OUTER HOUSE, COURT OF SESSION

[2024] CSOH 74

P14/24

OPINION OF LORD SANDISON

In the Petition

CAZ RAE

Petitioner

for

Judicial review of a decision by Glasgow City Council that an Environmental Impact Assessment is not required for the proposed demolition of the Wyndford Estate

Petitioner: Mure KC, Deans; Drummond Miller LLP
Respondent: (Glasgow City Council) Burnet KC, Colquhoun; Harper Macleod LLP
Interested Party: (Wheatley Homes Glasgow Limited): J Findlay KC, Dunlop; Shepherd & Wedderburn LLP

1 August 2024

Introduction

[1] In this petition for judicial review, the petitioner challenges the validity of a screening opinion adopted by Glasgow City Council as local planning authority for the City of Glasgow in October 2023 in terms of regulation 7 of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017, determining that an Environmental Impact Assessment ("EIA") was not required for the proposed demolition over a period of two years of four residential 26-storey blocks providing about 600 homes at

Wyndford Road, Maryhill, known collectively as the Wyndford Estate. The petitioner and her children live in the vicinity of the Estate. She asks the court to declare that the opinion was irrational and predicated on errors in law, and that it failed to comply with the requirements of regulation 7(1)(a)(i) of the 2017 Regulations and section 1(1) of the Nature Conservation (Scotland) Act 2004. She further asks the court to reduce the opinion.

Relevant provisions, etc

[2] Section 1(1) of the Nature Conservation (Scotland) Act 2004 is in the following terms:

> "*1 Duty to further the conservation of biodiversity*
>
> (1) It is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions."

[3] The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 contains the following provisions:

> "*3.— Permitted development*
>
> (1) Subject to the provisions of this Order and regulations 60 to 63 of the Conservation (Natural Habitats, &c.) Regulations 1994, planning permission is hereby granted for the development or class of development specified in sub-paragraph (1) of any paragraph of Schedule 1 or where any such paragraph is not divided into sub-paragraphs in that paragraph.
>
> …
>
> (8) Subject to paragraph (10), Schedule 1 development or Schedule 2 development within the meaning of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 ('the EIA Regulations') is not permitted by this Order unless–
>
> (a) the planning authority have adopted a screening opinion under regulation 8 of those Regulations that the development is not EIA development within the meaning of those Regulations
>
> …

7A.— Notification of an application for a determination under class 70

(1) A planning authority must give notice in accordance with this article that an application for a determination made under sub-paragraph (3)(b)(i) of class 70 (a building operation consisting of the demolition of a building) of Schedule 1 has been made.

…

[4] Part 23 of Schedule 1 to the Order, providing for classes of permitted development, contains the following:

"Class 70.—

(1)

A building operation consisting of the demolition of a building.

…

(3) Development is permitted by this class subject to the following conditions:–

(a) where demolition of the building is urgently necessary in the interests of safety or health the developer shall, as soon as reasonably practicable, give the planning authority a written justification for the demolition;

(b) where the demolition is demolition of a qualifying building …

(i) the developer shall, before beginning the development, apply to the planning authority for a determination as to whether the prior approval of the authority will be required to the method of the proposed development and any proposed restoration of the site;

(ii) the application shall be accompanied by a written description of the proposed development and any fee required to be paid;

...

(iv) the development shall not be begun before the occurrence of one of the following:–

(aa) the receipt by the applicant from the planning authority of a written notice of their determination that such prior approval is not required;

(bb) where the planning authority give the applicant notice within 28 days following the date of receiving his application of their determination that such prior approval is required, the giving of such approval;

(cc) the expiry of 28 days following the date on which the application was received by the planning authority without the planning authority making any determination as to whether such approval is required or notifying the applicant of their determination;

(v) the development shall, except to the extent that the planning authority otherwise agree in writing, be carried out–

(aa) where prior approval is required, in accordance with the details approved;

(bb) where prior approval is not required, in accordance with the details submitted with the application …"

[5] The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 provide *inter alia*:

"2.— *Interpretation*

(1) In these Regulations—

…

'EIA development' means development which is either—

(a) Schedule 1 development; or

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location …

3. Prohibition on granting planning permission without an environmental impact assessment

The planning authority or the Scottish Ministers, as the case may be, must not grant planning permission for EIA development unless an environmental impact assessment has been carried out in respect of that development and in carrying out such assessment the planning authority or the Scottish Ministers, as the case may be, must take the environmental information into account.

…

7.— General provisions relating to screening

(1) When making a determination as to whether Schedule 2 development is EIA development, a planning authority or the Scottish Ministers, as the case may be, must—

(a) in all cases take into account—

(i) such of the selection criteria set out in schedule 3 as are relevant to the development; …

(2) Where a planning authority adopt a screening opinion or the Scottish Ministers make a screening direction—

(a) that screening opinion or screening direction must be accompanied by a written statement giving, with reference to the criteria set out in schedule 3 as are relevant to the development, the main reasons for their conclusion as to whether the development is, or is not, EIA development; and

(b) where the screening opinion or the screening direction is to the effect that development is not EIA development, the statement referred to in paragraph (a) must state any features of the proposed development or proposed measures envisaged to avoid or prevent significant adverse effects on the environment.

8.— Requests for screening opinion of the planning authority

(1) A developer may request the planning authority to adopt a screening opinion.

(2) A request for a screening opinion under paragraph (1) must be accompanied by—

(a) a description of the location of the development, including a plan sufficient to identify the land;

(b) a description of the proposed development, including in particular—

(i) a description of the physical characteristics of the proposed development and, where relevant, of demolition works;

(ii) a description of the location of the proposed development, with particular regard to the environmental sensitivity of geographical areas likely to be affected;

(c) a description of the aspects of the environment likely to be significantly affected by the proposed development; and

(d) a description of any likely significant effects, to the extent of the information available on such effects, of the proposed development on the environment resulting from—

(i) the expected residues and emissions and the production of waste, where relevant;

(ii) the use of natural resources, in particular soil, land, water and biodiversity.

(3) A request for a screening opinion may, in addition to the information required in accordance with paragraph (2), also be accompanied by a description of any features of the proposed development, or proposed measures, envisaged to avoid or prevent significant adverse effects on the environment.

(4) The information referred to in paragraph (2) is to be compiled taking into account, where relevant—

(a) the selection criteria set out in schedule 3; and

(b) the available results of any relevant assessment.

…

Schedule 3 SELECTION CRITERIA FOR SCREENING SCHEDULE 2 DEVELOPMENT

1. Characteristics of development

The characteristics of development must be considered having regard, in particular, to—

(a) the size and design of the development;

(b) cumulation with other existing development and/or approved development;

(c) the use of natural resources, in particular land, soil, water and biodiversity;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;

(g) the risks to human health (for example due to water contamination or air pollution).

2. Location of development

The environmental sensitivity of geographical areas likely to be affected by development must be considered having regard, in particular, to—

(a) the existing and approved land use;

(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas—

(i) wetlands, riparian areas, river mouths;

(ii) coastal zones and the marine environment;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) european sites and other areas classified or protected under national legislation;

(vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in assimilated law and relevant to the project, or in which it is considered that there is such a failure;

(vii) densely populated areas;

(viii) landscapes and sites of historical, cultural or archaeological significance.

3. Characteristics of the potential impact

The likely significant effects of the development on the environment must be considered in relation to criteria set out in paragraphs 1 and 2 above, with regard to

> the impact of the development on the factors specified in regulation 4(3), taking into account—
>
> (a) the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected);
>
> (b) the nature of the impact;
>
> (c) the transboundary nature of the impact;
>
> (d) the intensity and complexity of the impact;
>
> (e) the probability of the impact;
>
> (f) the expected onset, duration, frequency and reversibility of the impact;
>
> (g) the cumulation of the impact with the impact of other existing and/or approved development;
>
> (h) the possibility of effectively reducing the impact."

Background

[6] In February 2022 the board of Glasgow Housing Association Limited (now known as Wheatley Homes Glasgow Limited) decided to demolish its properties on the Wyndford Estate. Certain types of development (including demolitions) require an EIA to be carried out in terms of the 2017 Regulations before they can commence. Since the proposed demolition fell within Schedule 2 to the Regulations, as being an urban development project with a development area of 1.1 hectares, the Council required to decide, by way of the adoption of a "screening opinion" in terms of regulation 7, whether it required an EIA. A request for a screening opinion was made to it on 20 February 2023. On 14 March 2023, it adopted a screening opinion determining that an EIA was not required. The petitioner commenced judicial review proceedings which resulted in that opinion being reduced, by consent, by this court on 12 September 2023. A further screening opinion was adopted by

the Council on 13 October 2023, again determining that an EIA was not required. It is against the adoption of that opinion that the present proceedings are directed.

Petitioner's submissions

[7] Senior counsel for the petitioner sought declarator that the Council's decision of 13 October 2023 that an EIA was not required for the proposed demolition of the Wyndford Estate was irrational and separately predicated on errors in law. It should be reduced accordingly.

[8] Counsel noted that the demolition of the Wyndford Estate was a development falling within the terms of paragraph 70(3)(b) of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. That required the developer to apply to the planning authority for a determination as to whether its prior approval would be required for the method of the proposed development and any proposed restoration of the site. Further, although paragraph 3(1) of the Order supplied a deemed grant of planning permission for works of development falling within paragraph 70, that was subject to paragraph 3(8), which provided that no development falling within Schedule 2 to the 2017 Regulations could proceed unless the planning authority had adopted a screening opinion determining that an EIA was not required. Prior approval to the method of the proposed demolition had been granted by the Council in July 2023. Counsel then reminded the court of the salient terms of the 2017 Regulations set out above, and of some of the content of the Scottish Government's Planning Circular No 1 of 2017 concerning the 2017 Regulations. Reference was also made to a "Statement for the methodology for the demolition of: Residential Tower Blocks 151, 171, 191 & 120 Wyndford Road Glasgow G20 8DU" issued by the demolition contractor, Safedem, which was described by counsel as

a generic document making it clear in its own terms that many surveys necessary for the execution of the proposed works had yet to be carried out (or at least fully carried out), and which accordingly did not explain what might yet be found at the site.

[9] The screening opinion complained of was then examined. It commenced as follows:

> "I am pleased to inform you that Glasgow City Council considers that an Environmental Impact Assessment (EIA) is not required for the above proposal because it has been determined that the Development is not likely to have a significant adverse effect on the environment and therefore it is not an EIA development as defined in regulation 2 of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017.
>
> A copy of the decision notice and an EIA screening checklist is attached.
>
> The attached screening checklist meets the requirements of Regulation 7(2), that a screening opinion must be accompanied by a written statement giving, with reference to the criteria set out in schedule 3 as are relevant to the development, the main reasons for our conclusion that the development is not EIA development. It also states any features of the proposed development or proposed measures envisaged to avoid or prevent significant adverse effects on the environment.
>
> The decision notice is a legal document and should be retained for future reference."

[10] The lawfulness of the screening opinion was challenged on various inter-related grounds. Firstly, the screening opinion came to the view that the proposed development was unlikely to have significant effects on the environment simply because such effects were likely to be eliminated by mitigation measures. In forming that view, the Council had misunderstood and misinterpreted the 2017 Regulations. That was an error in law and separately irrational.

[11] Secondly, the Council had failed to consider in the screening opinion several of the selection criteria which it was required to consider by regulation 7(1)(a)(i) of the 2017 Regulations. It was an error in law to fail to apply that regulation. When cross-checked by reference to the Council's previous screening opinion of 14 March 2023, it could

be seen that certain factors which the Council understood it was necessary to consider then had not been considered in October 2023. That was irrational.

[12] Thirdly, the Council had not had enough necessary information before it when it came to the conclusions set out in the screening opinion. That ought to have caused it to require an EIA on the basis of the precautionary principle of EU environmental law.

[13] Fourthly, the Council was also under a duty in terms of section 1(1) of the Nature Conservation (Scotland) Act 2004 to consider the effect of the proposed development on the conservation of biodiversity. It did not do so. That was a breach of statutory duty.

[14] Fifthly, in assessing the relevant criteria informing its decision on the screening opinion, the Council had erred in law by applying the wrong test, asking itself whether the proposed development was likely to have a significant adverse effect on the environment, whereas the proper test was simply whether it was likely to have a significant effect (of any kind) on the environment.

[15] The 2017 Regulations were made under the power conferred by section 40(1) of the Town and Country Planning (Scotland) Act 1997, enabling the making of regulations about the consideration to be given to the likely environmental effects, including effects on biodiversity, of a proposed development before planning permission for it was granted.

[16] Section 40(2)(a) explained that such regulations might make the same or similar provision as any provision made for the purposes of any EU obligation of the United Kingdom about the assessment of the likely effects of development on the environment.

[17] The introductory text to the 2017 Regulations explained that they had been made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and section 40 of the Town and Country Planning (Scotland) Act 1997 in particular. The Regulations implemented the EU obligation of the United Kingdom concerning the

assessment of the likely effects of development on the environment. That obligation was set out in European Union Directive 2011/92/EU ("the EIA directive"). The 2017 Regulations required to be interpreted in terms of the EIA directive and European Union principles of environmental law: regulation 2(3) provided that expressions used in the Regulations and in the directive were to have the same meaning for the purposes of the former as they did for the latter.

[18] The proper approach to interpretation of the 2017 Regulations had not changed following the United Kingdom's withdrawal from the European Union. European Union principles of environmental law were not "general principles of EU law" as abolished in domestic law by section 4 of the Retained EU Law (Revocation and Reform) Act 2023. They were specific principles. The European Union principles of environmental law had been retained by the Scottish Parliament. The Council had to have due regard to these principles. Reference was made to sections 13 and 15 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

[19] A proposed development might be either a "Schedule 1 development" or a "Schedule 2 development" for the purposes of the 2017 Regulations. A Schedule 1 development always required an EIA. A development was a Schedule 1 development if it fell into one of the categories listed in Schedule 1 to the 2017 Regulations. The proposed development did not fall within any of the categories listed in Schedule 1. A Schedule 2 development might or might not require an EIA. The proposed development was a Schedule 2 development, as it was an urban development project with an area of development exceeding 0.5 hectares. In terms of regulation 6(2)(a) of the 2017 Regulations, the Council had the power to issue a screening opinion determining whether the proposed development required an EIA, as it had done on 13 October 2023. The correct test as to

whether an EIA was required for a Schedule 2 development was that the project was likely to have a significant effect on the environment.

[20] Article 2(1) of the EIA Directive stated that:

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects".

This was mirrored in the definition of an "EIA development" in regulation 2 of the 2017 Regulations, which provided that an EIA development was either a Schedule 1 development or a "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location". The words "by virtue of factors such as" should not be interpreted as exclusionary of other factors. "Such as" required to be interpreted as listing factors which required to be considered, but were not the only factors which could be considered.

[21] A key purpose of the EIA directive and the Regulations was to enable public discussion on the environmental issues raised by a proposed development. In cases where an EIA was required, Regulation 5(2) of the 2017 Regulations (which reproduced article 5(3) of the EIA Directive) provided that a report had to be prepared by the developer setting out, *inter alia*, the likely significant effects of the development on the environment; a description of the features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment; and a non-technical summary of the position. The non-technical summary was a key requirement to enable effective public participation in the taking of decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

[22] That purpose was advanced by the requirements of public notice contained in part 5 of the 2017 Regulations (giving effect to article 6 of the EIA directive). Regulation 21(2) of the 2017 Regulations required the respondent, where an EIA was required, to publish a notice which described the application and the proposed development, and which set out how the EIA report could be read by members of the public and how they could make representations about it

[23] In *Berkeley* v *Secretary of State for the Environment* [2001] 2 AC 603 at 615D–616C, [2000] 3 WLR 420 at 430E–431D Lord Hoffmann had drawn attention to what had been said by Advocate General Elmer in *Aannemersbedrijf P K Kraaijeveld BV* v *Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR I-5403 at 5427 at [70]:

> "Where a member state's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard."

[24] The preamble to the EIA directive stated at paragraph 2:

> "Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes."

[25] The precautionary principle, in the context of the present dispute, meant that cases where material doubt arose should be resolved in favour of an EIA being required: *R (Champion)* v *North Norfolk DC* [2015] UKSC 52, [2015] 1 WLR 3710 at [51]. The precautionary principle also entailed that the Council was required to have regard to the degree of uncertainty as to the environmental impact of a proposed development. As stated in *R (Loader)* v *Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2013] PTSR 406 per Pill LJ:

> "[43] The decision-maker must have regard to the precautionary principle and to the degree of uncertainty as to environmental impact at the date of the decision. Depending on the information available, the decision-maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken."

A likelihood of a significant effect on the environment in this context was "something more than a bare possibility … though any serious possibility would suffice": *R (Bateman)* v *South Cambridgeshire District Council* [2011] EWCA Civ 157, per Moore-Bick LJ at [17].

[26] It should be borne in mind that a significant effect on the environment was not limited to significant adverse effects: *British Telecommunications Plc* v *Gloucester City Council* [2001] EWHC Admin 1001, [2002] 2 P&CR 33 where Elias J had noted at [64] that the Regulations drew a clear distinction between the effects of a project on the one hand, and the adverse effects on the other, reflecting in turn the same distinction drawn in the Directive at Article 5(3) and Annex IV paragraphs 4 and 5. His Lordship went on:

> [65] In view of this very clear distinction, I see no justification for treating the phrase 'significant effects' as though it were qualified by the word 'adverse'. If 'effects' had meant simply 'adverse effects' there would be no purpose in specifying that details of mitigation measures had to be given in respect of adverse effects. The reference to 'adverse' would be wholly otiose.
>
> …
>
> [70] It follows that in my view the planning authority did approach this question by applying the wrong test to determine whether an environmental statement was needed. Had it asked whether the proposed development had significant effects on the environment, and not merely significant adverse effects, it could only properly have concluded that it did, as Mr Roots frankly conceded."

[27] In *R (Swire)* v *Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin), [2020] Env LR 29 Lang J had noted at [57] that it was well-established that the local planning authority was entrusted by the Regulations with the task of judging whether the development was likely to have significant effects on the environment, and that

the court would only intervene if the decision-maker erred in law. Her Ladyship had observed that *Champion* had emphasised that the precautionary principle underlay Union policy and had stated:

> "[90] Applying the principles established in the case law, a screening authority must have sufficient evidence of the potential adverse environmental impacts and the availability and effectiveness of the proposed remedial measures, to make an informed judgment that the development would not be likely to have significant effects on the environment, and that therefore no EIA is required. See *Gillespie*, per Pill LJ at [37], [40], [41] and per Laws LJ at [46]; *Jones*, per Dyson LJ at [38], [39], [53], [55]; *Catt* [i.e. *R (on the application of Catt)* v *Brighton and Hove City Council* [2007] EWCA Civ 298; [2007] Env. L.R. 32; [2007] 2 P. & C.R. 11], per Pill LJ at [27], [33], [34]; *Loader*, per Pill LJ at [43], [47]; *Champion*, per Lord Carnwath at [51]–[53]; all cited above."

[28] It was an error in law to determine that the proposed development was unlikely to have significant effects on the environment because, in the decision-maker's view, such effects were likely to be eliminated by mitigation measures. In *R (Lebus)* v *South Cambridgeshire District Council* [2002] EWHC 2009 (Admin), [2003] Env LR 17, Sullivan J was asked to review a decision that an EIA was not required for a proposal for an egg production facility. The respondent adopted the position that the proposal would not have a significant impact on the environment if mitigation measures were imposed by way of planning conditions. His Lordship noted:

> "[41] Thus, it is plain that in so far as the statutory question was addressed, it was addressed upon the basis that planning conditions would be imposed and management obligations would be enforceable under section 106. The question was not asked whether the development as described in the application would have significant environmental effects, but rather whether the development as described in the application subject to certain mitigation measures would have significant environmental effects."

[29] That approach was doubted at [45] to [46] and [50] to [51]:

> "[45] Whilst each case will no doubt turn upon its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a

> development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.
>
> [46] It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance.
>
> …
>
> [50] It must have been obvious that with a proposal of this kind there would need to be a number of non-standard planning conditions and enforceable obligations under section 106. It is precisely those sort of controls which should have been identified in a publicly-accessible way in an environmental statement prepared under the Regulations.
>
> [51] Thus the underlying approach adopted by Mr Hussell was in error. In so far as one can discern the Council's reasoning, it was erroneous on the two grounds set out above: it was no answer to the need for an EIA to say the information would be supplied in some form in any event, and it was not right to approach the matter on the basis that the significant adverse effects could be rendered insignificant if suitable conditions were imposed. The proper approach was to say that potentially this is a development which has significant adverse environmental implications: what are the measures which should be included in order to reduce or offset those adverse effects?"

[30] These paragraphs were quoted with approval by the Supreme Court in *Champion* at [49]. From *Lebus*, it could be seen that it was a key purpose of the EIA regime that the public was engaged in the process of assessing the efficacy of any necessary mitigation measures. It was not appropriate to begin from the starting point that a significant effect on the environment could be reduced to insignificance through mitigation measures. Where the decision-maker was of the view that mitigation measures could reduce what would otherwise be a significant effect on the environment, those mitigation measures should be detailed in an EIA.

[31] This was supported by the Supreme Court's analysis in *Champion*, per Lord Carnwath JSC:

> "[51] Those passages to my mind fairly reflect the balancing considerations which are implicit in the EIA Directive: on the one hand, that there is nothing to rule out consideration of mitigating measures at the screening stage; but, on the other, that the EIA Directive and the Regulations expressly envisage that mitigation measures will where appropriate be included in the environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA."

[32] In *Gillespie* v *First Secretary of State* [2003] EWCA Civ 400, [2003] Env LR 30, the Court of Appeal was concerned with the redevelopment of a former gas works to residential use. The site was extensively contaminated. The Secretary of State came to the view that the contamination could be dealt with by planning conditions and that an EIA was not required. The Court of Appeal disagreed, per Pill LJ:

> [36] When making his screening decision, the Secretary of State was not in my judgment obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal. That would apply whatever the scale of the development and whether (as in *BT*) some harm to the relevant environmental interest is inevitable or whether (as is claimed in the present case) the development will actually produce an improvement in the environment. As stated in *Bozen* [i.e. *World Wildlife Fund* v *Autonome Provinz Bozen* [2000] 1 CMLR 149], it is the elements of the specific project which must be considered and all the elements of the project relevant to the EIA. In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision. If the judges in the cases cited took a contrary view, I respectfully disagree, though it appears to me that both Sullivan J in *Lebus* and Richards J in the present case did not require all remedial or mitigating measures to be ignored.
>
> [37] The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of

> the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration.
>
> …
>
> [41] When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in condition VI could be treated, at the time of the screening decision, as having had a successful outcome."

per Laws LJ:

> "[46] Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA. If then the Secretary of State were to decline to conduct an EIA, as it seems to me he would pre-empt the very form of enquiry contemplated by the Directive and Regulations; and to that extent he would frustrate the purpose of the legislation."

and per Arden LJ:

> "[49] I agree with both judgments. However, I would make it clear that in my view the question whether in a case such as this the Secretary of State can, in making his screening decision, take into account proposed conditions to be attached to the grant of permission turns not on the complexity or controversiality of the development as such but on the nature of the remedial measures contemplated by such conditions. Such measures can be taken into account if, fairly considered, they are of themselves unlikely to have significant effects on the environment because, for example, they are of limited impact or well-established to be easily achievable within the process of the development."

[33] From *Gillespie*, it could be seen that where mitigation measures were clearly set out, modest in scope, or plainly and easily achievable, they might be taken into account at the screening stage. Consideration also had to be given to the prospect of environmental effects in the course of the development, even if of a temporary nature, as well as to the final effect of the development. It could not be assumed that the mitigation measures would be successful in reducing the likelihood of an effect on the environment unless the effectiveness of the mitigation measures was plainly established and plainly uncontroversial. That was not possible in the present case because of the failure, as yet, to carry out numerous necessary site surveys. The mitigation measures themselves, if they were to be taken into account at the screening stage, must be unlikely to have significant effects on the environment, as for example being of limited impact or easily achievable.

[34] In *R (Jones)* v *Mansfield DC* [2003] EWCA Civ 1408, [2004] Env LR 21, Dyson LJ stated:

> "[38] It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply *because* all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*). The effect on the environment must be 'significant'. Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment.
>
> [39] I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case."

[35] From *Jones*, it could be seen that conditions and undertakings could not be used as a surrogate for the EIA process. The screening authority was required to have sufficient information to make a decision as to the likelihood of significant environmental effects. Individual cases were fact specific.

[36] In the present case, the Council had begun from the starting point that significant effects on the environment could be reduced to insignificance through mitigation measures. It was important to bear in mind that there were two relevant screening opinions. The screening opinion of 14 March 2023 which the court had previously reduced was relevant insofar as it showed the Council's then understanding of the potential environmental effects of the proposed development. In that opinion, the Council stated that there was a high probability of significant effects on the environment, but that they could be addressed through the prior approval application required by the General Permitted Development Order. That could be seen from various questions and answers in the earlier opinion. In response to the question: "Will there be the potential for a significant environmental impact as a result of the proposal?", the Council answered: "Yes, potentially – able to be addressed through the Prior Approval application." In response to the question: "Will there be a large change in environmental conditions?", the Council answered: "Yes, potentially – able to be addressed through the Prior Approval application." In response to the question: "Is there a high probability of the effect occurring?", the Council answered: "Yes". In response to the question: "Is there a low probability of a potentially highly significant effect?", the Council answered: "Yes". It was clear that as of March 2023, it was of the view that there was a high probability for significant effects on the environment, but that their impact could be managed through the prior approval process. That fell foul of the principle in *Jones* that

conditions and undertakings could not be used as surrogates for the carrying out of an EIA process. The demolition method could not be controlled other than by way of the prior approval process. Any change in the Council's position since March 2023 as to the probability of significant effects on the environment required to be fully and adequately explained by it, and it had not done so. In various respects, sufficient facts had not been put forward for consideration to enable it to make a meaningful decision.

[37] Insofar as the opinion of 13 October 2023 suggested that the risk of a significant effect on the environment was considered low, regardless of the applicability of any mitigation measures, that position was irrational. The Council's position had changed drastically from one that there was a high probability for significant effects on the environment which could be accommodated through the prior approval process to being that there was a low risk of significant adverse effects on the environment, without explanation. It could be inferred from the October screening opinion that the starting position of the Council was that the mitigation measures could reduce the effect on the environment to insignificance. Those measures had been heavily taken into account. In doing so, the Council fell into error in law.

[38] In any event, the proposed mitigation measures did not satisfy the test set out in *Gillespie*. They were not modest in scope nor plainly and easily achievable. They were not plainly established and uncontroversial. They involved, *inter alia*, replanting a large amount of trees; creating a site boundary exclusion zone, including the closure of roads, for explosive demolition of four tower blocks; removal and disposal of asbestos; the installation of filters to manholes and traps to avoid surface water pollution of the nearby River Kelvin; temporary works being erected to protect a Scottish Water installation, the private gas supply, and a Scottish Power sub-station; the evacuation of residents from

neighbouring properties; traffic management measures; and the redirection of pedestrian pathways. This was obviously a proposed development of significant complexity. The proposed mitigation measures themselves were likely to have a significant effect on the environment. The screening opinion itself noted that:

> "Across the 4 tower blocks proposed to be demolished, there are 600 flatted dwellings in total, which are being progressively vacated (and residents rehoused elsewhere) and will be unoccupied during the works. Adjacent to each block are residential properties which shall remain occupied throughout the Contract, though temporary 120m and 150m exclusion zones will be set up during the explosive demolition. The Safedem Community Liaison Team will update and support residents in the exclusion zone as well as those requiring to be evacuated. Evacuees will be transported to and from the Evacuation Centre, which will have catering facilities available. Should it become necessary, suitable overnight accommodation will be arranged for evacuated residents."

That was obviously not modest in scope nor plainly and easily achievable. Bearing in mind that the Council was not to assume that the mitigation measures would be successful, it could not be said that the effectiveness of those measures was plainly established and plainly uncontroversial. The Council did not have sufficient information to make a decision based on reasonable grounds concerning the nature, scope and effect of the proposed mitigation measures on the likelihood of significant environmental effects. It did not even have a clear statement of what the demolition process would entail. It could not be said that there was no serious possibility of a significant effect on the environment. The Council had not expressed any actual view on various matters, because it had not been enabled actually to consider them. Material uncertainties remained. A failure to require appropriate further investigation before issuing a screening opinion was *Wednesbury* unreasonable.

[39] In any event, the precautionary principle applied where the Council did not have adequate information to assess the sufficiency of mitigation measures. Any element of doubt required to be resolved in favour of an EIA. The Council had fallen into the same

error as in *Gillespie* and *Swire* and thus its decision that an EIA was not required was vitiated by an error in law, and separately irrational. It should accordingly be reduced.

[40] Further, it was observed that the criterion seemingly adopted by the Council in the October screening opinion for determining whether an EIA was required – "likely to have a significant adverse effect on the environment" – was not the criterion set out for determining whether a Schedule 2 development was an EIA development as defined in regulation 2 of the 2017 Regulations. That criterion was merely "likely to have significant effects on the environment". It was evident from the screening checklist provided with the opinion that that wrong criterion had been used at virtually every point throughout the screening process. Although an affidavit provided by the Council's case officer, Lisa Davison, claimed that the screening checklist used had been based on the most up-to-date standard form screening checklist produced by the Scottish Government in its relative Planning Circular, it was apparent that the Council had, without explanation, changed the references in that standard form from "significant effects" to "significant adverse effects". In nearly every instance, the Council had applied the wrong criterion. That was not an error of law which the court should, in the exercise of its discretion, excuse or overlook.

[41] Regulation 7(1)(a)(i) of the 2017 Regulations provided that the Council was to take into account "such of the selection criteria set out in Schedule 3 as are relevant to the development". Paragraph 1(c) of Schedule 3 to the 2017 Regulations required it to consider "the use of natural resources, in particular land, soil, water and biodiversity". It was additionally required, by section 1(1) of the Nature Conservation (Scotland) Act 2004, to further the conservation of biodiversity so far as consistent with the proper exercise of its functions. The October screening opinion did not show any evidence of engagement with that duty. It could not sensibly do so given the absence of numerous surveys required to

that end. It did not consider the use of land or soil, nor the conservation of biodiversity. Paragraph 1(g) of the Schedule required the Council to consider "the risks to human health (for example due to water contamination or air pollution)". The previous screening opinion had noted that there was a risk to human health from combustion of fossil fuels and air pollution, a matter not considered by the more recent opinion. Paragraph 2(c) of the Schedule required the Council to consider "the absorption capacity of the natural environment". Its previous screening opinion noted that there was a risk of flooding being caused by the proposed development. The new screening opinion did not consider that. Paragraph 3(a) of the Schedule required the respondent to consider "the magnitude and spatial extent of the impact (for example geographical area and size of population likely to be affected)". The proposed demolition would require mandatory evacuations of surrounding residents and exclusion zones. The screening opinion did not consider the magnitude and spatial extent of the impact with reference to the size of population likely to be affected. Accordingly, the Council had failed to comply with regulation 7(1)(a)(i) of the 2017 Regulations, and the opinion should be reduced.

[42] In *R (on the application of Cairns)* v *Hertfordshire County Council* [2018] EWHC 2050 (Admin), [2019] Env LR 6, a screening opinion was found to be inadequate, but the court elected not to quash a grant of planning permission as there had been no substantial prejudice. It was recognised that reduction was an equitable remedy, but the court should grant it in the present case. In *Champion* at [58] it had been noted that it was open to the court to take a view on the material before it that the contested decision would not have been different without the procedural defect complained of, and that in making that assessment it should take account of the seriousness of the defect and the extent to which it had 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.

[43] In the present case, it could not be said that the contested decision would not have been different. The Council had previously conceded in its screening opinion of March 2023 that there was a high probability of significant effects on the environment. An EIA should have been required. The Council's decision had important consequences and was not merely a technical or procedural error. An EIA was a key part of the democratic decision-making process as it had the function of enabling informed public discussion about the proposal. The Council's decision blocked concerned citizens such as the petitioner in the exercise of their right to participate in the democratic decision-making process.

[44] The respondent and interested party claimed that the petitioner's complaints were merely differences of opinion on matters of planning judgment which were for the Council, but that ignored the fact that an error of law had been made in the question which the Council asked itself, and that it had proceeded to issue the screening opinion without the information necessary to make the requisite decisions. Although a screening opinion did not require detailed assessments to be undertaken, it did require to engage meaningfully with the applicable criteria. This challenge was not, as was the previous one, based on the absence or inadequacy of reasons for the Council's decision; rather, it was that necessary matters had not been considered and dealt with.

Respondent's submissions

[45] Senior counsel for the Council submitted that the grounds of challenge set out in the petition amounted to nothing more than a disagreement with the exercise of the Council's planning judgment in applying the relevant criteria. It had been reasonably entitled to reach

the conclusion it did, and accordingly the court should refuse to grant any of the orders sought in the petition. Further reference was made to the provisions of the 2017 Regulations already set out. The Regulations forbade the granting of planning consent for any EIA development unless an EIA had been carried out. The proposed development was of a type listed in Schedule 2 to the Regulations, and would be an EIA development if it was "likely to have significant effects on the environment by virtue of factors such as its nature, size or location". The 2017 Regulations provided that a planning authority might adopt a "screening opinion" to determine whether or not a particular development was an EIA development. In the case of a Schedule 2 development, the planning authority had to assess whether it was likely to have significant effects on the environment; in so doing, it had to have regard to the selection criteria set out in Schedule 3 to the 2017 Regulations. In brief, those matters were (i) the characteristics of the development itself, (ii) the location of the development, and (iii) the characteristics of the potential impact of the development on the environment.

[46] The legal principles relating to challenges to screening opinions were summarised by Lang J in *Cairns* at [26]–[31] and by Coulson LJ in *Kenyon* v *Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302, [2021] Env LR 8. In the latter case his Lordship, drawing on earlier authority, had noted that, as set out in regulation 2, the test to be applied in considering whether an environmental statement was required was whether the development was likely to have significant effects on the environment, "likely" meaning that there was a real risk of such effects. His Lordship had observed, under reference to *R (on the application of Birchall Gardens LLP)* v *Hertfordshire CC* [2016] EWHC 2794 (Admin), [2017] Env LR 17 and *Evans*, that the questions of whether there was sufficient information to issue a screening opinion/decision, and whether a proposed development

was likely to have significant effects on the environment, were matters of judgment for the decision-maker. The mere fact that there were differing views as to the likely environmental effect did not mean that the screening direction had to be positive. A decision as to whether a proposed development was or was not likely to have significant effects on the environment could only be struck down on *Wednesbury* grounds.

[47] Both *Cairns* and *Kenyon* referred to the summary of the appropriate approach to take to screening opinions as set out by Moore-Bick LJ in *Bateman*:

> "[20] [A screening opinion] is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term 'screening opinion'".

[48] The assessment of whether a Schedule 2 development was an EIA development for the purposes of the 2017 Regulations was a matter for the planning authority in the exercise of planning judgment, and could only be challenged on the grounds of irrationality or other public law error, the burden of showing which lay on the petitioner. It was conceded that it would have been an error of law for the Council only to consider significant adverse effects on the environment, but in reality the Council had gone through all the relevant criteria and identified potential environmental impacts of the development, none of which was positive. In any event, no impact that might have made any difference to the outcome had been identified, and so the court should exercise its discretion not to reduce the adoption of the screening opinion on this ground. It was for the decision-maker, acting reasonably, to determine what evidence, and how much evidence, was needed in order to come to a view

as to the likely effects of the proposed development on the environment. Likewise, it was for the decision-maker (again, acting reasonably) to determine what weight should be given to the evidence which had been produced. In assessing whether or not a particular Schedule 2 development was likely to have significant impacts on the environment, the decision-maker was entitled to have regard to the entire proposal made by the developer; where appropriate, that would include having regard to the mitigation measures which the developer had proposed to put in place. Where a proposed mitigation measure was modest in scope, or easily achievable, and would adequately mitigate an identified adverse effect, the decision-maker could take that into account when assessing the likely impact of the development on the environment overall. Whether a particular mitigation measure fitted that description, and whether it would clearly deal with the adverse impact against which it was aimed, were again matters for the decision-maker in the exercise of its planning judgment.

[49] It was clear from the terms of the screening opinion that the Council had both correctly understood and applied the relevant test. It was not disputed that the Council had taken account of certain proposed mitigating measures when assessing the likely impact of the development on the environment, but it was reasonable to do so. The mitigation measures which were taken into account by the Council were as follows: (i) replacement of trees removed during the demolition; (ii) containment of dust and asbestos exposure by the implementation of a site boundary exclusion zone and the adoption of safe practices in relation to the identification, removal and disposal of asbestos; (iii) prevention of demolition materials entering drainage infrastructure through the use of manhole filters; (iv) use of acoustic barriers and vibration monitoring equipment; (v) carrying out of explosive works in accordance with relevant regulations and codes of practice; (vi) undertaking temporary

works to protect neighbouring power and water infrastructure; (vii) putting in place exclusion zones and evacuation of properties during the explosive part of the demolition; and (viii) putting in place a traffic management plan in respect of vehicles using the site. All of those measures were, in the opinion of the Council, nothing less than industry best practice. The demolition would proceed in accordance with, *inter alia*, BS 6187:2011 (code of practice for full and partial demolition); BS 5607:2017 (code of practice for safe use of explosives in construction industry); BS 5228:2014 (code of practice for noise and vibration control on construction and open sites); and the Control of Asbestos Regulations 2012. Any analysis of the likely effects of the proposed demolition would have been unrealistic had it failed to take that into account — to some extent, the mitigation measures were baked into the way in which the proposed works would be carried out, and could not sensibly be separated from them. In terms of paragraph 70(3)(b)(v) of the General Permitted Development Order, the prior approval process enabled the Council to ensure that the proposed method of demolition was adhered to.

[50] No evidence had been produced to demonstrate that the proposed development was complex, or that the proposed mitigation measures were wide-scoping, sophisticated, or not easily achievable, as the petitioner claimed. The proposed mitigation measures were straightforward to implement and well-understood by the Council. The proposal involved no non-standard planning conditions, as had been the case in *Lebus*, on which the petitioner relied. The Council considered that the proposed mitigation measures would adequately compensate for any adverse effect on the environment which the development might otherwise cause. That was a conclusion which it was entitled to reach, in the exercise of its planning judgment. Looked at objectively, the screening opinion considered the likely overall impact of the development, and accorded with the requirements of the

2017 Regulations. The petitioner's challenge was, in substance, a simple disagreement with the Council's factual conclusions and judgment, and did not amount to a sound challenge in a judicial review.

[51] Further, on an objective reading of the screening opinion, the Council had considered all relevant matters. It was for it, acting reasonably, to determine what matters were relevant to the question of the impact of the development on the environment, and it did so. The checklist attached to the screening opinion addressed all of the selection criteria set out in Schedule 3 to the 2017 Regulations. In particular, it was clear that the use of natural resources, biodiversity, risk to human health, and the absorption capacity of the natural environment had all been considered and a view reached. The petitioner's criticisms amounted to little more than unsubstantiated assertions based on disagreement with the Council's conclusions. No proper justification had been given for any of the suggestions that the Council failed to consider matters thoroughly enough. The fact that certain matters had been mentioned in the earlier (admittedly faulty) screening opinion, but not in the screening opinion currently under challenge, was of no moment: the Council gave the development renewed consideration when preparing the second opinion. It had given an appropriate level of consideration to the potential impact of the development on the environment and the conclusions it reached were reasonable, and based on the available evidence and its planning judgment. The petitioner's assertion to the contrary represented no more than a simple factual disagreement with those conclusions. A screening opinion required to consider the relevant criteria listed in Schedule 3 and to explain the planning authority's conclusions in relation to the issues which it considered most relevant and important in reaching its decision. It did not require a planning authority to give detailed reasons for its conclusions in relation to every aspect considered and any lack of detailed

reasons should not be assumed to reflect a failure to consider a particular aspect of the Regulations: *Kenyon* at [16].

[52] The petitioner's challenge on the basis of claimed failure to observe the requirements of the Nature Conservation (Scotland) Act 2004 was wholly lacking in specification. It was not disputed that the 2004 Act applied to the Council, but in the current context it added nothing substantive to the duties imposed on it to consider the conservation of biodiversity as part of the EIA screening process in terms of paragraphs 1(c), 2(b), and 3 of Schedule 3 to the 2017 Regulations. The potential for impact on biodiversity (in particular, the potential for impact on the River Kelvin, and the loss of trees) had been considered in some detail in the screening opinion. The Council had complied fully with its duties in terms of the 2004 Act. In any event, the petitioner did not specify what it ought to have done differently in order to comply with its obligations.

[53] The prayer of the petition should be refused.

Submissions for the interested party

[54] Senior counsel for the interested party adopted the submissions for the Council and repeated that the correct legal approach to challenges to EIA screening decisions had been summarised accurately by Coulson LJ in *Kenyon*. That approach was equally applicable in Scotland and to the 2017 Regulations. Coulson LJ had observed:

> "[10] The questions of whether there is sufficient information to issue a screening opinion/decision, and whether a proposed development was likely to have significant effects on the environment, are matters of judgment for the decision-maker: see *R (on the application of Birchall Gardens LLP)* v *Hertfordshire CC* [2106] EWHC 2794 (Admin) paragraphs 66 and 67, and *Evans* v *Secretary of State* [2013] EWCA Civ 114. In the latter case, Beatson LJ said:
>
> > "22. The assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which

> requires the exercise of judgment on the issues of 'likelihood' and 'significance': see *Bowen-West* v *Secretary of State* [2012] EWCA Civ 321 at [40] per Laws LJ, and *Jones* v *Mansfield* [2003] EWCA Civ 1408 at [17] and [61] per Dyson and Carnwath LJJ. Carnwath LJ stated that, because the word 'significant' does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped."

The paramount importance of the judgment of the decision-maker is also stressed by Beatson LJ at paragraphs 26–27 of his judgment in *Evans*, when he rejected the contention that the mere fact that there were differing views as to the likely environmental effect meant that the screening direction had to be positive. He said:

> '26. Mr Wolfe submitted that in the light of the views of English Heritage, the Suffolk Preservation Society, and the Council this [the absence of doubt] could not be the case. That, however, comes very close to suggesting that once there are differing views on a question, there must be a full EIA. It is also very similar to the submission made unsuccessfully in *Loader*'s case that a full EIA process is required in all cases where the effect would influence the development consent decision. As Pill LJ stated (at [46]), accepting that submission would devalue the entire EIA concept, which involves a formal and substantial procedure often involving considerable time and resources. It is also clear from both the national and the EU indicative guidance that the full EIA process will only be required in a very small proportion of the total number of Schedule 2 developments.
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> 27. To require the EIA process where there are differing views would also largely make the Secretary of State's role redundant. As to the *Waddenzee* case [i.e. Case C/127/02 *Waddenzee* (2004) ECR 1–7405], that was concerned with the Habitats Directive. The reference to a reasonable doubt is to a reasonable doubt in the mind of the primary decision-maker. There is no support in that case for the view that, where somebody else has taken a different view to the primary decision-maker, it is not possible to demonstrate that there is no reasonable doubt. It is not suggested in this case that the Secretary of State or his officer had any such doubt.'
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> …

[12] A decision as to whether a proposed development is or is not likely to have significant effects on the environment can only be struck down on *Wednesbury* grounds: see paragraph 31 of the judgment of Pill LJ in *Loader* .

[13] The limited nature and scope of a screening opinion was emphasised by Moore-Bick LJ in *R (Bateman)* v *South Cambridgeshire District Council* [2011] EWCA Civ 157. …"

[55] In the same case, Mummery LJ said:

> "40. In my judgment, the decision not to have an EIA is a significantly different kind of decision from a refusal or grant of planning permission. The reasons for a preliminary administrative decision whether or not to have an EIA do not have to satisfy the same standards of information and reasoning as would apply to a substantive decision on a planning application. The degree of 'grappling' is different, more provisional and less exacting …"

[56] The petitioner averred that the Council had erred in law in failing correctly to apply the 2017 Regulations in respect of the proposed mitigation measures, and that the appropriate course was to consider whether there might be significant effects, and if so to require an EIA. She maintained that mitigation measures might only be taken into account where they were modest in scope and plainly (or easily) achievable, but that the measures in the present case were wide-scoping, sophisticated and not easily achievable and that the precautionary principle should prevail. That stance was too restrictive. Each case would depend on its own facts: *Champion* at [52]-[53]. The petitioner accepted that some mitigation measures might be taken into account, and so the dispute was restricted to the particular facts and whether the present circumstances were such that the Council was entitled to have regard to the mitigation measures. The precautionary principle should only be applied where there was reasonable doubt in the mind of the decision-maker: *Kenyon* at paragraphs [66]–[69]. The petitioner did not identify such reasonable doubt, nor was it evident from the documents lodged by the parties. It was not sufficient to argue that doubt could be demonstrated by another party taking a different view to the view held by the decision-maker. The assessment of the mitigation measures was a matter of professional judgment.

[57] There was no proper evidence before the court to support the petitioner's assertions that the mitigation measures were wide-scoping, sophisticated and not easily achievable.

The facts in this case were quite different to those in *Lebus* or *Champion*. The petition appeared to raise issues of evidence to challenge the conclusions in the screening opinion. For example, the petitioner challenged the conclusions in respect of noise, vibration, and light in the screening opinion, averring that "It is difficult to think of development causing more noise and vibration than the controlled demolition of four large tower blocks". It was relevant to consider what information the Council had before it when preparing the screening opinion and bear in mind that it was for it to judge whether it had sufficient evidence to reach its decision. It had lodged the Statement for the Methodology for the Demolition. That was a professionally prepared document, reflecting expert analysis and setting out in considerable detail the specific methodology to be employed in executing the proposed demolition by reference to the particular features of the site. Demolition of a tower block was far from a novel exercise. The Council was entitled to rely upon the terms of the method statement, the expertise and experience of those undertaking the works and its own expertise and experience when assessing the relevant issues under the 2017 Regulations for the purposes of the screening opinion. The methodology statement detailed relevant matters including: (i) the relevant British Standards; (ii) Ecological Survey reports; (iii) protection of neighbouring areas (including the environment); and (iv) control of dust. The proposed method of demolition was well understood and practised by those professionals involved in the demolition of residential towers, including the interested party and those contractors acting on its behalf. Reference was made to an affidavit sworn by Brian Hamilton, a Chartered Structural Engineer of 30 years' experience employed by G3 Consulting Engineers Ltd, and their director in charge of the proposed demolition project, to the effect that the demolition contractor's proposal involved a tried and tested method of demolition. He considered that the method was suitable for use and he was

confident that it was deliverable. The risks forming part of the demolition method were not unusual and the contractor was suitably skilled and experienced to manage and mitigate it. It was accepted that the only way to ensure that the proposed demolition method was in fact that implemented was through the prior approval process in terms of paragraph 70(3)(b) of the General Permitted Development Order.

[58] The extent of the detail which the petitioner questioned was not a matter that the court required to examine, or indeed was equipped to examine. For example, the petitioner questioned the detail of where replacement trees would be planted and the particular species that would be used. These were not matters which rendered the decision not to require an EIA in any respect unlawful, but, at the highest, were matters that went to the merits of the decision made by the respondent. That was not the level of detail that needed to be contained within a screening decision. In any event the assessment of whether the mitigation measures were achievable was a matter for the judgment of the Council. The petitioner's averments that the proposed demolition was plainly of "significant complexity" and that the mitigation measures were "not plainly established and plainly uncontroversial" further reinforced the significance of the professional judgment of the Council and the professional information relied upon in preparing the screening opinion. The Council was satisfied of the sufficiency of the evidence when determining that it had enough information to assess the impacts and mitigation measures when fulfilling its duties under the 2017 Regulations. Its view on that could only be upset if it was *Wednesbury* unreasonable. Sufficient detail might well be present even where it was clear that certain material was missing: *Jones* at [39] (approved in *Champion* at [52]). This case did not remotely resemble the situation in *Lebus*, *Gillespie* or *Swire*. There was, for example, no evidence of any flora and fauna issue. The Council was entitled to exercise its own judgment and the court

should intervene only where it was clear that no adequate investigation of potential environmental impacts had taken place and it was obvious why further investigation was necessary. The petitioner failed to identify why information such as the species of the replacement trees was required in the screening opinion under the 2017 Regulations, or could have reasonably affected the decision-making process or its outcome.

[59] The petitioner further averred that the Council failed to assess various criteria contained in Schedule 3 to the 2017 Regulations when determining whether an EIA was required. The screening opinion had been lodged and stated on its first page that the screening checklist was the written statement required by the 2017 Regulations. Section 3 of the screening opinion thereafter carefully identified the selection criteria for screening Schedule 2 developments and properly assessed the potential impacts. In so doing the Council had identified the proposed mitigation measures and to what extent those measures reduced or controlled any effects on the environment. The Council had addressed the relevant issues identified in Schedule 3 to the 2017 Regulations. The assessment was proper, adequate and intelligible. The screening opinion did not need to cover every aspect in detail but could concentrate on the issues that the Council considered most important: *Kenyon* at [16]. This was not a challenge directed at the sufficiency of the Council's reasons. If the Council had indeed considered only adverse environmental impacts, that was in the context of there being no positive impacts. If what had been done amounted to an error of law, the court should exercise its discretion not to reduce the screening opinion, as in *Champion*, where Lord Carnwath JSC had observed:

> "[54] Having found a legal defect in the procedure leading to the grant of permission, it is necessary to consider the consequences in terms of any remedy. Following the decision of this court in *Walton* v *Scottish Ministers* [2013] PTSR 51, it is clear that, even where a breach of the EIA Regulations is established, the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy

> the rights conferred by European legislation, and there has been no substantial prejudice: para 139 per Lord Carnwath JSC, para 155 per Lord Hope of Craighead DPSC."

His Lordship had considered the potential impact on that position of the judgment of the European Court of Justice in *Gemeinde Altrip* v *Land Rheinland-Pfalz (Vertreter des Bundesinteresses beim Bundesverwaltungsgericht* intervening) (Case C-72/12) [2014] PTSR 311 and had concluded that nothing there was inconsistent with the approach of the court in *Walton*. It was thus open to the court to take a view, relying on the evidence provided by the developer or the competent authorities, or the case documents more generally, that the contested decision would not have been different without the procedural defect in question. That assessment should take account of the seriousness of the defect invoked and the extent to which it had 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.

[60] The petitioner finally averred that the Council was required to consider the conservation of biodiversity in the screening opinion in accordance with section 1(1) of the Nature Conservation (Scotland) Act 2004. However, the opinion considered biodiversity under the sub-heading "Use of natural resources, in particular land, soil water and biodiversity" in the context of the characteristics of the development, where it identified *inter alia* the proposed planting of trees. The issue of biodiversity was further considered in the context of the "Location of the Development", in particular any impact on the River Kelvin, which was a green corridor and Site of Importance for Nature Conservation. The screening opinion concluded that there was a low risk of any significant effect on the environment and identified measures such as filters to prevent demolition materials reaching the river. Section 1(1) of the 2004 Act provided for a target or general duty of every

public body exercising its functions to further the conservation of biodiversity "so far as is consistent" with the proper exercise of the particular function in question. Accordingly the Council's primary duty was in respect of its obligations under the 2017 Regulations, but in any event it had complied with its duties under section 1(1) of the 2004 Act in respect of biodiversity, as demonstrated by the terms of the screening opinion. Reference was made to *NLEI Ltd* v *Scottish Ministers* [2022] CSIH 39, 2023 SLT 149 at [60]–[63], especially at [62], where the court had stated, in the context of the general duty imposed on public bodies by section 44 of the Climate Change (Scotland) Act 2009 which was functionally analogous to section 1 of the 2004 Act:

> "[62] At the root of the petitioners' criticisms is a complaint that the reporter and the respondents did not give sufficient weight to the effects of climate change and the benefits of renewable energy when set against landscape and visual aspects. That complaint is understandable from a developers' point of view. At the same time it highlights the difficulty which their arguments face in the planning context. Failure to afford a particular factor a particular level of weight is not *per se* an error which is susceptible to judicial review. The scope of review in a challenge to a planning judgement is that set out in *Wordie Property Co* v *Secretary of State for Scotland* (LP (Emslie) [1984 SLT 345] at pp 347-348). The challenger must be able to point to 'a material error of law … irrelevant considerations … [a failure] to take account of relevant and material considerations' or demonstrate that the judgment 'is so unreasonable that no reasonable [minister] could have reached … it'".

[61] Each of the grounds relied upon by the petitioner was without merit. Most if not all of them strayed into issues of planning judgment in respect of environmental issues. The assessment of the effects of a proposed development on the environment was a matter of judgment for the Council as the decision-maker. The prayer of the petition should be refused.

Further submissions

[62] At the close of the substantive hearing, I required the respondent to provide further details of the prior approval process which had been gone through in terms of Class 70 of the General Permitted Development Order. I afforded parties the opportunity to make further submissions in writing as to the nature of that process and its significance, if any, for the purposes of the petition.

[63] The interested party submitted that the prior approval procedure was to be attended by the minimum of formalities and should be simple to operate, drawing an analogy with what had been said by Richards LJ in *Murrell* v *Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367, [2012] 1 P&CR 6 at [29]. A planning authority faced with an application under Class 70 had, per Coulson J in *Harrowgate Borough Council* v *Crossland* [2012] EWHC 3260 (QB) at [42] three options:

> "[42] … first, it might say that prior approval was not required; secondly, it might say that prior approval was required; or thirdly it might fail to do anything at all, which inaction would mean that, following the expiry of 28 days from the application having been received, planning permission would be deemed to have been granted ..."

[64] If a planning authority determined that prior approval was required, it could either approve or reject – in the case of Class 70 - the demolition methodology that was proposed. It had limited powers –

> "The sole and limited function of this provision was to enable the local planning authority to determine whether its own "prior approval" would be required for those specified details of that "permitted development",

per Lindblom LJ in *Keenan* v *Woking Borough Council* [2017] EWCA Civ 438, [2018] P&CR 10 at [36]. Absent agreement in writing in terms of paragraph 70(3)(b)(v) of the 1992 Order, the planning authority had no power to change the details supplied with or in the course of processing of the application. It had no power to impose further conditions. What was to be

approved was "the method of the proposed development". There was no power to approve part only of an application. The prior approval was not limited to the particular documents specified in it, but related to the application and all the documents comprised within it, whether or not set out in any decision notice issued by the planning authority. The proposed demolition would have to be carried out in accordance with the details approved. In any event mere approval of plans (which was what the Council's notice of the grant of prior approval in the present case bore to do) would not amount to approval of a demolition methodology.

[65] The petitioner generally agreed with the content of the interested party's note. It was only the method of the proposed demolition for which prior approval was required in the present case. That was quite separate from any issue about environmental impacts as regulated by the 2017 Regulations. The Council had no power under the 1992 Order to impose limitations or conditions beyond those found in the sub-paragraphs subsequent to paragraph (1) in Class 70. Conditions that specifically dealt with environmental protection could not therefore be imposed upon the grant of a prior approval, and the Council did not purport to do so in this case. The Decision Notice dated 7 July 2023 focused only upon certain plans and did not refer to the demolition method statement. However, the petitioner agreed that the method of proposed demolition was implicitly approved by the Decision Notice and that the development would therefore require to be carried out in accordance with the method statement. However, that was not a substitute for any environmental impact assessment, nor did it provide sufficient information for a screening opinion. Additional surveys still required to be carried out, including in relation to European Protected Species.

Decision

[66] The purpose of the EIA directive was most recently and succinctly stated by Lord Sales in *R (Finch)* v *Surrey County Council* [2024] UKSC 20:

> "[251] The basic purpose of the EIA Directive is to ensure that relevant environmental issues in respect of a project are identified and taken into account in the procedure for the grant of planning consent for the project, in particular with a view to examining whether environmental impacts can be avoided or mitigated by measures taken in designing the project or by the imposition and then monitoring of conditions attached to such consent. The EIA Directive lays down harmonised rules and procedures with a view to ensuring that a common approach is adopted across all Member States."

[67] The 2017 Regulations must be interpreted against that background, so that the right to meaningful public participation in decision-making relating to EIA developments is vindicated. The adoption of a screening opinion as to whether a particular development does or does not require an EIA is, notwithstanding its status as a "preliminary administrative decision" – *Bateman* at [40] – an integral part of the process for ensuring that such public participation occurs in appropriate cases. However, the language of the Regulations (and ultimately that of the directive) provides criteria for determining whether a development ought to be subject to an EIA which leave considerable room for differences of opinion, and the task of applying the law to the facts of any particular case has in the first instance been confided to the relevant planning authority. The result is that a decision to adopt a screening opinion may be challenged only on limited grounds, as explained by Lord Leggatt in *Finch*:

> "[56] Interpreting a legislative provision requires the court to identify, from the language and purpose of the legislation, the criteria to be applied in deciding whether the facts of any individual case fall within its scope. These criteria may be so precise that, when applied to the facts of a given case, they rationally yield only one answer. But sometimes, as Lord Mustill pointed out in *R* v *Monopolies and Mergers Commission, Ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32, the criteria are sufficiently imprecise that there is room for different decision-makers, each acting rationally, to reach different answers. In such a case the court will not

> interfere with the decision taken unless it is 'irrational' in the sense either that it is outside the range of reasonable decisions open to the decision-maker or that there is a demonstrable flaw in the reasoning which led to the decision. Examples of such a flaw would be that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error: see eg *R (Law Society)* v *Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649, para 98.
>
> …
>
> [58] The term 'substantial' is intrinsically vague because, in the absence of some further, more precise criterion, there will be cases in which the question whether the term applies has no answer on which reasonable people who understand the meaning of the term could all be expected to agree. The same is true of the term 'significant' which is used in article 3(1) and other provisions of the EIA Directive. Deciding whether an effect of a project on the environment is 'significant' clearly requires a value judgment and carries the potential for cases to arise in which different decision-makers may legitimately reach different conclusions without it being possible to say that any of them has made an error in interpreting or applying the term."

[68] Reference might also be made in this connection to the very similar observations made by Dyson LJ in *Jones* at [38].

[69] I consider that the phrase "likely to have significant effects on the environment" is one that should be construed as a whole. Although authority has, consistently with the appropriately wide and purposive interpretive approach to the Regulations, come to ascribe a particular meaning to the word "likely" in that phrase (the existence of a "real risk" having been favoured by Pill LJ in preference to any requirement of probability in *Loader* at [26]-[27], and "any serious possibility" by Moore-Bick LJ in *Bateman* at [17]), it should not be overlooked that the determination of whether there is such a real risk or serious possibility remains a matter for the relevant planning authority.

[70] Thus, at the Court of Appeal stage in *R (Morge)* v *Hampshire County Council* [2010] EWCA Civ 608, [2011] Env LR 8, Ward LJ (with whom Hughes LJ and Patten LJ agreed)

observed in the analogous context of the Habitats Directive (Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) that:

> "[80] … Whether the proposed development is likely by virtue of its size, nature or location to have significant effects on the environment within as well as around the area of the proposed roadway involves an exercise of planning judgment or opinion involving a consideration both of the chance of an effect occurring and also the consequences of it were it to occur. There may well be a range of valid answers to that question. Being a transposition of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L175, p 40) which is wide in scope and broad of purpose, it must be implemented in that spirit. Thus 'likely' connotes real risk and not probability. In judging whether the effects are 'significant' regard may be had to mitigating measures taken or to be taken to alleviate the harm. The focus is on the adverse effects: environmentally beneficial effects are irrelevant. Importantly for the court reviewing the decision, the test is rationality or in the parlance of the European Court of Justice, manifest error. If the local Planning Authority ask the right question and arrive at an answer within the bounds of reason and the four corners of the evidence before it, the decision cannot be categorised as unlawful. The question must be considered on a case by case basis. …"

[71] As to the precautionary principle, it is clear that if the screening planning authority is left in material doubt as to whether an EIA is required, then it should require one: *Champion* at [51]. However, the material doubt must be one that appears to the mind of the authority, or one which it was irrational in the sense discussed in *Finch* for it not to entertain – *Kenyon* at [66]–[69]. One particular way in which the precautionary principle may manifest itself is in the situation where a planning authority does not consider that it has sufficient information to determine whether a proposed development is or is not likely to have significant effects on the environment, in which case the principle may instruct that an EIA is required – *Loader* at [43], *Swire* at [90] and the cases cited therein. Again, however, a local authority's views on that matter may be challenged only on the basis of irrationality in the relevant sense.

[72] After that brief discussion of the applicable principles of law, I turn to examine the grounds of challenge advanced by the petitioner in the present case. The first such ground

is the apparent reliance by the Council on proposed measures which it considered would reduce or eliminate what would otherwise be a significant effect on the environment. In *Finch*, Lord Leggatt observed in this connection that:

> "[108] … An assumption made for planning purposes that non-planning regimes will operate effectively to avoid or mitigate significant environmental effects does not remove the obligation to identify and assess in the EIA the effects which the planning authority is assuming will be avoided or mitigated. This is clear from a line of authority referred to in the *Frack Free Balcombe Residents Association* case [i.e. *Frack Free Balcombe Residents Association* v *Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2548 (Admin), 2024 Env LR 16]. In *R (Lebus)* v *South Cambridgeshire District Council* [2002] EWHC 2009 (Admin); [2003] Env LR 17, paras 41-46, Sullivan J held that it is an error of law to reason that no environmental statement is needed because, although a project would otherwise have significant effects on the environment, mitigation measures will render them insignificant. What is required in such a case is an environmental statement setting out the likely significant effects and the measures which can be taken to mitigate them; see also *R (Champion)* v *North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710, paras 49-51. The same principle must apply in determining the scope of the assessment required where an environmental statement is carried out."

[73] I do not at first blush find those remarks to be particularly easy to reconcile with all of what was said in *Gillespie* or in *Champion*, in the passages from those judgments already cited, and the frequent observation that each case will turn on its own facts does little or nothing to assist in the identification of the legal test to be applied to those facts. However, it seems to be common ground that some inherent element of the proposed development which will avoid it having significant effects on the environment in a particular regard may (indeed should) be taken into account at the screening stage. Beyond that, it has been suggested, for example, that mitigatory or remedial measures may be taken into account if they are "modest in scope", or "plainly and easily achievable" – Pill LJ in *Gillespie* at [37] – or if their "nature, availability and effectiveness are already plainly established and plainly uncontroversial" – Laws LJ there at [46] – or if

> "fairly considered, they are of themselves unlikely to have significant effects on the environment because, for example, they are of limited impact or well-established to be easily achievable within the process of the development." – Arden LJ there at [49].

[74] The Scottish Government's Planning Circular No 1 of 2017 notes in this regard:

> "41. The Regulations expressly provide that a developer may, when requesting a screening opinion, include a description of any features of the proposed development, or proposed measures, envisaged to avoid, or prevent significant adverse effects on the environment, and the planning authority must take this information into account in reaching a screening opinion.
>
> 42. The extent to which mitigation or other measures are taken into account in reaching a screening opinion will depend on the facts of each case. In some cases, the measures may form part of the proposal, be modest in scope or so plainly and easily achievable that it will be possible to reach a conclusion that there is no likelihood of significant environmental effects. The planning authority must have regard to the information provided by the developer, and should interpret this in light of the precautionary principle and taking into account the degree of uncertainty in relation to the environmental impact, bearing in mind that there may be cases where the uncertainties are such that Environmental Impact Assessment is required.
>
> 43. Where, in reaching a screening opinion, a planning authority takes into account proposed mitigation measures, the authority should subsequently consider the need for appropriate obligations to ensure these measures are delivered and included in any subsequent grant of permission, regardless of whether or not the development is EIA development."

[75] That appears to me to represent an accurate statement of the law as it stands. That is so even if, because the decision as to whether any or all of the suggested descriptions applies to the measure in question is a matter of judgment for the planning authority reviewable only on irrationality grounds, one comes in practice to the conclusion that the authority has a wide discretion as to what to take into account by way of mitigation and remediation in arriving at its screening decision, which seems to be a rather long way from the starting point described in *Lebus* and approved in *Finch*.

[76] Turning to the screening opinion in the present case, the detail of the Council's assessment of the selection criteria as applied to the development proposal appears in the screening checklist at Section 3, which sets out in tabular form a column for each of the

criteria noted in Schedule 3 to the 2017 Regulations, a column asking for a "yes" or "no" answer as to whether the criterion is applicable to the development, a column headed "Briefly describe potential impact" and a final column headed "Is this likely to result in a significant adverse effect on the environment? Please explain". The use of the wording "significant adverse effect" is a matter that will require to be addressed in due course. There are various instances in which a potential impact has been identified but where it appears that mitigatory or remedial measures may have contributed to the ultimate decision that no significant adverse effect on the environment is likely. The mitigatory measures are in large part inherent parts of the development proposal, such as, for example, dust reduction measures, removal of asbestos pre-demolition, the installation of filters on manholes and traps with a view to preventing demolition materials being carried by surface water to the River Kelvin, and adherence to certain standards of working. Others are more obviously remedial in nature, for example the proposal to replace 35 trees with another 55 elsewhere.

[77] Whether by accident or design, however, at no point is the view stated that what would otherwise represent a significant adverse effect on the environment (as opposed to something that has the potential to impact the environment) ceases to be such because of the mitigation or remedial measures identified. In the case of the loss of the trees, for example, it is specifically noted that that loss is not considered to have such an effect and that "in any event" the impact of their loss would be mitigated by the replacement planting. The frank error of law identified in *Lebus* is accordingly absent from the Council's apparent reasoning. Further, the fact that the loss of the 35 trees is not seen as a significant adverse effect on the environment, regardless of whether or not they are replaced, and taken with the petitioner's (perhaps overly kind) concession that the Decision Notice on the application for prior approval dated 7 July 2023 implicitly required the demolition to be carried out in accordance

with the submitted method statement, draws any sting which might otherwise lie in the fact that the screening checklist refers to the prior approval process as a form of assurance that the replacement planting will indeed take place.

[78] As to whether the mitigation and remediation measures identified in the screening checklist fall within the categories which it is legitimate to take into account in a screening opinion exercise, there was no evidence (as opposed to unvouched assertion) before the court going to establish that they are not. The limited evidence before the court, in the form of the affidavit of Brian Hamilton, suggests the contrary, so far as it goes. My own uninformed views on, for example, the question of whether filters in manholes and traps will indeed clearly prevent surface water causing demolition debris to enter the Kelvin, are neither here nor there. The Council's decision as local planning authority to take the mitigatory and remedial measures it referred to into account has not been shown to be outwith the range of decisions reasonably open to it in that regard.

[79] I therefore reject the submission that the Council erred in law, or acted irrationally, in taking into account in its decision-making process the mitigatory and remedial measures which it did.

[80] On the question of whether there was a failure on the part of the Council to consider the relevant selection criteria, the screening checklist faithfully sets out the criteria identified in Schedule 3 to the 2017 Regulations, states the Council's view on the applicability of each such criterion, identifies any potential relative impact on the environment, and states a view, with brief reasons, as to whether there is likely to be a significant adverse effect on the environment in the relevant connection. Subject, again, to the use of the "significant adverse effect" test, that approach cannot be faulted. Taken on its own terms, and allowing for the

fact that the matters of planning judgment which it reflects are for the Council and not the court, the screening opinion does not betray any sign of irrationality.

[81] I reject the submission that the incongruity between the screening opinion of October 2023 and that of March 2023 operates as a potential separate source of irrationality in the relevant sense. The March opinion (which was in a very different format to that of October) was reduced by this court on the agreed basis that it represented an inadequate discharge of the Council's responsibilities under the 2017 Regulations. Quite correctly in those circumstances, a new evaluation of the significant effects on the environment took place, and the fact that that new evaluation differs from the previous faulty one in various regards cannot provide a basis for the conclusion that the new evaluation is irrational or that an explanation for the apparent differences between the two is called for in point of law. Rather, the October opinion must stand or fall on its own two feet; it does the former.

[82] On the related question of whether the Council had sufficient information to arrive at an informed judgment that a negative screening opinion could be issued, it requires to be borne in mind that it is in the nature of a screening opinion that a detailed and full assessment of the potential environmental impact of a proposed development is not required – *Bateman* at [20]. That would follow if and when an EIA was found to be required. Not all uncertainties have to be resolved, nor every aspect of the matter made subject to full and comprehensive examination, before a decision can be made that an EIA is not required – *Jones* at [39]. While it has been said, no doubt correctly, in this connection as with most other aspects of the screening opinion process, that the question of sufficiency of information is a matter for the judgment of the planning authority – *Kenyon* at [10] – the role of the precautionary principle must also be acknowledged in this regard, together with the need

for the information before the Council to suffice to enable it to make an "informed judgment". Another way of expressing that requirement appears as follows in *Finch*:

> "[76] The initial, information gathering stages of the process, including the preparation of the environmental statement, are thus directed towards the ability to reach a reasoned conclusion on the significant effects of the project on the environment. This is confirmed in article 5(1), which provides that the environmental statement shall 'include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment' Similarly, article 5(3)(c) provides that, 'where necessary, the competent authority shall seek from the developer supplementary information, in accordance with Annex IV, which is directly relevant to reaching [a] reasoned conclusion on the significant effects of the project on the environment.'
>
> [77] Implicit in these provisions, and in the aims of the EIA Directive, is the criterion that material should be included in the environmental statement and taken into account in the procedure only if it is information on which a reasoned conclusion could properly be based. Conjecture and speculation have no place in the EIA process. Thus, if there is insufficient evidence available to found a reasoned conclusion that a possible environmental effect is 'likely', there is no requirement to identify, describe and try to assess this putative effect. This criterion must also govern, where a possible effect is regarded as 'likely', the nature and extent of the assessment of the effect."

[83] The availability of an objective criterion beyond abstract reasonableness, in the form of the need for the information available to be capable of providing the basis for an "informed judgment" or a "reasoned conclusion" does enable the court to scrutinise the view of the planning authority as to the sufficiency of the information available to it more closely than is possible in other aspects of the screening opinion process. Further, the potential role of the precautionary principle in this regard makes that degree of scrutiny appropriate. However, the court still requires a proper basis upon which to determine that the planning authority's view of the sufficiency of the information available to it was irrational. In the present case, although it was submitted in general terms that the evident lack of some potentially relevant information before the Council made it inappropriate for it to proceed to issue a negative screening opinion, the proposition was not carried through

(particularly in the context of the inherently tentative nature of the screening process) to the extent of providing the court with the material necessary to permit it to conclude that the Council's view on the matter was irrational, even allowing for the heightened degree of scrutiny which is called for in this connection. I accordingly reject the complaint based on a claimed insufficiency of information properly to enable the Council's adoption of a negative screening opinion.

[84] The complaint about failure to comply with section 1(1) of the Nature Conservation (Scotland) Act 2004 can be briefly dealt with. The general duty on public bodies to further the conservation of biodiversity set out in that subsection in the exercise of any function is expressly made subject to consistency with the proper exercise of that function. The function in question here is the preparation of a screening opinion in terms of the 2017 Regulations. That function is highly regulated, both by the terms of the Regulations themselves and by the considerable body of case law which has grown up around them. The point at which considerations of biodiversity must be taken into account in the process is clearly set out by the Regulations, as is the treatment to be afforded to them. There is no room in that process for the conservation of biodiversity to be advanced otherwise than is there provided for. Put another way, due performance of the Council's duties in terms of the 2017 Regulations as they relate to biodiversity will amount to satisfaction of the duty in terms of the 2004 Act. Subject to the point next to be dealt with, there is no reason to hold that its duties were not duly performed in this regard.

[85] Finally, I turn to the use by the Council of the criterion of "significant adverse effect" on the environment in its screening opinion, as opposed to the criterion set out in the Regulations, ie "significant effect". For reasons that remain unexplained, the Council chose – seemingly deliberately – to substitute the wrong for the right criterion, and it must

be assumed that that wrong criterion was the one which it applied throughout the preparation of the screening opinion. The fault is thus a pervasive one, capable of affecting the court's assessment of some if not all of the grounds of complaint already considered as well as representing an independent ground for reduction of the screening opinion. There can be no doubt that the use of the wrong criterion represents, in point of form at least, an error of law on the part of the Council: *British Telecommunications* at [65].

[86] The question which remains is whether the court can, and if so whether it should, exercise its discretion to withhold the remedy of reduction of the screening opinion which would normally be the appropriate reaction to a decision arrived at in error of law. The most recent judicial pronouncement on that matter appears in *Finch*:

> "[62] It is also important to keep in mind that the legislation is essentially procedural in nature. It is not concerned with the substance of the decision whether to grant development consent but with how the decision is taken. Thus, as the House of Lords held in *Berkeley*, it is no answer to a challenge based on failure to carry out an EIA that complies with the EIA Directive to say that complying with the EIA Directive would not have affected the decision. It is essential to the validity of the decision that, before it is made, there has been a systematic and comprehensive assessment of the likely significant effects of the project on the environment in accordance with the EIA Directive. …"

[87] On the other hand, the most extensive judicial discussion of the question is that of the Supreme Court in *Champion*. In that case, Lord Carnwath, speaking for the Court, observed in the passage at [54] already set out that, following the decision of the Supreme Court in *Walton* v *Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67, 2012 SLT 1211, it was clear that, even where a breach of the EIA Regulations was established, the court retained a discretion to refuse relief if the applicant had been able in practice to enjoy the rights conferred by European legislation, and there had been no substantial prejudice. After discussing the import of the subsequent *Gemeinde Altrip* case in the European Court of Justice, his Lordship continued:

> "[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 the *Walton* case. 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."

[88] Adopting the approach in *Champion* (as itself based on the Scottish case of *Walton*), I consider that it is appropriate to conclude that, had the error in the present case not been made, that would not have resulted in a different conclusion on the need for an EIA. I do not find it necessary in order to reach that conclusion to look beyond the terms of the screening opinion itself. It will be recalled that in *Morge* at [80], the Court of Appeal observed that "The focus is on the adverse effects: environmentally beneficial effects are irrelevant." Although those remarks were made in the context of the habitats directive, I consider that the analogy with the EIA directive, at least in relation to screening opinions, is compelling. A decision to require an EIA is in practical terms driven by the identification and evaluation of adverse environmental effects, not neutral or beneficial ones. In that sense at least the defect in the Council's screening opinion may be regarded as lying at the lesser end of the scale of gravity. If, as I consider, the adoption of the correct legal test would have resulted in no difference to the outcome of the screening decision process, then it follows that no member of the public has been deprived of the guarantees of access to information and participation in decision-making which it is the function of the EIA directive and the 2017 Regulations to safeguard. In these circumstances, I consider it appropriate to exercise my discretion to refuse to reduce the adoption of the screening opinion notwithstanding the error of law embodied in it.

Conclusion

[89] I shall sustain the petitioner's first plea-in-law to the extent of granting decree of declarator that the decision reflected in the screening opinion of 13 October 2023 was predicated on an error of law. *Quoad ultra* I shall repel the remaining pleas of the parties and refuse the further prayers of the petition.