*1 R. (Friends of the Earth England, Wales and Northern Ireland Ltd) v The Welsh Ministers

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
26 March 2015

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[2015] EWHC 776 (Admin)
[2016] Env. L.R. 1

Queen's Bench Division (Planning Court)

Hickinbottom J

26 March 2015

Alternative sites; EU law; Motorways; Plans; Sites of Special Scientific Interest; Strategic environmental assessments; Wales;

H1 *Nature conservation—strategic environmental assessment—motorway extension—Directive 2001/42/EC—evaluation of reasonable alternatives—whether alternatives to constructing motorway across protected sites considered—Wildlife and Countryside Act s.28G—duty to further the enhancement of flora and fauna of Sites of Special Scientific Interest—whether duty met*

H2. In July 2014, on behalf of the Defendant (WM), the Welsh Minister for Economy, Science and Transport announced a decision to adopt a plan which provided for the construction of a new section of the M4 Motorway across several Sites of Special Scientific Interest (SSSIs) in Wales. The plan was subject to an appraisal process known as the Welsh Transport Planning and Appraisal Guidance (WelTAG) which provided a broad appraisal of transport proposals in the context of wider policy objectives for Wales (the WelTAG appraisal). The Claimant (FoE), a well known and respected environmental organisation, sought to challenge the adoption of the plan arguing that the decision-making process was unlawful in that there was a failure to comply with the requirements of Directive 2001/42/EC (the 2001 Directive). More specifically FoE argued that the adoption process failed properly to identify, describe and evaluate all reasonable alternatives and particularly alternatives that did not involve a motorway being constructed across protected sites. As a consequence, WM foreclosed the possibility of adopting a plan that did not involve such a motorway and thus the 2001 Directive's objectives of integrating environmental considerations into the preparation and adoption of plans was frustrated. In addition, FoE argued that WM failed to take reasonable steps to further the enhancement of the flora and fauna of the SSSIs over which the proposed Motorway was routed, contrary to the requirements of the Wildlife and Countryside Act 1981, s.28G (the 1981 Act).

H3. **Held** , in refusing the application:

H4. (1) The term "reasonable alternatives" in the 2001 Directive signified options which were considered by the decision-maker to be viable in the sense of being capable of meeting the objectives to which the decision-maker was working to such an extent that that option was viable. Article 5(1) of the 2001 Directive required *2 the relevant environmental report to identify, describe and evaluate all, and not merely a selection, of the alternatives capable of meeting the plan's objectives. An option other than the preferred option that was capable of meeting the objectives of the plan, as determined by the relevant decision-

maker, was the truest and most helpful formulation. However, an option which the decision-maker considered "viable", having regard to the full planning context, was also a helpful and appropriate way to characterise "reasonable alternatives". In the current case, it was primarily for WM to identify objectives, give each appropriate weight, and determine whether they were met by a particular option. If a particular plan was incapable of meeting the identified objectives such that in practice it would never be pursued, there was no point in subjecting it to a full environmental impact assessment. On the facts of the case, it was clear from both the plan and the WelTAG appraisals that the options discarded before the SEA assessment had been rejected because they would not significantly improve the position. Thus, WM had used the correct legal test and had chosen the option which they considered best met the transport planning objectives under the WelTAG. They had included, as reasonable alternatives, other options which they considered to be capable of meeting those objectives. The decisions they had made with regard to the selection of objectives, the weight given to each, and the selection of the preferred option and reasonable alternatives were all in accordance with the relevant legal tests, rational and otherwise lawful.

H5. (2) The provisions of s.28G of the 1981 Act did not impose a general duty on the decision-maker to have some particular regard to the desirability of protecting and preserving SSSIs. It imposed an entirely different type of obligation, namely a duty to "take reasonable steps … to further conservation and enhancement of flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest". Moreover, the s.28G duty did not seek to protect SSSIs by weighting the desirability of their protection as against other factors by requiring relevant authorities to take reasonable steps. On the facts of the case, the SEA assessment had properly considered the potential harm to the SSSIs and the available mitigation measures, and its conclusion that the plan would give rise to minor negative harm overall was unassailable as a matter of law.

H6 Cases referred to:

Archibald v Fife Council [2004] UKHL 32; [2004] 4 All E.R. 303; 2004 S.C. (H.L.) 117
Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2014] EWHC 406 (Admin); [2015] Env. L.R. D1
Garner v Elmridge Borough Council [2011] EWHC 86 (Admin); [2012] J.P.L. 119; [2012] P.T.S.R. D7
Heard v Broadland DC [2012] EWHC 344 (Admin); [2012] Env. L.R. 23
R. (Buckinghamshire CC) v Secretary of State for Transport [2014] UKSC 3; [2014] 1 W.L.R. 324; [2014] P.T.S.R. 182
R. (Buckinghamshire CC) v Secretary of State for Transport [2013] EWHC 481 (Admin); [2014] P.T.S.R. 182
R. (Chalfont St Peter Parish Council) v Chiltern DC [2014] EWCA Civ 1393
R. (Chalfont St Peter Parish Council) v Chiltern DC [2013] EWHC 1877 (Admin)
R. (Garner) v Elmbridge BC [2011] EWCA Civ 891; [2012] J.P.L. 119; [2012] P.T.S.R. D7 ****3***
R. (Garner) v Elmbridge BC [2011] EWHC 86 (Admin); [2011] 6 E.G. 103 (C.S.); [2011] P.T.S.R. D25
R. (Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 A.C. 295; [2002] Env. L.R. 12
R. (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC 74 (Admin)
R. (Save Historic Newmarket Ltd) v Forest Heath DC [2011] EWHC 606 (Admin); [2011] J.P.L. 1233; [2011] N.P.C. 35
Re Seaport Investments Ltd [2007] NIQB 62; [2008] Env. L.R. 23
Save Historic Newmarket Ltd v Forest Heath DC [2011] EWHC 606 (Admin)
Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin); [2013] Env. L.R. D2
Stevens v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin); [2013] 2 E.G.L.R. 145; [2013] A.C.D. 97
Terre Wallonne ASBL v Région Wallone (C-105/09) [2010] E.C.R. I-5611; [2011] Env. L.R. D8
Walton v Scottish Ministers [2012] UKSC 44; [2013] P.T.S.R. 51; [2013] Env. L.R. 16

H7Legislation referred to:

Directive 79/409 on the conservation of wild birds (Wild Birds)
Wildlife and Countryside Act 1981 (c.69) ss.28 , 28A , 28E , 28F , 28G(2)

Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment)
Planning (Listed Buildings and Conservation Areas) Act 1990 s.66
Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (Habitats)
Disability Discrimination Act 1995 s.6
Government of Wales Act 1998 ss.6 , 7 , 8
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) Sch. 1
National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672)
Countryside and Rights of Way Act 2000 ss.6 , 7 , 8 and Sch.9
Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment) arts 1 , 2(b)(b) , 3(1) (2) , 4(1) , 5(1) , 6 , 8 9 , Annex 1
Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 (SI 2004/1656) regs 5 , 8 , 12 , 13 , 16 , Sch. 2
Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 (S.R. No. 280 of 2004) Sch.2 para. 8 , 16
Government of Wales Act 2006 Sch.1 para.30
Conservation of Habitats and Species Regulations 2010 (SI 2010/490)

H8 Representation

Mr A. Goodman and Mr M. Dale-Harris , instructed by Deighton Pierce Glyn, appeared on behalf of the Claimant.
Mr J. Moffett and Mr T. Cross , instructed by Geldards LLP, appeared on behalf of the Defendant. ***4**

Judgment

Hickinbottom J:

Introduction

1. The M4 motorway is a vital transport route across South Wales. However, near Newport, there are sections of the motorway which do not have the capacity to accommodate the volume of traffic that uses it, resulting in high levels of congestion, traffic jams, accidents and pollution. These problems have been apparent for over 20 years, and have worsened over time. They are predicted to worsen further in the future. There is no doubt that the transport arrangements around Newport are in need of improvement.

2. On 16 July 2014, on behalf of the Welsh Ministers, the Minister for Economy, Science and Transport Edwina Hart AM ("the Minister") announced the decision to adopt a plan called "M4 Corridor Around Newport" ("the Plan"), which provides for a new section of motorway to be constructed to the south of Newport between current M4 Junctions 23 (Magor) and 29 (Castleton) and various complementary measures including the reclassification of the current route of the motorway between those points to a trunk road. The new stretch of motorway would run across the Gwent Levels, an area comprising several Sites of Special Scientific Interest ("SSSIs") and the River Usk Special Area of Conservation ("SAC").

3. This claim was issued on 23 September 2014 by the Claimant, which is a well-known and respected environmental organisation. In the claim as issued, it is contended that the adoption of the Plan should be quashed on three grounds (the order being mine):

Ground 1:

The decision-making process that led to the adoption of the Plan was unlawful, in that, in a number of respects, it failed to comply with European Council and Parliament Directive 2001/42/EC , commonly known as the Strategic Environmental Assessment Directive ("the SEA Directive "), implemented in Wales by the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 (SI 2004/1656) ("the 2004 Regulations"). Several sub-grounds are pleaded; but the foundation of the Claimant's case is that the process by which the Plan was adopted failed properly to identify, describe and evaluate all reasonable alternatives (and particularly alternatives that did not involve a motorway being constructed across the protected sites) on a comparable basis to the Plan. The SEA Directive requires assessment of the significant environmental effects of, not only the preferred option, but of all potential viable alternatives. The preferred plan and all of the alternatives canvassed in the SEA Report involve a highway crossing the Gwent Levels. Because the vital decision—to put a highway across the protected sites—had been already been taken before the SEA process began, the Minister, without any environmental assessment as required by the SEA Directive , foreclosed the possibility of adopting a plan that did not involve such a highway; and, thus, the SEA Directive 's objective of integrating environmental considerations into the preparation and adoption of plans was frustrated. This ground raises starkly the issue of what is meant by "reasonable alternatives" in the SEA Directive . ***5**

Ground 2:

In adopting the Plan, the Minister failed to take reasonable steps to further the conservation and enhancement of the flora and fauna of the SSSIs over which the proposed route runs, as required by s.28G of the Wildlife and Countryside Act 1981 .

Ground 3:

The Plan failed to take into account the Welsh Government's own policies with regard to reduction of carbon emissions.

4. On 31 October 2014, Dove J ordered the application for permission to proceed be listed for hearing on a rolled-up basis so that, if permission were granted, the substantive claim would immediately follow.

5. At that hearing before me, Alex Goodman and Matthew Dale-Harris appeared for the Claimant, and Jonathan Moffett and Tom Cross for the Welsh Ministers. I thank them all for their considerable assistance.

6. During the course of the hearing, Mr Goodman abandoned reliance on Ground 3, and I formally refuse permission to proceed on that ground. This judgment is concerned with Grounds 1 and 2.

The SEA Directive

7. In due course, I will need to look at the SEA Directive in some detail but, at the outset, an indication of where it fits into the legal framework for environmental protection might assist, before I move on to deal with the facts of this case.

8. One of the earliest impacts of European law on town and country planning in this jurisdiction was Council Directive 85/337/EC ("the EIA Directive"), which came into force in 1988. In considering applications for certain major development projects, the EIA Directive requires an Environmental Impact Assessment ("EIA"), i.e. the presentation, collection, publication and assessment of information on the environmental effects of the proposed project. The Directive was implemented in Wales by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) . Under those regulations, the construction of motorways and express roads falls within Sch.1 , and consequently an EIA is mandatory.

9. The EIA focuses upon the environmental assessment of major projects that are likely to have a substantial impact on the environment. However, by the time consent for development in respect of such a project is being considered, prior decisions may have been taken which effectively limit the room for significant change. The SEA Directive seeks to address that issue by requiring strategic environmental assessment ("SEA") to be an integral part of plans and programmes, so that potentially environmentally-preferable alternatives are not discarded as part of the process of approving plans and programmes without proper consideration of the environmental impacts of the various options.

10. As Lord Reed JSC noted in *Walton v Scottish Ministers [2012] UKSC 44* at [12]–[13], this was lucidly explained by Advocate General Kokott in her opinion in *Terre Wallonne ASBL v Région Wallone [2010] E.C.R. I-5611; [2010] EUECJ C-105/09* , at [31]–[33]:

> "31. The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA Directive complements ***6** the EIA Directive , which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.
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> 32. The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures (Proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment, COM (96) 511 final, p.6). Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context.
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> 33. An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included."

11. Thus, as Lady Hale succinctly put it in *R. (Buckinghamshire County Council and Others) v Secretary of State for Transport [2014] UKSC 3* at [155]:

> "The aim of the [SEA] Directive is not to ensure that all development proposals which will have major environmental effects are preceded by [an SEA]; rather, it is to ensure that future development consent for projects is not constrained by decisions which have been taken 'upstream' without such an assessment, thus pre-empting the environmental assessment to be made at project level."

12. The SEA Directive is expressly procedural in nature (see recital (9)). It does not impose any substantive duties on the relevant authority: it rather seeks to improve the quality of decision-making for development by requiring the authority to assess the potential environmental effects of a particular plan or programme before its adoption. Its aim is to ensure that future planning decisions are not constrained by earlier strategic decisions; so that art.5 of the SEA Directive requires that the likely significant environmental effects of a plan or programme "and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme are identified, described and evaluated". Those options must be the subject of public consultation in the form of a report with the draft plan or programme (art.6); and, before the adoption of the plan or programme, the results of that consultation must be taken into account by the relevant authority (art.8). The environmental evaluation of those alternatives must be on a comparable basis to the evaluation of the preferred option.

13. I shall return to the SEA Directive after considering the factual background against which the challenged decision to adopt the Plan was made.

The Gwent Levels SSSIs

14. Section 28 of the Wildlife and Countryside Act 1981 ("the 1981 Act") enables the Natural Resources Body for Wales ("the NRB") to designate land an SSSI, by *7 reason of any of its flora, fauna, or geological or physiological features. The protection of those designated sites was substantially increased by the Countryside and Rights of Way Act 2000 ("the 2000 Act") which, by s.75 and Sch.9 , inserted new sections 28A - 28R into the 1981 Act . For example, development of designated land now requires the consent of the NRB (s.28E); although, if an owner is refused consent, he may appeal to the Welsh Ministers (s.28F). Importantly for this claim, in exercising any of their functions, the Welsh Ministers have a duty, set out in s.28G(2) , to take reasonable steps to further the conservation and enhancement of the features (such as flora or fauna) which have led to the designation. An alleged breach of that duty is the basis of Ground 2, and I return to it below (see paragraph 125 below).

15. Furthermore, the Conservation of Habitats and Species Regulations 2010 (SI 2010/490) applies a protection regime to sites designated as Special Areas of Conservation ("SACs") under European Council Directive 92/43/EEC ("the Habitats Directive"), and sites designated as Special Protection Areas under Council Directive 79/904/EEC ("the Wild Birds Directive").

16. The City of Newport lies on the River Usk, near the mouth of that river as it joins the Severn Estuary. The existing M4 motorway runs to the north of the city. To the east of the city, south of the M4 and immediately south of the main line London-South Wales railway line, lies Llanwern Steelworks. To the south and east of those works, and to the east of the river, there is an area of ancient wetlands and marshes running down to the estuary, that forms four SSSIs, namely (running east to west) Magor & Undy SSSI, Redwick & Llandevenny SSSI, Whitson SSSI and Nash & Goldcliff SSSI. To the west

of the river, is a fifth, St Brides SSSI. In addition, in December 2004, the River Usk was designated an SAC. I will refer to these protected areas collectively as "the Gwent Levels SSSIs".

Traffic Forecasting Methodology

17. Helen Bowkett is the Head of Transport Evidence for the Welsh Government. She has extensive experience in transport modelling, and appraisal of highway and transport schemes. In her statement of 30 January 2015, she explains the methodology and appraisal process used by the Welsh Government, known as "The Welsh Transport Planning and Appraisal Guidance" ("WelTAG"). It will be helpful to summarise that process at this stage.

18. WelTAG is derived from the United Kingdom Department of Transport Guidance, WebTAG, which (says Ms Bowkett) "is widely accepted and is applied as the industry standard…". WelTAG is a substantial document, exceeding 200 pages. It was published by the Welsh Government in June 2008, with the intention that it be applied to all transport strategies, plans and schemes promoted by the Government (para.1.1.1). It has two primary purposes, namely (para.1.4):

> "• To assist in the development of proposals to enable the most appropriate scheme to be identified and progressed – one that is focused on objectives, maximises the benefits and minimises the impacts; and
>
> • To allow the comparison of competing schemes on a like-for-like basis, so decision-makers can make difficult funding decisions."

It is therefore made clear from the outset that the process is "focused on objectives". ***8**

19. The March 2013 WelTAG Stage 1 Appraisal Report in respect of the M4 Corridor Enhancement Measures (see paras 45 and following below) adds (at para.1.2):

> "WelTAG aims to ensure that transport proposals contribute to the wider policy objectives for Wales. Three pillars of sustainability, known as the Welsh Impact Areas, underlie policy in Wales. These are:
>
> > '• Economy: this reflects the importance of a strong and developing economy for Wales;
> >
> > • Environment: this reflects both the legal requirements and desire to protect and enhance the condition of the built and natural environment; and

> • Society: this reflects the desire to address issues of social exclusion and to promote social justice and a high quality of life for Welsh people.'"

20. WelTAG provides a mechanism for "providing decision-makers with information about all significant impacts from proposals (positive and negative)" (para.45 of the Statement of Martin Bates dated 30 January 2015). It is structured into the following stages (para.2.2.3 of WelTAG):

> "• A **planning** stage which includes problem identification/proposal rationale, objective setting (these are interactive processes), option development and testing;
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> • An **appraisal** stage, which involves a two-stage process;
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> • A **post appraisal** stage which involves both on-going monitoring of performance and evaluation/value for money assessment; and
>
> • **Participation** (including **consultation**), which occurs at several stages in the planning process (from setting objectives through to proposal appraisal and quite possibly implementation) and should start being considered from the outset."

21. The planning stage has the function of establishing the conditions in the area, and its transport problems and opportunities; and to generate objectives for the steps that follow (para.4.2.1). In the appraisal process, the Transport Planning Objectives ("TPOs") are key. The guidance emphasises:

> "4.2.2 Good practice in transport planning requires that the planning of any transport intervention is objective-driven. The planner starts by establishing the final outcomes to be achieved, which are formulated as Transport Planning Objectives (TPOs), and then develops solutions – which will help to achieve these objectives.
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> 4.2.3 Therefore, the planning process starts from problems and opportunities, then sets objectives, and then identifies the best ways of achieving these. An important implication of this is that the planner has to consider a diverse range of alternatives, and not start from an implicit objective of promoting a particular proposal. A planner who thinks that WelTAG is simply a new hoop through which to get their preferred proposal is missing the point of transport appraisal and this guidance."

The guidance stresses that the starting point of the process is "the identification of transport problems [such as traffic congestion], constraints and opportunities…" (para.4.3.1), and that TPOs setting out what it is sought to be achieved "underpin ***9*** the whole development and appraisal process by allowing the planner to test whether or not a proposal is

likely to succeed in addressing the identified problems …" (para.4.4.1). The process is therefore underpinned by the TPOs, as well as the Welsh Impact Areas.

22. The two-stages into which the appraisal process is subdivided are described as follows (para.2.2.9):

> "Stage 1 is always required and has the primary purpose of testing and screening options.
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> Stage 2 is only applicable to schemes and provides a fuller, more evidence based, appraisal of the options selected for future development by Stage 1."

The Evolution of the Plan

23. Transport is a devolved function under the Government of Wales Acts. Until 1999, responsibility for motorways in Wales rested with the United Kingdom Government, initially the Minister of Transport and later the Secretary of State for Wales. On 1 July 1999, under the Government of Wales Act 1998 and para.2 of the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672) , that function passed to the Welsh Government, being performed by the National Assembly for Wales until 1 May 2007, when it was transferred to the Welsh Ministers by s.162 of, and para.30 of Sch.11 to the Government of Wales Act 2006 . Town and country planning is similarly a devolved function, now resting with the Welsh Ministers.

24. Plans for a new motorway between London and South Wales were announced by the United Kingdom Government Minister of Transport in 1956. It was built in sections, that were later joined together. The Severn Bridge was opened in 1966, and, a year later, a motorway was opened between what are now M4 Junctions 24 and 28 as, effectively, a Newport by-pass. That section included the first motorway tunnels in the United Kingdom, at Brynglas. Since then, various steps have been taken to improve that stretch.

25. The result of this process of evolution is that the section of the motorway between M4 Junctions 23 and 29 around Newport falls short of modern motorway design standards. It has many lane drops and gains, as a result of some sections (including the Brynglas Tunnels) being two-lanes and others being three-lanes. Parts have no hard-shoulder, because of the incorporation of the original hard-shoulder into the highway itself. There are frequent junctions.

26. Coupled with these design issues, traffic flows are very high. In addition to through traffic, this part of the M4 is characterised by large volumes of local traffic. Martin Bates is a Project Director in the Transport Infrastructure Delivery Division of the Welsh Government, having previously had a similar role in the Welsh Office. He has been closely involved with developing proposals for the road transport system around Newport since 2005. In his statement of 30 January 2015, he sets out the history of the M4 around Newport, and how the challenges it presents have been considered from time-to-time. This history is largely uncontroversial, and this part of the judgment is indebted to it. Mr Bates says—again, uncontentiously—that, once traffic flows exceed 80 per cent of road capacity, "operational problems" can be expected (para.17 of his statement). By 2012, the traffic flows on the M4 around Newport during peak times exceeded 90 per cent, ***10*** being 98 per cent between M4 Junctions 27 and 28. In practice, this means that the motorway is congested during weekday peak periods, with traffic jams and frequent incidents which can cause very severe delays. The motorway and surrounding roads are not resilient in transport planning terms: they cannot cope with changes in demand or conditions, such as bad weather. In addition, the motorway as it currently operates gives rise to high levels of noise and air pollution.

27. By 2022, if nothing more is done than that which is already planned and committed, traffic flows are forecast to exceed 80 per cent for the whole stretch from M4 Junctions 24 to 29 and to exceed 100 per cent between Junctions 26 to 29. By 2037, the traffic flows are expected to exceed 100 per cent of capacity between Junctions 24 to 29. Once traffic flow exceeds 100 per cent capacity, severe operational problems are of course inevitable, the affected part of the road network effectively seizing up altogether.

28. These problems have been recognised since the 1980s. In March 1989, the South Wales Area Traffic Study identified the need for substantial improvements to address the growing capacity issue for the section between M4 Junctions 23 and 29. It concluded that, because of topographical and other physical restrictions, there was no obvious opportunity to widen the existing motorway and no obvious corridor for a new road to the north of Newport.

29. Routes to the south of Newport were therefore investigated; and, in February 1992, a new three-lane relief road motorway from Magor to Castleton was included in the Government's plan for new highway schemes, "Roads in Wales: Progress and Plans for the 1990s: 1992 Supplement" (which was the forerunner of the Welsh Trunk Road Forward Programme). Expert consultants (Ove Arup & Partners ("Arup")) had been engaged by the Welsh Office to assess the options, including corridors to the north and south of Newport and simple widening and improvement of the current motorway. They concluded that a new motorway to the south was the preferred option, corridors to the north offering less traffic relief, having high costs risks, providing a major intrusion into communities and landscape, and being less compatible with existing planning strategy and policy. The Countryside Council for Wales was concerned about the impact of any southern route on the Gwent Levels SSSIs, and it requested a report providing a detailed explanation for the assessment of the northern options and the reasons for discarding them. A further review was carried out, but northern routes were again rejected, on the basis that (amongst other things) they would have a more severe impact on the built environment and the requirement for a new crossing of the River Usk would be a major severance feature.

30. Corridors to the north of Newport were therefore discarded in 1993 and, as Mr Bates says (para.33 of his statement):

> "Since then, no one has credibly suggested that a route to the north of Newport would be appropriate."

The Claimant does not suggest that the Minister (or her predecessors) erred in not considering northern options further.

31. Following consultation, the preferred route for the M4 relief road was announced by the Secretary of State for Wales on 12 July 1995. A TR111 Notice was issued the same day, identifying a 134m wide corridor within which, to avoid any development that might create a risk that the proposed road would not be deliverable, any development decisions had to be referred to the Government for ***11*** consideration. That route avoided some protected areas (such as the Severn Estuary SAC), but crossed the Gwent Levels SSSIs. However, says Mr Bates (para.34), the route was identified to "minimise the potential impacts on the Gwent Levels SSSIs". The preferred route was modified slightly in 1997, to enable the development of an employment site at Duffryn.

32. In 1999, responsibility for motorways was transferred from the United Kingdom Government to the Welsh Government, as I have described (para. 23 above).

33. In 2004, the Welsh Government Minister for Economic Development and Transport ordered a review of transport programmes, to ensure a strategic fit with new core planning policy documents, namely "Wales: A Better Country" and "The Wales Spatial Plan". That review confirmed that additional capacity was required on the M4 motorway. On 7 December 2004, the Minister announced that the Welsh Government was proceeding with proposals to develop a new section of the M4 south of Newport.

34. Those proposals were subjected to a further preferred route review between 2004 and 2006, which specifically and expressly took into account changes such as the strengthening of protection for SSSIs by the 2000 Act (particularly the Welsh Government's duty under s.28G of 1981 Act , introduced by the 2000 Act), the designation of the River Usk as an SAC in 2004, and the ending of steel production at Llanwern Steelworks. Indeed, reading the Arup review report dated April 2006 as a whole, it is clear that the s.28G duty was a main driver of the review (see, e.g., para.3.2); and it expressly referred to the increased importance of SSSIs consequent upon the introduction of s.28G which it expressly took into account. The conclusion of the review was that the route corridor south of Newport remained the preferred option; but, in accordance with the Welsh Government's duty under s.28G , it recommended revisions to the route protected by the 1997 TR111 Notice, moving the preferred route north ("Route C4") to reduce the impact on and severance of the Gwent Levels SSSIs. It was noted that that new route reduced the length of SSSIs crossed and reduced the overall severance of the SSSI from the Caldicott Level. A more southerly alignment was discarded because it "would be contrary to the Ministerial commitment to deliver the lowest possible long-term environmental impact". In announcing the revisions on 19 April 2006, the Minister said:

> "There is a clear need for additional capacity along the M4 corridor in South-East Wales, essentially to reduce congestion along this strategic gateway and remove the obstacles to greater prosperity the length of the M4 corridor through to Swansea and West Wales. … The changes to the 1997 Protected Route offer a clear benefit to the environment by taking the route northwards and where possible onto land previously of industrial use thereby reducing its impact on the Gwent Levels including the [SSSIs]" .

That same day, a revised TR111 Notice was published, replacing the 1997 Notice, to protect the revised preferred C4 Route (which is essentially "the Black Route" eventually adopted in the Plan: see [54] below).

35. In 2009–10, various WelTAG Stage 1 Appraisals of the project were undertaken, which led to objectives for the M4 and transport system around Newport being identified by April 2009. These are set out as an appendix to an Arup draft document dated 4 May 2010, in the form of twelve TPOs which, as Mr Goodman emphasised in reply, have never substantively changed: with the exception of new TPO 15 ("A ***12*** cultural shift in travel behaviour towards more sustainable choices") which has been added, they are in substance the same as the TPOs in the adopted Plan (set out in [62] below). The outcome of these 2009–10 Stage 1 appraisals was that a new M4 route to the south of Newport was recommended for further appraisal (para.50 of Mr Bates' statement).

36. However, the project did not proceed to Stage 2, because, in a written statement in July 2009, the Deputy First Minister Ieuan Wyn Jones AM announced that the new M4 relief motorway was not affordable; although the statement accepted "the need to urgently address safety and capacity issues on the existing route" through the introduction of "a range of measures". That statement was reflected in "The National Transport Plan 2010–15", published in March 2010, which set out the transport schemes the Welsh Government would progress over the five year period. That did not include the new M4 relief motorway; but it said that, given the continuing capacity and safety problems, the Welsh Government would:

> "Deliver a package of measures designed to improve the efficiency of the M4 in South-East Wales, including public transport enhancements, making the best possible use of the motorway and improving the resilience of the network."

This became known as the M4 Corridor Enhancements Measures ("CEM") Programme.

37. Two things are noteworthy about this development in the funding position. First, the project for a new M4 relief motorway was apparently not altogether abandoned. The Arup draft report dated May 2010 says:

> "In order to achieve the above [i.e. the TPOs], Arup was asked to investigate potential schemes to improve the operation of the existing M4 around Newport, as part of the New M4 Project. Such schemes are to be implemented *as interim measures* to:
>
> • Make best use of existing infrastructure and capacity;
>
> • Improve the resilience of the network; and
>
> • Improve public transport.
>
> A strategy was thus required to embrace the above three themes and to ensure that any measures put forward would contribute effectively to one or more of those themes." (emphasis added)

It was therefore recognised that, in due course, a longer-term solution to the identified problem would or may be required. However, future funding (even after the five years of the 2010–15 plan) was far from guaranteed; and Mr Bates (at para.52 of his statement) accepts that:

> "The M4 [CEM] Programme was therefore initiated by the Welsh Government and this aimed to create an affordable package of measures which could be delivered in phases *as an alternative to a new motorway* , to deal with the capacity, resilience, safety, and sustainability problems on the M4 around Newport." (emphasis again added).

38. Second, the funding problem was not simply a question of the amount of money that a new relief road motorway would cost. A motorway such as that proposed, by its nature, has to be delivered in a single stage. The money for it therefore has to be available in a single stage. The cost cannot be spread by phasing the ***13*** development. The Welsh Government therefore looked to packages of measures which (as Mr Bates says) could be delivered in phases.

39. Under the M4 CEM Programme, over one hundred possible measures were identified and considered in the course of public consultation, including corridor efficiency measures, widening the existing M4 between Junctions 24 and 29, hard shoulder running on the existing M4, bus priority on the M4, reduced public transport fares, a new lagoon barrage link, a new dual carriageway road to the south of Newport, and improvements to existing roads including the A48 Southern Distributor Road (a trunk road currently running between M4 Junctions 24 and 28) ("the SDR") and the A4810 Steelworks Access Road (which runs between M4 Junction 23A and the SDR) ("the SAR"). It became apparent that no single solution would address the problems, and combinations of measures were therefore considered.

40. On 6 March 2012, the Welsh Government issued a consultation document, "M4 Corridor Enhancement Measures Magor to Castleton (M4 CEM): Easing the Flow" ("the March 2012 CEM Consultation Document"). The document describes the transport problems with the M4 around Newport, and the TPOs already identified (which had increased to fifteen, in the same terms as the TPOs in the eventually adopted Plan: see [62] below), which it refers to as "Goals". Under the heading, "Developing strategic approaches to achieving the M4 CEM Goals", the document said:

> "No single solution delivers all the Goals, but through this methodology, measures that contribute towards a combination of compatible options, or 'Packages', have been identified. The Packages combine public transport, highway and other travel solutions.
>
> The strategic approaches adopted by the Welsh Government to reduce congestion and to delivering the M4 CEM Goals all involve creating some new highway capacity on the M4, and/or elsewhere in the highway network between Magor and Castleton. However traffic congestion will not simply disappear as a result of capacity increase. This is because the development of new or up-graded, convenient and reliable roads tends to encourage more people on to them. This results in additional vehicles using additional road capacity (not a stable volume of vehicles using more/emptier roads).
>
> To avoid this and to curb the rising demand for more highway capacity and to out transport onto a carbon reduction pathway, the M4 CEM Programme proposes increasing and improving the opportunities for access, and for travel and transport using alternative modes, such as trains and buses (public transport), cycling and walking. We also propose minimising the need for certain types of journey.
>
> To enable the sustained productivity and competitiveness of Wales, and the South East Wales region in particular, highway infrastructure must also be developed …" .

41. As a result, the approach which the Welsh Government "may" take was described as one involving one of three highway infrastructure options, plus public transport measures, plus common measures, which (it was said) "could form part of the M4 CEM Strategy". It was said that studies had shown that "new or improved public transport measures are likely to have only a minimal effect with respect to reducing traffic on the M4" of less than 3 per cent (para.8). The common measures were ***14*** those that merely supported the strategic highway capacity and public transport measures. The key element was the highway infrastructure changes suggested, of which there were four:

i) Option A: The construction of a new, high quality dual carriageway road south of Newport through the Gwent Levels SSSIs. Although the cost was estimated at £830m, unlike a motorway it could be delivered in phases.
ii) Option B: Improvements to the SDR from M4 Junctions 24 to 28, mainly by the removal of (and improvements to) traffic islands on that road. The improvements would be "at-grade", i.e. at the same level as the main road, at an estimated cost of £45m.
iii) Option C: Grade separated junction improvements to the same A48 road, i.e. the alignment of junctions at different levels by using (e.g.) flyovers or underpasses, at an estimated cost of £300m.

iv) Option D: Widening of the M4 between Junctions 24 and 29 to four lanes per carriageway, including providing an additional tunnel at Brynglas at an estimated cost of £550m.

42. The public transport measures—which comprised mainly increasing rail and bus services—were costed at £300m capital expenditure with ongoing subsidy costs of a similar amount over a 60 year period.

43. In respect of each of these options, the consultation sought views on the extent to which the option would address the problems identified and achieve the TPOs. It also sought views of prioritisation of TPOs. It was said that, once the consultation period had ended, the Minister would "decide which measures should be pursued as the best strategy aimed at addressing the problems of capacity, resilience, and safety, and sustainable development on the M4 Corridor between Magor and Castleton in the light of the responses to the Consultation" (para.11).

44. The public consultation was held between March and July 2012. In November/December 2012, the Welsh Government also consulted on a number of other preliminary documents, namely a Health Impact Assessment, an Equality Impact Assessment, a Strategic Habitats Regulations Assessment Screening Report, a Strategic Habitats Regulations Statement to Inform Appropriate Assessment and an Environmental Report which purported to be an SEA report. The SEA Report was prepared on the same options basis as the March 2012 CEM Consultation Document. It was immediately met by a threat of judicial review by (amongst others) the Claimant, on the basis that the report did not comply with the SEA Directive because it failed to identify, describe and evaluate reasonable alternatives. Mr Bates says (at para.61 of his statement) that it was subsequently recognised that it could not be an environmental report for the purposes of the SEA Directive or the 2004 Regulations , because it did not set out a preferred strategy (or, indeed, as the pre-action protocol letter alleged, reasonable alternatives). Before me, it is common ground that that report did not form part of any valid SEA process, and the Welsh Ministers do not rely upon it as such.

45. In March 2013, following that consultation, all of the M4 CEM options were considered in a WelTAG Stage 1 Appraisal Report, again prepared by Arup. This was, of course, an internal appraisal report, not the subject of consultation; and, although, as I have described, the criteria by which the WelTAG appraisal was performed reflected to an extent SEA Directive criteria, it was not part of any SEA process. For each option considered, the report included an appraisal of the ***15*** November 2012 Environmental Report and the comments received on the consultation on that document (see para.7 and the Appraisal Summary for each option).

46. The appraisal's conclusions on the effects of the various highway infrastructure options on the problems with M4 around Newport were effectively set out in paras 5.5 and 11.1.

i) Option B: It said that Option B "would have little impact on the [Brynglas] tunnel traffic, and slightly reduces the total across the Usk screenline (indicating network disbenefit)"; and concluded that "no relief is likely to be provided to motorway congestion under Option B". It consequently recommended that Option B should not be taken forward for further appraisal.

ii) Option C: It was acknowledged that Option C would likely have some benefits, but these would not be focused on relief to the motorway. Transport modelling indicated "very little relief to motorway congestion as a result of Option C". Option C "would reduce traffic through the tunnel by about 9% in the opening year, although by 2035 the tunnel traffic volume would still be over 10% higher than the 2020 Do-Minimum total" and "by the design year (2035) analysis has shown that the traffic levels through the Brynglas tunnels under Option C would be reduced by only some 4% compared to a do-minimum scenario". It consequently recommended that Option C should not be taken forward.

iii) Option D "would increase the volume of traffic through the tunnels by about 20,000 vehicles per day (20%) in 2035". There would of course be four-lane carriageways through the tunnels, which was an inherent part of the option; but that would simply mean that the pinch-point would be moved westwards to Junction 28. The appraisal said: "Option D would be expected to experience capacity problems on the motorway west of the tunnels by the design year…", with

the section of motorway between Junctions 26 and 27 operating at 106 per cent capacity which was "likely to result in severe operational problems". It consequently recommended that Option D should not be taken forward.

47. Therefore, the appraisal concluded that, by the design year (2035), Options B, C or D (none of which involved a road across the Gwent Levels SSSIs) would provide no significant relief from the current identified problems with the M4. Indeed, in respect of each case, by that date the problems sought to be addressed would be as bad as or worse than they are now.

48. Of public transport, it said that studies suggested that a 50 per cent increase in public transport use could result in a less than 3 per cent decrease in traffic volumes on the M4. Thus it concluded that a high level assessment suggests that "public transport enhancements will not address the problems of the M4 CEM Programme"; but such enhancements would have wider benefits and they might usefully be pursued through an initiative by another team, the South East Wales Integrated Transport Task Force. It also supported various "common measures", i.e. measures that would support any highway option chosen.

49. Of Option A (which was the only option which involved a new road across the Gwent Levels SSSIs), the appraisal said that: ***16**

> "Option A has a much greater effect on reducing traffic volumes through the Brynglas Tunnels than either of the SDR improvement options, with a reduction of over 50% in the opening year. It also produces the highest total volume of traffic crossing the Usk screenline, suggesting that it offers greater capacity/network resilience than other options."

Option A was referred to as "the favoured option"; but the final conclusion of the appraisal was that *only* Option A, together with public transport enhancement and common measures, was "worthy of further consideration and more detailed appraisal". Public transport measures would have no material effect on the M4 problem (and should be considered in a different forum), and common measures were only supportive. The only option that addressed the identified problems was the highway option, Option A.

50. But, again, that option was not progressed; because there was then another major development with regarding to funding. As I have described, the reason why new motorway options had been removed from the table in 2009 was not simply cost. By its nature, a motorway has to be delivered as a single development; other options might be delivered in phases, so that the capital costs can be spread over a period of development. The Welsh Government determined that it could not afford a single stage development such as a motorway. However, from 2011, there were discussions between the Welsh Government and HM Treasury, as well as the work of the Commission on Devolution in Wales, which considered the devolution of fiscal powers and the borrowing powers of the Welsh Government. By June 2013, it had become clear that the Welsh Government would be able to use its borrowing powers to fund a solution to the problems of the M4 round Newport that involved the costs of a single development new motorway. It was again possible to consider new motorway options. Indeed, the Minister's written statement of 26 June 2013 made clear that that is what the Welsh Government proposed to do. She said:

> "As a result of ongoing discussions with the UK Government there has been a significant change in the assessment of the affordability of a major enhancement of the M4.

> Building on the extensive development and consultation work undertaken on M4 [CEM], we will be consulting formally over the summer with [the NRB] in order to go out to public consultation this September with a finalised draft Plan and [SEA] Report.
>
> If implemented, the draft Plan would lead to a motorway being built south of Newport."

51. Mr Goodman, rather pejoratively, described this as a policy "U-turn" by the Welsh Government; but, in my view, that is not a fair description. A new motorway south of Newport had always been the Government's preferred option, but it had not been viable in the period 2009–13 because funding was not available for such an option. That is why, during that period, they investigated other options. In substance, it was not the Welsh Government's underlying policy or preferences that changed in 2013: it was the availability of funding.

52. With this development, a further WelTAG Stage 1 Appraisal had been conducted on 24 June 2013, which was clearly the basis upon which the Minister announced the motorway route south of Newport as, again, the preferred option. Mr Bates makes clear that the only change that prompted the fresh appraisal was: ***17**

> "… the availability of funding, which enabled a solution to the problems on the M4 to be delivered in a single phase. The problems faced and the potential options for solving them had otherwise not changed." (para.76 of his statement).

The problems sought to be addressed had not changed. Nor had the objectives: the TPOs were reappraised, but were considered still to be "wholly relevant" (para.1.3 of the June 2013 WelTAG Appraisal); and did not change at all from the March 2012 CEM Consultation/March 2013 WelTAG Appraisal.

53. With regard to options, the June 2013 WelTAG Appraisal set out (in para.6) the conclusions to the March 2013 WelTAG Appraisal and in particular why it recommended that Options B, C and D be discarded, namely (in short):

> "[N]o relief is likely to be provided to motorway congestion under Option B….
>
> Whilst Option C would be likely to result in benefits, these would not be focused on relief to the motorway. By the design year (2035), analysis has shown that the traffic levels through the Brynglas tunnels under Option C would be reduced by only some 4% compared to a do-minimum scenario….
>
> Traffic forecasts for Option D have indicated that, by the design year (2035), the section of motorway between Junction 26 and Junction 27 is likely to be operating some 6% above capacity in the westbound direction during weekday PM peak. This would be likely to result in severe

> operational problems. The lack of an alternative route will thus result in motorway capacity problems and network resilience issues."

The change in available funding—the only change since March 2013—did not improve any of those options.

54. The June 2013 WelTAG Appraisal considered three highway options (designated by the colour of the proposed new highway route on the appraisal plan) and two other sets of measures:

i) "The Red Route": In essence, Option A from the earlier appraisal. A new section of dual carriageway to the south of Newport following the route of Option A in the March 2013 Appraisal.
ii) "The Purple Route": A new three-lane motorway to the south of Newport along a similar route to the Red Route, albeit with minor differences to reflect the requirements of motorway standards.
iii) "The Black Route": A new three-lane motorway to the south of Newport following the route protected by the 2006 TR111 Notice (see [34] above).
iv) Public transport measures.
v) Complementary measures that would be implemented alongside each of the above, which built on the M4 CEM common measures, including:

a) Reclassification of the existing M4 motorway between current M4 Junctions 23 and 29 (not applicable to the Red Route option, which would leave the current M4 in place).
b) An M4/M48/B4245 connection.
c) Providing cycle-friendly infrastructure.
d) Providing walking-friendly infrastructure. ***18**

The Red, Purple and Black Routes were common in their eastern part, being routed south of the SAR. Each crossed the Gwent Levels SSSIs.

55. The June 2013 WelTAG Report provided a comparative assessment of these options, concluding that the Welsh Government should progress the preparation of a draft Plan on the basis of the Black Route. With regard to the other options:

i) The Red Route: The Report recommended that the Red Route should not be taken forward for further appraisal. In the summary, it said (para.13.1.1):

> "The dual 2-lane all-purpose road on the Red Route alignment does not perform as strongly as the motorway options, scoring less well than the motorway options against 13 out of the 15 [TPOs].
>
> The Red Route option has significantly reduced capacity compared with the two motorway scenarios and attracts less traffic. By 2035, the Red Route would be expected to be operating at or near capacity and, as such, would attract up to 20% less traffic than both motorway options.
>
> Provided that funding can be made available to deliver the new road as a single project, then a motorway solution will offer greater value for money and better meet the objectives for the project."

ii) The Purple Route: The Black Route was preferred to the Purple Route because, although both performed similarly against the TPOs, the Black Route was expected to produce higher economic benefits; its route was already protected, and so there was less deliverability risk; and the Purple Route went through a landfill site which also had attendant risks.

iii) Public transport: The appraisal showed that public transport improvements would contribute to other transport objectives, but they would likely have only a minimal impact in terms of reducing traffic on the M4 and thus relieving the traffic problems associated with that. It recommended that public transport initiatives be taken up separately by other delivery teams within the Welsh Government.
iv) Common and Complementary Measures: It recommended that these should be considered further as part of Stage 2 appraisal.

56. The Appraisal Report dealt with environmental matters quite shortly, on the basis that these would be dealt with in due course in an SEA Report. However, it said that all three highway options "result in moderate to large impacts on the environment (biodiversity, landscape and townscape in particular" (p.71). Of biodiversity, it said:

> "The new motorway would cross approximately 8.5km of [SSSIs] resulting in a loss of 60ha (less than 1.5%) of the total SSSI. The principal ecological interest of the Gwent Levels SSSI lies in the reen drainage system [i.e. the system of drainage channels]."

57. These options formed the basis of an SEA Report that was published for consultation on 23 September 2013. The proposed alternatives to be assessed in the SEA Report were the subject of a scoping report which was put out to consultation with statutory consultees; but no comments were received that additional alternatives should be considered. A further option ("the Blue Route"), to which I shall return (see [67]–[70] below), was raised in correspondence from ***19*** July 2013; but it was not detailed by its proponents until December 2013, and was not included in the SEA Report.

58. The purpose of the SEA Report consultation was set out on the frontsheet:

> "We want your views on our draft Plan which aims to address transport related problems on the M4 around Newport."

59. The report identified a "draft Plan" and "reasonable alternatives" to that option. The glossary gave the following definitions:

> "draft Plan: This is the Welsh Government's preferred strategy to solve transport related problems affecting the M4 Corridor around Newport in South Wales. If implemented, the draft Plan would lead to a new motorway (Black Route) being built to the south of Newport, alongside some complementary highway management, walking and cycling initiatives. Assessments of the draft Plan compare it to reasonable alternatives as well as the Do Minimum scenario."
>
> "Reasonable alternatives: These are reasonable alternatives to the draft Plan, being other options that the Welsh Government considers could solve transport related problems affecting the M4 Corridor around Newport in South Wales. If implemented, the reasonable alternatives would

lead to either a new dual carriageway (Red Route) being built to the south of Newport, or a motorway solution along a similar alignment (Purple Route) alongside some complementary highway management, walking and cycling initiatives."

60. The "transport related problems" referred to were set out in detail in para.2.2, and summarised in para.1.2 in similar terms to those set out above at paragraphs 25 and following. I need not set them out in detail here. They were not only described as "transport related", but they are each in substance related to the problems with regard to the M4 around Newport.

61. Given these problems, the aims of the Welsh Government were set out in para.2.3:

"The aims of the Welsh Government for the M4 Corridor around Newport are to:

1. Make it easier and safer for people to access their homes, workplaces and services by walking, cycling, public transport and road.
2. Deliver a more efficient and sustainable transport network supporting and encouraging long-term prosperity in the region, across Wales, and enabling access to international markets.
3. To produce positive effects overall on people and the environment, making a positive contribution to the overreaching Welsh Government goals to reduce greenhouse gas emissions and to making Wales more resilient to the effects of climate change.

The draft Plan aims to help to achieve or facilitate these aims as part of a wider transport strategy for South East Wales, as outlined within the Prioritised National Transport Plan."

62. The TPOs or "Goals" of the draft Plan were dealt with in para.2.4, as follows:

"If the draft Plan (or any reasonable alternative to the draft Plan) is successful, its success will be measured by how well it achieves the following goals: ***20**

1. **Safer, easier and more reliable travel east-west in South Wales.**
2. Improved transport connections within Wales and to England, the Republic of Ireland and the rest of Europe on all modes on the international transport network.
3. More effective and integrated use of alternatives to the M4, including other parts of the transport network and other modes of transport for local and strategic journeys around Newport.
4. **Best possible use of the existing M4, local road network and other transport networks.**
5. **More reliable journey times along the M4 Corridor.**
6. Increased level of choice for all people making journeys within the transport Corridor by all modes between Magor and Castleton, commensurate with demand for alternatives.
7. **Improved safety on the M4 Corridor between Magor and Castleton.**
8. Improved air quality in areas next to the M4 around Newport.
9. Reduced disturbance to people from high noise levels, from all transport modes and traffic within the M4 Corridor.
10. Reduced greenhouse gas emissions per vehicle and/or person kilometre.
11. Improved travel experience into South Wales along the M4 Corridor.

12. An M4 attractive for strategic journeys that discourages local traffic use.
13. Improved traffic management in and around Newport on the M4 Corridor.
14. Easier access to local key services and residential and commercial centres.
15. A cultural shift in travel behaviour towards more sustainable choices."

The emboldened TPOs were most selected as priorities in the 2012 M4 CEM Consultation exercise (see [40]–[44] above).

63. In the narrative of the SEA Report, the relevant history of the problems and proposals for their resolution was set out. It was explained that the March 2013 WelTAG Appraisal concluded that "… the following measures are worthy of consideration", namely the Red Route, public transport enhancements and common measures. The options considered in the June 2013 WelTAG Appraisal were set out, and it was said that that appraisal concluded that the Black Route and complementary measures would "best achieve the goals and address the problems of the M4 Corridor around Newport…" (para.2.6.2). That was the preferred option. The SEA Report then set out the draft Plan, and the Red Route and the Purple Route alongside complementary measures as reasonable alternatives.

64. The 2013 SEA Report expressly took account of the 2000 Act as a relevant statute (Table 5). Section 6 of the report deals with Environmental Objectives, which include: "Ensure that biodiversity is protected, valued and enhanced". Section 7 deals, at some length, with the assessment of the significant effects of each SEA option (i.e. the preferred route and reasonable alternatives), as required by the SEA Directive . The details of the effects of the Black Route option are set out in para.7.2 (which refers to the reen system being the principal ecological interest in the SSSIs) and Table 16 (which refers to mitigation measures such as new reens, actively managing the SSSIs more effectively and project-level measures designed to ***21** facilitate animal movements etc). All of this is focused on the potential harm to the Gwent Levels SSSIs, and mitigation in respect of that harm. That part concludes:

> "Any scheme would be required to integrate necessary measures to avoid, reduce and offset in addition to delivering enhancements. The net benefit for biodiversity is considered to be positive in the long-term. However, considering the importance of the sites and features that may be affected the significance of effect has been determined as minor negative to account for any short term to medium term effects."

The high level mitigation measures so far as biodiversity is concerned are set out in s.8 .

65. The SEA Report was published in September 2013, with a draft Plan Consultation Document (which set out in more detail the appraisal of the draft Plan and reasonable alternatives), and associated assessments including the March 2013 and June 2013 WelTAG Appraisals. A dedicated website was set up, with an information hotline and email address, and all of these documents were put onto that website, as well as hard copies being deposited in libraries and local authority offices. Two stakeholder workshops and ten public exhibitions were held across Newport. The consultation period concluded on 16 December 2013.

66. On 11 July 2014, having taken into account the consultation responses, Mr Bates recommended the Black Route to the Minister, in a submission about which no discrete complaint is made. On 16 July 2014, the Minister announced the decision to adopt the Plan. It is, of course, that decision which the Claimant challenges in this claim.

67. As I have indicated (at [57] above), a further possible option was raised by various bodies after the Ministerial announcement in June 2013 had not only put motorway options back onto the agenda but indicated that a new motorway south of Newport was the preferred option. The first letter was from Wildlife Trusts Wales to the Minister on 12 July 2013, which expressed concern about the proposed new motorway, and suggested that an upgraded SAR and SDR would provide a solution to the M4 problems at much less cost. It said that, with the Institute of Welsh Affairs and the Chartered Institute of Logistics and Transport Wales, they had commissioned a report from Professor Stuart Cole, a transport economics consultant. On 16 August 2013, RSPB Wales wrote to Mr Bates, expressing concern that not all reasonable alternatives had been included in the scoping report, and they specifically referred to the Blue Route and the commissioning of Professor Cole to report upon it. Professor Cole also referred to the Blue Route as an option in his evidence to the National Assembly for Wales Environment and Sustainability Committee during its enquiry into proposals for the M4 in the Newport area.

68. Professor Cole's report ("The Blue Route—A cost effective solution to relieving M4 congestion around Newport") was published on 7 December 2013. The Blue Route comprised upgrading the SAR to a two-lane dual carriageway of expressway/motorway standard, a freeflowing junction between the SAR and the SDR, grade improvements to the junctions along the SDR, and freeflowing junctions between the dual carriageway and the M4 at junctions 23A and 28. Thus it was proposed that there should be a high quality road, short of a motorway, running across the top of the Gwent Levels SSSIs and through the centre of Newport, which would be an alternative route to the current M4 which would remain. I do not doubt the credentials of Professor Cole—which are not challenged by the Defendant, and ***22** which are on any view impressive. However, this report was relatively modest in length (16 pages) and detail. But its conclusion was that the Blue Route would satisfy traffic capacity requirements between 2018 (by when Professor Cole considered it could be complete) until 2025. The report costed the package at £380m.

69. With eight other alternatives suggested during the SEA consultation exercise, it was appraised by Arup, the results of that appraisal appearing in a document published with the SEA Post-Adoption Statement, with the descriptive title "M4 Corridor Around Newport: The Plan: Strategic Appraisal of Alternatives Considered During Appraisal" ("the Post-Adoption SAA"). Although it was noted that upgrading the SAR and SDR as individual proposals had been discarded in 2010 as, looked at separately, neither fulfilled the objectives set for the Plan, Arup examined the Blue Route which combined the two components.

70. The Blue Route is appraised in paragraph 4.1. As Professor Cole's report put forward a high level concept of the relevant route, Arup assessed a range of possible scenarios, namely (i) the full proposed package (which Arup costed at more than £800m), (ii) the package without the freeflowing connections with the M4 (which Arup costed at more than £600m), and (iii) upgrading with a limited budget of £380m, namely just grade separated junction improvements along the existing SDR. These three scenarios were the subject of detailed analysis, the appraisal executive summary concluding:

> **"The 'Blue Route'**
>
> Appraisal indicates:
>
> • It would provide some local accessibility benefits and a degree of increased network resilience, particularly at times of accidents and delays on the M4.

> • It would not address the problems (i.e. the need for the scheme) or achieve the objectives for the M4 around Newport, whilst it performs poorly compared to the draft Plan (Black Route) appraisal.
>
> • The cost of a Blue Route that aims to be attractive to motorway users is likely to cost more than £600m, whilst an optimal solution would cost more than £800m, excluding any allowance for land and compensation.
>
> • Legal agreements between the Welsh Government and Tata Steel and St Modwen require access points to their land and operational areas. Therefore to upgrade the SAR to 'expressway' or motorway standard would require a completely new scheme to be developed that would involve land and property acquisition to provide the necessary motorway standard and the necessary service roads and junctions to serve existing and planned residential and employment land developments.
>
> • Forecasts of future traffic volumes show even with the optimal Blue Route in place, operational problems would continue to be experienced around Newport.
>
> • The Blue Route in combination with public transport measures would still not provide sufficient relief to the M4 Corridor around Newport.
>
> • The risks of the Blue Route compared to the Black Route include greater economic, environmental and social impacts on communities, property ***23** and future development land allocations in the urban area of Newport, also resulting in possible job losses and potentially substantial claims for compensation.
>
> • The Blue Route would not provide a long term solution to the identified (and acknowledged) problems associated with traffic congestion and journey time variability on the motorway around Newport.
>
> The Blue Route, either as a stand-alone measure or in combination with public transport measures, is not considered to be a reasonable alternative to the draft Plan. The Blue Route, as considered within this document, should not be taken forward for further appraisal."

Therefore, in summary, the Blue Route did not meet the objectives; but, even if it had done so, it would be an unattractive option.

71. In compliance with its obligations under article 9 of the SEA Directive and para.16 of the 2004 Regulations (see [81]–[82] below) the Welsh Government published, with the Post-Adoption SAA, three other documents: the Post-Adoption Statement, a Consultation Participation Report and a Strategic Habitats Regulations Assessment. The Post-Adoption Statement summarised the reasons for adopting the Black Route in the light of the reasonable alternatives considered, and

the potential environmental effects and associated mitigation in similar terms to the SEA Report, as I have already described. There is no discrete complaint about that Statement.

The Law

72. I have already referred to the SEA Directive , and its place in the panoply of European measures designed to protect the environment (see [7]–[12] above).

73. Recital (4) states:

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during the preparation and before their adoption."

74. Thus, the objective of the SEA Directive —particularly important given the need for a broad and purposive approach to the interpretation of such instruments (see, e.g., *Walton v Scottish Ministers [2012] UKSC 44* at [20]–[21] per Lord Reed JSC)—is set out in article 1 , as follows:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

75. I pause there to note that, although the ultimate object of the Directive is the protection of the environment, it seeks to fulfil that very high level object in a ***24** discrete way, namely by ensuring that relevant plans and programmes are subjected to an environmental assessment thus improving decision-making. It imposes purely procedural requirements. Of course, to ensure effectiveness, that environmental assessment must be performed during the preparation of the plan or programme, and before its adoption (art.4(1)); but it imposes no substantive obligations with regard to the decision itself, e.g. to chose the option that will cause the least environmental harm.

76. "Environmental assessment" is a process, defined in art.2(b) as follows:

> "… the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with article 4 to 9 ."

"Environmental report" is defined in the same article as:

> "… the part of the plan or programme documentation containing the information required in article 5 and Annex 1 ."

77. Article 3(1) and (2) identify the circumstances in which an environmental assessment must be carried out. There is no doubt that the Plan in this case requires an SEA assessment under the Directive.

78. Article 5(1) , crucial to Ground 1 in this claim, provides:

> "Where an environmental assessment is required under article 3(1) , an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I ."

79. Annex I includes, as information to be provided in the report:

> "(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;…" .

80. Article 6 requires consultation on the draft plan or programme; and, before adopting any plan or programme, art.8 requires the decision-maker to take into account the environmental report prepared under art.5 and the responses to consultation under art.6 .

81. Article 9 requires the plan or programme as eventually adopted to be made available to the public, together with:

> "… a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to article 5 , [and] the opinions expressed pursuant to article 6 …have been taken into account in accordance with article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with…" .

82. The SEA Directive was implemented in Wales by the 2004 Regulations . They very much follow the form and terminology of the Directive; and it is common ***25** ground that they fully and properly transpose it. I can therefore deal with the Regulations briefly.

83. Regulation 5 (found within Pt 2) effectively replicates art.3 of the Directive . Regulation 12 , reflecting art.5 , provides:

> "(1) Where an environment assessment is required by any provision of Part 2 , the responsible authority must prepare, or secure the preparation of, an environment report in accordance with paragraph (2) and (3) of this regulation.
>
> (2) The report must identify, describe and evaluate the likely significant effects on the environment of –
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives, taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report must include such of the information referred to in Schedule 2 as may reasonably be required…" .

Schedule 2 ("Information for Environmental Reports") mirrors Annex I of the SEA Directive , para.8 being in identical terms to para.(h) of that annex (save for the reference to the examples "such as technical deficiencies or lack of know-how", which is omitted).

84. Regulation 13 requires consultation in line with the SEA Directive requirements; and reg.8 prohibits the adoption of a plan or programme unless the environmental report and responses to the consultation process have been taken into account. Regulation 16 effectively transposes the post-adoption procedures of art.9 of the SEA Directive .

85. The SEA Directive does not seek to define "reasonable alternatives"; although the European Commission guidance in relation to the Directive ("Implementation of Directive 2001/42 on the assessment of the Effects of Certain Plans and

Programmes on the Environment ") ("the SEA Commission Guidance"), to which I shall return (see [103]–[104] below), seeks to give some indicators. It is in any event clear that that Member States have a significant margin of discretion with regard to how "reasonable alternatives" are identified. The European Commission Report on the application and effectiveness of the SEA Directive dated 14 September 2009 (COM(2009) 469) explains at para.3.5, under the heading "Definition of reasonable alternatives (Article 5(1))":

> "Consideration and identification of alternatives in the environmental report is one of the few issues that have given rise to problems in [Member States]. Extensive national guidelines have been developed by some [Member States] in order to provide support for the identification and selection of reasonable alternatives in individual procedures. However, the majority of [Member States] have not defined how this should be done.
>
> Most national legislations do not provide a specific definition of 'reasonable alternatives' or a number of alternatives that must be assessed; the choice of 'reasonable alternatives' is determined by means of a case-by-case assessment and a decision. All [Member States] report that a 'do-nothing' alternative has to be included in the environment report on a mandatory basis."

86. Nor do the 2004 Regulations seek to define or further elucidate "reasonable alternatives". ***26**

87. However, I was referred to a number of authorities in which the term has been considered, notably: *R. (Save Historic Newmarket Limited) v Forest Heath District Council [2011] EWHC 606 (Admin)* (Collins J) (" *Save Historic Newmarket* "); *Heard v Broadland District Council [2012] EWHC 344 (Admin)* particular at [53]–[72] (Ouseley J) (" *Heard* "); *R. (Buckingham County Council and Others) v Secretary of State for Transport [2013] EWHC 481 (Admin)* particularly at [160]–[165] (Ouseley J) (" *HS2* ") (which passage appears to have been accepted as sound by the time the matter went to the Supreme Court: see *R. (Buckingham County Council and Others) v Secretary of State for Transport [2014] UKSC 3* at [47]–[48] per Lord Carnwath JSC); *R. (Chalfont St Peter Parish Council) v Chiltern District Council [2013] EWHC 1877 (Admin)* (His Honour Judge Foster) (" *Chalfont St Peter (Admin Court)* ") and *[2014] EWCA Civ 1393* ("; *Chalfont St Peter (CA)* "); and *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2014] EWHC 406 (Admin)* particularly at [84]–[100] (Sales J, as he then was) (" *Ashdown Forest* "). Although none of these cases concerned Wales, the transposition of the SEA Directive in England (by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633)) is in materially the same terms as the 2004 Regulations for Wales.

88. I shall deal with specific aspects of those cases in due course; but I will first set out propositions concerning "reasonable alternatives" for the purposes of art.5(1) of the SEA Directive which I derive from them, of course read with the Directive itself. In these propositions, I simply refer to a "plan", rather than "plan or programme"; but both are intended to be covered. I refer to the relevant decision-maker as "the authority".

i) The authority's focus will be on the substantive plan, which will seek to attain particular policy objectives. The EIA Directive ensures that any particular project is subjected to an appropriate environmental assessment. The SEA Directive ensures that potentially environmentally-preferable options that will or may attain those policy objectives are not discarded as a result of earlier strategic decisions in respect of plans of which the development forms part. It does so by imposing process obligations upon the authority prior to the adoption of a particular plan.

ii) The focus of the SEA process is therefore upon a particular plan—i.e. the authority's preferred plan—although that may have various options within it. A plan will be "preferred" because, in the judgment of the authority, it best meets the objectives it seeks to attain. In the sorts of plan falling within the scope of the SEA Directive , the objectives will be policy-based and almost certainly multi-stranded, reflecting different policies that are sought to be pursued. Those policies may well not all pull in the same direction. The choice of objectives, and the weight to be given to each, are

essentially a matter for the authority subject to (a) a particular factor being afforded particular enhanced weight by statute or policy, and (b) challenge on conventional public law grounds.

iii) In addition to the preferred plan, "reasonable alternatives" have to be identified, described and evaluated in the SEA Report; because, without this, there cannot be a proper environmental evaluation of the preferred plan. ***27**

iv) "Reasonable alternatives" does not include all possible alternatives: the use of the word "reasonable" clearly and necessarily imports an evaluative judgment as to which alternatives should be included. That evaluation is a matter primarily for the decision-making authority, subject to challenge only on conventional public law grounds.

v) Article 5(1) refers to "reasonable alternatives *taking into account the objectives… of the plan or programme…* " (emphasis added). "Reasonableness" in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an "alternative" to the preferred plan, is not a "reasonable alternative". An option which will, or sensibly may, achieve the objectives is a "reasonable alternative". The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no "reasonable alternatives" to it.

vi) The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process.

vii) However, as a result of the consultation which forms part of that process, new information may be forthcoming that might transform an option that was previously judged as meeting the objectives into one that is judged not to do so, and vice versa. In respect of a complex plan, after SEA consultation, it is likely that the authority will need to reassess, not only whether the preferred option is still preferred as best meeting the objectives, but whether any options that were reasonable alternatives have ceased to be such and (more importantly in practice) whether any option previously regarded as not meeting the objectives might be regarded as doing so now. That may be especially important where the process is iterative, i.e. a process whereby options are reduced in number following repeated appraisals of increased rigour. As time passes, a review of the objectives might also be necessary, which also might result in a reassessment of the "reasonable alternatives". But, once an option is discarded as not being a reasonable alternative, the authority does not have to consider it further, unless there is a material change in circumstances such as those I have described.

viii) Although the SEA Directive is focused on the preferred plan, it makes no distinction between the assessment requirements for that plan (including all options within it) and any reasonable alternatives to that plan. The potential significant effects of that plan, and any reasonable alternatives, have to be identified, described and evaluated in a comparable way.

ix) Particularly where the relevant plan sets a framework for future projects (e.g. a core planning strategy), it may be appropriate and indeed helpful to have an SEA process that is iterative. If so, the appraisal has to evaluate the extant options at each stage in a comparable way. As part of an iterative SEA process, options which may be capable of achieving the objectives may be discarded on the way; but such options cannot be discarded without being subjected to an SEA Directive -compliant assessment. ***28**

x) Although an SEA process that is iterative may be particular appropriate for some framework-setting plans and programmes, it is by no means mandatory. The authority may adopt a non-SEA process to identify those options which meet the objectives. That non-SEA process may itself be iterative.

xi) The objectives an authority sets for plans caught by the SEA Directive are likely to be particularly broad and high level, as well as multiple and varied. An assessment as to whether the objectives would be "met" by a particular option is therefore peculiarly evaluative; but an option will meet the objectives if, although it may not be (in the authority's judgment) the option that best meets the objectives overall (i.e. the preferred option), it is an option which is capable of sufficiently meeting the objectives such that that option could viably be adopted and implemented. That, again, is an evaluative judgment by the authority, which will only be challengeable on conventional public law grounds. However, whilst allowing the authority a due margin of discretion, the court will scrutinise the authority's choice of alternatives considered in the SEA process to ensure that it is not seeking to avoid its obligation to evaluate reasonable alternatives by improperly restricting the range options it has identified as such.

xii) The authority has an obligation to give outline reasons for selecting (i) its preferred option over the reasonable alternatives, and (ii) the alternatives "dealt with" in the SEA process. Alternatives "dealt with" include both (i) reasonable alternatives (which must be dealt with in the SEA process) and (ii) other alternatives (which need not, but may, be dealt with in that process). The reasons that are required are merely "outline". The authority need only give the main reasons, so that consultees and other interested parties are aware of why reasonable alternatives were chosen as such (including, in appropriate cases, why other options were *not* chosen as reasonable alternatives)—and, similarly, why the preferred option was chosen as such.

89. Turning to the authorities, the relative competence of primary decision-makers and the courts in the planning field is very well-established and uncontroversial. I hope that, for convenience, I may be forgiven for referring to the way I put the matter recently in *Stevens v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin)* at [35]–[37]:

> "35. The courts themselves have long-recognised that town and country planning involves acute, complex and interrelated social, economic and environmental implications, and that Parliament has consequently entrusted its regulation to administrative decision-makers with planning experience and expertise, namely planning authorities (whose planning officers and committees also have local knowledge), and on appeal the Secretary of State acting through inspectors. Certainly, the courts have eschewed any suggestion that they should engage with the merits of planning decision-making, leaving such decisions to the appointed decision-makers, on the basis of guidance promulgated by the Secretary of State. It is well-recognised by the courts that planning decisions quintessentially require planning judgments of fact and degree, the merits of which are a matter entirely for the appointed administrative decision-makers. The limited role of the court in these circumstances has been emphasised in a number of cases (see, e.g., ***29** *R. (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23* at [60] per Lord Nolan, [129] per Lord Hoffmann and [159] per Lord Clyde; and *R. (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC 74 (Admin)* at [7] per Sullivan J as he then was)…. In *Alconbury* , having considered the relevant European Court authorities, Lord Hoffmann (at [129]) said that those cases did not require the court to substitute its decision for that of the administrative authority, and that such a requirement would not only be contrary to the jurisprudence of the European Court but 'profoundly undemocratic'.
>
> 36. Hence, according to this principle, in any challenge to such a planning decision, the courts are restricted to considering the legality of the decision-making process. The principle is well-established….
>
> 37. Of course, that does not mean that a planning determination cannot be challenged in the courts: effectively, it may be challenged on any of the conventional public law grounds …" .

Those comments were of course made in relation to decision-making in the context of an application for development consent; but they equally apply—indeed, apply with greater force still—in the context of the preparation and approval of plans and programmes. That is the important starting point.

90. Of the cases to which I was referred on the construction of art.5(1) of the SEA Directive , I found two particularly helpful.

91. First, there is the judgment of Ouseley J in *HS2* , in which he considered five applications for judicial review of the United Kingdom Government's decision in January 2012 that there should be a high-speed rail link between London on the one hand and Manchester and Leeds on the other ("the Y-network"). One of the many matters with which Ouseley J grappled was the contention that the SEA report in that case was defective because it did not analyse reasonable alternatives in the form of new motorways, changes to the conventional rail system and alternatives in the configuration of any high speed network system. He dealt with this at [162]–[163]. What he said was in the event obiter, because he found that the SEA Directive did not apply in this case; but, as I understand it, the issue was fully argued before him, and the superior courts (to which the matter proceeded) did not suggest that his comments were in any way unsound. He said:

> "162. The SEA [Directive] requires the environmental report to contain an outline of the reasons for selecting the alternatives dealt with. That selection is made taking into account the objectives of the plan. Alternative objectives do not have to be explained nor, for these purposes, the reasons why the objectives are thought worth achieving. It is alternative ways of meeting the objectives which are the focus of the SEA. The Government concluded that alternative strategies for motorways or a new conventional or enhanced existing rail network were not capable of meeting the plan objectives set for high speed rail. It is obviously a contestable view as to whether those objectives should be met, or can be met to a large extent by means other than a new high speed rail network. These alternative strategies could not, however, have constituted reasonable alternatives to the plan for assessment in the SEA, since they are incapable by their very nature of meeting all the objectives for a new high speed rail network. The sifting process whereby a plan is arrived at does not ***30*** require public consultation at each sift. This whole process has been set out in considerable detail in the may published documents for those who wished to pursue it, but it did not all have to be in an SEA.
>
> 163. The consultation process ranged wider on alternatives than would have been necessary for a consultation limited to what the SEA [Directive] required in relation to a plan. Although these were alternatives which the Government was prepared to consider through its non-SEA consultation process, that does not make them reasonable alternatives for the purpose of SEA, when measured against the objectives of the plan…" .

92. That passage is particularly helpful in emphasising (i) "it is alternative ways of meeting the objectives which are the focus of the SEA"; (ii) a "reasonable alternative" is one capable of meeting the objectives identified; and (iii) the broad nature of the discretion in the decision-maker in determining whether options are capable of meeting the objectives identified and thus are "reasonable alternatives".

93. I pause to note that, at [165], Ouseley J suggested that there was no obligation on the decision-maker to assess all reasonable alternatives: "What is required in the SEA are the reasons for the selection of the reasonable alternatives chosen for assessment". Leaving aside the whittling down of alternatives within an SEA process, in my respectful view, that elides the criteria for reasonable alternatives and the criteria for the need to give reasons which may not be (and, in my judgment, are not) the same thing. I shall return to the difference as I see it below (see [101]–[102]). But suffice it to say for now that art.5(1) requires an SEA environmental report to identify, describe and evaluate the environmental effects of reasonable alternatives, i.e. *all* alternatives that are capable of meeting the relevant objectives, not a selection of such alternatives. However, the point does not arise before me, because, for the purposes of this claim, it is common ground that the SEA Report *was* required to deal with all reasonable alternatives. Mr Goodman submits that it did not do so; and Mr Moffett submits that it did.

94. The second judgment is that of Sales J in *Ashdown Forest* . This was an application to quash the Wealden District Core Strategy Local Plan (part of the statutory development plan for the relevant area) on the grounds that, inter alia, the steps taken by the authority to investigate whether the overall housing requirement figure of 9,440 was justified were inadequate to comply with the SEA Directive , because of a failure to examine reasonable alternatives. In considering the process with regard to reasonable alternatives, Sales J said this:

> "90. … As to the substance of the work to be done by a local planning authority under article 5 in identifying reasonable alternatives for environmental assessment, the necessary choices to

be made are deeply enmeshed with issues of planning judgment, use of limited resources and the maintenance of a balance between the objective of putting a plan in place with reasonable speed (particularly a plan such as the Core Strategy, which has an important function to fulfil in helping to ensure that planning to meet social needs is balanced in a coherent strategic way against competing environmental interests) and the objective of gathering relevant evidence and giving careful and informed consideration to the issues to be determined. The effect of this is that the planning authority has a substantial area of discretion as to the extent of the inquiries which need to be carried out to identify the reasonable alternatives which should then be examined in greater detail. ***31**

91. These points are similarly relevant to interpretation of the SEA Directive and the standard of investigation it imposes as under ordinary domestic administrative law: see, e.g., the review of the authorities by Beatson J (as he then was) in *Shadwell Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin)* [" *Shadwell Estates* "] at [71]–[78]. The Directive is of a procedural nature (recital (9)) and the procedures which it requires involve consultation with authorities with relevant environmental responsibilities and the public, with a view to them being able to contribute to the assessment of alternatives (recitals (15) and (17) ; articles 5 and 6). The relevant aspect of the obligation in article 5 is to identify and then evaluate "reasonable alternatives" to the plan in question. Under the scheme of the Directive and Environmental Assessment Regulations it is the plan-making authority which is the primary decision-maker in relation to identifying what is to be regarded as a reasonable alternative (and see [*Heard*] at [71] per Ouseley J: part of the purpose of the process under the Directive is to test whether a preferred option should end up as preferred "after a fair and public analysis of what the authority regards as reasonable alternatives"). In respect of that decision, the authority has a wide power of evaluative assessment, with the court exercising a limited review function.

92. This interpretation is reinforced by the scope for involvement of the public and the environmental authorities in commenting on the proposed plan and to make counter-proposals to inform the final decision by the plan-making authority. The Directive contemplates that the plan-making authority's choices may be open to debate in the course of public consultation and capable of improvement or modification in the light of information and representations presented during that consultation, and accordingly recognises that the choices made by the plan-making authority in choosing a plan and in selecting alternatives for evaluation at the article 5 stage involve evaluative and discretionary judgments by that authority which may be further informed by public debate at a later stage.

93. The interpretation is also supported by the limited nature of the information which the plan making authority is obliged to provide to explain the selection of the "reasonable alternatives" which are selected for examination. It is only "an outline of the reasons" for selecting those alternatives which has to be provided (paragraph (h) of Annex I ; language which is similar to that used in paragraph (a), "an outline of the contents, main objectives of the plan or programme [etc]"), directed to equipping the public to participate in debate about the plan proposed, not a fully reasoned decision of a kind which might be appropriate for a more intrusive review approach or exercise of an appellate function on the part of the court.

94. As Mr Pereira submitted, paragraph (h) of Annex I (replicated in Schedule 2 to the Environmental Assessment Regulations) is to be contrasted with the language in the text of the equivalent paragraph of the draft of the SEA Directive which was originally proposed for adoption. The corresponding paragraph in the draft Directive (paragraph (f)) referred to "any alternative ways of achieving the objectives of the plan or programme which have been considered during its preparation (such as alternative types of development or alternative locations for development) and the reasons for not adopting these alternatives". This was a more demanding standard in relation to the ***32** level of reasons which would be required to be given at the article 5 stage which the legislator chose to reject in favour of an obligation to provide only "an outline of the reasons" for selecting the alternatives to be subjected to full comparative appraisal.

…

96. It is open to the plan-making authority, in the course of an iterative process of examination of possible alternatives, "to reject alternatives at an early stage of the process and, provided there is no change of circumstances, to decide that it is unnecessary to revisit them"; "But this is subject to the important proviso that reasons have been given for the rejection of the alternatives, that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary, by repeating them, to know from the assessment accompanying the draft plan what those reasons are": [*Save Historic Newmarket*] at [16]-[17]. It may be that a series of stages of examination leads to a preferred option for which alone a full strategic assessment is done, and in that case outline reasons for the selection of the alternatives dealt with at the various stages and for not pursuing particular alternatives to the preferred option are required to be given: [*Heard*] at [66]–[71]. As Ouseley J put it in *Heard* , in this sort of case "The failure to give reasons for the selection of the preferred option is in reality a failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage" ([70]).

97. A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: see [*Heard*] at [71]). The court will be alert to scrutinise its choices regarding reasonable alternatives to ensure that it is not seeking to avoid that obligation by saying that there are no reasonable alternatives or by improperly limiting the range of such alternatives which is identified. However, the Directive does not require the authority to embark on an artificial exercise of selecting as putative "reasonable alternatives," for full strategic assessment alongside its preferred option, alternatives which can clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan and for good planning reasons, as not in reality being viable candidates for adoption.

98. In my judgment, that is the position in the present case…

…

100. As to the Claimant's challenge to the adequacy of the reasons given… for selecting Scenario C, but not Scenarios A or B, for full strategic assessment, I consider that it fails. [The authority] was only obliged to give an "outline of the reasons for selecting the alternatives dealt with", which in my view it undoubtedly did…. In giving "outline reasons" it was entitled to focus, as it did, on the main reasons why particular alternatives (in particular, Scenarios A and B) were not considered to be viable or attractive having regard to the full planning context – and hence were not "reasonable alternatives" – without descending into great detail to set out each and every aspect of the case or of impediments to adoption of such alternatives." ***33**

95. I make no apology for the length of that quotation which, as will be seen, provides the derivation of (or at least substantial support for) many of the propositions I have set out above. In particular, Sales J stressed the importance of recognising the competence of the relevant authority, which has been assigned by a democratically-elected body to be the primary decision-maker. In the case before me, the relevant authority is the Welsh Ministers. It is they who have been assigned to identify objectives for the resolution of the transport problems that afflict the M4 around Newport. It is they who have been assigned to give appropriate weight to the multifarious objectives they have identified, and the other material considerations. It is they who, as primary decision-makers, have been assigned to determine—of course, on a properly informed basis and on a proper construction of the relevant legal provisions—the option that best meets their objectives (i.e. the preferred option) and whether any other particular option sufficiently meets those objectives to make it viable. After due SEA Directive process,

it is for them to determine, again on a properly informed basis (including the responses to the SEA consultation), whether the provisionally preferred option remains the option which best meets their objectives. This court is only concerned with whether those decisions are legally rational.

96. Sales J referred to the judgment in *Shadwell Estates* , in which Beatson J (as he then was) specifically considered the role of the court in challenges to environmental assessment process. He confirmed (at [73]) that review of such assessments is on "conventional *Wednesbury* grounds"; and he quoted (at [78], within the passage cited by Sales J with approval), the *[2007] NIQB 62* , in which Weatherup J said (at [26]) that:

> "The responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information in environmental reports. The court will not examine the fine detail of the contents but seek to establish whether there has been substantial compliance with the information required by Sch.2 [i.e. Annex I of the SEA Directive , which was transposed in Northern Ireland by Sch.2 to the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 (SI 1991/1220 (NI11)) in materially the same terms as it was in Wales and England]. It is proposed to consider whether the specified matters have been addressed rather than considering the quality of the evidence."

97. Mr Goodman referred me to *Chalfont St Peter (CA)* , in which, he submitted, Beatson LJ (giving the judgment of the Court of Appeal) himself assessed whether the threshold for "reasonable alternatives" (which threshold, at [75], was described as "low") was crossed. I will come back to that reference to "low threshold" (see paragraph 104 and following below); but, as accepted by Mr Goodman during the course of his reply, Beatson LJ could not have been suggesting that there was any question of precedent fact here or that the nature of the court's role was anything other than considering conventional public law grounds. The case concerned a core strategy allocation of a convent school site for housing. The claimant contended that there was a reasonable alternative, not considered in the SEA assessment, that a parish school could relocate to the convent school site, with the current parish school site then being used for housing. The County Council (the relevant local education authority) indicated that it would not provide funding for such a land swap, because the current parish school facilities were adequate. All parties appear ***34*** to have accepted that the role of the court was one of traditional review; the judge at first instance had clearly regarded that as the proper role of the court; and Beatson LJ did not seek to gainsay that, concluding (at [76]) that "the District Council was not *under an obligation* to consider the land swap proposal as a reasonable alternative" (emphasis added). It is clear from *Shadwell Estates* that Beatson LJ's very firm view is that the basis of review is *Wednesbury* ; and it is inconceivable that he would have suggested such a fundamental change in public law in such a manner, without reference to any of the relevant authorities that make the court's role clear. Nothing in his judgment in *Chalfont St Peter (CA)* , properly construed, suggests a different role for the court.

98. Paragraph (h) of Annex I to the SEA Directive , when read with art.5(1) (as transposed in para.8 of Sch.2 to the 2004 Regulations , when read with reg.12) requires the environmental report to include "an outline of the reasons for selecting the alternatives dealt with …". The term "reasonable alternatives" is not used here. "The alternatives dealt with" must include all "reasonable alternatives" (with which such a report is required to deal), together with alternatives which have been dealt with in the SEA process but which have been assessed during that process as not meeting the objectives and thus not being "reasonable alternatives".

99. The requirement to give reasons for selecting alternatives was considered by Ouseley J in *Heard* . This again concerned a core strategy document, which included provision for major urban growth in an area to the North-East of Norwich ("the North East Growth Triangle" or "NEGT"). One complaint was that the SEA Report failed to explain why, during the iterative

SEA process, the options selected were restricted to those with growth in that particular area. Ouseley J held that (i) an iterative SEA process is allowed, but the SEA Directive requires an equal examination of all alternatives reasonably selected for examination at a particular stage, whether preferred or not (see [71]); (ii) the Directive requires reasons to be given for the selection of an option as the preferred (or sole) option (see [69]–[70]); and (iii) outline reasons can be given by reference to earlier documents, if those documents contained the required information (see [62]). None of those propositions is contentious before me; and, if I might respectfully say so, they certainly seem good to me. The judge also confirmed that what were "reasonable alternatives" depended upon an evaluative assessment by the relevant authority, saying (at [71]):

> "It is part of the purpose of this process to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of *what the authority regards* as reasonable alternatives" (emphasis added).

100. With regard to the complaint about the absence of reasons for the selection of alternatives in that case, Ouseley J said (at [66]):

> "I conclude that, for all the effort put into the preparation of the [Joint Core Strategy], consultation and its [Sustainability Assessment, which was intended to satisfy the requirements for an SEA report], the need for outline reasons for the selection of the alternatives dealt with at the various stages has not been addressed. No doubt there are some possible alternatives which could be regarded as obvious non-starters by anyone, which could not warrant even an outline reason for being disregarded. The same would be true of those which obviously could not provide what [Regional Strategy] required, or which placed development in an area beyond the scope of the plan or the legal ***35** competence of the Defendants. But that is not the case here on the evidence before me, in relation to a non-NEGT growth scenario, with or without [the Northern Distributor Road], and especially with an uncertain [Northern Distributor Road]. Without the reasons for the earlier selection decisions, it is less easy to see whether the choice of alternatives involves a major deficiency."

101. There was before me a lively debate as to whether Ouseley J was here using "obvious non-starters" negatively to define "reasonable alternatives" (i.e. "reasonable alternatives" being all options that are not "obvious non-starters") as Mr Goodman submitted and as Beatson LJ appears to have assumed in *Chalfont St Peter (CA)* (at [75]: see [104] and following below); or, as Mr Moffett contended, merely to mark that some alternatives might prove so obviously "non-starters" that no reasons for the discarding of them need be given. Mr Moffett submitted, with very considerable force, that options that are "regarded as obvious non-starters by anyone" are unlikely ever to have fallen within the category of having the potential to meet the objectives of the relevant plan or programme.

102. The concept of the "obvious non-starter" may well be useful in some circumstances; but it is not a term that appears in the SEA Directive or statutory scheme nor, clearly, did Ouseley J use it as a term of art. In my view, he was not dealing with the scope of "reasonable alternatives" but with a different issue, namely the failure of a decision-maker to give reasons for the selection of the preferred (or sole) option and reasonable alternatives. He was here referring to the discarding of options that were never possibly reasonable alternatives, and stressing that, where these obviously never had merit as a reasonable alternative, it was unnecessary for the decision-maker to give any reasons at all for their being discarded because the reasons

for discard would be obvious. He was not suggesting that there could not be alternatives that, in terms of being non-starters (in the sense of not meeting the decision-maker's objectives), were less than obvious but which nevertheless did not fall within the scope of "reasonable alternatives". For those options, reasons may have to be given for not selecting them as reasonable alternatives. Mr Goodman, very properly, accepted that, in respect of some options, it might only become apparent to the decision-maker that they are "non-starters" so far as meeting the decision-makers' objectives is concerned after some appraisal of them has been done. In my judgment (and with respect to those who appear to have taken a different view), Ouseley J's comments were clearly not intended to refer to the question of the scope of "reasonable alternatives". Indeed, they do not appear to me to be concordant with the views he generally expressed in *HS2* , to which I refer above (at [91]–[92]).

103. I was referred to the SEA Commission Guidance, which (at para.5.14) states that: "The alternative chosen must be realistic". Otherwise, in the absence of any assistance in the SEA Directive or 2004 Regulations , the courts have attempted to identify the hallmark of a "reasonable alternative" to a preferred plan or programme.

104. In this context, Mr Goodman relied upon this passage from the judgment of Beatson LJ in *Chalfont St Peter (CA)* at [75]–[76]:

> "75. Departmental Policy , which was in force [in England] at the time of these decisions, states of the requirement to evaluate reasonable alternatives, that 'there is no point in inventing an alternative if it is not realistic'. That and ***36** the phrase 'obvious non-starters' used by Ouseley J in [*Heard*] (at [66]) for proposals which do not warrant even an outline reason for being disregarded shows that the threshold is low.
>
> 76. Notwithstanding the low threshold, … I have concluded that, in the circumstances of this case, the District Council was not under an obligation to consider the land swap proposal as a reasonable alternative. It was thus not under an obligation to subject it to a sustainability appraisal in its environmental report."

This reflects the reasoning of the first instance judge, who also took the phrase "obvious non-starters" to be negatively definitional of "reasonable alternatives" (see *Chalfont St Peter (Admin Court)* at [29]). However:

i) For the reasons I have given above (at [104]), I do not consider that Ouseley J in *Heard* was seeking to define "reasonable alternatives". He was only commenting on the fact that there are some non-reasonable alternatives which will require reasons to explain why they have not been chosen as reasonable, and others where the reason is so obvious that it need not be spelled out by the decision-maker when he is attempting to explain his selection. As a characteristic of options that are "reasonable alternatives", for the reasons I have given, I do not consider that any alternative that is not "an obvious non-starter" (*Heard* at [66], per Ouseley J) fits the bill.
ii) The reference to "realistic" in (and in the SEA Commission Guidance: see [103] above) is of little assistance, unless it is seen in full context. An option is not "realistic" if it is in practice not going to be pursued because the decision-maker lawfully determines that it will not sufficiently meet the objective.
iii) Mr Moffett submitted that "thresholds" in this context are not an entirely helpful concept. I see the force in that submission. However, in *Chalfont St Peter (CA)* Beatson LJ was considering a core strategy, i.e. a framework-setting plan. In that context, where there are very large numbers of possible alternatives and options that may fulfil the broad objectives of the strategy, it may be more apposite to say that the "viability" threshold is "low", because options that are capable of meeting the high level objectives might be many. It may be seen as "higher" if, as with the draft Plan in this case, the possible options are fewer. For the reasons I have already given, it is clear that Beatson LJ was not suggesting a test of review anything other than *Wednesbury* .

105. However, two other attempts at identifying the characteristic are, in my respectful judgement, more helpful. In *HS2* at [162], Ouseley J used the concept of an option "capable of meeting the plan objectives" (see [91] above); and, in *Ashdown Forest* , Sales J considered that a "reasonable alternative" was one which the decision-maker "considered to be viable or attractive having regard to the full planning context" (see [94] above). In my view, an option other than the preferred option that is capable of meeting the objectives of the relevant plan, as determined by the relevant decision-maker, is the truest and most helpful formulation. However, whilst I am unpersuaded that "attractive" is an optimal term, an option which the decision-maker considers "viable … having regard to the full planning context", as suggested by Sales J in *Ashdown Forest* at [100] is, in my respectful view, also a helpful and ***37*** appropriate way to characterise "reasonable alternatives"; because an option will be so viable if, and only if, it is capable of meeting the objectives.

106. I reiterate that it is primarily for the Minister to identify objectives, to give each of those objectives the weight she considers appropriate and to determine whether a particular option does or does not meet the objectives. Mr Goodman submitted that this approach was legally wrong: the Minister merely has to take into account those objectives in determining whether an option is a reasonable alternative. But I do not agree. If, in the Minister's rational view, an option is capable of meeting the objectives, then its acceptability on (e.g.) environmental grounds will be considered during the SEA process: indeed, that is the very purpose of the process. Making it a reasonable alternative ensures that it is subject to that process. That is not only what the SEA Directive requires, it makes clear practical sense: if a particular plan is incapable of meeting the identified objectives such that in practice it will never be pursued, there is no point in subjecting it to an environmental assessment.

107. In this case, matters were, in the event, clear cut: other than the draft Plan and the alternatives assessed in the 2013 SEA Report, none of the options considered came anywhere near meeting the objectives, the overall aim being to solve the current problems of the M4 around Newport. It is common ground that the M4 around Newport requires improvement. In each of the discarded options, by the design date, the problems would not be significantly less than they are today. In respect of most, they would be considerably worse. Therefore, the fact that some of those options might possibly cause less environmental harm—and in that sense they might be environmentally-preferable to the Plan—is not to the point.

108. The SEA Directive requirement for "an outline of reasons for selecting the alternatives dealt with" obliges the relevant decision-maker to provide reasons why all of the options covered by the SEA process were selected for that process. As I have explained, with regard to the preferred option and reasonable alternatives, they will have been selected because the decision-maker considers that they are capable of meeting the relevant objectives. The Directive requires the decision-maker to explain *why* . That requires consideration of not only why those options selected were considered capable of meeting the objectives, but, in appropriate circumstances, why other options were not. In this case, the Welsh Government did just that: it is clear from the SEA Report that the options discarded pre-SEA had been discarded because they would not significantly improve the position with regard to the M4 around Newport from the current position, upon which it was the entire purpose of the Plan to improve. In my judgment, that is clear from the face of the SEA Report; but, insofar as it is not, it is patently clear from the WelTAG Appraisals to which cross-reference is made in the SEA Report.

109. As Ouseley J explained in *Heard* (at [70]), the requirement also obliges the decision-maker to explain why, of all of the options that are capable of meeting the objectives, the decision-maker considers the preferred option to be the best, again by reference to the objectives. But, again, the SEA Report explains that too, namely that, of the viable options, the Black Route satisfies the TPOs best; and, in summary terms, why that was considered to be the case. ***38***

Ground 1

110. As I have indicated, under the umbrella of Ground 1, Mr Goodman relied upon several "sub-grounds"; but these largely illustrate the consequences of the fundamental public law error which, Mr Goodman submitted, underlies them all.

He submitted that the process by which the Plan was adopted failed properly to identify, describe and evaluate all reasonable alternatives (and particularly alternatives that did not involve a motorway being constructed across the Gwent Levels SSSIs) on a comparable basis to the Plan. The draft Plan and all of the alternatives canvassed in the SEA Report involve the building of a fast road of two- or three-lanes each carriageway, on an identical alignment over the most environmentally sensitive part of their course, so that any possibility of an option not involving such a highway had been foreclosed prior to the commencement of the SEA process in 2013. Whether such other options might have less environmental impact than the preferred draft Plan was therefore never assessed within the SEA process; and, thus, the pass had been sold on the SEA Directive object of integrating environmental considerations into the preparation and adoption of plans. The major framework-establishing decision had been taken prior to the relevant public consultation.

111. He submitted that the legal test for "reasonable alternatives" was that indicated by Ouseley J in *Heard* , i.e. all alternatives that were not "obvious non-starters" fell within the scope of "reasonable alternatives". However, in this case, it was clear (he said) that the Minister considered options without a major highway across the Gwent Levels SSSIs to be a reasonable alternative, in the sense of sufficiently meeting the objectives that she had set, because she assessed such alternatives in the March 2013 WelTAG Appraisal. Those options must have been regarded by the Minister as "reasonable alternatives" to the draft Plan, because the objectives did not change over the material period, and she not only had them appraised internally through the WelTAG Stage I Appraisal process but also put them into what she considered to be an SEA Report in November 2012. Only options that were regarded as "reasonable alternatives" would have been put into such a process.

112. The object of the SEA Directive was thus defeated.

113. However, forcefully as these submissions were made, I cannot accept them.

i) I have set out the scope of "reasonable alternatives", namely they are options which are considered by the decision-maker to be viable in the sense of being capable of meeting the objectives to which the decision-maker is working to such an extent that that option is viable.
ii) The problems with the M4 around Newport that the Welsh Government sought to address, and the Government's aims and objectives in respect of them, did not materially change over the material period.
iii) It is common ground that the SEA process in this case was not iterative. It started in September 2013, with the publication of the SEA Report for consultation. That identified the Black Route as the preferred option, and the Red Route and Purple Route as reasonable alternatives.
iv) However, prior to September 2013, the Welsh Government had conducted an extensive non-SEA exercise on options that did not involve a new stretch of motorway running south of Newport over the Gwent Levels SSSIs, namely Options A, B, C and D in the March 2013 WelTAG Appraisal. At this stage, options involving a new stretch of motorway were not viable, ***39*** because (and only because) they could not be financed. That appraisal concluded that none of the options met the objectives, save for Option A which involved a major new road (but not a motorway) across the Gwent Levels SSSIs. As at March 2013, there was thus only one viable option that met the objectives, Option A.
v) The change in the Welsh Government's borrowing powers led to the removal of the impediment that had made motorway options non-viable, namely funding. The June 2013 WelTAG Appraisal included the Black Route as the preferred option together with Option A (as the only non-motorway option, renamed the Red Route) and the Purple Route (effectively the Option A route, but as a new motorway) as viable options that were considered by the Welsh Government sufficiently to meet the objectives. The SEA Report itself made the selection criteria clear: it defined the "draft Plan" as "the Welsh Government's preferred strategy *to solve transport related problems affecting the M4 Corridor around Newport* …"; and the "reasonable alternatives" of the Red Route and Purple Route as "reasonable alternatives to the draft Plan, being *other options that the Welsh Government considers could solve transport related problems affecting the M4 Corridor around Newport* …" (see [59] above: emphases added). That precisely identified the preferred option and reasonable alternatives on the correct legal basis, i.e. in terms of options which are capable of "solving transport related problems affecting the M4 Corridor around Newport" by meeting the TPOs specifically designed to do just that. In any event, looking at that report in its full context, it is abundantly clear that, throughout, the Welsh Government had in mind, and applied, the correct legal basis.
vi) Other alternatives (including those that created a high(er) quality road by improving the existing SAR or the SDR) had by June 2013 already been discarded on the basis that they were not judged to meet the objectives (again, the correct legal test). That was, certainly, a rational decision: indeed, on the basis of the March 2013 WelTAG Appraisal, it was all but inevitable, as those other options would not have resulted in any significant improvement of the M4 around Newport by the design date compared with the current position.
vii) Contrary to Mr Goodman's submission, the inclusion of those other options in the November 2012 "SEA Report" and the March 2013 WelTAG Appraisal does not suggest that, at that time, the Welsh Government considered those other options *did* meet the objectives. Although most options included in SEA reports are generally either preferred options

or reasonable alternatives, (a) it is common ground that the November 2012 report did not form part of a valid SEA process, nor do the Welsh Ministers rely upon it as such (see [44] above); and (b) when looked at fairly and as a whole, the documents were not phrased in a way suggesting that the options put forward would meet, or were capable of meeting, the TPOs; indeed, the main purpose of the consultation was expressly to obtain informed views as to the extent to which (if at all) the options did meet the objectives.

viii) The Claimant relies upon the Blue Route as an option which ought to have been included in the 2013 SEA Report. However, (a) the Blue Route was not sufficiently worked up to be put into the report at the time the report ***40*** was published; (b) it comprised a combination of two elements that had previously been investigated as discrete options and found not to meet the objectives; and (c) in any event, after that route had been considered by Arup, it was found not to meet the objectives because it failed to relieve the problems on the M4. The Welsh Government did not arguably act irrationally in considering that the Blue Route did not meet the objectives, as was concluded in the Post-Adoption SAA. No other option, not already considered, is suggested by the Claimant as one which is capable of meeting the objectives.

ix) The SEA Report (particularly when read with the WelTAG Appraisal Reports to which it cross-referred) explained why the discarded options had been discarded, i.e. they did not satisfy the TPOs: in short, they did not resolve to any significant extent the problems of the M4 around Newport that the Plan was designed to resolve.

114. Therefore, on the facts, Mr Goodman cannot begin to make good his contention that the Welsh Government failed to include in the 2013 SEA Report and process reasonable alternatives that ought to have been included. They used the correct legal test throughout, choosing the option which they considered best met the TPOs as their preferred option and including other options that they considered capable of meeting the objectives as reasonable alternatives. The decisions they made with regard to selection of objectives, the weight given to each objective chosen and the selection of preferred option and reasonable alternatives were all in accordance with the relevant legal tests, rational and otherwise lawful. They explained, giving at least outline reasons (and, in practice, far more), why they had selected their preferred option and reasonable alternatives.

115. For those reasons, the foundation upon which Ground 1 is built is fundamentally flawed. The Minister's approach to the identification of "reasonable alternatives" was not wrong in law: indeed, it was eminently correct.

116. That foundation having been found wanting, Ground 1 must fail. However, although they are mere reflections of the same overriding issue, before leaving Ground 1, I should briefly refer to the nine "sub-grounds" upon which Mr Goodman relied.

Sub-ground (i): The Defendant's environmental assessment was improperly and irrationally premised on the basis that there was no reasonable alternative other than to build a road over a specified route across four SSSIs (the assessed variations occurring only in the route taken thereafter)

117. The SEA Report was indeed based on the premise that no option that did not involve a high quality road across the Gwent Levels SSSIs was capable of achieving the TPOs. However, that premise was not irrational. The pre-SEA process had ascertained that, of the non-motorway options, only the option of a high quality dual carriageway across the Gwent Levels SSSIs was capable of achieving those objectives which, over the relevant period, did not change: by the design date, the other options did not obtain any benefit over the current position with regard to problems caused by traffic on the M4 which the objectives directly reflected. No other option capable of meeting the objectives has been suggested. The decisions of the Welsh Government in discarding options as not being capable of achieving the plan objectives were based upon WelTAG assessments and (non-SEA) ***41*** consultation. It is not arguable that they fell outside the band of legitimate decision-making or are otherwise unlawful. Indeed, on the basis of the evidence before them the decisions were not only rational but all but inevitable.

Sub-ground (ii): The Defendant, in treating harm to the SSSIs as inherently unavoidable failed to rationally assess the Plan or conform to the requirements of the SEA Directive

118. The Welsh Government did not simply "treat" harm to the SSSIs as inherently unavoidable: the conclusion of the process that they adopted was that options that did not include a high quality highway across the Gwent Levels SSSIs were not capable of achieving the objectives.

Sub-ground (iii): The Defendant misunderstood article 5(1) of the SEA Directive as requiring that alternatives examined in the environmental report should "deliver" the objectives, rather than take account of them and/or the reasons given for not selecting alternatives are inadequate and erroneous"

119. The Welsh Government did not misunderstand the scope of "reasonable alternatives" for the purposes of art.5(1) . It correctly understood that a reasonable alternative was one which was capable of meeting the TPOs. It was only such options that had to be subjected to the SEA process. That does not, as Mr Goodman suggests, undermine the purposes of the SEA Directive of integrating environmental considerations into strategic planning decision-making, because any options capable of achieving the relevant objectives are subject to SEA assessment on a basis comparable to that upon which the preferred option is evaluated. The SEA does not require such an assessment of options that will not achieve those objectives, because in practice such options are never going to be pursued.

Sub-ground (iv): The scope of the Environmental Report was narrowed so as to exclude reasonable alternatives in consequence of a scoping exercise which was improper and in breach of Article 5(4)

120. On the facts, this was not the case. All options capable of achieving the TPOs were included in the SEA Report.

Sub-ground (v): The Defendant improperly and/or irrationally and/or unlawfully excluded from consideration the Blue Route or any alternative capable of testing the otherwise inherent assumptions as to the inevitability of environmental harm

Sub-ground (vi): The Defendant's after the fact rejection of the Blue Route as amounting to a reasonable alternative was irrational, unlawful and failed to accord with the requirements of the SEA Directive

121. These two sub-grounds can conveniently be dealt with together. Again, on the facts of the case, the propositions cannot be made out. The environmental harm that would inevitably result from a high quality highway running across the Gwent Levels SSSIs was not "assumed": the Welsh Government discarded options that did not involve such a highway, because they rationally considered none would be capable of achieving the TPOs. In the light of the previous assessment that neither of the two main elements of the Blue Route (improvement to the SAR and the SDR, respectively) would be anywhere near capable of achieving the TPOs, it ***42** was not irrational not to include a combination of those elements as a reasonable alternative in the SEA Report. In any event, assessment of the Blue Route after the publication of the SEA Report confirmed that the Blue Route was not capable of meeting the objectives.

Sub-ground (vii): The Defendant's "sifting" process by which it alighted upon the preferred option in June 2013 was procedurally improper, irrational and inconsistent with the SEA Directive

122. See the comments in relation to sub-ground (i) (at [117] above).

Sub-ground (viii): The SEA process was inadequate and/or irrational in that it did not set out adequately and intelligently why only alternatives involving roads through the SSSIs had been selected

123. Again, on the facts of the case, this proposition cannot be maintained. The Welsh Government had an obligation to give outline reasons for its selection of the preferred option and reasonable alternatives. It more than adequately explained why it considered other options would not achieve the TPOs—in short, because none would improve the position with regard to the M4 around Newport which was in essence what the Welsh Government sought to do.

Sub-ground (ix): The Defendant failed to take into account and/or give adequate reasons regarding its consideration of current knowledge and methods of assessment in relation to the impact of planned public transport improvements traffic forecasting (in breach of Article 5(2) of the SEA Directive)

124. It is the Claimant's case that the Welsh Government has taken a pessimistic and incorrect view of likely traffic flows on the M4 taking account of the effects of (e.g.) the potential impact of public transport measures such as the proposed electrification of the main South Wales railway line and local lines (the South Wales Metro). It relies on the July 2014 National Assembly for Wales Environment and Sustainability Committee's Report on its inquiry into the Government's proposals, which noted (i) academic evidence that suggested the methodology adopted by the Government "consistently predicted significant traffic growth while actual traffic data shows the trend to be broadly flat", and that insufficient consideration had been given to the potential impact of public transport proposals; and (ii) other academic evidence that, if the predictions relied upon by the Government are correct, then the proposal will not be sufficient to improve traffic conditions (paras 18-25 of the report). However, (i) the Welsh Government concluded on the basis of proper evidence that the effect of public transport measures on the usage of the M4 (as opposed to other potential benefits of such initiatives) would be negligible (see [48] above); and (ii) the Environment and Sustainability Committee are noted as merely having heard evidence that

"suggested" that there were "weaknesses" in the methodology, and it made other comments which suggest that it considered the Government may have misinterpreted data (which the Government denies), which cannot possibly render the environment report invalid. The Welsh Government, as advised by Arup, was patently entitled to act on the basis of the evidence it had and the widely-accepted methodology employed. ***43**

Ground 2

125. As his second ground, Mr Goodman submits that, in considering and making her decision to adopt the Plan, the Minister breached the duty imposed upon her by s.28G of the 1981 Act . That section provides, so far as material:

> "(1) An authority to which this section applies…..shall have the duty set out in exercising its function so far as their exercise is likely to effect the flora, fauna or geological or physiographical features by reason of which [an SSSI] is of special interest.
>
> (2) The duty is to take reasonable steps, consistent with a proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest."

The Welsh Ministers are an authority to which the section applies; and, therefore, the Minister was subject to the duty imposed by s.28G when deciding to adopt the Plan.

126. Mr Goodman submits that the duty was breached in two respects.

127. First, the Welsh Government failed properly to understand the nature of its duty under s.28G , which gave the protection and preservation of SSSIs enhanced weight in the decision-making process, such that there is a presumption against any plan that would lead to harm to such sites.

128. In support of that bold proposition, Mr Goodman relied upon authorities concerning the interpretation of provisions such as s.66(1) of the Planning (Listed Building and Conservation Areas) Act 1990 which imposes a duty on the relevant planning authority when considering an application for development which affects a listed building or its setting to have "special regard to the desirability of preserving the building or its setting…". In *Garner v Elmridge Borough Council [2011] EWHC 86 (Admin)* , of that provision, Ouseley J said this (at [8]):

> "Section 66 does not permit a local planning authority to treat the desirability of preserving the setting of a listed building as a mere material consideration to which it can simply attach what weight it sees fit in its judgment. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate. It is the obvious consequence of the statutory language, rather than an illegitimate substitute for it."

129. That was quoted with apparent approval on appeal (see *[2011] EWCA Civ 891* at [7] per Sullivan LJ). Mr Goodman submits that the same approach should have been adopted by the Minister in relation to s.28G of the 1981 Act .

130. However, I do not agree. As Ouseley J made clear, in interpreting the true meaning and effect of s.66 of the 1990 Act , the statutory language was key. Section 28G of the 1981 is in entirely different terms. It does not impose a general duty on the decision-maker to have some particular regard to the desirability of protecting and preserving SSSIs: it imposes an

entirely different type of obligation, namely a duty to "take reasonable steps… to further the conservation and enhancement of *44 the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest".

131. As Mr Moffett submitted, that s.28G duty is more akin to the duty of an employer under what was s.6 of the Disability Discrimination Act 1995 , which provided:

> "Where –
>
> (a) any arrangements made by or on behalf of an employer, or
>
> (b) any physical feature of premises occupied by the employer
>
> place the disabled person concerned at a substantial disadvantage in comparison with persons not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect."

As Baroness Hale explained in *Archibald v Fife Council [2004] UKHL 32* (at [57]), that entailed a measure of positive discrimination, in the sense that it imposed a positive duty on the employer to take steps that are in all the circumstances reasonable to help disabled people which they are not required to take for others.

132. Similarly here, the s.28G duty does not seek to protect SSSIs by weighting the desirability of their protection as against other factors, but by requiring relevant authorities to take reasonable steps to "further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest". I gain some comfort that my view, based upon the wording of the relevant statutory provision, appears to be shared by the academic authors to whom I was referred (see Burnett Hall on Environmental Law , 3rd edn (2012) at para.9/087).

133. The question I have to consider is, therefore, not whether the Minister gave the desirability of conserving and enhancing these features particular enhanced weight, but whether she took reasonable steps to conserve and enhance those features. It is rightly common ground that "conserve and enhance" includes "not damage" the features.

134. I have already dealt with the relevant facts. However, in brief, the following matters are particularly relevant to this issue:

i) In the early 1990s, the Countryside Council for Wales expressed concerns about potential environmental impact of the proposed M4 relief motorway, routed as it was south of Newport and across the Gwent Levels SSSIs. As a result, a further review was carried out, which noted the detrimental environmental effect that any northern route motorway would have, and confirming the southern route was preferred (see [29] above).
ii) For the purpose of the first TR111 notice in 1995, the route was identified to "minimise the potential impacts" on the Gwent Levels SSSIs (see [31]).
iii) The route was altered—moving it north—as a result of a review in 2004–6, to reduce the impact on and severance of the Gwent Levels SSSIs. The review specifically and expressly took into account the strengthening of the protection for SSSIs by the 2000 Act and particularly the Welsh Government's duty under s.28G of the 1981 Act brought into being by the 2000 Act . In announcing the consequent revisions to the preferred route in the 1997 TR111 Notice, the Minster emphasised that the changes "offer a clear benefit to the environment by taking the route northwards and where *45 possible onto land previously of industrial use thereby reducing its impact on the Gwent Levels including the [SSSIs]" (see [34] above).
iv) The March 2013 WelTAG Appraisal specifically took into account, for each option considered, the comments received from the consultation on the November 2012 Environmental Report (at [45] above).
v) The June 2013 WelTAG Appraisal did not deal with environmental matters in any detail, pending the SEA Report. However, it said that all three highway options "result in moderate to large impacts on the environment …". It also indicated that the main ecological interest of the SSSIs was the reen system (see [56] above).
vi) The 2013 SEA Report expressly took account of the 2000 Act as a relevant statute, and, in detail, assessed the significant effects of the draft Plan and the chosen reasonable alternatives, determining the significance of effect as "minor negative" (at [68] above).

vii) The SEA Post-Adoption Statement set out the potential environmental effects and associated mitigation, in detail, in a similar manner to the SEA report (see [71] above).

135. Mr Moffett submitted that the only steps that the Minister could have taken to conserve or enhance the relevant features would have been:

i) Not to proceed with any option that involved a highway across the Gwent Levels SSSIs. However, as I have explained, none of the options that did not involve such a highway came anything like achieving the objectives, namely the TPOs or (in short) the relief of the M4 motorway around Newport. The do-minimum scenario was also discounted on, amongst other things, the environmental unacceptability of the status quo.
ii) To mitigate the harm necessarily caused by such a highway. Looking at the history, briefly related above, it is simply not maintainable that the Minister was not sensitive to that harm, and to the importance of mitigating and minimising it. Indeed, as Mr Moffett submitted, looked at fairly, the whole process that resulted in the decision challenged was focused on the potential harm to the Gwent Levels SSSIs of a new highway crossing them, and the mitigation of that harm. The Minister clearly paid the SSSIs and the desirability of preserving and protecting them the regard required of her. She did not arguably err in this regard.

136. The second way in which Mr Goodman submitted that the Minister breached her duty under s.28G was that, he said, the 2013 SEA Report conclusion that the biodiversity impacts of the Black Route (and the reasonable alternative highway options) were "minor negative" was irrational, particularly bearing in mind the June 2013 WelTAG report conclusion that all three highway options "result in moderate to large impacts on the environment …".

137. Mr Goodman did not actively pursue this sub-ground at the oral hearing. In my view, that was appropriate reticence: this is, in substance, a merits challenge. Although he suggests that the mitigation measures identified in the SEA Report were similar to that in the June 2013 WelTAG Appraisal conclusion, the SEA Report properly considered the potential harm to the SSSIs and the available mitigation measures, and its view as to the lack of long-term effects and thus its conclusion of minor negative harm overall is unassailable as a matter of law. ***46**

138. For those reasons, Ground 2 also fails.

Conclusion

139. This is a rolled-up hearing. As I have indicated, Mr Goodman (if I might say so, wisely) did not pursue Ground 3. I have formally refused permission to proceed in relation to that ground. With regard to Grounds 1 and 2, although, as will be apparent, I do not consider that each aspect of those grounds was of equal merit, I formally grant permission to proceed. However, for the reasons I have given, I refuse the substantive application.

140. Indeed, despite Mr Goodman's valiant efforts, he has fallen very far short of persuading me that any of his grounds has been made good. Whilst I do not for one moment question the sincerity of the Claimant, its real complaint is as to the merits of the policy decision to sacrifice—to the necessary extent—the environmentally important and protected Gwent Levels by the construction of a motorway across their northern part. However, the merits of such a decision are quintessentially for the Welsh Government. This court is only concerned with the process by which that decision was made. For the reasons I have given, I am quite satisfied that the decision was lawful. ***47**

