Neutral Citation Number: **[2021] EWCA Civ 592**

Case No: C1/2020/0164

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING DIVISION)
THE HONOURABLE MRS JUSTICE LANG DBE
[2019] EWHC 3505 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2021

Before :

LADY JUSTICE KING
LORD JUSTICE COULSON
and
LADY JUSTICE CARR

Between :

R (on the application of Hudson)	**Appellant**
- and –	
The Royal Borough of Windsor and Maidenhead	
Legoland Windsor Park Limited	**Respondents**
Merlin Attractions Operations Ltd	
Merlin Entertainments PLC	

Marc Willers QC (instructed by **Richard Buxton Solicitors**) for the **Appellant**
Cain Ormondroyd (instructed by **the Royal Borough of Windsor and Maidenhead**) for the **Respondent**
John Litton QC (instructed by **DLA Piper UK LLP**) for the **Interested Parties**

Hearing dates : 16 & 17 March 2021

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Approved Judgment

LORD JUSTICE COULSON :

1 INTRODUCTION

1. This is a planning appeal arising out of a decision, dated 10 April 2019, by which the Respondent local planning authority ("the Council") granted planning permission to the Interested Parties (to whom I shall refer generically as "Legoland") to construct a holiday village at their Windsor resort. The Appellant, who was at the time the chairman of the Berkshire branch of the Campaign to Protect Rural England, sought to challenge that decision by way of judicial review. His challenge was rejected by Lang J ("the judge") in a judgment dated 19 December 2019 ([2019] EWC 3505 (Admin)).

2. Although there are five Grounds of Appeal, they cover just two issues. Grounds 1-4 are all concerned with veteran trees and the extent, if at all, to which proper reasons for the decision to grant planning permission were given, and whether the particular policy considerations relating to such trees were taken into account. Ground 5 is a separate debate, arising out of what is agreed to have been the failure to carry out an Appropriate Assessment ("AA") under the Habitats Directive and the Habitats Regulations 2017. The broad issue is whether a different decision might have been reached, if there had been such an AA. Ground 5 is complicated by a new legal argument raised by the Appellant, and the further evidence relied on by both sides in connection with an issue (which had in any event only been raised for the first time at the oral hearing before the judge) about the size of the buffer zone around the proposed development site, to protect the adjoining Windsor Forest and Windsor Great Park, which are Sites of Special Scientific Interest (SSSI) and/or Special Areas of Conservation (SAC).

2 THE FACTUAL BACKGROUND

3. The planning history is set out at [8]-[40] of the judgment below. It is unnecessary to repeat here the detail of that history, or the judge's lengthy citation of the relevant documents. However, three particular elements of the factual background should be emphasised.

4. The first is that the Council, as the relevant planning authority, consulted Natural England ("NE") as statutory consultees in respect of the proposed development. After exchanges between the Council and NE, on 13 March 2018, NE withdrew its objections to the proposed development, subject to appropriate mitigation measures being secured. The relevant letter of 13 March 2018 from NE is set out at [26] of the judge's judgment.

5. Secondly, there were numerous exchanges between the Council and Legoland in respect of the potential impact of the proposed development on veteran trees. Up until May 2018 the disputes had been wide-ranging, and related – amongst other things – to the proper classification of various trees, and the potential risk to certain trees created by the proposed development. Prior to a meeting of the Council's Planning Committee Development Management Panel ("the Panel") on 10 May 2018, the parties' respective positions were set out in:

    a) The Council's arboricultural co-ordinator's email of 20 April 2018, which reiterated her concerns about the potential impact of the proposed development on veteran trees. These concerns were reflected in the Officer's Report, referred to below.

b) Legoland's planning consultants' letter of 9 May 2018 which, by reference to the Tree Constraints Plan (8926/01 Rev E), confirmed that the works would be carried out without harming any veteran trees.

6. Thirdly, there was an Officer's Report ("OR"), prepared for the meeting of the Panel on 10 May 2018, which recommended refusal of the planning application. The OR is summarised at [28]-[34] of the judgment below. The summary table of the OR at 1.7 was in the following terms:

It is recommended the Panel refuses planning permission for the following summarised reasons (the full reasons are identified in Section 10 of this report):	
1	The proposal constitutes inappropriate development in the Green Belt. The proposal would have a significant impact on the openness of the Green Belt and would result in significant encroachment into the countryside. There is also harm arising to significant trees. A case of Very Special Circumstances does not exist which would outweigh this harm.
2	It has not been adequately demonstrated that the quantum of development in Holiday Village 1, 2 and 3 (outline), and the layout shown in Holiday Village 1 (full) could be achieved without harm to significant trees.

3 THE MEETING ON 10 MAY 2018

7. There is a transcript of the Panel meeting on the 10 May 2018 which was prepared by Legoland's planning advisers. The audio version, from which the transcript was prepared, could be downloaded by any interested member of the public from the Council's website. Unsurprisingly perhaps, in view of the terms of paragraph 1.7 of the OR, the bulk of the discussion on 10 May 2018 concerned the Green Belt and the extent to which there were very special circumstances which outweighed the harm to the Green Belt caused by the proposed development. The Panel eventually voted to approve the application in principle, subject to a range of caveats, and the relevant part of the minutes read:

> "The Legal Advisor to the Panel noted that reasons for approval that were considered by the Panel to amount to Very Special Circumstances to clearly outweigh the harm to the Green Belt and other harm were the economic benefits which were given substantial weight and that significant weight was given to changes to the parking and traffic arrangements as well as to the creation of accommodation."

8. The issue relating to the potential harm to the Green Belt, and whether the economic benefits could be said properly to amount to very special circumstances which outweighed that harm, did not arise before the judge and does not arise on this appeal. The only point arising from the Panel meeting in May 2018 which is relevant to the

appeal concerns what was said/decided about veteran trees. The judge found at [57]-[60] that the reference to "other harm" in the minutes set out at (paragraph 7 above) was *not* a reference to veteran trees. She concluded that the majority of members of the Panel did not accept that there was a risk of harm to significant and veteran trees on the development site which would not be overcome by the proposed mitigating measures. Those findings are in issue on this appeal and are dealt with in detail in Sections 7 and 8 below.

9. There was never any challenge to the Panel's decision on 10 May 2018 to approve the application in principle, nor to the decision to delegate the formulation of the necessary planning conditions, and the terms of the legal agreement between the Council and Legoland, to the Head of Planning acting in consultation with various Councillors. Although it was envisaged that the Secretary of State might "call in" the application, that did not happen.

4 THE DECISION OF 10 APRIL 2019

10. The decision which is challenged by way of judicial review was the decision taken 11 months later by the Council to grant planning permission. That decision, dated 10 April 2019, granted full planning permission for (amongst other things) project 1 (Holiday Village 1) and project 2 (reconfiguration of the car parking and related works) as well as outline planning permission for other related elements of the proposed development. Condition 4 set out the approved plans in accordance with which the development had to be carried out. These included the Tree Constraints Plan prepared in advance of the Panel meeting in May 2018 (see paragraph 5b) above).

11. Numerous other documents were identified in the 30 conditions which were attached to and formed part of the planning permission, including the Environmental Statement (ES) and the Supplemental Environmental Statement (SES) prepared on behalf of Legoland. Further, the planning decision of 10 April 2019 expressly said on its face that it "should be read in conjunction with" the s.106 agreement between the Council and Legoland, pursuant to which Legoland undertook to prepare various plans which had to be approved before any works could start on site. The conditions and terms relevant to veteran trees are again dealt with in detail in Sections 7 and 8 below.

5 THE JUDGMENT IN OUTLINE

12. Having set out the relevant facts, the judge identified the relevant legal framework at [41]-[47] of her judgment. It is not suggested by the Appellant that there were any errors in that analysis. The judge then went on to deal with the individual grounds of challenge.

13. At [48]-[63] the judge considered and rejected the challenge based on the Council's alleged failure to give adequate reasons for the decision in respect of the impact on veteran trees. At [64]-[72] she rejected the challenge based on a revision of the National Planning Policy Framework ("NPPF"), again relating to veteran trees. And at [73]-[93] she concluded that, although it was common ground that an AA should have been but was not carried out, no relief would be granted because, in accordance with s.31(2A) of the Senior Courts Act 1981, she was satisfied that it was "highly likely that the outcome would not have been substantially different" if an AA had been undertaken.

14. Because it is not suggested that the judge failed to have regard to the correct legal principles, the only complaint available to the Appellant on appeal is that she misapplied the law to the facts and therefore came to the wrong conclusions. Despite that narrow focus, as seems all too common in planning appeals, there were more issues on appeal then there had been before the judge.

6 THE ISSUES ON APPEAL

15. As I have said, Grounds of Appeal 1-4 are all concerned with veteran trees. Both before the judge, and again in this court, much of the Appellant's case on these grounds concerned the meeting and decision of the Panel on 10 May 2018. Whilst that was plainly an important step along the road to the final grant of planning permission in April 2019, its significance must not be overstated. There was no challenge to the decision of 10 May 2018 and, by the time of the commencement of these judicial review proceedings, any such challenge would have been statute-barred. The decision under review was the decision to grant planning permission on 10 April 2019, and not the decision the previous year.

16. On analysis, Ground 2 is the only one of the Grounds of Appeal which directly engages with the decision of 10 April 2019 to grant planning permission. The argument is that the judge was wrong to conclude at [61] that it was permissible to have regard to the planning conditions, and the s.106 agreement, when considering the adequacy of the Council's reasons for the grant of planning permission. I therefore take Ground 2 first (Section 7 below). Thereafter, I address Grounds 1 and 3 which, in one way or another, seek to focus on the Panel decision taken 11 months earlier (Section 8 below). There is a separate argument, Ground 4, in respect of a change to that part of the NPPF dealing with veteran trees, which came into force after the meeting of 10 May 2018. I deal with that in Section 9 below.

17. As I have said, Grounds 1-4 are all concerned with the potential impact of the decision to grant planning permission on the veteran trees at the site. I therefore repeat the point made above that, although this was an issue which was debated at the meeting on 10 May 2018, and although it was also reflected in a number of the planning conditions and the s.106 notice, the impact on veteran trees was not the principal focus of the decision in principle in May 2018. The vast bulk of the debate on 10 May 2018 was concerned with the question of whether, because this proposed development would harm the Green Belt, the benefits of the development significantly outweighed that harm. That is not the subject of this appeal.

18. As to Ground 5, the separate, stand-alone point arising out of the failure to carry out an AA, the judge concluded that, applying s.31(2A) of the Senior Courts Act 1981, it was highly likely that the outcome would not have been substantially different if an AA had been undertaken. Her reasons for that conclusion, set out at [91], were not the subject of any sustained challenge at the appeal hearing. Instead, a new point arose (or more properly, a point rejected by the judge arose again in a different context), argued by reference to emails that were not disclosed until after the judge had given judgment, concerned with the width of the buffer zone between the development site and the SSSI/SAC. The Appellant's new argument was based on the premise that NE had assumed that there would be a buffer zone of 20m during construction, but that the permission granted was on the basis of a 15m buffer zone only, which in turn meant

that the judge had been wrong to conclude that the absence of the AA would have made no difference to the outcome. I deal with that aspect of the appeal in Section 10 below.

7 GROUND 2: THE DOCUMENTS SETTING OUT THE REASONS

7.1 The Complaint

19. Ground 2 is in these terms:

> "The learned judge erred in concluding that it was legally permissible to rely on the planning conditions included in the Decision Notice and the Section 106 Agreement, when considering whether the Council gave adequate reasons for its decisions."

20. In support of this argument, Mr Willers submitted that it would be wrong in principle to require an interested member of the public who wished to understand the reasons for the decision, not only to listen to the audio recording of the Panel meeting on 10 May 2018, but also to read the Decision Notice of 10 April 2019 and the conditions attached, and the s.106 agreement and the schedules attached to that as well. He said that this was the sort of "paperchase" deprecated by Sales LJ (as he then was) in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71; [2017] 1WLR 3765.

21. On behalf of the Council, Mr Ormondroyd argued that, since both the planning conditions and the s.106 agreement were expressly part of the decision of 10 April 2019 under review, it was plainly appropriate to have regard to those documents when considering the adequacy of the reasons for that decision. Both Mr Ormondroyd and Mr Litton, on behalf of Legoland, submitted that Mr Willers had mischaracterised the decision of this court in *Oakley*.

7.2 The Law

22. There is no authority for the proposition that, when seeking to understand the reasons for a decision to grant planning permission, an interested member of the public is entitled to look only at a part of that decision, and cannot or need not look at other component parts of the same decision (such as, in this case, the planning conditions or the s.106 agreement, which was expressly to be read in conjunction with the planning decision). On the contrary, planning conditions are part of the decision itself: that is why reasons for any conditions imposed must be stated in the decision notice (see Article 35(1)(a) of the Town and Country Planning (Development Management Procedure) (England) Order 2015/595 ("the 2015 Order"). Moreover, planning conditions and any s.106 agreement are automatically placed on the Planning Register, along with the decision itself (see Article 40(4) of the 2015 Order).

23. It is trite law that the interpretation of a decision to grant planning permission can only be undertaken by reference to the decision itself, including the conditions imposed upon it and the reasons given for the imposition of those conditions: see *Menston Action Group v Bradford MDC* [2016] EWCA Civ 796 at [11]. That again means that it would be wrong in law to excise the planning conditions, or any of the documents said to form part of the decision, from any consideration of the reasons for the decision itself, or the adequacy of those reasons.

24. Moreover, as noted at [32] of the judgment of Lord Carnwath JSC in *R(CPRE Kent) v Dover District Council* [2017] UKSE 79; [2018] 1 WLR 108, the EIA Regulations require that, where an EIA application is determined by a local planning authority, the authority must, amongst other things, make available for public inspection a statement containing "a description, where necessary, of the main measures to avoid, reduce and, if possible offset the major adverse effects of the development…" On that basis too, planning conditions (which almost invariably contain mitigating measures) are a critical element of the decision and the reasons for it, and cannot be ignored merely because they might be lengthy or extensive.

25. In *Oakley,* the problem was that the planning committee's decision to approve the application in principle was never properly explained. As Elias LJ said:

> "65 I am not persuaded that the reasoning can be adequately inferred. This was not a case where the decision essentially turned upon the resolution of a single issue, as in *Chaplin*. Nor is it a case where the officer set out the relevant competing considerations, perhaps expressed the view that it was a marginal decision, and came down on one side or the other. It may be easy to infer in such a case that the committee did merely balance the interests differently. Here there was a complex assessment of numerous factors in play and there is no indication at all how they were assessed. For example it is not clear whether the committee accepted the officer's view that there was harm over and above inappropriate development. Nor is it possible to understand which factors in favour of the development carried such weight, either individually or collectively, as to justify the conclusion that these benefits very clearly outweighed the policy of the preservation of the Green Belt. Did the committee reject the officer's conclusion that consideration of alternative sites had not been sufficiently robust? Or that contrary to the applicant's arguments, it would be detrimental to the landscape and the biodiversity? We are left in the dark about all these matters. It is not even clear in which respects the committee found that the development would contravene the development plan. In the circumstances I do not accept that the reasoning is sufficiently transparent to relieve the committee of the duty to provide reasons."

26. In order to supply some of the missing reasoning, the Council sought to rely on a letter referring the application to the Secretary of State in connection with the possibility of the application being "called in". However that letter had not been made publicly available and was only disclosed on the appeal. It was that scrabbling around, trying to find a coherent explanation for the decision which, at [82], that Sales LJ rightly deprecated as a "paperchase". Moreover, the challenge in *Oakley* was to the decision in principle, the equivalent here of the decision of the Panel on 10 May 2018. The dispute in *Oakley* did not concern a decision to grant planning permission, accompanied by the sort of detailed conditions and s.106 agreement that we have here.

7.3 Analysis and Conclusions

27. A decision to grant planning permission can often be the culmination of a great deal of preparatory work, assessments, reports, advice, and consultation, not only between the developer and the planning authority, but also between the authority and other statutory consultees. That was certainly the case here. In order to understand the decision of 10 April 2019, and the reasons for it, it is therefore necessary to consider that decision as a whole. There can be no justification for treating one part of the decision differently to another, let alone concluding that only some parts of the documentation comprising the decision itself fall to be considered when ascertaining the reasons why the decision was made.

28. On this basis, understanding a decision to grant planning permission, and the reasons for it, inevitably requires a consideration of all the documents which make up the decision itself. In the modern age, that may involve a good deal of material, certainly for a complex and potentially significant proposal such as the one advanced by Legoland. But that is not the sort of "paperchase" that Sales LJ had in mind in *Oakley*. As I have said, he was referring to a situation where there was an attempt to fill the hole created by the failure to explain a decision in principle by reference to documents which had not been made publicly available. Here, all of the relevant material forming part of the planning decision of 10 April 2019 was publicly available.

29. In my view, on the specific issue of the veteran trees, the documents forming part of the planning decision of 10 April 2019, and in particular the conditions and the s.106 agreement - the very documents which the Appellant maintains should not be considered at all when assessing the adequacy of the reasons – contain all that an informed member of the public needed to know about why the Council had concluded that the mitigating measures would prevent any harm to those trees. So, for example, condition 4 made the Tree Constraints Plan an approved plan, in accordance with which the development had to be carried out. Condition 8 required (amongst many other things) the provision of a Construction Environment Management Plan (CEMP) for each individual project, which had to include an explanation of how the construction "will avoid impact to the adjacent SSSI and SAC and the root protection zone of any mature and veteran trees within the adjacent SSSI and SAC and also veteran trees within the project areas…"

30. What is more, condition 8 was accompanied by the reason for its imposition:

> "Reason
>
> To ensure the construction of the development does not impact the designated site adjacent to the site boundary, all the mature and veteran trees within and adjacent to the SSSI and SAC, and veteran trees within the application site, and to protect the ecological interests within the retained buffer zone…"

In other words, the condition itself explained why the CEMP and the other requirements in condition 8 were necessary: in order to ensure that (amongst other things) the veteran trees within the proposed site and in the buffer zone would not be harmed, and would be fully protected.

31. Similar provisions can be found in conditions 10 and 11, which dealt with other requirements, including the provision of an arboricultural method statement which had

to be approved before the works could start. The "Reason" that was given for both conditions 10 and 11 was that they would ensure that trees, some of which were identified as veteran trees, were "appropriately protected".

32. In a similar way, the s.106 agreement between Legoland and the Council required Legoland to provide a Landscape and Ecology Management Plan (LEMP) dealing, amongst other things, with the veteran trees on site, and how they would be protected after construction, once the resort was operating.

33. Accordingly, I consider that, when considering whether there were adequate reasons for the grant of planning permission on 10 April 2019 in respect of veteran trees, the judge was right to conclude at [61] that she could have regard to the planning conditions and the s.106 agreement. Those documents, which are expressly referred to and incorporated into the planning permission itself, explain the reasons for the decision. In respect of veteran trees, the conditions in particular gave express reasons why the development was being permitted, subject to compliance with those conditions. In short, the conditions were saying: with careful management and compliance with these conditions, there will be no harm to veteran trees.

34. For these reasons, I reject Ground 2 of this appeal. The judge was entitled – indeed, I would say, obliged – to have regard to the conditions and the s.106 agreement when considering whether, in respect of veteran trees, proper reasons were given for the decision to grant planning permission.

8 GROUNDS 1 AND 3: REASONS FOR THE DECISION

8.1 The Complaints

35. Ground 1 is in these terms:

> "The learned judge erred in concluding that the reasons were legally adequate, in circumstances where the materials that she relied upon failed to provide any reason why, contrary to officers' advice, it was possible to avoid the harms to veteran trees."

Ground 3 is in these terms:

> "The learned judge erred in finding that the majority of the Panel members concluded that [Legoland] would adequately protect the aged and veteran trees on the development site by means of the various mitigation measures proposed."

36. Both of these criticisms appear to relate to the Panel meeting on 10 May 2018: that was certainly how they were presented orally by Mr Willers. The first complaint is that, in essence, no reasons were provided to explain why the Panel decided that it was possible to avoid harm to veteran trees, whilst the second complaint is that there was nothing in the transcript of the Panel meeting to show that a majority of Panel members were of the view that such harm would be avoided.

37. I should say at the outset that these Grounds illustrate the danger of attacking a decision to grant planning permission by reference to a much earlier decision, which is not the

subject of judicial review. By 10 April 2019, a number of things had changed since the Panel meeting, and the Council and Legoland were agreed on various important matters in respect of which, a year earlier, they had differed. The court must therefore be very cautious when considering these two Grounds of Appeal: they cannot easily be married up with subsequent events, in particular the planning permission of 10 April 2019, and the conditions to which I have already referred. I develop that point further below.

8.2 The Law

38. As to reasons generally, the classic statement can be found in the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter* [2004] 1WLR 1953:

> "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."

That summary was approved by Lord Carnwath in *Dover* at [35]-[37].

8.3 The Debate about Trees

39. In the run-up to the Panel meeting on 10 May 2018, there was a long established dispute between Legoland and the Council as to whether or not the proposed development risked harming veteran trees. There were specific disputes as to the classification of particular trees, suggested exclusion zones, and the retention of certain trees.

40. The Council had identified three potential veteran trees that were at risk : tree 180, tree 291, and tree 293. Legoland accepted that tree 180 was a veteran tree, but had explained how and why trees 291 and 293 should not be classified as veteran trees. It is important to note that, by the time of the decision to grant planning permission in April 2019, the Council had come to accept Legoland's classification: it was the Legoland classification

that was set out on the Tree Constraints Plan, referred to at paragraphs 5b), 10 and 29 above, and which became an express part of the planning permission of 10 April 2019. On one view, therefore, these two Grounds of Appeal concern just one tree, tree 180.

41. Legoland's arboricultural assessment was attached to its Environmental Statement. That assessment dealt expressly with tree 180 and explained the various techniques which would minimise any impact on it. In the months prior to the meeting on 10 May 2018, Legoland provided further detailed material and another technical note explaining why all three trees noted above would not be harmed. The Council did not provide any response to those documents but simply reiterated their concerns about those three trees, which concerns were reflected in the OR.

42. Immediately prior to the Panel meeting, on 9 May 2018, Legoland's planning consultants wrote a lengthy letter dealing with a number of points arising out of the OR. There was a page and a half about trees. The consultants explained how and why there would be no harm to tree 180 specifically, and in their conclusion they reiterated that "the scheme causes no harm to ancient or veteran trees". That letter (previously referred to at paragraph 5b) above) was available to the members of the Panel at the meeting the following day.

43. Accordingly, by the time of the meeting on 10 May 2018, the Panel members knew that there was a dispute between the OR, which said there was a risk that veteran trees, in particular tree 180, would be lost or harmed, and Legoland's consultants, who made plain that veteran trees (including tree 180) would not be harmed. That was therefore an issue which had to be decided on 10 May 2018.

44. For what it is worth, I note that this history makes the present case very different to *Dover* on its facts. There, the Council had rejected the OR on the simple say-so of the applicant's advisors, without any material which indicated how or why the OR was or might be wrong. Here, Legoland had dealt in detail with the points that had been raised both before and after the OR, and the Panel was in a position to make a proper, informed choice between the competing viewpoints.

8.4 Analysis and Conclusion

45. Mr Willers submitted orally that the grant of planning permission meant that the Panel members had either concluded that there would be no harm to veteran trees, or that there would be harm, but that it was outweighed by the economic benefits of the proposed development. He said that, although it was not clear which conclusion the Panel had reached on 10 May 2018, there were pointers in the transcript to indicate that they had come to the latter rather than the former conclusion, and that this would have been unlawful (because the potential harm to veteran trees was not capable of being balanced against other factors in this way). On that premise, he maintained that the reasons for the decision were inadequate.

46. I am unable to accept those submissions. In my view, they are seeking to create doubts where, on a fair analysis, none exist.

47. At the meeting on 10 May 2018, nobody was suggesting that it was open to the Panel members to conclude that, although there would be harm to the veteran trees, that was outweighed by the economic benefits of the development. That was not an option

expressed in the OR. It was not a view expressed by anyone else before or at the Panel meeting. On the contrary, by reference to the transcript at 1.124-1.127, it is clear that the members of the Panel were given clear advice that this was *not* a conclusion to which they could come, and that they had to decide then and there whether or not there would be harm to veteran trees. Accordingly, I do not consider that there is any substance in the submission that this alternative reason was even open to the Panel, let alone that it was a proposition to which the members had any regard.

48. In support of this part of his submissions, Mr Willers sought to rely on the minuted reasons for the decision (paragraph 7 above), and in particular the reference to "other harm". He submitted that this must have been a reference to harm to veteran trees, thereby indicating that the balancing exercise was being wrongly applied to this element of the proposal. Just as the judge did at [60], I respectfully disagree with that submission. It is clear that the minute was dealing only with the substantial point at issue at the meeting on 10 May 2018, namely the balance between the harm to the Green Belt and the countervailing economic benefits. The phrase "the harm to the Green Belt and other harm" was, as Mr Ormondroyd persuasively demonstrated, a reflection of the precise wording of the NPPF on proposals affecting the Green Belt, cited by the judge at [47] of the judgment below. It had nothing to do with veteran trees.

49. The judge also found, by reference to the transcript, that the majority of the members of the Panel had concluded that there would be no harm to veteran trees because of the protection measures that would be adopted. Mr Willers complained that this was not a fair reading of the transcript (the argument which forms the centrepiece of Ground 3). Again, for the following reasons, I disagree.

50. First, as I have said, the binary decision – would the proposed development cause harm to the veteran trees or not? – was the only decision in relation to trees that the Panel had to reach. There was an inevitable element of shorthand in the transcript, and the comments have to be considered in context. Mr Ormondroyd was, I think, right to say that, when a Panel member said that they 'did not accept the tree argument' or that they 'sided with Legoland on this issue', such remarks can only be taken to mean that they had concluded that no harm would eventuate to veteran trees. I therefore agree with the judge's reading of the transcript.

51. Secondly, as to Mr Willers' complaint that, by reference to the transcript, these or similar views were not expressed by a majority of the Panel members present, this presupposes that all the members were required to speak and to comment on the veteran tree issue (which, although important, was much less significant than the argument about the Green Belt). There is no justification for that presumption. In any event, the view of the majority can be seen in the planning permission eventually granted.

52. That leads on to what I consider to be the most powerful answer to these two Grounds of Appeal, namely the actual grant of planning permission 11 months after the Panel meeting. It is plain that, on any fair reading of that decision, the Council accepted Legoland's previous submissions and evidence that there would be no harm to veteran trees by reason of the numerous mitigation measures which had been identified. That is what the planning permission expressly said: that is the effect of conditions 4, 8, 10 and 11 (amongst others). The decision repeatedly assumes that, if these conditions were complied with, the development would avoid any harm to veteran trees. Moreover, that outcome was expressly anticipated by the Panel: the transcript of the meeting on 10

May 2018 makes clear that the members indeed thought that any risk of harm to the trees could be overcome by conditions (see, by way of example, 1.234-1.235 of the transcript).

53. For all those reasons, therefore, I would reject Grounds of Appeal 1 and 3. It is plain, both by reference to the transcript of the May 2018 meeting, and the subsequent planning decision itself, that the Council had concluded that there would be no harm to veteran trees, provided of course that the relevant conditions were complied with. That is the only fair reading of the documents. It is not appropriate for this court to create another possible reason for the earlier decision (the 'harm balanced against benefit' point in respect of veteran trees), when that was not an argument which was put before the Panel, not a possibility that was identified in the OR or in the transcript, and which is wholly contradicted by the express terms of the grant of planning permission in April 2019.

9 GROUND 4: THE CHANGE IN POLICY

9.1 The Complaint

54. The complaint making up Ground 4 is in these terms:

> "The learned judge erred in finding that the policies in the NPPF relating to veteran trees were not a material consideration".

This is a reference to the change in the NPPF. At the time of the Panel meeting on 10 May 2018, paragraph 118 of the NPPF said that planning permission should be refused if it would result "in the loss or deterioration of irreplaceable habitats, including ancient woodland and the loss of aged or veteran trees found outside ancient woodland, unless the need for and benefits of the development in that location clearly outweighed the loss." That paragraph was changed in July 2018, and paragraph 175 of the NPPF now states that "development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists…"

55. Mr Willers' submission was that this change in the wording of the NPPF amounted to a strengthening of the protection given to veteran trees, and that therefore this change in policy should have been referred back to the Council before the decision to grant planning permission was taken on 10 April 2019.

9.2 Concession

56. Mr Willers conceded that Ground 4 was premised on the assumption that Grounds 1, 2 or 3 had been successful: in other words, the change in the NPPF would only be relevant on the facts of the present case if the Council had decided that there would be harm to veteran trees, but that this was in some way outweighed by other benefits. If this court concluded, as the judge did, that the decision to grant planning permission was based on the conclusion that, if the conditions were complied with, there would be no harm to veteran trees at all, then the change in policy would have had no effect because it had already been decided that harm would not occur. As Mr Willers put it, "if there was no harm, this [Ground 4] would be irrelevant".

57. For the reasons I have given, I have rejected Grounds 1, 2 and 3. On that basis, in the light of Mr Willers' sensible concession in respect of Ground 4, the issue about the change to the NPPF simply does not arise. The change in the NPPF made no difference in this case.

9.3 Timing

58. I note that, as a matter of fact, paragraph 175 of the NPPF, which came into force in July 2018, was expressly referred to in condition 11 of the planning permission of 10 April 2019. In other words, there was no need to refer anything back to the Council after the Panel meeting in May 2018, because by the time that planning permission was granted 11 months later, the Council had indeed had regard to the updated paragraph of the NPPF. Again, therefore, Ground 4 unravels because of the attempt by the Appellant to treat the Panel decision of May 2018 as if it was the decision under review.

9.4 The New Argument

59. At the appeal hearing, Mr Willers ran a new argument that there was another material difference between the two paragraphs. He noted that, whilst paragraph 118 referred to 'loss' of veteran trees, paragraph 175 referred to 'loss or deterioration' of such trees. It was not, however, clear where this submission went, given the fact that paragraph 175 of the NPPF was referred to in the planning conditions (and it was not suggested that the Council had misunderstood or misapplied that paragraph in coming to their decision).

60. In any event, it seems to me to be unfairly legalistic to suggest that there was any substantial change in policy to be derived from the use of the phrase "loss or deterioration" in paragraph 175. What both of the paragraphs of the NPPF are intended to do is to prevent harm (whether described as "loss" or "deterioration") to veteran trees. Moreover, "loss or deterioration" is a phrase that is also expressly used in the superseded paragraph 118, so any difference between the two paragraphs in that respect must be minimal. Although neither paragraph could be said to be well-drafted, it seems clear that it is the balancing factor (which changes from "clearly outweighing" the harm, to requiring "wholly exceptional reasons" for permitting such harm) which represents the policy shift in 2018. Beyond that change, which is of no application to this appeal (because there is no harm at all), these paragraphs appear to me to be very similar in effect. They do not perhaps benefit from granular analysis by over-enthusiastic lawyers.

61. Accordingly, for all these reasons, I would reject Ground 4 of the appeal.

10 GROUND 5: THE ABSENCE OF AN AA

10.1 The Complaint

62. The final complaint is in these terms:

> "The learned judge erred in finding that it was highly likely that the outcome would not have been substantially different had an Appropriate Assessment been undertaken."

This relatively straightforward proposition has been complicated by two additional issues. The first, not argued below and contrary to the way in which Ground 5 has been formulated, is the Appellant's submission that the judge applied the wrong test, and that, by reference to the CJEU decision in *Altrip* (see below), what mattered was *not* whether the outcome would have been substantially different, but whether the outcome would inevitably have been the same. The second concerns the new evidence disclosed after the judge's judgment, in connection with the depth of the buffer zone.

63. It is therefore appropriate to address, first, the judge's judgment (Section 10.2 below); then the new evidence (Section 10.3 below); then the applicable test (Section 10.4 below); and finally to analyse the competing submissions and offer a conclusion (Section10.5 below).

10.2 The Judge's Judgment

64. As the judge rightly noted at [84], it was common ground that an AA should have been undertaken to assess the impact of the proposed development on the SSSI/SAC. NE was mistaken when it had initially advised otherwise: [84] and [87]. The issue before the judge then became whether, pursuant to s.31(2A) of the Senior Courts Act 1981, relief should be refused because it was highly likely that the outcome would not have been substantially different if an AA had been undertaken.

65. The judge's analysis in respect of that question can be found at [91], where she said:

> "91 Applying the test under section 31(2A) of the Senior Courts Act 1981, applicable to judicial review claims, I am satisfied that it is highly likely that the outcome would not have been substantially different if an Appropriate Assessment had been undertaken, for the following reasons:
>
> > i) IP1 carried out extensive, detailed assessments, first identifying an adverse impact on the integrity of the SAC, and then assessing the effectiveness of proposed mitigation measures.
> >
> > ii) NE, the statutory consultee, sought further information from IP1 and was eventually satisfied, following submission of the SES, that the adverse effect on the integrity of the SAC could be mitigated, so as to make the development acceptable.
> >
> > iii) The proposals were the subject of extensive consultation and there was no disagreement by anyone, including the Claimant, with NE's assessment.
> >
> > iv) The planning officers considered IP1's proposals and NE's advice, and concluded that the impact on the adjacent SAC could be mitigated by securing an appropriate CEMP and LEMP by means of planning conditions. Although the CEMP and LEMP had not been drafted at the date of the OR, the proposed mitigation, which would be incorporated into the CEMP and LEMP were substantially set out in the ES and SES

> v) The approach adopted by IP1, NE and the Council was consistent with the requirements of the Habitats Directive, as set out above.
>
> vi) The Panel appears to have accepted the OR's advice on this issue"

66. As I have already noted, there was no serious criticism of those conclusions. But to the extent that these findings were challenged by the Appellant, I confirm that, on the basis of the material which was made available for the appeal, they seem to me to be entirely correct. They form the basis of the judge's general conclusion that it was highly likely that, even if an AA had been prepared, it would have made no substantial difference to the outcome of the planning application.

67. At the oral hearing before the judge, a specific point arose about the buffer zone between the development site and the SSSI/SAC, which had not been foreshadowed in the Appellant's skeleton argument. The judge dealt with the history as follows:

> "35 On 9 May 2018, IP1 sent a letter to the Defendant, taking issue with the OR. Amongst other matters, it repeated its representations, made in earlier correspondence, that the proposed 24 metre exclusion zone was in excess of the 15 metres recommended in NE's general advice and was not justified. The letter stated that a 20 metre exclusion zone had been provided and the proposed veteran tree reserves (protecting trees within the site as well as on the boundary) would further enhance the protection provided.
>
> 36 In fact, the proposed 20 metre exclusion zone was only intended to apply to the construction phase, not the operational phase. Table E6.1 of the ES set out mitigation measures proposed during construction and stated that "[t]he 20m buffer of the woodland will be designed as part of the LEMP and where no infrastructure will enter the buffer, this will be fenced off to prevent heavy plant and material storage in these areas." Correspondence from IP1 (25 September 2017) and Baker Consultants (16 October 2017) to the Council indicated that only a 15 metre buffer would be provided during the operational stage. This was later confirmed in the SES, at paragraph 3.10, which referred to Plan IP02 which "shows a 15m buffer to the ancient woodland, in line with guidance from Natural England."

The potentially different depths of the buffer zone during the construction and operational phases explains why the judge, having dealt with the general reasons why she did not think the outcome would have been substantially different at [91], then went on to say at [92]:

> "92 Plan IP02, showing the 15 metre buffer for the operational phase, was referred to in the SES and submitted as part of the planning application. Therefore both NE and the Council must have been aware of the depth of the proposed buffer when concluding that the mitigation measures proposed by IP1 were

> sufficient to mitigate the adverse effect of the proposed development on the SAC."

68. Before the judge, it was not suggested that there was any inconsistency between IP02 and any other element of the planning permission, or that in some way the buffer zone could not be increased beyond 15m during construction if that was what the Council required. However, as we shall see, these two propositions are now at the heart of the Appellant's case on Ground 5.

10.3 The New Evidence

69. After the judge's judgment had been handed down, the Council disclosed an email exchange between Claire Pugh of the Council and NE about the buffer zone. Those emails can be summarised as follows:

    a) On 12 April 2018, Ms Pugh emailed NE by reference to an indicative drawing dated 10 April (591/37/7), which showed the proposed plan of Holiday Village 1. She said:

    > "Can I also just check on the 20m buffer needed from the SSSI? Would the SUDS [drainage] pond need to be outside of this buffer zone, or is it just buildings and paths?"

    b) In their reply at 16:05 on the same day, NE confirmed that the SUDS pond would need to be outside the buffer zone.

    c) The following day, 13 April 2018, Ms Pugh emailed NE again to say that she had measured the SUDS pond in Holiday Village 1 and it was within 20m of the SSSI. She asked whether, if that was right, NE would change their response and object to the development. There was no further response from NE (and thus no objection).

70. There was a witness statement from the Appellant's solicitor setting out these emails and seeking to rely on them as fresh evidence at the hearing of the appeal. There was a response from Mr Batterton, Legoland's solicitor, which enclosed a detailed briefing note from Legoland's planning consultants dated 23 March 2020. Although the Appellant (somewhat surprisingly) objected to that responsive evidence, Andrews LJ permitted both the emails and the statements to be adduced by way of further evidence. There was no subsequent evidence from the Appellant dealing with or challenging Mr Batterton's statement.

71. It follows that the only detailed evidence as to the significance of the further emails from a planning perspective comes from the briefing note attached to Mr Batterton's statement. Although it is unnecessary to set it all out here, it is important to record that Legoland's consultants:

    a) Accept that the buffer zone for which planning permission was granted was 20m. At no point does their briefing note argue for a lesser depth for the buffer zone at either the construction or the operational stage;

b) Assert that it was an overstatement to suggest that the SUDS pond of Holiday Village 1 fell within the 20m buffer zone. Drawing 591/35/7, to which Ms Pugh was referring, was labelled as being indicative rather than fixed, and even then there was only a very minor encroachment [3.4];

c) Confirm that the SUDS ponds and associated work were capable of being constructed and operated without encroachment into the 20m buffer for the SSSI/SAC and without impact on the layout of the balance of the approved built form of Holiday Village 1. It was considered to be a straightforward engineering operation to construct the SUDS pond without any need to encroach into the 20m buffer zone [4.10].

10.4 The Applicable Test

72. The Appellant's first point, unheralded until the appeal, was that s.31(2A) was inapplicable and the test was not whether it was "highly likely" that the outcome would not have been substantially different, but instead, because the failure in respect of the AA arose from obligations imposed by European law, the test was whether the Council and Legoland could show that, if there had been an AA, the decision would have been the same.

73. This potential incompatibility has been noted in a number of authorities: see most recently *Pearce v SoS* [2021] EWHC 326 (Admin) at [146]-[150] and, in this court, *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179 at [66]. The issue as to whether there is in law a real and substantial difference between the two formulations has not so far fallen for final decision, principally because, in the reported cases, the planning authority has always been able to demonstrate that, whichever test was applied, the same result eventuated. That is the position of both the Council and Legoland in the present appeal: both say that they can meet the test, however it may be put.

74. In my view, although the tests appear to be potentially different, with the test said to be derived from European law apparently more onerous, it is by no means clear that they are different in practice or application.

75. The starting point for any consideration of this issue is the judgment of Lord Carnwath in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 where he said:

> "138 It would be a mistake in my view to read these cases as requiring automatic "nullification" or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells* makes clear, the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered "impossible in practice or excessively difficult". Proportionality is also an important principle of European law.

> 139 Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.
>
> 140 Accordingly, notwithstanding Mr Mure's concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime."

76. In *R (Champion) v North Norfolk District Council & Anr* [2015] UKSC 52, the Supreme Court held that *Walton* was consistent with European Law: see the analysis at [54] – [59]. The Supreme Court considered the decision of the CJEU in *Altrip* [2014] PTSR 311 (perhaps the high water mark of the proposition that the test in European law is to show that the decision would not have been different), but concluded that it did not affect the analysis in *Walton.* Lord Carnwath's conclusion at [58] of *Champion* was as follows:

> "58 Allowing for the differences in the issues raised by the national law in that case (including the issue of burden of proof), I find nothing in this passage inconsistent with the approach of this court in *Walton.* It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive."

77. To the extent that it matters, *Altrip* is not itself authority for the proposition that the test, even in European law, is that the result would inevitably be the same: the CJEU refers to the test as being that the decision would not have been different. Moreover, the court in *Altrip* stressed that this was ultimately a matter for national law: see in particular [51]-[52]. This was a point expressly picked up by Lord Carnwath in the passage in his judgment in *Champion* set out above. On that point, I can see no reason to conclude that s.31(2A) of the Senior Courts Act 1981, which is the relevant national law in this instance, does not comply with the well-known principles of equivalence and effectiveness. It is, on its face, proportionate and consistent with EU law.

78. For completeness, I should refer to the most recent detailed consideration of the test in European law, contained within the judgment of Dove J in *Canterbury City Council v SoS* [2019] EWHC 1211 (Admin). He said at paragraph 84:

> "84 To attempt to draw the threads together, it is beyond argument that in cases where there has been a breach of European environmental law the court retains a discretion not to quash that decision on the Grounds of that illegality. It is for the decision-taker, in this case the Defendant, to demonstrate that the decision reached would inevitably have been the same absent the legal error. In doing so the court must be careful to avoid trespassing into the "forbidden territory" of evaluating the substantive merits of the decision. Ultimately the court is not, unlike some other tribunals or jurisdictions, provided with the complete "case file" or all of the material before the decision-taker, and therefore it is not afforded the same scope for its consideration of the case as the original decision-taker; it is therefore not equipped to remake the decision in the event that illegality is found. If the court is satisfied that the decision would necessarily have been the same without the error of law which infects it then the court can exercise its discretion not to quash the decision. That judgment must be reached on the basis of the facts and matters as known at the time of the decision being taken. These principles are of equal application to a case involving a breach of European law obligations where the case-law endorses the withholding of substantive relief in cases where the decision in question would not have been different without the procedural defect invoked by the Claimant. In making the evaluation it would be relevant to consider, amongst other matters, the seriousness of the breach of European law and whether or not that breach has deprived the public of a guarantee introduced with a view to allowing the public access to environmental information and "to be empowered to participate in decision making".

79. So where does all this go? I would tentatively summarise the current position in this way. First, whilst I can see that the two tests are potentially different, with the test under s.31(2A) being less stringent than that formulated in *Altrip*, I consider that the difference may have become overstated. Secondly, the proper application of *Walton* and *Champion* means that, whichever test is applied, the same factors will need to be examined. When considering whether it is highly likely that the outcome would not have been substantially different (or whether the outcome would not have been different, or even whether the outcome would have been the same), what matters in each case is the seriousness of the failure or breach, and whether or not that failure deprived the public of a proper opportunity to comment upon and object to the proposals, and thereby caused prejudice.

80. Thirdly, once an analysis has been undertaken by reference to those factors, the precise formulation of the test may not matter: in the real world, it would be a very unusual case in practice in which the court's consideration of the seriousness of the breach and any prejudice caused was sufficient to establish that it was highly likely that the outcome would not have been substantially different, but insufficient to establish that the result would have been the same. That may well explain why the authorities demonstrate that the hypothetical difference in the formulation of the test has not given rise to a real issue in practice.

10.5 Analysis and Conclusions

81. In analysing Ground 5, it is therefore necessary to consider the factors identified in *Walton* and *Champion*. There was no argument about the seriousness of the breach. The focus was on the extent to which the public had been deprived of the opportunity to comment and object.

82. On that issue, the starting point is [91] of the judge's judgment, set out at paragraph 65 above. As I have already indicated, that summary demonstrates the lengthy and extensive public consultations which took place here and, in particular, the close involvement of NE throughout. Ultimately, NE withdrew their objection to this proposed development and, although the new emails show that they were given an express opportunity to renew their original objection, they declined to do so. To that extent, therefore, the new emails only confirm the judge's conclusions at [91] of her judgment. In addition, the papers show that there were – perhaps unsurprisingly – a number of detailed objections from members of the public, many of which referred to and relied upon the proximity of the SSSI/SAC. Again, the absence of the AA did not deprive anyone of their right to object on this ground.

83. I should also note that the ES and the SES demonstrated, in detail, that the proposed development would cause no harm to the SSSI/SAC, provided that the appropriate conditions were applied. The residual impact on the SSSI/SAC was shown as 'Neutral' in the ES, which assessment was never challenged or doubted at the time of the meeting in May 2018 or the decision in April 2019. The handful of matters mentioned briefly in argument by Mr Willers, concerned with litter, erosion, risk of fire and the like, were never raised by anyone at the time, despite the extensive consultation. These were not matters raised by NE. They do not begin to suggest that a different result might have occurred if there had been an AA.

84. For these reasons, subject to the specific point about the depth of the buffer zone between the development and the SSSI/SAC, I conclude that the Council and Legoland have discharged the necessary burden under s.31(2A) and, to the extent that it is a higher test, they have shown that, even if an AA had been carried out, the outcome of the planning application would not have been any different. Even with an AA, I conclude that NE would have withdrawn their objection and, notwithstanding the objections from some members of the public about the proximity of the SSSI/SAC, all of which were properly considered, planning permission in the same terms would have been granted.

85. Turning then to the issue about the buffer zone, the judge found that the effect of the approved documents was that there would be a 20m buffer zone during construction and a 15m buffer after construction, during the operation of the development: see [35]-[36] and [92]. On appeal, Mr Willers sought to argue that this finding was in fact the wrong way round, and that the effect of the approved planning documents was that a 15m buffer applied during construction, whilst a 20m buffer applied during the operational phase. In support of this argument, he relied on drawing IP02 (which showed a 15m buffer zone and was expressly incorporated into the planning permission) whilst drawing IP10, which showed a 20m buffer, was not similarly incorporated.

86. Why does this specific argument matter, particularly in the light of Legoland's alternative argument that, even if the judge was wrong and the planning permission envisaged only a 15m buffer zone during construction, a 20m buffer could be imposed by the Council in any event during the construction phase through the s.106 Agreement

and/or the approval system for the CEMPs and LEMPs? Mr Willers' highly technical answer was that, if he was right and a 15m buffer zone had been imposed during construction by the terms of the planning permission, Legoland's alternative argument was immaterial, because the Council could not derogate from the permission granted, even to insist on a deeper buffer zone.

87. In my view, a fair reading of the documents as a whole confirms that the judge's conclusion was correct, and that the planning permission imposed a 20m buffer zone during construction. Mr Willers' contrary argument ignored the ES, which was a critical part of the planning permission that was granted. Section E5 was concerned with the potential effects of the development and was divided into a first section headed "During Construction", and a second section headed "During Operation". This lengthy part of the ES made plain that detailed mitigation measures were required for both phases. The mitigation measures themselves were set out in detail in Section E6 of the ES. That was divided into the same two sections, the first dealing with those measures "During Construction" and the second with the measures "During Operation". In the first section, under the heading "During Construction", there was a table, E6.1, which stated:

> "The 20m buffer of the woodland will be designed as part of the LEMP and where no infrastructure will enter the buffer, this will be fenced off to prevent heavy plant and materials storage in these areas."

88. In my view, therefore, it is plain from the ES that the buffer zone during construction was intended to be 20m and that planning permission was granted on that basis. That can be derived from the express reference to the 20m buffer in table E6.1 under the heading "During Construction", and from the statement that the 20m buffer will be fenced off "to prevent heavy plant and material storage in these areas". As the judge correctly found, heavy plant and materials storage are features of the construction phase, not the operation of the resort.

89. This is confirmed by condition 8, which referred to the need for a CEMP for each project to set out "how construction…will avoid impact to the adjacent SSSI/SAC", and which expressly refers back to the ES and table 6.1. Accordingly, there can be no doubt that the provision of a 20m buffer zone can, if necessary, be secured by the operation of the CEMP process.

90. In my view, that interpretation is further supported by the express reference to the LEMP in table E6.1. That reference confirms that, following the construction phase, the 20m buffer would be retained as part of the long term management of the landscape. Moreover, the s.106 Agreement makes clear that the LEMP must conform with the ES (and therefore comply with the requirement in the ES for a 20m buffer "during construction").

91. What about the 15m buffer shown on drawing IP02? As Mr Ormondroyd submitted, that must be treated as a minimum figure in the circumstances, particularly given the clear statement in the ES that the buffer will be 20m, and the requirements for the CEMPs and LEMPs to the same effect (and which could therefore be rejected by the Council if they showed a less deep buffer zone). Contradictions between different documents making up a complex whole are a commonplace in the planning and

construction worlds, and it is important that, if it is possible, such contradictions are approached by the court in a constructive rather than a destructive way.

92. Accordingly, I reject Mr Willers' primary argument. As the judge concluded, the planning permission of April 2019 required and was based on a buffer zone of 20m during the construction phase. In those circumstances, the derogation argument does not arise.

93. I do, however, disagree with the judge's conclusion that the planning permission envisaged that the buffer zone would be reduced to 15m during the operation of the resort. Her conclusion was based on IP02 (on which Mr Litton also relied during his submissions) but, as I have said, the drawing cannot bear that interpretation. It is contrary to the ES. In any event, having different widths for the two phases makes no sense: if a buffer zone is required to protect the SSSI/SAC, it should be the same size both during construction, and once the construction is completed. When taken in the round, therefore, I consider that the documents making up the planning permission indicate a 20m buffer zone for both phases. It therefore follows that I accept the Appellant's argument that the planning permission was granted on the basis of a 20m buffer for the operational phase. I note that this also appears to be what NE themselves envisaged.

94. As things stand, a small part of the SUDS pond (as shown on drawing 591/35/7) appears to encroach into that 20m buffer zone. But there is no difficulty about that for two reasons. First, the encroachment is shown on a drawing that is purely indicative. It is not necessarily showing the final location of the pond. Secondly, Mr Batterton's unchallenged evidence was that the SUDS ponds could be redesigned so as to not encroach into the 20m buffer zone at all. Such redesign will be necessary in order to comply with the planning permission granted.

95. Finally, I should mention that, because Ms Pugh's email was couched in general terms, it is not clear how and from where she had measured the buffer zone. This was a point made in the planning consultants' briefing note, referred to at paragraph 72 above. But despite a vague indication by Mr Willers that the measurements were unclear, I am not persuaded that the accuracy of the measurements has anything to do with the absence of an AA, or the possible outcome of the planning application if there had been an AA. It is something that can be sorted out sensibly on site through the CEMP process, before the works commence. For present purposes, I simply reiterate that the buffer zone is to be 20m for both the construction and operational phases, and the buffer zone itself is to be measured from the boundary of the SSSI/SAC.

96. For all these reasons therefore, I would reject Ground 5. If my ladies agree, that would lead to the dismissal of this appeal.

LADY JUSTICE CARR

97. I agree

LADY JUSTICE KING

98. I also agree