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CO/1465/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 20th June 2008

B e f o r e:

SIR MICHAEL HARRISON

Between:
THE QUEEN ON THE APPLICATION OF LITTLEWOOD

Claimant

v

BASSETLAW DISTRICT COUNCIL

Defendant

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(Official Shorthand Writers to the Court)

Mr W Upton (instructed by Richard Buxton Environmental and Public Law) appeared on behalf of the **Claimant**
Mr D Forsdick (instructed by Legal Department) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. SIR MICHAEL HARRISON:

Introduction

2. This is an application for judicial review to quash a planning permission granted by the defendant, Bassetlaw District Council, ("the Council"), on 18th December 2007 for what was described as "Steetley Regeneration Phase 1 including a manufacturing facility" on the site of the former Baker Refractory Works at Steetley, near Worksop in Nottinghamshire. The manufacturing facility was a pre−cast concrete manufacturing facility proposed by the applicant for planning permission, Laing O'Rourke, who are the Second Interested Party in these proceedings and whom I will refer to as "Laing". The site is on the border between Nottinghamshire and Derbyshire and the proposal included an access road which fell within the district of Bolsover in Derbyshire. That aspect of the proposal fell to be determined by Bolsover District Council who are the First Interested Party but who took no part in these proceedings. The claimant is Claire Littlewood who lives at Steetley Farm, Steetley, within about 450 metres of the proposed development. She and other local residents are objectors to the proposed development and she spoke on behalf of the objectors at the relevant meetings of the Planning Committee of Bassetlaw District Council when the planning application was considered.

3. The application for judicial view was brought on nine grounds. Permission to apply for judicial review was granted by Collins J on 4th April 2008 on six of those nine grounds. In granting permission, Collins J stated that he was only granting permission on those grounds because the threshold of arguability is a low one, but he was far from persuaded that, at the end of a full hearing, the claimant would necessarily succeed.

Background

4. The application site forms part of a wider area referred to as the Steetley site. The application site, which includes the former Baker Refractory Works, has an area of about 26 hectares, whilst the Steetley site as a whole, which includes a former quarry and a former colliery, has a total area of about 85 hectares. The application site is bounded on its eastern side by a railway which was a relevant consideration in Laing's site selection process.

5. The proposed development consists, broadly speaking, of a main building where the manufacturing would take place, together with cement silos and a concrete batching plant adjoining its south eastern corner. A car parking area and a lorry unloading area are proposed to the south of the building, and a lorry loading area and a storage area are proposed to the north of the building. The access road would run from the south along the western boundary of the site, whilst land is safeguarded on the eastern side of the site for possible future railway sidings. The proposed building, together with the access road and a part of the area to be used to the north of the building would cover about a quarter of the area of the buildings comprised in the former Baker Refractory Works which are now being demolished in order to create a development platform of about 198,000 square metres. The proposed development would take place on part of that platform, the building itself being about 26,000 square metres. The development

as a whole would involve an inevitable impact on a Site of Importance for Nature Conservation designated in the local plan and it would involve the loss of some areas of ancient woodland. Those latter aspects form part of one of the grounds of challenge.

First ground of challenge − the Masterplan

6. The main ground of challenge in this case relates to the failure of the District Council to require the production of a Masterplan for the area as a whole before deciding the planning application. The challenge is put in two ways. Under ground 1, it is said that the failure to require the Masterplan was a failure to take into account a relevant planning consideration and that it was a perverse decision not to require it. Under ground 2, it is said that it was a failure to take into account the likely significant environmental effects of the development, in particular, the cumulative impact of the proposal together with any likely future proposal on the rest of the Steetley site, contrary to the requirements of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (as amended) ("the EIA Regulations").

7. The factual background to this main ground of challenge is as follows. On 21st February 2007, the District Council gave a screening opinion that the proposal required the submission of an Environmental Statement to accompany the application. The reason given for that opinion was that the proposed development was Schedule 2 development which was likely to result in significant effects on the environment sufficient to warrant the submission of an Environmental Impact Assessment (an "EIA") by virtue of a number of factors, the first being "the possible cumulative effects in that the proposed application should not be considered in isolation from the whole of the Steetley site."

8. Some of the statutory consultees and interested parties had requested the submission of a Masterplan. Laing did not accept that a Masterplan was necessary at this stage, maintaining that the Phase 1 development had been designed as a stand alone development which was not reliant on any future development on neighbouring land.

9. The Planning Statement accompanying the application, when dealing with the phased development approach in section 8.3, stated as follows:

> "8.3.1.The applicants recognise that several parties would like to see a master plan developed incorporating the comprehensive redevelopment of the entire Steetley site including the Baker Refractory site, Armstrong Quarry and the former Colliery area. The applicant agrees that such a master plan needs to be developed and work is already in hand to prepare this. However, the site has only recently been acquired and therefore time is needed to properly assess all of the options, including the previous proposals drafted by EMDA and Basilton Properties. This will clearly necessitate discussions with relevant parties over the coming months. It is proposed that a planning application covering the entire site will be made later this year.
>
> 8.3.2 In the meantime, Laing O'Rourke have an extremely urgent

> business need for a new pre−cast concrete manufacturing facility to replace an existing facility elsewhere in the UK. Such a facility must be developed quickly due to the expiry of the lease on the existing site. As a result a new facility is required to be up and running during 2008. It is clear therefore that Laing O'Rourke cannot wait for a full site master plan to be approved before applying for the pre−cast facility. As a result that current application proposal forms Phase 1 of the wider site master plan which will be developed over the coming months.
>
> 8.3.3 The current application should be considered on its own merits and is designed to be capable of implementation without the requirement for other parts of the site to be involved. The applicants are happy to accept a condition or legal obligation to formerly [sic] submit a wider site master plan within an appropriate period."

Paragraph 17.12 of the Environmental Statement stated:

> "The Pre−Cast Concrete Manufacturing facility forms the first phase of a future wider regeneration of the Steetley site. At present, a masterplan for the future development of the Site has not been prepared. Any future phases of Development on the Steetley site will be the subject of the Environmental Impact Assessment, and potential Type 2 cumulative impacts of the Phase 1 Scheme and future phases of Development will be addressed at this point."

10. When this matter came before the Planning Committee of the District Council on 29th October 2007, members had the benefit of an officer's report which dealt with the relevant planning considerations. The paragraph of the report which dealt with this particular aspect stated:

> "The required time scale means that the proposal cannot wait for the completion of the comprehensive masterplan for the wider Steetley site, as requested by some of the consultees and interested parties. Whilst work is underway in preparing such a masterplan, this is a particularly complex site and there is a considerable amount of work to be done. Whilst the application proposal is for phase 1 of the masterplan, it has been submitted in advance of the masterplan proposal, which is intended to follow later. The requirement for a masterplan would form part of the Section 106 Legal Agreement."

11. The officer's report was accompanied by a briefing note on the proposed contents of the section 106 agreement which included a proposal that a Masterplan should be provided within 12 months of the commencement of the development. A section 106 agreement, which was completed on the same day as the issue of the planning permission, contained such a requirement.

12. Whilst this ground of challenge relating to the failure to require the production of a master plan before deciding the planning application was divided into two grounds − namely, under the planning regime and under the EIA regime − the main thrust of the

challenge was under the EIA regime although many of the arguments were common to both regimes.

13. The general point was that this was not a stand alone development; it was Phase 1 of a wider regeneration proposal. It was therefore necessary to have a master plan to judge the cumulative effect of Phase 1 together with the future proposals for the wider area because it may show that the harmful effects of the present application could be avoided when the wider area is taken into account, but it would be too late to do so after the grant of planning permission for Phase 1.

14. Mr Upton, who appeared on behalf of the claimant, submitted in relation to the ground under the planning regime that the Council, having decided that a Masterplan was necessary, erred in law by not requiring it when determining the application, thereby both failing to take a material consideration into account and being perverse in so deciding. The only reason given for not requiring the Masterplan was the time constraint and that, he submitted, was an inadequate response.

15. Mr Upton sought to draw an analogy with the approach of Sullivan J in the cases of R v Rochdale MBC, ex parte Tew (1999) 3 PLR 74 and R v Rochdale MBC ex parte Milne (2001) Env LR 22, as approved by the Court of Appeal in Smith v Secretary of State for the Environment, Transport and the Regions (2003) Env LR 32, which were both cases dealing with outline planning permissions where it was held that it is at the outline stage that the planning authority must have sufficient information to enable any likely significant environmental effects to be identified and that any conditions attached to a grant of planning permission should be sufficient to ensure that the scheme brought forward at the reserved matters stage does not differ significantly from that which had been approved.

16. Mr Upton placed reliance on the provisions of the European Guidelines for the assessment of cumulative impacts which refer to the cumulative impacts as including reasonably foreseeable actions and potential future impacts.

17. He accepted that the normal approach would be to assess only the cumulative impacts from projects which have been permitted, but in this case he relied on the fact that the Council had required Laing, as part of the section 106 agreement, to produce a master plan within 12 months of the commencement of development which, he said, showed that the Council thought there would be potentially significant environmental effects, but that they had failed to use their power under Regulation 19 of the EIA Regulations to require further information.

18. Mr Upton also relied on national guidance that an obligation in a section 106 agreement was only a material planning consideration if it was necessary. He contended that the Council must therefore have thought that a Masterplan was necessary. It was submitted that, by granting the planning permission without having first required a Masterplan, the Council had failed to take account of the environmental information they had identified as being necessary in order to assess the likely significant environmental effects of the development, contrary to the EU Directive and the EIA Regulations. That failure to assess the cumulative effects was said to be perverse and unlawful. It was said to be contrary to the dictum of Simon Brown J, as

he then was, in R v Swale Borough Council, ex parte RSPB (1991) JPL 39, and approved by Davis J in R (on the application of Candlish) v Hastings Borough Council (2005) EWHC 1539, when he said that the proposal should not be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development.

19. Mr Elvin QC submitted on behalf of the defendant that the issue over the Masterplan was a matter of planning judgment by the Council as to whether the Masterplan was a necessary pre−condition to the grant of permission for Phase 1 or whether it could properly be required after the grant of permission.

20. He submitted that there was no legal or policy requirement under the planning regime for a Masterplan. The claimant's suggestion that the Council must have thought a Masterplan necessary because a section 106 obligation has to be necessary to be a material consideration was, Mr Elvin said, wrong because it was decided by the House of Lords in Tesco Stores v The Secretary of State for the Environment (1995) 1 WLR 759 that a section 106 obligation only has to be reasonably related to the development to be a material consideration; it does not have to be "necessary" to the grant of the permission.

21. Mr Elvin submitted that the claimant's attempt to draw an analogy with the cases of Tew and Milne was misconceived because they were dealing with the status of an outline planning permission and the need for a master plan to set out the parameters of the application for the application site; they were not dealing with a Masterplan for future development on another site.

22. So far as the requirement for a Masterplan to assess cumulative effects under the EIA regime is concerned, Mr Elvin placed some reliance on the European Guidelines for the assessment of cumulative impacts which had also been relied on by Mr Upton for its reference to "reasonably foreseeable actions". The comfort which Mr Elvin sought to draw from that document was its statement that the time boundaries in the past and in the future for assessment of cumulative impact will depend, inter alia, on the availability and quantity of information as well as the local or national planning horizons for future development. He made the point that there are, as yet, no proposals for the rest of the Steetley site and there is nothing in national or local plan policy which suggests any form or quality of development on the site.

23. Consultation is being carried out at the moment on the process of translating those European Guidelines into national guidance. I was referred to a consultation paper issued by the Department for Communities and Local Government providing an EIA good practice guide which states at paragraph 124:

> "In most cases, detailed consideration of the combined effects of the development proposed together with other developments will be limited to those areas that are already begun or constructed or those that have not been commenced but have a valid planning permission."

24. Mr Upton relied on the words "in most cases" in that quoted sentence, whilst Mr Elvin submitted that it is not possible to apply the reasonably foreseeable test for cumulative

assessment to a situation where there is no formulated proposal for the wider development and where neither European nor national law or policy requires the generation of a future proposal for an assessment to be made.

25. Mr Elvin said that, if further stages come forward with their environmental impacts, those impacts will have to be assessed cumulatively with those from the first phase which means that Laing may have to suffer less flexibility for a later phase.

26. I can understand why the claimant has raised this issue of a Masterplan. The proposed development was described in the application as "Steetley Regeneration Phase 1" and paragraph 7.12 of the Environmental Statement makes it clear that it is the first phase of a future wider regeneration of a Steetley site. Indeed, it is clear from paragraph 8.3.1 of the Planning Statement that Laing agree that a Masterplan needs to be developed. The issue, it seems to me, is whether or not the Masterplan was legally required to be produced before planning permission was granted.

27. It is clear from the Council's Scoping Opinion dated 21st February 2007 that they thought at that time that the application site should not be considered in isolation from the whole of the Steetley site. However, by the time the application came to be determined on 29th October 2007, no proposal for the wider area had yet been formulated by Laing.

28. It is tolerably clear from paragraph 8.3.2 of the Planning Statement and from the paragraph from the officer's report which I have also quoted earlier in this judgment, that Laing had an urgent need for a new pre−cast concrete manufacturing facility on the site during 2008 due to the expiry of the lease on their existing site. However, it is clear from the officer's report and from the council's decision that the Council accepted that, due to the complex nature of the site, it would not be possible to complete a Masterplan for the whole of the Steetley site in time for a decision on the Phase 1 application to meet Laing's required time scale for their new facility. That was why the Masterplan was dealt with by way of a section 106 obligation.

29. One of the many issues dealt with in the officer's report was the social and economic benefits of the proposed development which would create 270 new jobs in an area which had experienced significant job losses in recent years. It was described as a prestigious showcase industrial facility which may act as a catalyst for further high profile investment. As the officer's report made clear, those benefits had to be weighed against the harmful effects of the proposal. Meeting Laing's required time scale was obviously important to achieve those benefits.

30. The Council could have insisted on the production of a Masterplan as a pre−requisite to the grant of permission but that would have meant deferring consideration of the application with consequential delay and failure to meet Laing's required timescale. It was suggested that this was a rushed decision, but the Council had already deferred consideration of the application once on 26th September 2007 in order to consider further information that had been provided. The Council had a difficult decision to make bearing in mind the perceived social and economic benefits that were at risk.

31. In my view, the Council's decision to determine the application on 29th October 2007 without insisting on a Masterplan as a pre−condition but requiring its subsequent production by a section 106 obligation was a planning judgment which cannot be said to be Wednesbury unreasonable.

32. Equally importantly, at that time no proposals had yet been formulated by Laing for the rest of the site for the reasons that I have mentioned. I simply do not see how there could be a cumulative assessment of the proposed development and the development of the rest of the site pursuant to the EIA Regulations when there was no way of knowing what development was proposed or was reasonably foreseeable on the rest of the site. The site was not allocated for development in the local plan. No planning application had been made and no planning permission given in respect of the rest of the site, and no proposals had yet been formulated for that part of the site. There was not any, or any adequate, information upon which a cumulative assessment could be based. In my judgment, there was not a legal requirement for a cumulative assessment under the EIA Regulations involving the rest of the Steetley site in those circumstances.

33. Having therefore considered the various submissions made under the planning regime and under the EIA regime, I have come to the conclusion that there was no legal error involved by the Council not insisting on a Masterplan as a pre−condition to the grant of permission, and there was no obligation on the Council in the circumstances to consider the cumulative impact of the unknown future development on the rest of the Steetley site. In my view, the Council were entitled to decide the application as a stand alone development and to require the subsequent production of a Masterplan by way of section 106 agreement so that cumulative impact could be considered when future proposals for the rest of the site were forthcoming.

Second ground of challenge − misdescription of site

34. The next ground of challenge, which was ground 5 in the claim form, relates to an alleged misdescription of the application site. It is based on some passages in the officer's report to which I should first refer before summarising the claimant's submissions on this aspect.

35. At the beginning of the officer's report, the Steetley site as a whole was described as predominantly open land with the exception of the former industrial areas which are covered by hardstandings.

36. Under the heading of "Planning Policy", the report stated:

> "This site is not allocated or protected for employment use in the Bassetlaw Local Plan. The Plan recognises that the site of the Former Steetley Colliery and the adjoining quarry contains a significant amount of derelict land and a former factory site and that there may be potential for part of it to be reused for employment creating development...
>
> It is considered that the reuse of the application site for employment has material benefits which outweigh the locational policies that would normally preclude this type of development outside a settlement

envelope."

37. Under the heading of "Landscape and Visual Impact", the report stated "the proposed development would re−use derelict and despoiled land removing the former buildings ..." and it went on to state that "the proposed new buildings and the silos will replace the existing buildings..." Finally, under the heading of "Conclusions", the report referred to "... the proposed development of the existing employment site."

38. Finally, the Local Plan stated at paragraph 2.54:

> "It is likely that most of the site will be restored to agriculture, forestry or informal leisure use, and will remain open in character. There may be potential, however, for part of it to be reused for employment creating development."

39. The thrust of the ground of challenge relating to those parts of the officer's report was that they mistakenly gave the impression that the whole of the application site was an employment site, being a brownfield or previously developed site, and that the whole site was derelict or despoiled, whereas significant parts of the site are open land including a Site of Importance for Nature Conservation and areas of ancient woodland. It was also submitted that the report failed to make clear that the new building would not be on the footprint of the existing buildings.

40. I do not consider that there is any merit in this ground of challenge. In the first place, the Minutes of the meeting of the Planning Committee on 29th October 2007 show that those points were made orally by the claimant to the Committee and that the members of the Committee specifically asked questions about them. The Minutes expressly record that the relevant officer explained that not all of the site had been built on but that the land was within the curtilage of a previously developed site.

41. Secondly, members of the Planning Committee went on a site visit on 26th September 2007. They were accompanied by Mr Askwith, a team leader in the Development Control Department of the Council, who has made a witness statement describing how they visited the site by bus. They had a clear elevated view of the whole area and they had plans with them with Mr Askwith giving a commentary pointing out relevant features to them and responding to their questions. He expressly states that members had pointed out to them the area which would be the footprint of the proposed building and that, at that time, the tower and the other parts of the old Baker Refractory buildings were still standing and were in the course of demolition.

42. In those circumstances, I cannot see how members of the Planning Committee could have been under any misapprehension as to the nature or status of the site. The points now raised were raised before them and were considered by them. They were aware from their site visit about the degree of openness of the site and they were made aware of the location of the footprint of the proposed building in relation to the location of the existing buildings in the course of demolition. In my view, the officer's report, when read as a whole, was perfectly adequate and it could not be said to be significantly misleading as alleged by the claimant. It is clear from the Minutes of the meeting and

from the site visit that members of the Planning Committee could not possibly have been confused or misled.

Third ground of challenge − nature conversation and archeology

43. The next ground of challenge, which was ground 6 in the claim form, relates to the issues of nature conversation and archaeology. It is contended that the Council failed to have proper regard to the adverse impact on those matters, the point being raised in relation to both the EIA assessment and the planning decision.

a) nature conversation.

44. I deal first with the issue relating to nature conversation. As I have mentioned earlier, the proposed building, together with ancillary facilities to the south including the car parking area and the unloading area, would have an inevitable impact on a Site of Importance for Nature Conservation (a "SINC") and on two areas of ancient woodland, all of which are designated in the Local Plan.

45. The main point made on behalf of the claimant is that the Council's conclusion that the adverse impact on those areas was outweighed by the benefits of the scheme was manifestly unreasonable because the damage was avoidable if the Council had not accepted the layout proposed by Laing. Reference was made to paragraph 13 of PPS 9 which advises that, where a site has significant biodiversity interest of recognised local importance, planning authorities and developers should aim to retain that interest or to incorporate it into any development of the site. Mr Upton submitted that the Council had failed to consider whether there was an alternative layout which could have avoided those areas.

46. The Environmental Statement had a lengthy and detailed chapter dealing with nature conversation and ecology, with chapters containing an impact assessment and mitigation measures which included a compensatory habitat creation area to the northwest of the site. The overall conclusion, taking into account the habitat creation area, was that there would be a moderate and adverse impact in the medium term on the SINC and that there would be a loss of the two remaining areas of the ancient woodland.

47. The Environmental Statement not only had a section dealing with alternative sites showing Laing's national and local search for a suitable site but it also had a section dealing with alternative site layouts and design. Paragraphs 3.25 and 3.26 of the section stated as follows:

> "3.25 A determining factor in deciding the location of the manufacturing facility was its proximity to a railway line. The facility has been located adjacent to the railway to enable rail transport to be considered for use in the future for deliveries and shipments. Consequently, situating the manufacturing facility in any other location other than the eastern side of the Site was discounted as this would prohibit the use of this sustainable mode of transport in the future.

> 3.26 The option of locating the storage yard to the south of the manufacturing building was considered. This option was discounted as it would locate the nosiest operational activity, such as the aggregate pouring, closer to the residential receptors to the north of the Site."

48. In the conclusions of that chapter of the Environmental Statement, it was stated:

> "The Scheme layout and design has been largely dictated by the Applicant's operational requirements. However the layout of the Site has been considered in terms of maximising the opportunities for sustainable transport options and minimising impacts to nearby residential properties."

49. The officer's report had a section on ecology and biodiversity. Amongst other things, it referred to the fact that the Environmental Statement accepted that there would be an ecological impact of varying degrees and that, as a result, it set out the mitigation measures proposed in respect of the disturbance to flora and fauna, loss of habit and the ancient woodland impact. When referring to the two small areas of ancient woodland, the report expressly stated that the developer had considered relocating the building as an alternative but that, for logistical reasons set out in the Environmental Statement, it was not practical. This section of the report then concluded:

> "Given the inevitable impact on ecology should the proposed development proceed, it is necessary to determine whether other material considerations, such as the social, economic and environmental benefits, outweigh the nature conservation issues, including the ecological mitigation offered by the developer, as provided for in the existing planning policies."

50. It is therefore clear, firstly, that the Environmental Statement dealt adequately both with the issue of the impact on the SINC and on the areas of ancient woodland and with the issue of an alternative layout. It made it clear that an alternative layout had been considered but that, for the reasons given, it was not practical. Secondly, it is clear that members were advised about those issues in the officer's report. Nobody could have been in any doubt about the adverse effect on the SINC and the ancient woodland. Indeed, it is clear from the Minutes that members asked some questions about the ancient woodland and the nature conversation aspect. Thirdly, it is clear from the Council's decision that members must have accepted Laing's case that changing the layout was not practical and, weighing the adverse impacts on the SINC and the areas of ancient woodland against the social, economic and environmental benefits of the proposal, they considered that the balance came down in favour of permitting the proposed development. That is a classic example of the exercise of planning judgment with which the Court will not interfere unless it can be shown to be Wednesbury unreasonable. In my view, the claimant's case does not come any where near showing that the exercise of that planning judgment was Wednesbury unreasonable. Nor has it been shown that the Environmental Statement was in any way deficient on this aspect.

b) archaeology.

51. I turn to deal with the other aspect of this ground of challenge, namely the issue of archaeology. The issue relates to the potential presence of caves and any remains within them.

52. The position is that the part of the Non−Technical Summary of the Environmental Statement dealing with archaeology stated that the assessment had concluded that, due to significant disturbance through development and quarrying, the site had little archaeological potential and that the development would have no impact on archaeological resources. The relevant section of the Environmental Statement itself dealing with archaeology was not included in the papers in this case, although it is apparent from the officer's report that it dealt with a number of archaeological aspects but, as I understand the position, it did not deal with the potential presence of caves.

53. That omission was rectified by the representations from other parties. Dr Jacobi of the British Museum referred to records of two caves with rare faunas, one found in 1926 and one found in 1976. The senior archaeological officer of Nottinghamshire County Council pointed out in a letter of 16th August 2007 that, whilst she agreed with most of the conclusions of the archaeological assessment, the issue of caves had not been dealt with. She considered that there was a potential for archaeological issues from the presence of the caves. She stated:

> "Unfortunately, as far as I can tell there is very little information provided on the location of the caves, or how/if they may be impacted upon by the proposed development. It would be extremely useful to have additional information on these features. Should the proposals seem likely to affect them, my feeling is that it would be premature to decide upon this planning application until such additional information is available, and I would recommend that the application be deferred or refused. Otherwise, it may be appropriate to impose an archaeological condition such as the following;
>
> 'No development shall take place within the application site until details of a scheme for archaeological mitigation has been submitted to and approved in writing by the LPA.'"

54. The claimant, in a joint letter with others, also raised concerns about the adequacy of the officer's report relating to the issue of the caves.

55. The officer's report had a section dealing with the archaeology. After dealing with other archaeological issues, the report stated:

> "The Nottinghamshire County Archaeologist has generally agreed with most of the conclusions of the archaeological assessment, however, one issue remains outstanding, that is, the potential presence of caves and the possibility for potential archaeological issues arising. In light of additional information appropriate archaeological conditions could be imposed."

56. It is suggested in Mr Elvin's skeleton argument that, by the time of the decision on 29th October 2007, as a result of further discussions the County Archaeologist had agreed to the matter being dealt with by way of a condition. There is an email from her dated 27th September 2007 showing that she had not agreed to it being dealt with by condition by that stage, but Mr Upton in his skeleton argument refers to the County Archaeologist having taken the right approach at first. I infer therefore that the County Archaeologist had agreed to the matter being dealt with by way of condition by the time of the Council's decision on 29th October 2007. However, my decision does not turn on that point.

57. The Minutes of the Council's meeting on 29th October 2007 show that members asked questions about archaeology on the site. They followed the advice in the officer's report that the matter could be dealt with by way of condition. Condition 15 was in the form which had previously been suggested by the county archaeologist. It reads as follows:

> "No development shall take place within the application site until details of a scheme for archaeological mitigation has been submitted to and approved in writing by the Local Planning Authority unless otherwise agreed in writing by the Local Planning Authority. Thereafter the scheme shall be implemented in full accordance with the approved details.
>
> REASON: To ensure that any features of archaeological interest are protected and recorded."

58. Since the date of the decision, and in pursuance of Condition 15, a watching brief and archaeological investigations were agreed with the County Archaeologist. As a result of the investigations that have been carried out, no traces of the 1926 cave were found. The 1976 cave contained evidence of small animal bone but nothing to indicate human occupation. The County Archaeologist has agreed that no further investigations are required.

59. Mr Upton submitted on behalf of the claimant that condition 15 assumes that any archaeological interest can be destroyed rather than maintained in situ, contrary to PPG16 which contains a presumption in favour of the preservation of important archaeological remains and their setting. There being no provision for alteration of the layout if archaeological investigations were to indicate that there should be an alteration, he submitted that the Council had prejudged the issue without adequate information. Finally, he submitted that, as further investigations were required at the time of the decision, the Council erred in law by failing to refer the matter back to Laing for a proper assessment of the archaeological issue and a consequent revision of the Environmental Statement because the Council could not conclude that there were no environmental effects until the further investigations had been carried out (see R v Cornwall County Council ex parte Hardy (2001) Env LR 25).

60. Mr Elvin reminded me that the EIA process comprises a number of stages, including the provision of the Environmental Statement which has to meet the requirements of the EIA Regulations and the responses to consultation which can include responses from a wide range of consultees including members of the public, those responses

being taken into account alongside the Environmental Statement when deciding whether to grant planning permission.

61. Mr Elvin also reminded me of the approach to Environmental Statements adopted by Sullivan J in R (on the application of Blewett) v Derbyshire County Council (2004) Env LR 29 which was approved by the House of Lords in R (on the application of Edwards) v The Environment Agency (2008) UKHL 22, when he stated at page 41:

> "In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations..., but they are likely to be few and far between."

62. In this case, the Environmental Statement concluded that the development would have no impact on the archaeological resources, but it had not dealt with the issue of the caves. That omission was rectified by consultees and others. Armed with the information obtained through the publicity stage from the consultees and others, the Council had to consider whether it was a matter upon which further information was required before the grant of permission or whether it was a matter which could be dealt by way of a condition requiring further measures before development commenced. The Council took the view that it could be dealt with by way of condition. That was, in essence, a matter of planning judgment. The caves were not scheduled and such interest as they had were the artefacts that may be within them. In the Council's view, it was not a matter of changing the layout to avoid the cave or caves, it was a matter of ensuring that measures were taken so that, if there were artefacts, they could be investigated, preserved and recorded before the development commenced. That is a matter which is capable of being dealt with by way of a condition. This case is distinguishable from the Hardy case for a number of reasons, but not least because that case was concerned with bats which were the subject of strict protection under the Habitats Directive and which, if found, would have inevitably constituted a "significant adverse effect" under the regulations.

63. In my view, the Council were entitled, as a matter of judgment. On the facts of the case, to deal with this matter by way of a condition. I do not consider that the EIA process was deficient. I would only add that, if I am wrong about that, I would not, as a matter of discretion, have granted the claimant the relief sought due to the outcome of the investigations that have subsequently been carried out pursuant to the conditions.

Fourth ground of challenge−effect on climate change

64. The next ground of challenge, which was ground 7 in the claim form, was that the Council failed to consider the adverse effect of the pre−cast concrete production on climate change, in particular, from C02 omissions. It was accepted by Mr Upton that consideration of climate change is not included in Circular 2/99, but he placed reliance on the new Supplement to PPS1 entitled "Planning and Climate Change" which was issued on 17th December 2007, the day before the planning permission was granted in this case. It was submitted that the Environmental Statement should have assessed this aspect, and also that it should have discussed the requirement for a permit under the Pollution Prevention Control Regulations (which have now become the Environmental Permitting Regulation). In those circumstances, it was submitted that the Environmental Statement had overlooked and omitted consideration of the effect of concrete production on climate change.

65. Mr Elvin accepted that the Environmental Statement had omitted to deal with climate change, but he submitted that it was not an issue that had been raised before these proceedings and that, in any event the Planning Statement had a section dealing with the issue of sustainability to which the Environmental Statement had cross−referred and which included some measures to reduce carbon footprint. He pointed out that the Environmental Statement had dealt with the effect of omissions on a wide range of matters, including air quality, and he submitted that the argument relating to this omission was a counsel of perfection which was not fundamental to the validity of the Environmental Statement.

66. I agree with those submissions. Whilst I accept that the effect of the pre−cast concrete production on climate change was not included in the Environmental Statement, it was not a point that had been raised with the Council by anyone, including by the Environment Agency, let alone the claimant. Even if it were permissible to raise the point at this stage, the fact that it is raised so late in the day, without the point having been taken when it should have been taken, is a matter relevant to the exercise of my discretion.

67. I bear in mind the approach of Sullivan J to the validity of an Environmental Statement in the Blewett case which I referred to earlier. I do not consider that the omission of the effect of the production of concrete on climate change renders the Environmental Statement as a whole so deficient that it could not reasonably be described as an Environmental Statement. Even if I were wrong about that, I would not have granted the relief claimed in view of the fact that this point had not been raised previously and in the view of the effect of granting relief on the proposed development.

Fifth ground of challenge

68. I turn finally to the last ground of challenge which was ground 9 in the claim form. The contention under this ground was that the Non−Technical Summary of the Environmental Statement fails to comply with the requirements of the EIA Regulations by failing to mention a number of matters such as the fact that the development platform was covering an area far greater than the proposed building, that the archaeological interest in the caves was unknown, the use of blasting, information on alternatives and the impact on atmosphere pollution. It was submitted, recognising that

there may be an issue of discretion, that given the poor quality of the Non−Technical Summary, local objectors could have been prejudiced.

69. In my view, there is no merit in this ground. Schedule 4 of the EIA Regulations requires a Non−Technical Summary of the information provided under paragraphs 1 to 5 of Part 1 of Schedule 4 and a non−technical summary of the information provided under paragraphs 1 to 4 of Part II of Schedule 4. I have read the Non−Technical Summary in this case which deals in summary form with each of the 18 sections of the Environmental Statement. To say that it is so deficient that it could not reasonably be described as a Non−Technical Summary or that it was Wednesbury unreasonable for the Council to have accepted it is quite untenable. Even if that had not been so, there is no evidence that anybody has been misled or prejudiced by any alleged deficiency.

Conclusion

70. Having therefore considered the numerous matters raised by the various grounds of challenge, I have decided that this claim fails for the reasons that I have given.