in February 2016. These included the absence of any updated appropriate assessment and that the previous assessment done by Environ had concluded that an adverse effect on the SPA and SAC could occur if Site 78 were used for a waste facility.

35. However, in a further letter eight days later, responding to an email (which I have not seen) adding "further information", Mr Keatley said Natural England "welcomes the clarification of the status of the planning application for site 78 and provision of the Habitats Regulations Assessment for the plan". Although it is not clear, it may be that Mr Keatley was there referring to the R-AEA report when he referred to the "Habitats Regulations Assessment for the plan".

36. Mr Keatley's next paragraph suggests that Natural England was persuaded by the "further information" that all was well. He acknowledged that the two planning applications, one granted in 2014, the other refused in 2015, "will not lead to a likely significant effect on the South Pennines SPA/SAC", contrary to previous responses from Natural England. He suggested that "the allocation statement for site 78 [in the waste management DPD] … [should] state that the extant planning permission must be developed in accordance with the submitted plans and conditions".

37. As I understand Mr Keatley's letter, he was suggesting that site 78 could, after all, be designated in the waste management DPD as suitable for a waste facility, provided the specifications of the facility were as set out in the planning permission application documents, since these were such that the emissions produced would be negligible and not, as Environ had suggested, potentially harmful to the SPA and SAC.

38. The planning permission application leading to the present challenge was made on 11 August 2016, supported by an environmental statement of August 2016 from consultants acting on the developer's behalf, Wardell Armstrong. The LPA invited comments from statutory consultees, including Natural England, which raised no objection. In its letter of 31 August 2016, Natural England explained that it had assessed the application "using the Impact Risk Zones (IRZ) data".

39. I infer that the IRZ data must be data used by Natural England to measure a risk of adverse impact. In its letter, Natural England again expressed the view, this time through a Ms Jacqui Salt, that if the proposal is undertaken "in strict accordance with the details submitted", it was "not likely to have a significant effect on the interest features for which the [SAC] and … [SPA] have been classified; and that therefore the LPA "is not required to undertake an Appropriate Assessment ….".

40. There were strong objections to the planning application from members of the public. None of the objectors directly advocated the need for an appropriate assessment under the 2010 Regulations, nor drew attention to the Environ report of 2012, which was publicly available. The Environ report was not mentioned in the report of the relevant officer to the committee, prepared for the purpose of the committee determining the 2016 planning application.

41. That report was prepared by Carole Anne Howarth, the LPA's principal planning officer. It is common ground that it sets out the reasons adopted by the committee for its decision, made at a meeting of the committee on 9 February 2017, to grant the application. The report recommended approval of the application subject to conditions and a section 106 agreement for continued funding of tree planting at East Riddlesden Hall.

42. The summary statement at the start of the report referred to the effect of the proposal on the surrounding landscape and on East Riddlesden Hall and residential properties; stated that the effect had been assessed and that "[o]n balance, the proposal is considered acceptable, and provides overall benefits and public benefits that outweigh the identified harm".

43. Among the background documents were the emerging waste management DPD and the files relating to the two previous planning applications. The detailed report began by describing the site and the planning history. The author then referred to relevant policy documents including the NPPF. She then mentioned and dealt with the objections and summarised them.

44. The author recorded the position of other bodies in section 7.0 of the report. She noted that the LPA's air quality officer had no objections. On the subject of emissions, she stated that the LPA would assist the Environment Agency in its likely "detailed assessment of any new process emissions before issuing an operating permit". The conservation officer, she noted, did not object on cultural heritage grounds.

45. The Environment Agency, Ms Howarth recorded, did not object but noted that the developer "proposes changes to the 2015 planning application in particular a reduced diameter stack and reduced maximum emissions of NOx, SO2 and Ammonia ….". The Agency observed that it "cannot grant a permit until we are satisfied that the operation of the process will not cause significant pollution to the environment or harm to human health".

46. The author went on to record that Historic England did not object but drew attention to section 66 of the 1990 Act and paragraph 132 of the NPPF. The report went on to describe the proposal in detail. A likely negative impact on tourism, in particular related to East Riddlesden Hall, had been pointed out by the National Trust and was acknowledged (paragraph 11.63).

47. On the subject of health, emissions and air quality, the author emphasised (paragraph 11.69) that these were the "main concern raised by residents" but pointed out in the next paragraph that the developer's "comprehensive information on air quality" (probably, I infer, a reference to the R-AEA report) included the conclusion that the

proposed development "is forecast to have no significant effects on air quality during normal operating conditions".

48. The point was then made, in the discussion at paragraph 11.72ff of the report, that it was for the Environment Agency to grant an operating permit or withhold one if not satisfied that the level of emissions was acceptable; and that it was not appropriate for the LPA and the planning system to "duplicate controls which are the statutory responsibility of other bodies" (paragraph 11.102).

49. There was a discussion of cultural heritage issues in paragraphs 11.151-11.169 in the report. The author referred to and quoted section 66(1) of the 1990 Act. She referred to Historic England's reference in a previous objection (no longer maintained) to paragraphs 132 and 134 of the NPPF and the "clear and convincing justification" test. The adverse visual impact of the stack and intermittent vapour plume on the setting of East Riddlesden Hall were mentioned.

50. At paragraphs 11.165 and 11.166, specific reference was made to section 66 of the 1990 Act and the requirement under NPPF paragraph 132 that "'great weight'" should be given to the conservation of a heritage asset in the consideration of a proposed development and there should be a clear and convincing justification for the harm". The degrees of harm referred to in respectively paragraph 133 (substantial) and paragraph 134 (less than substantial) were then correctly expressed.

51. After referring again to the harm tests and the need for clear and convincing justification, the conclusion at the end of paragraph 11.169 was that "as with all planning applications, the balance has to be considered and this is discussed further under section 13.0 …".

52. Within that section of the report, headed "Summary, conclusions and the balance", the public benefits intended to flow from granting the application were identified and discussed. They were, "in short, employment, regeneration, landfill diversion and the generation of electricity" (paragraph 13.34). Those public benefits were found to be less than "substantial".

53. On the other side of the balance, harm to the setting of East Riddlesden Hall, among other things, was discussed. The harm was categorised as "less than substantial" (paragraph 13.19). There was then a detailed and at times repetitious account of the relevant body of law, including section 66 of the 1990 Act, paragraphs 132-134 of the NPPF and case law, mixed with factual points (paragraphs 13.20-13.51).

54. The report's author pointed out in the same part of the report that the developer had done all it could to minimise the harm to the setting of East Riddlesden Hall. It had moved the chimney stack position which had caused Historic England to withdraw its objection. It had slimmed down the stack and agreed to plant trees in the grounds of the Hall. The harm had been minimised as far as was possible.

55. She concluded at paragraph 13.50, with emphasis in the original, that:

> "there is a clear and convincing justification for the … plant to be built in this location and in its proposed form. It is considered that the '**less than substantial harm**' to the setting of the listed building is outweighed by the public benefits (which are not required

to be substantial), notwithstanding the requirements of section 66 of the [1990] Act and the need to give special regard to the preservation of the setting of a Listed Building".

56. Finally, among the reasons for recommending the grant of the planning permission, the reason numbered 8 stated that:

> "there are potential effects on the setting of the heritage asset in that the heritage assets have been identified and taken into consideration, that no substantial harm will result and that the harm that does result has been weighed against the public benefits and found, on balance, to outweigh the harm".

57. At the meeting on 9 February 2017, members were treated to a Powerpoint presentation by Ms Howarth as well as her report. Among the slides were two headed "Balance on Heritage", followed by one headed "Overall Balance and Conclusion". The first of these three slides dealt with the harm to the setting of the heritage asset; the second, with the public benefits on the other side of the balance and the conclusion, also included in the third of the three slides, that the latter outweighed the former. The committee members were also taken on a site visit during the meeting.

58. During the meeting, a number of objectors expressed concern about pollution as a ground of objection. One claimed that Rombald's Moor would be "polluted with a cocktail of particulate matter" if the development proceeded; another complained of likely "pollution and air quality – with a potential to drift over a wide area, that contains ecologically sensitive areas for bats etc". A third referred to the SPA and SAC as "nationally and internationally important for a wide range of species of flora and fauna and should be subject to some of the highest levels of protection".

59. The minutes of the meeting show that the discussion was lively and controversial. The views of supporters and objectors alike were fully aired. The decision of the committee was to accept the recommendation in the report and to grant the application subject to the suggested conditions, which were 44 in number, and subject to a section 106 agreement providing for the planting of trees in the grounds of East Riddlesden Hall.

60. The Secretary of State decided not to call in the application and informed Ms Howarth of this in a letter dated 30 March 2017. The formal grant of planning permission was dated 11 April 2017. The issue soon became litigious and a letter before claim from solicitors representing a body called Aire Valley Against Incineration was sent to the LPA on 8 May 2017.

61. In exchanges of witness statements up to shortly before the hearing before me, the validity of the methodology and conclusions reached in the R-AEA report was debated, challenged by a retired pharmacist on the claimant's side, Mr Hammond, and defended by the author of the R-AEA report, Mr Broomfield, on the developer's side. I made it clear that I did not consider myself equipped or qualified to resolve this conflict of expert evidence at the hearing, which in the usual way did not feature oral evidence and cross-examination.

<u>The Parties' Submissions: Grounds 1 and 2</u>

62. The first ground of challenge is that the LPA failed properly to apply the test in section 66(1) of the 1990 Act. The second is that the LPA failed to assess the significance of East Riddlesden Hall as a heritage asset and failed to assess the significance of the detrimental impact of the development on its setting. These two grounds can conveniently be taken together.

63. Mr Sinclair, for the claimant, submits that the LPA must not only decide whether the harm to the asset or its setting is either "substantial" or "less than substantial"; it must go on to assess where on a "spectrum" of harm the amount of harm lies. This is necessary in order to give "great weight" (NPPF paragraph 132) to the conservation of the asset, whether the harm to the asset or its setting is assessed as substantial (paragraph 133) or less than substantial (paragraph 134).

64. Furthermore, Mr Sinclair submitted, the assessment of harm on a spectrum has two aspects to it: first, there must be an assessment of the significance of the asset itself; and secondly, there must be a separate assessment of the significance of the impact of the development proposal on the asset or its setting. He contended that this approach finds support in Holgate J's review of case law in the *Leckhampton* case at paragraphs 29-31 and his consideration, at paragraph 40, of the officer's report in that case.

65. Mr Sinclair also relied on the analysis in the decision of Lewison LJ in *R (Palmer) v. Herefordshire Council* (cited above) at paragraphs 5:

> "… The degree of harm (if any) is a matter of judgment for the decision-maker, but if the decision-maker decides that there is harm, he is not entitled to give it such weight as he thinks fit. To the contrary he must give it considerable weight: *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45, para 22. However, this does not mean that the weight that the decision-maker must give to the desirability of preserving the building or its setting is uniform. It will depend on, among other things, the extent of the assessed harm and the heritage value of the asset in question: *East Northamptonshire District Council*, para 28; *R (Forge Field Society) v Sevenoaks District Council* [2015] JPL 22, para 49. This is consistent with paragraph 132 of the [NPPF]…. ".

66. And Mr Sinclair pointed out that at paragraph 34, Lewison LJ said:

> "It is also clear as a matter both of law and planning policy that harm (if it exists) is to be measured against both the scale of the harm and the significance of the heritage asset. Although the statutory duty requires special regard to be paid to the desirability of not harming the setting of a listed building, that cannot mean that any harm, however minor, would necessarily require planning permission to be refused."

67. As I understood his case, Mr Sinclair submitted that unless the LPA introduces the concept of a "spectrum" of harm requiring an assessment of the significance of the asset or its setting, on the one hand, and the impact on the proposal on it, on the other, the LPA will not properly perform its duty under section 66(1) of the 1990 Act and under paragraph 132 of the NPPF, to give "great weight" to the conservation of the heritage asset.

68. If the LPA, submitted Mr Sinclair, merely adopts a "binary" classification of the harm to asset, or its setting, as either substantial or less than substantial, it will be guilty of carrying out a bare or unweighted balancing exercise rather than the weighted

balancing exercise which the law requires and which cannot be performed without placing the harm on a spectrum, whether the harm is classified as substantial or less than substantial.

69. He added that his argument was strengthened by paragraph 135 of the NPPF which, in the context of non-designated heritage assets, did not require any division of the harm into the categories of "substantial" and "less than substantial". It followed, he said, that when applying paragraph 135 in the case of non-designated heritage assets, a spectrum of harm must be used; and that it would be strange if that were, by parity of reasoning, not also the position where designated heritage assets with a stronger claim to protection are concerned.

70. Mr Sinclair said the same error was committed here as in the *Forge Field Society* case, cited above, and *R (Blackpool BC) v. Secretary of State for Communities and Local Government* [2016] EWHC 1059 (Admin). As in those cases, the report writer had erred by treating as slight the weight to be given to the harm to the setting of East Riddlesden Hall. She had identified that harm but not given it its due weight on the side of the scale weighing against planning permission.

71. In support, Mr Sinclair criticised the content of the report for not, he said, containing any or any adequate assessment of the significance of East Riddlesden Hall, nor of the harm that would be done to its setting if the development were to proceed. He submitted that the section headed "Cultural Heritage" (paragraphs 11.151-11.169) did not fulfil those requirements and that the required assessment was wholly absent from section 14 (paragraph 14.1-14.21) on "Overall conclusion and the balance", which did not mention the setting of East Riddlesden Hall at all.

72. In the section of the report headed "Heritage Assets" (paragraph 13.19-13.51), Mr Sinclair submitted that there was an erroneous "bare" balancing exercise at paragraph 13.44 ("[t]here is not *substantial* harm to the heritage asset therefore it is not necessary to demonstrate *substantial* public benefits…") and at paragraph 13.50 (emphasis in original):

> "[i]t is considered therefore that there is a clear and convincing justification for the [proposal] …. the '**less than substantial**' harm to the setting of the listed building is outweighed by the public benefits (which are not required to be substantial), notwithstanding the requirements of section 66 of the [1990 Act]".

73. He pointed out and criticised the use of the word "potential" in the phrase "there are potential effects on the setting of the heritage asset", forming part of reason number 8 for recommending the grant of planning permission, arguing that this betrayed a disregard of the special weight to be given to the harm to the heritage asset's setting and a dismissive downplaying of that harm corresponding to diminished weight to be placed on it.

74. He argued, finally, that the same defect could be found in the Powerpoint slides which, he said, again failed to place the necessary extra weight on the side of the balance which would be against the grant of planning permission. The slide dealing with harm to the setting of East Riddlesden Hall downplayed that weight, he said, failing to spell out what the nature of the harm was; while the next slide, dealing with the public benefits, contained a list of the benefits in ten bullet points.

75. Mr Barrett, for the LPA, took issue with the need to introduce into the analysis the concept of a "spectrum" of harm to a heritage asset, above and beyond the binary classification of the harm as substantial or less than substantial. He submitted that Mr Sinclair's approach found no support in the language of section 66 or that used in the NPPF.

76. If harm were required to be assessed along a spectrum, he submitted, the division between substantial and less than substantial harm would be redundant and would not have been written into paragraphs 133 and 134, respectively, of the NPPF.

77. He added that there had been clear judicial endorsement for the proposition that those paragraphs (and paragraph 132) were in harmony with the duty under section 66 of the 1990 Act, so that a decision maker who followed the paragraphs in the NPPF would generally comply with the statutory duty. That would not be so if the concept of a spectrum of harm had to be superimposed on the binary division of harm into one of the two categories set by the NPPF paragraphs.

78. Mr Barrett accepted that in either case, the conservation of the heritage asset, including its setting, had to be given "great weight" (NPPF, paragraph 132). However, where the harm was assessed as less than substantial, it could be outweighed by public benefits that were less than substantial; whereas if it was substantial, it could only be outweighed by public benefits that were, in their turn, substantial.

79. He contended that the former and not the latter proposition was properly assessed as applicable in the present case and that proposition was not inconsistent with the undertaking of the required weighted balancing exercise giving considerable weight to the conservation of the heritage asset and requiring a clear and convincing justification for the development proposal.

80. He submitted that paragraph 135 of the NPPF did not assist the claimant's argument. In the case of non-designated heritage assets, the statutory duty under section 66 of the 1990 Act was not engaged. Consequently, a conventional bare or unweighted balancing exercise was appropriate. The regime was different for designated heritage assets: the harm had to be classified into one of the two categories and the weighted balancing exercise had to be undertaken.

81. Mr Barrett also took me to passages in Ms Howarth's report. He noted that the committee was told (as if it did not already know) that the proposed development is within 500 metres of East Riddlesden Hall and that the Hall is Grade I listed, a classification enjoyed by only 2.5% of listed buildings (paragraph 11.151). In the same paragraph the Hall was described as "significant as a seventeenth century hall and agricultural complex owned by wealthy members of the landed gentry".

82. He noted that at paragraph 11.160, the author relayed the concern of the owner, the National Trust, that the "position and prominence of the chimney stack and associated vapour plume … will cause harm to the setting of East Riddlesden Hall". Mr Barrett said that passage showed that the significance of the building and the extent of harm to its setting was not overlooked. Indeed, in the same paragraph the author referred to the introduction of an "industrial feature" into the view that was popular with visitors at functions.

83. Mr Barrett emphasised that the report author quoted verbatim from the *Barnwell Manor* case [2014] EWCA Civ 137 the words of Sullivan LJ that even where the harm to a Grade I listed building was less than substantial, so that the grant of permission would not have to be "wholly exceptional", "it does not follow that the strong presumption against the grant of planning permission has been entirely removed".

84. He submitted that the committee members were advised correctly in the report to undertake the weighted or tilted balancing exercise and that they did not err in law in finding that, even with the additional weight given to the harm to the setting of East Riddlesden Hall, it was properly open to the committee to find that harm outweighed by the public benefits of the proposal: employment, regeneration, diversion from landfill and generation of electricity.

85. Mr Coppel QC, for the developer, supported Mr Barrett's analysis of the duty under section 66(1) of the 1990 Act and the corresponding paragraphs in the NPPF, paragraphs 132-134. He argued that it was "not useful" to mix metaphors by referring to a "spectrum" alongside the required weighted balancing exercise.

86. The latter exercise represented the correct approach; there was no need or room for a further "spectrum of harm" exercise. He submitted, by reference to the report, that the LPA had correctly positioned the fulcrum of the balance towards the "heritage" end of the notional horizontal weighing scale and had not started with the fulcrum in the middle of that scale, as the claimant contended.

Reasoning and Conclusions: Grounds 1 and 2

87. Having set out the parties' rival contentions in some detail, I can deal with assessment of them relatively briefly. The first point to consider is the contention of Mr Sinclair that the LPA was obliged to place the harm in this case somewhere on a spectrum. I do not accept this contention and I agree with Mr Barrett that it is not supported by the language of either section 66(1) of the 1990 Act or paragraphs 132-5 of the NPPF. Nor do I agree that is a requirement that has emerged from the case law cited by Mr Sinclair.

88. If Mr Sinclair were correct, the LPA would be obliged, first, to make a finding on the issue how significant East Riddlesden Hall is. Obviously, its significance is at the high end of the scale, not the low end of the scale. That is answered by its classification as a grade I listed building, enjoyed by the élite 2.5 per cent of listed buildings. There is, therefore, no need for the LPA to revisit that question.

89. The effect of that classification is determined by the language of paragraph 132 of the NPPF, which differentiates between grade I and grade II listed buildings. It is a binary classification. I see no need for the LPA to make a further finding whether it is a "high grade I" on the spectrum, a "low grade I", or somewhere in between. That would introduce unnecessary complexity.

90. The same objection arises in answer to Mr Sinclair's submission that the LPA should have explicitly placed the harm to the Hall's setting somewhere along the spectrum of "less than substantial harm" in this case. The two categories of harm are adequate to

enable the weighted balancing exercise to be carried out. I do not accept that the cases cited by Mr Sinclair introduce the spectrum concept.

91. That would mean subdividing less than substantial harm into sub-categories such as "slight less than substantial harm", "quite serious less than substantial harm", "really serious less than substantial harm", and so forth. The exercise leads to over-refinement, while the approach ordained by the NPPF deliberately keeps the exercise relatively straightforward, avoiding unnecessary complexity.

92. Next, I respectfully agree with all three counsel and our eminent planning judges that in a case such as this the balancing exercise must be weighted and not bare. If it is bare, the court can grant relief. Whether or not the weighted balancing exercise has been properly carried out must, in this case, be judged by considering Ms Howarth's report and applying to it the not too exacting linguistic and legal standard explained in the judgment of Lewison LJ in *Palmer*, cited above.

93. I observe with some regret that in this case there is strong evidence of defensive drafting by Ms Howarth. This is not a criticism of her work; it is a sorry consequence of a litigious culture in which planning decisions are, rightly, subject to scrutiny to ensure they are lawfully made. The repetitious allusions to the need for considerable weight to be given to the harm to the setting of the Hall would, perhaps, have been better replaced by saying more about the nature of that harm.

94. But I find no substance in the suggestion that the committee was left unaware of either the significance of the Hall, or the harm - a view partly spoiled by a chimney with intermittent vapour plume about 500 metres away - to its setting that would arise if the permission were granted, or the need to give considerable weight to that harm and to apply a presumption against planning permission even though the harm was less than substantial.

95. It may be something of a paradox that repetitious and effusive references to the need to give considerable weight to harm were probably included in the report as a defence against recommended rejection of that harm as decisive in this case. But I do not accept that the report paid only "lip service" (Mr Sinclair's phrase) to the importance of the heritage asset and the presumption against planning permission.

96. The references in the report drawn to my attention by Mr Barrett and Mr Coppel properly dealt with those issues. They render untenable the argument that the committee was effectively invited to dismiss as trivial the importance of the Hall as a heritage asset or the weight to be given to the harmful chimney and vapour plume spoiling the view. That effect was less than substantial harm but it was not downplayed.

97. The committee was made aware of the height of the main plant building and chimney stack; and that the plume of vapour would be visible about 17 per cent of the time and was a new industrial feature of the view to add to the existing ones, in particular electricity pylons. Mention was also made in the report of the likely adverse impact on bookings for functions which the National Trust mentioned.

98. The public benefits attributed to the proposal were in no way exaggerated. They were found to be less than substantial and there was scepticism about the claimed potential

for job creation which the new plant would provide, once the temporary construction phase was over. That did not, of course, mean that the benefits were incapable of outweighing the harm to the setting of the Hall, even giving that harm great weight.

99. I therefore do not find, on a fair reading of the report, that the committee was misled into paying more scant regard to the harm than the law requires. The balancing exercise was weighted, not bare. The necessary considerable weight was given to the harm but because it was less than substantial, it was the more easily outweighed by the public benefits of the proposal. I conclude that the first and second grounds of challenge are not made out.

The Parties' Submissions: Grounds 3-5

100. The third ground of challenge is that a negative "appropriate assessment" done by Environ in its report in 2012 has not been followed up by any further appropriate assessment under regulation 61 of the 2010 Regulations; and that accordingly, grant of planning permission is precluded by regulation 61(5) of the 2010 Regulations.

101. The fourth ground, alternative to the third, is that there is at least a scientific doubt about the potential negative impact on the SAC and SPA which is a likely "significant effect" (regulation 61(1)(a)) on those two designated European sites; such that, applying the precautionary principle, a further "appropriate assessment" under regulation 61(1) must be undertaken before planning permission can be granted.

102. The fifth ground is a conventional irrationality challenge to the decision to grant planning permission. It is argued that to grant planning permission the LPA must wilfully overlook the damage to the two European sites, to which the Environ report had drawn attention. The acidification level at the two sites was already so far (at 198 per cent) in excess of the critical load, that to permit the waste facility to increase the level of acidification yet further, by an additional 2 per cent or so, was irrational.

103. Mr Sinclair made his factual submissions in support of these grounds in composite form. He emphasised that Environ had been properly appointed to advise the LPA for the purpose of the emerging waste management DPD. Environ had been specifically required to perform an appropriate assessment of site 78 to deal with any negative impact on air quality at the two European sites. Its findings were unequivocal and should have ruled out any waste facility at that site, which is also the planning application site.

104. He also submitted that Natural England had agreed with Environ's analysis and had pointed out in Mr Keatley's letter of 25 April 2016 that according to the Environ report "it is not possible for the plan [i.e. the waste management DPD] to include a site that is likely to have an adverse effect on the South Pennine Moor SPA/SAC". The apparent volte-face in his follow up letter of 3 May 2016 was a case, according to Mr Sinclair, of the left hand not knowing what the right hand was doing.

105. Mr Sinclair argued that unless the precautionary principle was to be disregarded, which would be unlawful, it would be irrational and wrong to rely on Natural England's changed position, at any rate without carrying out a further "appropriate assessment" under regulation 61(1) of the 2010 Regulations.

106. He submitted that the LPA had "drunk from the poisoned well" of Natural England's advice; the position was analogous to that in the *Wealden DC* case, in which Jay J found that Natural England had erred in its measurement of certain traffic flow figures, to the point where it became irrational for the authority concerned to rely on its advice. As Jay J put it, at paragraph 109:

> "… if expert advice induces a decision-maker into error in carrying out the judgments mandated by art. 6(3) [of the Directive], I consider that it would be both artificial and wrong to hold that the court should not characterise what has occurred as irrational."

107. Mr Sinclair complained that while Ms Howarth's initial "scoping" letter of 16 July 2013 giving pre-application advice to the developer had rightly referred to the "potential adverse impact" on the site of the proposal, derived from the Environ report, when she came to prepare her report to the committee, she failed even to mention the Environ report and, in Mr Sinclair's phrase, the LPA brushed it under the carpet.

108. As for the subsequent R-AEA report in 2015, prepared for the second application and reused for the third application, Mr Sinclair submitted that it was inadequate to overcome and displace the conclusions set out in the Environ report, at first adopted but then inexplicably, wrongly and irrationally disavowed by Natural England and the LPA.

109. He submitted, finally, that the R-AEA report was not referred to by the LPA until it responded to this claim and that, although objectors had not referred to the Environ report in terms, the LPA should of its own motion have recognised the scientific doubt, at the very least, to which it gave rise; but failed to do so.

110. Mr Barrett, for the LPA, submitted that the issue of adverse effect on the SAC and SPA was not a controversial issue during the consultation process leading to the planning permission and was not raised by the claimant or anyone else during that process, but only in the grounds of claim, after planning permission had been granted.

111. He submitted that health issues and air quality had been raised in vague and unscientific terms by a small handful of objectors; none had mentioned the Environ report. That report had been overtaken by the R-AEA report, which laid to rest any issue of adverse effect on the SPA and SAC because it was founded on the actual specifications of the proposed plant (in the incarnation envisaged in the 2015 planning application) and not on a hypothetical plant with very different specifications, which Environ had considered back in 2012.

112. Mr Barrett submitted that the *Wealden DC* case was completely different because there the objectors concerned had raised the issue of traffic flow measurement during the public consultation phase of the exercise and not merely as an afterthought, with the consequence that Natural England was – unlike in the present case – joined in the proceedings as an interested party.

113. Mr Barrett argued that it was not for the LPA of its own motion to raise issues that evidently no one thought significant at the time. The officer's report needed only to address the principal controversial issues. The report is not, he pointed out, a fact finding exercise; it was for the objectors and, importantly, the statutory consultees to

raise such issues as they thought needed raising. The statutory consultees included the Environment Agency, Natural England and English Heritage. The National Trust, as owner of the Hall, was also consulted and though it objected it did not do so on this ground.

114. Furthermore, the Environ report had not expressed its conclusions in unqualified terms; it had pointed out that an adverse effect could not be ruled out unless the potential effects were addressed. They subsequently were addressed by the developer in the R-AEA report. In consequence, Natural England had not acted irrationally in changing its position and the LPA did not act irrationally by accepting Natural England's advice.

115. Mr Coppel QC supported Mr Barrett's position. He added that the 2016 planning application included an environmental statement which included, on the subject of air quality, a cross-reference to the R-AEA report. He emphasised the completely different findings in the latter report, which allayed concerns about a possible adverse effect on the SPA and SAC and superseded the hypothetically based Environ report.

116. Mr Coppel argued that there was nothing wrong with the LPA taking the position that the Environment Agency could act to prevent any harmful emissions by denying the developer an operating permit; and that it was right for the LPA to proceed on the footing that the safeguard of the Environment Agency's powers would operate properly. Nor was it wrong for Natural England to make an assessment based on the "IRZs" data referred to in its letter of 31 August 2016 and for the LPA then to rely on that assessment.

Reasoning and Conclusions: Grounds 3-5

117. I have considered these arguments. First, I accept that the Environ report was an appropriate assessment and that it raised at least the possibility that the hypothetical waste facility modelled in it would give rise to harmful emissions which, unless satisfactorily addressed, would rule out planning permission for a waste facility at the site, applying regulation 61 and the precautionary principle.

118. Secondly, I agree with the LPA and the developer that the exercise undertaken by R-AEA was, as demonstrated clearly in the R-AEA report, a wholly different exercise from that undertaken by Environ. The dataset used by R-AEA was, it cannot be disputed, completely different and "cleaner" for emissions than the hypothetical parameters selected by Environ.

119. Although Mr Sinclair contended that the analysis undertaken by R-AEA was flawed and the conclusions drawn from it unreliable and wrong, he did not make good that critique. He was unable to dispute that the parameters used by R-AEA were other than those intended to be used in the two plants for which permission was sought in the 2015 application and, subject to modifications already mentioned, the 2016 application. He did not raise an arguable case that R-AEA's predicted emission levels were unrealistically low.

120. The debate in witness statements after the event between Mr Hammond and Mr Broomfield, did not equip the claimant with the necessary factual or scientific evidence that would have enabled me to conclude that the R-AEA report was

invalidated and not worthy of being relied upon by a prudent and reasonable LPA. I accept Jay J's point, made in the *Wealden DC* case, that a decision maker may act irrationally if it adopts uncritically scientific advice that is itself irrational.

121. But I do not find that such was the case here. This is a case in which a doubt is raised by a third party but it is not a doubt founded on credible grounds. It follows that there was a basis founded in tenable scientific opinion entitling the LPA to form the view that the concerns expressed in the Environ report had been allayed.

122. Next, I come to consider the change in Natural England's position. I do not find that change to a consequence of the left hand not knowing what the right hand was doing. It was the same hand on both occasions, in the person of Mr Keatley who penned the letter of 3 May as well as that of 25 April 2016.

123. Furthermore, he based his reconsidered view on the "further information" attached to the absent email of 25 April 2016. It is probable that the further information partook of the R-AEA report or the gist of its reasoning. I do not think there was anything wrong or irrational in Natural England accepting the reasoning and conclusions in that report or in statements derived from it.

124. Natural England carried out some kind of diagnostic testing using what was called the "IRZs data". Although I do not know exactly how that process works or what was done, I am not persuaded that whatever the process was, its use was other than proper or conclusions derived from its use invalid. It was for the claimant to make that case and he did not do so either through Mr Hammond's written evidence or Mr Sinclair's eloquence.

125. The case is, therefore, qualitatively different from the *Wealden DC* case, where Natural England's error was simple and palpable and was, therefore, easily exposed during the contemporary discussions. It follows, furthermore, that the advice from Natural England raising no objection to the 2016 planning application on the basis of air quality, was not a "poisoned well" (nor, perhaps more aptly, a toxic gas). The water in the well is not shown to be impure.

126. I remind myself, also, that there is no prescribed format for an "appropriate assessment" under the 2010 Regulations and that it is for the LPA, not the court or an objector, to judge the regulation 61 issue of whether there is a scientific doubt on the issue of adverse environmental impact, triggering application of the precautionary principle and the need for a further appropriate assessment before planning permission is granted.

127. For those reasons, I am satisfied that the LPA was entitled to take the view based on tenable scientific opinion that there was no such scientific doubt, that a further appropriate assessment was therefore not required and that regulation 61 of the 2010 Regulations was not a bar to the planning permission being granted.

128. Finally, by similar reasoning, I reject the argument that it was wrong and misleading not to mention the Environ report in the report of Ms Howarth to the committee. There was no need to refer to it in the absence of any objection founded upon it. I accept that it had been overtaken by the subsequent and up to date treatment of the air quality issue in the R-AEA report.

129. I also reject the argument that the R-AEA was not properly dealt with in the report of Ms Howarth. As I have already noted, at paragraph 11.70, she referred to the developer's "comprehensive information on air quality", which must refer to or include reference to the R-AEA report. It was unnecessary for the author to say more than she did on the subject, in answer to the objections founded on a concern about air quality at the two European sites.

130. I find, therefore, that each of the third, fourth and fifth grounds of challenge are not made good and must be rejected.

Conclusion; Disposal

131. For those reasons, the grounds of challenge are not well founded and, accordingly, the claim must fail. I hope the objectors are comforted by the assurances drawn to their and my attention, as a result of these proceedings, that emissions from the two new plants will not be harmful and that, if they are, the Environment Agency will not permit the plants to operate.

132. Written argument, and a limited amount of oral argument, was addressed to me on the effect of section 31(2A)(a) of the Senior Courts Act 1981, should the court find any unlawfulness in the decision challenged. Since I have not found any unlawfulness in the decision, the issue does not arise and I need not therefore analyse in detail the competing arguments on this issue.

133. I say only that, if I had found that some or all of the complaints of unlawful conduct were well founded, I would not have withheld relief on the basis that the conduct complained of (erroneous assessment of harm to the setting of the heritage asset and/or wrong treatment of the Environ report and breach of the regulation 61 duty) would have inexorably led to the same outcome. I do not have much idea what the outcome would have been on that hypothesis.

134. For the reasons given above, although I have considerable sympathy for the claimant and the other objectors, I find no legal flaw in the decision challenged, and I dismiss the claim.