Neutral Citation Number: [2021] EWHC 871 (Admin)

Case No: CO/3211/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2021

**Before**:

**SIR DUNCAN OUSELEY**
**Sitting as a High Court Judge**

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**Between :**

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| **LONDON BOROUGH OF HILLINGDON** | **Claimant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR TRANSPORT** | **Defendants** |
| **-and-** | |
| **THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT** | |
| **-and-** | |
| **HIGH SPEED RAIL (HS2) LTD** | **Interested Party** |

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**CRAIG HOWELL WILLIAMS QC and MELISSA MURPHY** (instructed by **THE SOLICITOR TO THE LONDON BOROUGH OF HILLINGDON**) for the **Claimant**
**TIMOTHY MOULD QC** (instructed by **THE GOVERNMENT LEGAL DEPARTMENT**) for the **Defendants**
**DAVID ELVIN QC and MICHAEL FRY** (instructed by **DLA PIPER UK LLP**) for the **Interested Party**

Hearing dates: 10-11 February 2021

**Approved Judgment**

**SIR DUNCAN OUSELEY:**

1. This action concerns the specific statutory regime for the approval of particular details in respect of the high speed railway between London and Birmingham, HS2, currently under construction. The London Borough of Hillingdon, LBH, challenges, by way of judicial review, the decision of 28 July 2020 by an Inspector appointed by the Defendants. He allowed an appeal by High Speed Two (HS2) Limited, HS2L, from the refusal of an approval by LBH, under paragraph 6 of Schedule 17 to the High Speed Rail (London-West Midlands) Act 2017, the HS2 Act. The approval of LBH had been sought by HS2L for the lorry routes to be used by construction lorries to and from the HS2 construction sites within LBH's area.

2. At the heart of LBH's case is its contention that HS2L ought to have provided a traffic impact assessment of the routes it had selected. This is not because LBH contended that other routes should have been selected by HS2L instead, but because LBH, as planning and highway authority for the routes selected, wished to impose controls on the level of usage of those routes by construction traffic, particularly in the normal peak traffic hours. To select and justify the controls it might wish to impose, it needed information which it said HS2L was duty bound to supply. HS2L had not supplied that information and so the Inspector was wrong in law to allow HS2L's appeal.

3. For this contention, LBH relied strongly on the judgment of the Court of Appeal in *R(London Borough of Hillingdon) v Secretary of State for Transport and another* [2020] EWCA Civ 1005, [2021] PTSR 113; for convenience, I refer to it as *Hillingdon 1*. That case also concerned the duty on HS2L to supply information for the purposes of approvals sought, but under a different paragraph of Schedule 17 to the HS2 Act. The Court of Appeal judgment came out on 31 July 2020, after the Inspector's decision now under challenge. The Court of Appeal allowed an appeal from Lang J, whose judgment had been applied by the Inspector in this case. On 23 February 2021 the Supreme Court refused HS2L permission to appeal.

4. Mr Howell Williams QC for LBH in that appeal, and before me, contends that the Court of Appeal decision is applicable to the decision here, yet the Inspector applied the approach of Lang J and of the Secretaries of State which the Court of Appeal had found unlawful. Mr Mould QC for the Secretaries of State and Mr Elvin QC for HS2L contend that the decision of this Inspector did not suffer, in any material way, from the vices to which the Court of Appeal judgment in *Hillingdon 1* was addressed.

**The statutory, policy and agreements framework**

5. **The Act**: S20(1) HS2 Act deems planning permission to have been granted under the Town and Country Planning Act 1990, TCPA, for the construction and operation of HS2. S20(3) provides: "Schedule 17 imposes conditions on deemed planning permission under subsection (1)."

6. Schedule 17 paragraph 1 provides that the requirements in paragraphs 2-12 are "conditions of the planning permission." The enforcement provisions in the TCPA apply to enable the conditions to be enforced by a local planning authority. Paragraph 6 contains the "Condition relating to road transport":

> "(1) If the relevant planning authority is a qualifying authority, development must, with respect to the matters to which this

paragraph applies, be carried out in accordance with arrangements approved by that authority.

(2) The matters to which this paragraph applies are the routes by which anything is to be transported on a highway by a large goods vehicle to—

(a) a working or storage site,

(b) a site where it will be re-used, or

(c) a waste disposal site.

(3) In this paragraph "relevant planning authority" means, subject to paragraph 27, the unitary authority or, in a non-unitary area, the county council in whose area the development is carried out.

(4) Sub-paragraph (1) does not require arrangements to be approved in relation to—

(a) transportation on a special road or trunk road, or

(b) transportation to a site where the number of large goods vehicle movements (whether to or from the site) does not on any day exceed 24.

(5) The relevant planning authority may only refuse to approve arrangements for the purposes of this paragraph on the ground that—

(a) … or

(b) the arrangements ought to be modified—

(i) to preserve the local environment or local amenity,

(ii) to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or

(iii) to preserve a site of archaeological or historic interest or nature conservation value,

and are reasonably capable of being so modified.

(6) The relevant planning authority may only impose conditions on approval for the purposes of this paragraph—

(a) with the agreement of the nominated undertaker, and

(b) on the ground referred to in sub-paragraph (5)(b)…."

7. A "large goods vehicle" is defined by reference to Part 4 of the Road Traffic Act 1988. They are goods vehicles with a maximum permissible operating weight over 7.5 tonnes, and are therefore the larger heavy goods vehicles.

8. Applying those provisions here, LBH is a relevant planning authority and a qualifying authority within paragraph 6(1) and (3), and became a qualifying authority in circumstances I shall come to. Hence its approval to the routes for large goods vehicles used in the construction of HS2, was required; paragraph 6(2). HS2L is the "nominated undertaker". LBH contended that a traffic impact assessment was required in order for it to know whether and how the arrangements could and should be modified to meet the provisions of paragraph 6(5)(b)(i) and (ii). It proposed conditions to which HS2L did not consent, and so for the purposes of its decision on the application for the approval of arrangements, they could not be imposed.

9. Paragraph 22 deals with appeals: where HS2L "is aggrieved by a decision of a planning authority on a request for approval…(including a decision to require additional details), it may appeal to the appropriate Ministers…." The appropriate ministers may allow or dismiss the appeal or vary the decision of the authority, "but may only make a determination involving- (a) the refusal of approval or (b) the imposition of conditions on approval, on a ground open to that authority." The parties agreed before me that the requirement for HS2L's consent to the imposition of a condition by a local authority did not apply to the imposition of a condition by the Secretaries of State on an appeal, and that they could impose conditions regardless of HS2L's consent. On an application under paragraph 6, they could not impose a condition on a ground other than those in subparagraph (5)(b).

10. I need to refer briefly to other provisions of the Schedule. The paragraph at issue in *Hillingdon 1* was paragraph 3, which related to "other construction works", including earthworks and fences. An approval could only be refused on a limited range of grounds, which, so far as material, were the same as in paragraph 6 (5)(b)(i-iii), that is the preservation of local amenities, preventing prejudice to road safety and traffic flow, and to preserve a site of archaeological or other special interest. Subparagraph (4) of paragraph 3 did not have a counterpart in paragraph 6; it enabled the planning authority, on approving a plan under paragraph 3, to require additional details to be submitted by HS2L for the authority's approval. This provision did however have counterparts in paragraph 2, the condition relating to building works, and paragraph 7, relating to waste, soil disposal and excavation. But these were not relevant in *Hillingdon 1*.

11. There was also a general paragraph, 16, in the Schedule, providing that a local authority did not need to consider a request for approval unless HS2L had deposited with the authority a document setting out its proposed programme of Schedule 17 requests for approval to the authority, and a document explaining how the subject of the request fitted into the overall scheme of the works authorised by the HS2 Act. Paragraph 16(2) makes it clear that this does not apply to a request for approval of additional details. There is no express general power in the Schedule, or Act, enabling relevant information about the subject matter of the request to be required from HS2L. This was an issue in *Hillingdon 1*.

12. **Statutory guidance**: Under paragraph 26 of Schedule 17, the Secretary of State may issue guidance to local authorities, which are obliged to have regard to the guidance in the exercise of their functions under this Schedule. So too was the Inspector.

13. The guidance issued by the Secretary of State provides in [4.4] that the approvals in Schedule 17:

> "have been carefully defined to provide an appropriate level of local planning control over the works while not unduly delaying or adding costs to the project. Planning authorities should not through the exercise of the Schedule seek to:
>
> - revisit matters settled through the Parliamentary process;
>
> - …modify or replicate controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, or existing legislation such as the Control of Pollution Act…."

14. S106 TCPA 1990 agreements should not be used to circumvent the limits of Schedule 17 or the guidance.

15. The guidance envisaged that further information could be sought in relation to a request for approval. At [7.1], it said that requests could only be refused or conditions imposed or "additional information requested" where that related to the grounds specified for determining the request for approval. Chapter 8 of the guidance is entitled "Requests for additional details" but it is concerned with those provisions of the Schedule which expressly enable an authority, as part of its determination of the request, to require further details to be submitted for later approval. It adds that this power cannot be used to expand the grounds on which approval may be withheld. In [9.1], the guidance states that a local authority can only require a modification where the grounds for doing so relate directly to the permitted grounds for refusal and where the design can reasonably be modified.

16. Chapter 10 deals with the imposition of conditions. It repeats the statutory requirement that no condition be imposed by a local authority without the consent of HS2L. This is to avoid delay caused by the imposition of inappropriate conditions. If the conditions are not agreed, the authority can refuse approval.

> "[10.2] Conditions cannot be imposed which reserve for future approval matters which are integral to the approval being sought….
>
> [10.3] When determining any request for approval, conditions should not be imposed which conflict with controls or commitments contained in the Environmental Minimum Requirements. This is because these controls would have been considered necessary or sufficient by Parliament when it had approved deemed planning permission for the railway."

17. It is evident that, although an application for approval under the Schedule has some similarities to an application for the approval of reserved matter under a planning permission, the issues for a local authority to determine, and its power to impose conditions were limited; and undertakings had to be given about how they would handle the requests for approval, before it qualified for that task. It also needs to be remembered that there has to be, here, an approval of lorry routes, on which there will be LGVs for the construction period. The approval cannot re-examine the principle of the development, and prevent it on the grounds of construction traffic impact.

18. **"Qualifying authorities" and the Planning Memorandum**: LBH became a qualifying authority under the provisions of paragraph 13 of the Schedule. An authority could only qualify if it had given the Secretary of State "undertakings with respect to the handling of planning issues arising under this Schedule which he or she considered satisfactory, and had not been released from those undertakings." This was an agreement which clearly was intended to avoid foreseeable problems with local authority approvals, and provision for them, for that purpose, was part of the statutory structure.

19. Those undertakings are set out in the Planning Memorandum, signed by LBH. Its introduction states that it seeks to ensure that the process of obtaining the considerable number of approvals which have to be sought under Schedule 17 "does not unduly hinder construction of HS2." It contains the obligations of the authorities who choose to sign up to it, and HS2L. HS2L "will work with qualifying authorities to support the determination of requests for approval, which will include early and constructive engagement in accordance with obligations set out in this Memorandum." It is binding on the authority, which undertakes to act in accordance with it, and it is to be taken into account by signatory authorities in determining requests for approval.

20. Section 7 of the Planning Memorandum deals with the need for expeditious handling of requests for approval. Authorities should not seek to impose unreasonably stringent requirements on the requests for approval, which might frustrate or delay the project, or unreasonably add to its costs. They should give "due weight" to the conclusions of the Select Committee where relevant. They would use reasonable endeavours to deal with requests within 8 weeks. HS2L would "respond quickly to requests for information or clarification to assist the planning authority in the timely processing of requests." HS2L agreed to engage in "proportionate forward discussions" about forthcoming requests. Repeated failure to comply with the requirements of the Memorandum could lead to an authority being disqualified. The reasons for refusing a request should be specific as to the grounds in the Schedule relied on, full, clear and precise. In section 7.7.3, in a passage relied on by HS2L, the Memorandum said:

> "Where the authority's decision in relation to the determination of construction arrangements has been reached on the grounds that the arrangements ought to be modified and are reasonably capable of being modified, the authority shall include an explanation of why and how it considers modifications should be made and where."

21. In section 9, the authorities agreed that in determining requests for approval, it would take into account "the assessments in the Environmental Statement, the arrangements in the CoCP [Code of Construction Practice] and the Environmental Memorandum,

and any relevant undertakings and assurances in the Register of Undertakings and Assurances, to the Act."

22. Signatory authorities to the Planning Memorandum are part of the Planning Forum, which meets regularly to assist with the effective implementation of the planning provisions in the Act. They have to take its conclusions into account. The Planning Forum produces Planning Forum Notes, PFN, setting out "standards and practices to be followed by those implementing" Schedule 17. This includes LBH. PFN6 defined the information required to be submitted with the requests for approval of lorry routes.

23. **The Environmental Minimum Requirements, EMRs, 2017**: These are referred to in the statutory guidance. They set out controls on HS2L, as the nominated undertaker, to which it is bound under the Development Agreement. They are relevant to the controls available which, applying the guidance, conditions should not modify or replicate, and featured strongly in the arguments for the Secretary of State and HS2L. The background to the EMR is explained in the Introduction to the document setting them out. The intention of the Secretary of State is to carry out the project "so that its impact is as assessed in the ES", the Environmental Statement, supplemented by additional volumes as changes arose. The EMR General Principles state that the controls in the EMR, the Act and in the Undertakings given by the Secretary of State "will ensure that impacts which have been assessed in the ES will not be exceeded," except in circumstances which do not apply here, such as a change in circumstances which was not likely at the time of the ES or are unlikely to be environmentally significant. HS2L "will be contractually bound to comply with the controls set out in the EMRs" and will in any event "use reasonable endeavours to adopt mitigation measures that will further reduce any adverse environmental impacts…insofar as these mitigation measures do not add unreasonable costs to the project or unreasonable delays to the construction programme." In addition, HS2L will have to comply with the Planning and Environmental Memoranda and the CoCP.

24. The EMR themselves include the following at [3.1.2 and 3.1.3]:

> "3.1.2 The nominated undertaker shall comply with and, where required to do so by the Secretary of State, shall…execute and deliver memoranda and agreements on planning heritage and related matters in the form reasonably required by the Secretary of State, including but not limited to the planning and heritage memoranda ….
>
> 3.1.3 The nominated undertaker shall comply with all undertakings and assurances [specified in the HS2 Register of Undertakings and Assurances published by the Department for Transport…] and those undertakings or assurances shall take priority over the remainder of the EMRs to the extent of any inconsistency."

25. The CoCP, a component of the EMRs, is intended to provide for consistency in the management of construction activities across local authority boundaries and with a wide range of "key stakeholders." It is relevant to the Secretary of State's and HS2L's submissions about the extent of controls which should not be duplicated by conditions on an approval of a request. The CoCP sets out what are described as a series of

measures and standards of work which HS2L has to apply to "provide effective planning, management and control during construction to control potential impacts upon people, businesses and the natural and historic environment…." Class measures to be approved by the Secretary of State include road mud prevention measures, but road transport is for the planning authority. As part of its Environmental Management System, lead contractors are required to plan their works in advance to ensure that, as far as reasonably practicable, measures to reduce environmental effects are incorporated into the construction methods and that commitments from the ES and the Act are complied with. The CoCP is implemented by being imposed on the lead contractors by HS2L, incorporating both general and site-specific requirements. The lead contractors will be obliged to undertake the necessary monitoring work of the impact of construction works.

26. Traffic management is the specific topic in Chapter 14 of the CoCP. [14.1.1] obliges HS2L to require that "the impact from construction traffic on the local community (including …users of the surrounding transport network) be minimised by the contractors where reasonably practicable." [14.1.2] requires public access to be maintained where reasonably practicable and that appropriate measures are implemented to ensure that the local transport networks can continue to operate effectively. "The impact of road based construction traffic will be reduced by implementing and monitoring clear controls on vehicle types, hours of site operation, parking and routes for large goods vehicles." It is not specific about controls on large goods vehicle numbers during the day. "Route-wide, local area and site-specific traffic management measures will be implemented during the construction of the project …" Generic route wide measures should be discussed in advance with the local highway authorities, and HS2L would ensure that a Route-wide Traffic Management Plan (RTMP) would be produced in consultation with highway and traffic authorities. This would cover a wide variety of matters such as the maintenance of the road, road safety measures for vulnerable road users, the site-specific traffic management measures, road closures, and monitoring deviation from authorised routes.

27. HS2L would also require the production of Local Traffic Management Plans, LTMPs, in consultation with highway authorities, among other bodies. The topics to be included were access routes and site accesses, and "a list of roads which may be used by construction traffic in the vicinity of the site, including any restrictions to construction traffic on these routes, such as the avoidance of large goods vehicles operating adjacent to schools during drop-off and pick-up periods and any commitments set out in the HS2 Register of Undertakings and Assurances." In relation to lorry management, the LTMPs would include details where appropriate of the "timing of site operations and timing of traffic movements" and of the "local routes to be used by lorries generated by construction activity." Site-specific traffic management measures which could be covered included "measures to minimise impact on highway users" among many which were rather more specific.

28. **The Development Agreement**: HS2L was bound into these arrangements under the HS2 Development Agreement of 2014, amended in 2017, with the Secretary of State for Transport. Both parties agreed, cl.9, to act reasonably and to co-operate with each other and with local authorities, and various other bodies. HS2L's obligations in cl.10.1(N) were to manage, develop and deliver the project and to discharge its

obligations under the Agreement at all times "so as to comply with and discharge the Undertakings, Assurances and Requirements …." These were defined as including, cl.1.1, the EMRs, the Register of Undertakings and Assurances, and any other undertakings or assurances given by the Secretary of State to any third party in connection with the proceedings before a Select Committee in respect of the HS2 Bill. The Secretary of State had also given an undertaking to Parliament, breach of which would be a contempt, that he would secure compliance with the EMRs.

29. I shall come to the agreement between HS2L and LBH, and others, in due course.

**The decision in *Hillingdon 1***

30. Both the decision of LBH and of the Inspector in this case were made between the decision of Lang J at first instance and the decision of the Court of Appeal, overturning that decision. The Inspector here was clearly applying the law as set out by Lang J. The fundamental issue here is how material that was to his decision.

31. In *Hillingdon 1*, HS2L had requested approval under Schedule 17 of the Act for proposed works of ecological mitigation in an archaeological protection zone. These were "other construction works" comprising "earthworks" and "fences" within paragraph 3 of the Schedule. The concern of LBH was the potential impact which those works could have on the archaeological interest of the site. The site was not owned by LBH nor by HS2, and two years earlier, the HS2L experts had not been able to access the site for the purpose of investigating its archaeological potential. There was no later information as to its accessibility for that purpose. LBH was treated as having refused to approve the request, in substance but not in form, on the grounds that HS2L had failed to furnish it with adequate information and evidence to enable it to determine the application in accordance with its statutory duties under Schedule 17. HS2L argued that approval ought to have been granted on the basis that the EMR regime, which it was obliged to adhere to under the Development Agreement, meant that HS2L would have to carry out the investigations itself in the future and decide whether there were planning concerns which needed to be met through mitigation or modification.

32. The Secretaries of State allowed HS2L's appeal, contrary to the recommendation of the Inspector. The Inspector's "overall conclusions" had been:

> "78. With regard to archaeology, I find that the information available to the council was not adequate. The design of the work ought to, and could reasonably, be modified to preserve a site of archaeological interest, if found necessary once adequate information becomes available.
>
> 79. Moreover, if found necessary once adequate information becomes available, the development ought to, and could reasonably, be carried out elsewhere within the developments permitted limits. I find it unreasonable to expect the council to approve an application, or to show how the works ought to be, and could reasonably, be modified or carried out elsewhere, on the basis of inadequate information."

33. The Secretaries of State disagreed with the Inspector that the information was inadequate. They thought that the context for the adequacy of information was provided by the bespoke HS2 consent and controls regime, which included the EMRs and, within that, the Planning Memorandum, the assessments in the Environmental Statement, the arrangements in the CoCP, and the Heritage and Environmental Memoranda. HS2L's statement in support of the request was properly based on the programme of site investigation to be carried out at the site, and the Inspector's concerns were met by the EMRs ensuring that the necessary investigations would be carried out before the earthworks were undertaken. If the investigations showed that modifications were required to the proposed works, HS2L would be required to make them and, if necessary, to make a further Schedule 17 submission to LBH:

> "39. …It was not the purpose of the Schedule 17 procedure to replicate or police the process of investigation set out in the EMRs, but rather to complement it.
>
> 40.The Secretaries of State conclude that the correct approach here, therefore, was for the council to determine the application on the basis of the controls already in place under the EMRs".

34. The Secretaries of State considered that the Council and Inspector had "incorrectly sought to replicate those controls through the Schedule 17 process." Accordingly, the Council ought not to have refused the application because of inadequate information. Overall they concluded as follows:

> "50. The Secretaries of State consider that the Schedule 17 regime should not duplicate the controls in the EMRs and are satisfied in this case that the EMR processes, which were approved by Parliament alongside the HS2 Act, will ensure that the appropriate surveys will be conducted at the appropriate time and that appropriate action will be taken in accordance with their findings, including a further Schedule 17 application should that be required."

35. The Court of Appeal commented at [63]:

> "The Decision has the effect of stripping local control from qualifying authorities. It does not, for example, make approval under schedule 17 conditional upon (i) HS2 Ltd carrying out the works it says it will carry out under the EMRs; and /or (ii) the results of any such works which are carried out demonstrating that no mitigation or other modifications is required; and /or (iii) if such mitigation or modification is required, HS2 Ltd then being compelled to carry out that work;…."

36. Lang J's judgment of 20 December 2019 found that a power to seek further information could readily be implied into the statutory scheme, that HS2L was under an implied obligation to co-operate with reasonable requests for information, but the application of the principle that a decision maker had to be provided with sufficient information to make his decision depended on the statutory context. Here, she found

that the authority had been stripped of meaningful control by the language of Schedule 17, which served to constrain and render unusually restrictive the decision-making functions of the local authority. She found that LBH had sufficient information taken as a whole from HS2L to enable it to approve the request, having regard to the limited role of LBH under the statutory scheme and guidance. HS2L had accepted that the site was of importance and that the relevant guidance documents were engaged; its contractors would carry out the necessary investigations, critically review the results to see if modifications were necessary, and if an application were required under Schedule 17, it would be made. As the guidance warned against modifying or replicating controls in the EMRs, it was not appropriate for LBH to seek to commission its own expert investigations, and it should have determined the application on the basis that the scheme of archaeological investigation created under the EMRs would be applied by HS2L in accordance with its contractual and other obligations.

37. The judgment of the Court of Appeal found that Schedule 17 conferred functions on local authorities to determine certain matters of local concern, but did not permit those to be delegated or sub-contracted to a third party, such as HS2L, or for it to be abrogated by statutory guidance or non-legislative material, nor did such materials purport to do so. They were no more than material considerations. Their aim of avoiding approvals or refusals of requests modifying or replicating other statutory or other controls could not in law remove the effect of the powers which were granted to the local authorities. It therefore concluded at [70]:

> "It follows from the statutory scheme that, if HS2 Ltd fails to furnish an authority with information and evidence sufficient to enable the authority to perform its duty, then the authority is under no obligation to determine the request. It is also evident from the statutory scheme …that, since HS2 Ltd cannot proceed to carry out works without an approval, it has a concomitant duty to furnish an authority with such evidence and information as is necessary and adequate to enable the authority to perform its allotted statutory task. If, for some reason, HS2 Ltd does not do this then the correct approach is not to refuse the request for approval (as occurred in this case) but instead to decline the process the request until such time as adequate evidence and information has been furnished. The eight-week period for consulting and then deciding upon the request will not start to run until adequate information has been provided."

38. In its elaboration of its reasoning, the Court made a number of points to which Mr Howell Williams drew my attention. The fact that the role of the authority was limited did not mean that where its role remained, that was limited. The constraints were on the grounds of refusal. Those had to be addressed "fully and objectively" taking into account the relevant information and evidence material to that decision. The Secretaries of State did not argue that the decisions could be delegated, but rather that the decision had no evaluative content. But that could not be correct in view of the grounds upon which a refusal could be made or conditions imposed, with HS2L's consent; [72-3]. The Court found an internal and fundamental flaw in the reasoning of

the Secretaries of State: on the one hand, they said that HS2L had no obligation to provide information to the local authority, but the local authority, thus bereft of the wherewithal to decide the request, had to address the specific and limited grounds of refusal permissible, providing fully evidence-based reasoning. So the local authorities had to address whether the proposed works ought to be and could reasonably be constructed in some other way, or carried out elsewhere. The Secretaries of State had not explained how that was to be done; [74-5]. The statutory guidance and EMRs could not supply the deficiency: they could not alter the system of statutory controls; they were non-binding material considerations; nothing in the EMRs supported the stance of HS2L declining to provide information, rather there was a duty of co-operation; the avoidance of replication and modification of other means of control did not mean that the statutory controls in the HS2 Act were to be stripped from the authority, let alone on the basis of promises by HS2L to carry out the evaluative task itself "in accordance with the somewhat loose contractual obligations in its agreement with the Secretary of State." The latter's powers in the contract and through undertakings could not, [76], "create a new system of non-statutory 'control' differing from that which Parliament intended."

39. I cannot see what paragraph 16 of Schedule 17 has to do with the issue in that case or has to do with the issue in this case, as the information it requires HS2L to provide is (a) about its proposed programme of requests, and (b) a document explaining how the subject matter of the request fits into the overall scheme of works. None of that was at issue in *Hillingdon 1*, nor here, and could not have helped LBH resolve anything before it then or now. The Court of Appeal referred to it as an introduction, of uncertain effect, to what then followed, in [77], which binds me:

> "We are in no doubt that the scheme contemplated by Schedule 17-characterised as it is by duties of mutual co-operation on the parts of HS2 Ltd and the authority-must be construed to imply a duty of adequacy [in the supply of relevant information]. We do not see how the system, which Parliament has carefully designed, can work absent HS2 Ltd being under an obligation to enable the authority to perform its task. We agree with the judge on this point that the duty on HS2 Ltd to furnish information is commensurate with the task the authority must perform ….Since we consider that the authority must perform the evaluative assessment implicit in paragraph 3(6) it follows that HS2 Ltd must provide information necessary to enable that duty to be performed. We also take the view that the statutory guidance on the EMRs, properly read, operate upon this premise. It is important to note the common ground in this case that HS2 Ltd did not provide such information and evidence."

40. After further recitation of paragraph 16, but without explanation of what the Court took its purport to be, the Court noted that HS2L had a discretion as to when it submitted a request for approval, and that the eight week period for approval of a request ran from its receipt, the Court continued:

> "The situation that arose in this case is the very antithesis of what should have occurred. Here HS2 Ltd submitted its request

> for approval prematurely and then used that prematurity to argue that it was under no obligation to furnish the necessary evidence. The scheme set up under Schedule 17 contemplates that a request will be submitted only when it contains adequate information. There may always be some leeway for debate as to what is adequate and under the co-operative procedure which has been instituted there will often be scope for discussion between HS2 Ltd and the authority as to what is required, but that does not alter the underlying point which is that the request 'as deposited' should be 'adequate' to meet the statutory task to be performed by the authority."

41. The Court further supported its view of the implied obligation on HS2L to provide "adequate information" by reference to the consultation process provided for in Schedule 17. Parliament struck a balance between expediting the approval process and "the democratic need to ensure that local environmental and planning concerns and interests are protected", [81]:

> "It is hardly conceivable that Parliament intended to place the evaluation of local interests into the hands of the nominated undertaker, HS2 Ltd. This would have undermined the entire scheme. …
>
> 82. Standing back we ask (rhetorically) whether Parliament intended Schedule 17 to be construed to lead to the situation whereby the state nominated undertaker could circumvent local planning control over impact by declining to furnish the authority with information on such matters and arrogate to itself the task of carrying out any required investigation, free from independent control by the local authority."

42. The Court also accepted, [84], that the system of enforcement of planning control in the TCPA 1990 would apply, by virtue of s20 of the 1990 Act, to any conditions agreed to by HS2 Ltd (or, I add, imposed on appeal by the Secretary of State). But the same could not apply to any controls emplaced outside the Act. Non-legislative instruments, such as the EMRs, could not supplant the legislative enforcement controls.

**The request for approval and LBH's Decision of 9 March 2020**

43. The request made by HS2L on 19 December 2019 was for the approval of lorry routes in connection with five construction sites. The Written Statement for Information, 33 pages long, and Route Management, Improvement and Safety Plan, ROMIS, were submitted with it, for information. The Written Statement, WS, was required by the Planning Memorandum and the Planning Forum Notes, PFN. The sites were identified and their role in the construction process. The routes themselves, and the areas through which they ran, were described, shown on a plan and not at issue.

44. PFN 6 covered lorry route approvals, which were required where more than 24 LGV movements were predicted in a day, to or from an HS2 construction site. The request

had to include a list of routes from the A40, and a requirement in relation to suppliers which would not be coming off the A40. The PFN had no further "requirements". But "For Information" the request should include a covering letter defining the works to which the routes related, a plan of the routes, a written statement describing the sites, the works at each site, and a summary of the lorry route information from the LTMP which would include predicted LGV numbers and timings. The ROMIS should include a summary of any physical changes necessary to facilitate the use of the routes by LGVs, and a summary of measures required to ensure the safety and free flow of traffic in the proximity of the work site access points. This included, here, such matters as specific places where vegetation needed to be cleared, signage put up for traffic management measures, and access to a site to be altered. PFN 6 was complied with, and the contrary was not suggested. LBH, as a qualifying authority, was part of the Planning Forum, which had produced PFN6, and to which it was contractually bound to have regard.

45. Local traffic control measures were set out in the LTMP, which accompanied but did not form part of the application for approval. The LTMP and the Route-wideTMP were part of the EMRs. The application said that the measures in it would be kept under review during the execution of the works in question, in consultation with LBH, and others. The construction traffic management measures could also change in response to different phases of construction work or if new measures were identified as the works progressed. Any changes to the LTMP would also be subject to consultation with LBH and others.

46. There was a section entitled "Estimated LGV Numbers and Timings." The numbers came from the LTMP, and would be updated as necessary. At [2.1.75], the Written Statement said this:

> "The works likely to generate the peak LGV movements are the removal of excavated material from the shaft and concrete deliveries. A high level programme for the works to which this LGV route application relates and how they fit into the overall programme for other works in the area as contained in Section 5. Core working hours will be from 08.00 to 18.00 on weekdays (excluding bank holidays) and from 08.00 to 13.00 on Saturdays. To maximise productivity within the core hours a period of up to one hour before and up to one hour after normal working hours for start-up and close-down of activities will be permitted to include (but not limited to) deliveries, movement to place of work, unloading, maintenance and general preparation work. This will not include operation of plant or machinery likely to cause a disturbance to local residents or businesses. LGV movements will primarily be restricted to the core working hours, however some deliveries such as concrete will be made outside of the hours. …"

47. Then, for each of the five sites, information about numbers was given in the following manner, and I take the South Ruislip Vent Shaft Main Compound as an example:

> "2.1.76 The average number of LGVs (i.e. daily combined two-way trips) during the busy periods using the route is expected

> to be 120 movements/day. The peak number of LGVs using the route is expected to be 140 movements/day (during peak month of construction activity).
>
> 2.1.77 The works likely to generate the peak LGV movements are concrete, infill material and steel reinforcement deliveries."

48. The issues raised in the pre-submission consultation were summarised. LBH wanted predicted LGV numbers for these routes and peak profile in the LTMP. Some wanted construction traffic to avoid peak hours. An indicative quarterly construction programme was provided for each site, from set up to demobilisation. Other consents required were listed.

49. The ROMIS had been provided as required by PFN 6, which included a summary of measures required to ensure the safety and free flow of traffic near the worksite access points. The ROMIS, also as a convenient collection point, set out a number of specific assurances given to third parties, including schools and businesses, and Transport for London, about the use of particular roads. Some were given to LBH. These were not new assurances but were registered undertakings or assurances given to Parliament, accompanied the Bill, and are part of the EMRs. One, given to LBH, related to HGV movements. HS2L would use reasonable endeavours to put no more than 550 HGVs a day through a key roundabout off the A40, Swakeleys Roundabout, and to reduce so far as practicable the numbers of HGVs in the two peak hours there, provided that was reasonably practicable having regard to their impact on the safe, timely and economic construction of the HS2 works, and the benefits of a reduction in LBH.

50. The application was refused on 9 March 2020. The reasons given by LBH were as follows:

> "The Council and HS2 Ltd has evidence that HS2 LGV traffic numbers will result in congestion and therefore prejudice the free flow of traffic particularly in the AM and PM peak. The Council also has significant concerns about the arrangements into and from work sites that is likely to prejudice the free flow of traffic and the safety of other road users. HS2 Ltd has failed to submit information in support of it's Schedule 17 application as to how it's proposal would impact during traffic peak periods and also how the impact would be assessed via a comprehensive monitoring and reporting scheme. The Council is therefore entitled to refuse the application on the basis that the arrangements referred to in Schedule 17, paragraph 6 ought to be modified to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area and are reasonably capable of being so modified. The Council considered that the following 2 conditions could mitigate the above reason for refusal, however, HS2 Ltd refused to accept the imposition of the following 2 mitigating conditions, thereby resulting in the refusal of this permission."

51. Each of the conditions required HS2L to submit a scheme for the approval of LBH. The first was a scheme for the use of the routes to four of the sites "to reduce and restrict the movement of LGVs during the peak hours", setting maximum numbers at six junctions, and setting out the methods for recording and reporting the movements to LBH on a weekly basis with information available on written request at any other time. Its purpose was to manage LGV movements in the peak hours "to avoid impacts on the free flow of traffic." This covered only four of the five worksites, the ones accessed via Swakeleys Roundabout on the A40. The second was a scheme for the arrangements to be used at the worksite accesses, e.g. for stop/go signs, which had to demonstrate that the movements into and out of the sites would be managed suitably to maintain a free flow of traffic, i.e. without queueing, and maintaining the safety of other road users during those movements.

52. The thinking behind all this was contained in the Officer's Report to the Planning Committee. In the summary, it said that it was anticipated that on average up to a peak of 400 two-way HGV movements would be generated on a daily basis during a period of programmed works extending over 58 months. This number of movements per day from 8am to 6pm "will result in a considerable amount of additional movement on the network." There would also be construction worker traffic. "Traffic modelling and available evidence demonstrate that the road network on which the LGVs are to be routed is generally congested with little or no capacity for further growth."

53. It continued that the HS2 ES:

> "identifies the impact of the scheme as 'likely to have a significant environmental effect'. Modelling undertaken for recent investigations into the partial signalisation of Swakeleys Roundabout reveal that the AM and PM peak periods are heavily congested. This information was commissioned by HS2 Ltd to support the requirements of a Legal Agreement. The proposed partial signalisation of Swakeleys Roundabout was not agreed in part because of the impacts of such a scheme would have on the wider network.
>
> Although the submission is for a large amount of LGV movements on roads known to be congested and despite requests, no information on how the LGVs will be managed to reduce impacts on the road network have been provided. Such information should indicate the frequency of HGV movements during the AM and PM peak periods and the remaining working day. The programme could also be adapted to use the routes during the less busy school holidays. In addition the Council has not been provided with a clear understanding of how HS2 Ltd intend to monitor traffic impacts and congestion, or what restrictions are placed on the movement of lorry movements in the peak hours. No information is therefore currently before the Council to indicate that a) HS2 Ltd understand and accept the available information (compiled by themselves)on the current state of roads in the AM and PM peaks and b) that there is a clear and meaningful plan of action

> to manage LGV movements to meet the conditions set out in Schedule 17(6)(1).
>
> The Council is also seeking to ensure there are suitable controls at the access and egress points of the worksites in order to avoid queuing on roads or the unsafe movement of lorries across highways. No information is available on these matters.
>
> HS2 Ltd has advised that the issues raised should be covered by the Local Traffic Management Plan (LTMP) which forms part of the Environmental Minimum Requirements (EMRs). These form contractual obligations for the contractors to abide by and are said to be a statutory control providing comfort to the Local Authority that matters of concern are dealt with. However, the LTMP makes no reference to the movement of LGVs during peak times. The Council's concerns are therefore not dealt with through the EMRs. the LTMP also does not adequately describe or set out the control of movement to and from sites, so again, the EMRs are not sufficient. Finally, the LTMP and approach to monitoring traffic numbers is somewhat ad hoc and on an infrequent basis and therefore inadequate in giving confidence that contractors would be accountable for the movement of LGVs.
>
> The applicant has therefore been formally requested to agree the imposition of conditions to ensure the lorry routes and the arrangements are reasonably modified, so as to minimise the disturbance to the free flow of traffic and to ensure the safe operation of the highway network. Essentially, the Council is simply seeking to reach agreement on the level of LGV movements in the peak hours and to set out a robust monitoring regime in which the Council as the Highways Authority ensures the project is appropriately managed within the Borough….
>
> Without such agreement, the approach adopted by HS2 Ltd and the applicant is simply to have unfettered management of the routes set out in the submission with no clear mechanisms or controls in place. Consequently, without the agreement to the conditions the proposals would have clear prejudicial effects on road safety and the free flow of traffic in the area."

54. Transport for London's, TfL, consultation response had been that it would be useful to see a more detailed breakdown of LGV movements in the peak periods, but recognised that due to construction types and phases, it was hard to be exact but an indication of "circa 20 LGV movements between the hours of X and Y could prove beneficial (this data could be provided in subsequent LTMPs)."

55. The LBH Highway's Engineer commented that HS2L's position was that "more detailed and relevant traffic flow analysis" was contained in supplementary ES volumes, including one entitled "Traffic and Transport appraisal" which set limits in

HGV site related activity. But the detail had been put directly into the HS2L traffic assignment model, and so the LGV numbers could not be "fully assessed without direct access to this modelling tool and background information." The relatively broad-brush figures provided by HS2L did not permit the LGV construction movements during the peak highway periods to be extracted or deduced. But that was the crucial information for the Council:

> "…as it allows for an appraisal of any associated traffic burden inflicted by HS2 Ltd operations during the most sensitive and acute periods of baseline traffic network activity. A clear presentation of data linked to the latter (i.e. baseline traffic network levels) would also be considered a reasonable demand with specific regard to the highway network directly affected by proposed routing.
>
> Clearly and ideally it is the strong intention of this highway authority to ensure that peak traffic periods are avoided in full or in substantive part to ensure least possible harm.
>
> Without this information and given that this borough had not been party to the aforementioned traffic assignment modelling process, it is not possible to make an informed decision on the acceptability (or otherwise) of 'end-game' impact of HS2 Ltd activities at the most crucial morning and afternoon/early evening traffic periods.
>
> Hence, as is common to all S17 'Lorry Route' applications, it would be expected that an analysis of the said 'peak hour' activity impacts on the highway network form the dominant part of these submission for appraisal ….
>
> As is the norm, the peak morning and afternoon traffic periods are of most concern as some of these roads are running to over -capacity and the proposal will potentially add to current delays and congestion.
>
> Crucially, what is missing from the submission is references to how the proposal would impact during traffic peak periods with the time-line distribution of the operational movements. Such information would indicate the predicted frequency of LGV movements during the aforementioned to peak periods and the remaining working day. Without this detail a fully informed judgement cannot be made."

56. The Planning Officer expressed his view of the problem this way:

> "The amount of LGV traffic associated with this submission and in accumulation with other HS2 works is significant. At its peak (lasting a month) the LGV numbers surpass 400. That

> equates to 40 every hour or one every 90 seconds. The road network is already at capacity and therefore not only does the sheer volume of traffic pose a concern but so too does the management of the LGVs, particularly if there is a delay creating a bottleneck at access points.
>
> As submitted, the applicant is presenting a situation of unfettered use of the road network with no limitations on the movement of LGVs in peak hours or restrictions of peak working times to school holidays when the roads are invariably quieter.
>
> Essentially there is no hurdle or controls to restrict vehicular movements at peak hours. This is of a clear concern given the traffic all converges at one of the few access points to the A40 and major strategic network."

57. He then dealt with the proposal for partial signalisation of Swakeleys Roundabout over the A40 by TfL which managed that roundabout. LBH and HS2L had signed an agreement in 2017, the Hillingdon Agreement, for an investigation of whether that would be beneficial in managing HS2L construction traffic on the road network. Modelling and assessment work was undertaken. The evidence supported the conclusions in the original HS2L ES that the network was particularly problematic at peak times on roads leading to major junctions. The study concluded that partial signalisation would be beneficial to the movement of HS2L LGVs off Swakeleys Roundabout, and would continue to have benefits after the HS2 works were finished. But the study did not adequately cover the effect of partial signalisation on the wider network, as traffic left the roundabout (TfL's) quicker and then blocked up other parts of the network, (LBH's). Nor had reassignment of flows from congestion caused by HS2 traffic been adequately assessed in the study. So, the proposal was not taken forward.

58. This study supported the LBH's view as to the impacts of construction traffic on its network, but it had not been presented by HS2L as part of its information relevant to the request. The original 2014 HS2 ES, which was presented as part of the supporting information for the request, said that the increases in traffic flows during construction would lead to congestion and increased delays at various junctions in LBH, including Swakeleys Roundabout; this was a "likely significant residual effect."

59. The Officer's Report explained the information which had actually been sought from HS2L, explaining why in this way: "Officers would like to ensure that any approval would not have a negative impact on the free and safe movement of traffic and that any arrangements necessary to minimise the harm are reasonable. If the council is being asked to ensure the routes are managed in a safe and efficient manner, then a sufficient amount of information needs to be provided. Initially there was limited information on the arrangements related to the above."

60. The report then referred to what the Highway Engineer said about the crucial need for information about LGV activity during the morning and afternoon peak highway periods. The information sought from HS2L had been:

> "1. Background information on the assessment of traffic along the routes in light of the changes to the project; how the existing flow of traffic will be impacted by the proposals. This then informs the types of arrangements necessary to secure the free flow and safe movement of traffic.
>
> 2. Details of the arrangements to manage peak hour traffic.
>
> 3. A breakdown of the traffic numbers (including programme) in cumulation with the rest of the project.
>
> 4. A clearer indication of when the routes will be used.
>
> 5. How traffic numbers will be monitored and recorded and how these will be reported to the council with respect to the numbers along these routes."

61. The Report then set out HS2L's response:

> 1. The assessment of traffic impact was set out in the ES accompanying the Bill, which stated where significant adverse effects were expected to arise. HS2L was not required to minimise the specific adverse effects there identified, but it could not create significant new adverse effects beyond them unless they were not reasonably foreseeable at the time. [This is because those assessed effects had been regarded as acceptable problems for the construction and operation of HS2.] If the assumptions about construction activities diverged significantly from those in the ES, HS2L would have to ensure that they did not create significant new adverse effects. This would be measured against the conditions which had been considered in the ES; traffic growth allowed for in the ES would therefore, for example, not be a new condition when it appeared on the roads.
>
> 2. The Vehicle Management System would limit the number of vehicles which could book in during the peak periods; this would ensure free flow. This VMS could be amended to reduce the numbers booked in if there were issues or continuous disruption. The VMS was being built with contractor input to prevent HS2 works having an impact on the area.
>
> 3. The RTMP required contractors to provide the "forecasts of flow assumptions", if available, within their LTMPs, prepared for consultation within the CoCP. Those forecasts needed to be comparable with those used in the ES, i.e. "averaged peak flows over the busiest month." Local Traffic Liaison Group Meetings would deal with how the information was to be provided to local authorities.

> 4. A histogram had been provided which indicated a 58 month construction programme with a peak of over 400 vehicles per day at month 47.
>
> 5. The VMS limited the number of vehicles allowed to enter per day; suppliers booking in a vehicle would have to provide its details which gate staff would have. Summaries of information on actual and predicted numbers would be provided at local TLG meetings, but not the individual contractors' forecasts, nor the specific data or access to the VMS. (Officers expressed concern that there was no scope for this information to be shared with LBH, and what they saw as a lack of collaborative working arrangements.)

62. On 27 February 2020, HS2L supplied what LBH described as "important details" about the percentages of peak hour LGV arrivals and departures at the sites collectively. This was translated by LBH into a figure of 80 LGVs in the peak hours directed at "a sensitive pinch point" at Swakeleys Roundabout and affecting two other junctions nearby, the:

> "available evidence for which suggested that these were congestion hotspots. Consequently, these pinch points would have the effect of slowing vehicles and having a bunching effect at the access points of sites (in the AM peak) and junctions (in the PM peak). This would have significant consequences on the free flow of traffic with associated air quality problems."

63. The Report considered that there should be an appropriate degree of managing the traffic in the peaks by staggering and restricting movements or a greater degree of holding lorries on site:

> "The LTMP and EMRs do not provide any control, and no information is available to the Council to demonstrate that this matter has been adequately considered with an appropriate management of traffic relative to a) the baseline traffic movements and b) the congestion hotspots. As presented the proposals would impact on the free flow of traffic."

64. The arrangements were capable of being modified by "a greater formalised degree of control of traffic."

65. HS2L's reply to a further emailed question, about whether HS2L had reviewed the Swakeleys Roundabout modelling data, expressed its view that the data was "not material to" the application for approval to LGV routes. Its task was to ensure that there were no significant new adverse effects beyond those accepted in the ES. The obligation to reduce LGV peak hour movements was not specific but was part of the general obligation on HS2L to use reasonable endeavours to reduce adverse impacts, though that did not extend to reducing them below the levels assessed in the ES. Flows of LGVs would be managed to that end. Section 4.3.2 of the RTMPs set out

that there would be no "junction specific modelling for temporary construction traffic impact, unless stipulated by an assurance."

66. The Borough Solicitor explained the legislative framework within which the decision had to be made, reminding members of *Hillingdon 1*, then between Lang J's decision and appeal to the Court of Appeal; Lang J had found that there was no express power to seek further information but that there was an implied duty on HS2L to co-operate with reasonable requests for information. He reminded them also of an earlier Inspector's decision finding that it was for LBH to show why the arrangements could and should be modified in the way it proposed, and for the purposes of free flow and road safety. There were similarities, but he distinguished it on the grounds that the traffic here was much more significant, and LBH now had more evidence of the inefficacy of the monitoring of vehicle movements. (This meant, however, submitted Mr Howell Williams that LBH could not put forward limits, by way of suggested conditions, on the numbers of construction vehicles on any particular access route during the peak periods, having regard to the underlying flows, by assessing the numbers of LGVs which the present flows could additionally accommodate, and imposing that number as a limit.)

67. The Minutes record Officers saying that "there was clear evidence to support the Council seeking modifications to the submitted traffic arrangements." Although there were no objections to the routes, and the partial signalisation of Swakeleys Roundabout would bring some relief to HS2 traffic, that remedy would adversely affect the wider traffic network, and the evidence used in the TfL Report "confirmed that the road network around Swakeleys roundabout was heavily congested." They would become more problematic with 400 LGV movements a day. Vehicles could bunch, waiting in the roads to enter the sites. If the conditions had been agreed, approval would have been recommended. But Officers were "convinced" that HS2 works would result in congestion on the road network and reduce the free flow of traffic. Peak hour restrictions could be put in place to reduce traffic movements when the roads were most congested. The Sub-Committee noted that these roads "already experienced significant congestion levels" and were "struggling". Spreading the movements through the day would help the network contractors and HS2. Further information was required, and the arrangements ought to be modified. "Although the Council welcomed the reduction in traffic, nonetheless no further information had ever been produced by HS2 to change the conclusion that there were likely to be significant adverse effects as a result of HS2 traffic."

## The appeal

68. I have set out the reasons for refusal. The appeal was dealt with by way of written representations. HS2L understandably supported its submissions with Lang J's judgment, and the earlier decision of an Inspector, on lorry routes, to which the Officer's Report alluded. It contained the error that the Inspector, (and presumably the Secretaries of State) could not impose conditions on HS2L, without its consent, and welcomed discussions with the Inspector, should he be minded to do so. (HS2L however accepted before me that it had somewhat misunderstood its position, and the last sentence of [31] of *Hillingdon 1* needs to be read in that light and with the last sentence of [82]; the powers of the Ministers and local authority are not co-extensive in that respect.) HS2L emphasised that the onus was on the local authority "to demonstrate that each component of the relevant test" in paragraph 6 of Schedule 17

was made out. LBH had failed to undertake that exercise. HS2L derived that submission from the language of paragraph 6(5)(b) of Schedule 17, and paragraph 7.7.3 of the Planning Memorandum. These, with Lang J's judgment, were prayed in aid of a contention, said by LBH now to have been superseded by the judgment of the Court of Appeal in *Hillingdon 1*, that "the Council must provide evidence to substantiate a refusal or the imposition of conditions…"

69. HS2L set out its view about the controls in place to reduce potential traffic impacts. The CoCP required route-wide, local and site-specific traffic management measures to be implemented. The RTMP dealt with routes, and traffic flow management. This included an obligation to comply with and to take steps to monitor compliance with the approved routes, and for the collection of vehicle flow data, and for traffic management measures to be deployed. The LTMPs were required by the CoCP to contain details, where appropriate, of the timing of site operations and traffic movements. The details of the draft LTMP included those points, the proposed VMS, and the routes to be used.

70. HS2L's principal contention was that LBH had not provided any evidence to support the reasons for refusal, and had shown insufficient justification for them, contrary to what it had been bound to do by the Planning Memorandum to which it had signed up. There was no evidence that there would be congestion prejudicial to free flow in the peaks, as claimed. Nor had the Council explained how or where any modification should take place. The conditions proposed only covered routes accessed from Swakeleys Roundabout, and the South Ruislip Vent Shaft Main Compound was not accessed that way. True it was that the ES had described a significant environmental effect from construction traffic in the area, but that impact had been considered by the Select Committee and "fully accepted by Parliament" in approving the Bill. Parliament had accepted the EMRs, and the stated intention of the Secretary of State to carry out the project so that its impact would be as assessed in the ES. The EMR General Principles also required HS2L to use reasonable endeavours would be used to reduce the impact, so long as they did not unreasonably delay the construction programme; it was contractually bound to them by the Development Agreement. In reality, LBH was using the approval process to re-open matters concluded by the legislative process.

71. HS2L instanced what the ES had provided for. On one relevant link, the ES assessed a maximum of 1869 daily two-way movements during the 12 month peak construction period; this had been reviewed and the construction work rescheduled with the result that that figure was down to 1460 daily over a 9 month period. HS2L was also committed in the Development Agreement to reduce significantly the figures for traffic at Swakeleys Roundabout down from those assessed in the ES, and found acceptable, to 550 movements a day. The ES had not provided for any control over the movements of LGVs during the peak hours. There was no justification for a new form of control.

> "6.78 The key point is that there is nothing in the Legal Agreement which provides that there needs must be a further restriction on LGVs during peak hours. The Legal Agreement was negotiated with the council and it did not seek to restrict the movement on the number of LGV's during peak hours.

> Rather the Council was content for these reasonable endeavours obligations to be placed on the Appellant."

72. The statutory guidance said that planning authorities should not seek to use Schedule 17 powers to modify or replicate controls in place such as in the EMRs. HS2L continued:

> "6.80 The Council is now seeking to modify this EMR requirement without explanation or evidence. The Council is essentially seeking to go beyond what was agreed in the Legal Agreement and is using the submission to renegotiate a previously agreed position between the parties that was acceptable to Parliament. The imposition of this condition therefore runs entirely contrary to paragraph 4.4 of the Guidance.
>
> 6.81 Moreover, the CoCP specifically requires that, *"timing of site operations and timing of traffic movements,"* should, if appropriate, be contained within LTMPs. the EMRs make clear that the vehicle management system (**"VMS"**) set out in the LTMP is the appropriate mechanism for this to be monitored and controlled."

73. HS2L then turned specifically to LGV numbers:

> "6.85 If the Council seeks to place a restriction on vehicle numbers it must show why that is appropriate within the confines of paragraph 6(5)(b). As provided in Planning Forum Note 6, the Appellant is only required to provide the Council with predicted LGV numbers and timings for information purposes only. It is not required to provide an hourly breakdown of LGV movements at specific road junctions as part of the Submission.
>
> 6.86 In addition, paragraph 4.3.2 of the RTMP provides that, *"no junction-specific modelling will be undertaken for temporary construction traffic impacts unless stipulated by an assurance."* There is no such assurance in the present case which means that this condition seeks to modify the express provision of the EMRs and, as such, is clearly contrary to paragraph 4.4 of the guidance."

74. A similar line was taken over the Council's aim of requiring the provision of numbers of LGV movements on a weekly basis so that it could monitor traffic flow on a continuing basis. It was stepping outside the scope of its statutory function under the Act. The key point was that it was HS2L's responsibility, and not the Council's, under the VMS to monitor those movements. The VMS was required under the LTMP, one of the EMRs, and the condition sought to replicate or to modify the existing requirements to which HS2L was subject.

75. In summary, the EMRs contained the necessary controls so as to render the first condition proposed by LBH unnecessary, duplicating or modifying another regulatory regime. There was no evidence to justify "an additional control reducing or restricting the number of LGVs during peak hours or at all."

76. The argument about Condition 2, and the immediate site access arrangements, developed along the same lines. These were catered for by the LTMP and the VMS which would set to include the maximum flow of vehicles to a site in order to prevent queueing on the highway. If a traffic management issue arose, it should be resolved through the LTMP, the existing control which the condition would replicate or modify.

77. LBH responded. It summarised its position: its road network was already heavily used and at capacity particularly in the peak hours; it was bound to ensure it could be used safely and efficiently by all; HS2L was seeking to use it for the movement of over 400 LGVs per working day; LBH had been tasked under the Act to consider the arrangements on the routes which HS2L LGVs would use, satisfying itself that the arrangements would prevent or reduce prejudicial effects on road safety or on the free flow of traffic; HS2L had provided no detailed information on how it intended to manage the movement of LGVs during the sensitive and congested peak hours. LBH, as a responsible authority, could not approve the unfettered use of the road network in the hope that HS2L would develop and enforce suitable plans at a later date for managing the network. It proposed a "vague form of self regulation that is not obviously aimed at managing the road network for everyone" and its "processes are not designed to achieve the same objectives as the Council as the responsible highways authority." It illustrated its concern: there would be a peak month in "month 47", but that could be any month in any year, and it might or might not coincide with school holidays when traffic would be rather lighter. That did not trouble HS2L but did trouble LBH.

78. The ES covered the routes in question, but did not cover how the routes were to be used; that was what the "arrangements" in paragraph 6(5)(b) were for. HS2L had admitted that in the Select Committee: the restrictions to be applied to the roads were subject to TMPs, controls in Schedule 17, and the highway arrangements would have to be agreed with the highway authorities. So it was not a question of route modification but of use modification.

79. LBH contended that HS2L had already produced the evidence showing the problem, justifying a cap on peak hour movements in the ES, and in contributing to the study of partial signalisation of Swakeleys Roundabout. There was also a further updated assessment, produced by TfL, relating to the reassignment of traffic in response to construction traffic and the partial signalisation of Swakeleys Roundabout, which was before the Inspector. These sources were the only evidence which the Inspector had about the problems. LBH had set out how the arrangements could and should be modified in its proposed conditions. HS2L was denying the existence of the very problems which it said it should be relied on to resolve. The EMRs contained no proposals to constrain peak hour LGV movements.

80. Relevant extracts from the ES and its amendments were set out, recognising that the changes in traffic flows, even after mitigation, would lead to congestion and delays on construction routes in LBH, and would have major adverse effects on two links. The

problems were accepted in the extracts cited from the Select Committee report. Parliamentary approval was accompanied by a Legal Agreement between LBH, HS2L and the Secretary of State, aimed in part at reducing the daily 1400 LGV movements to 550 or fewer. This focused on numbers and not on the management of the numbers. It was cl.6.1 of this Legal Agreement which contained the obligation on HS2L to use "reasonable endeavours to attain a maximum of 550 HGV movements per day… at Swakeleys Roundabout, and reduce so far as reasonably practicable the number of HGV movements at Swakeleys Roundabout during the AM Peak and PM Peak" by measures then identified. Cl.6.9 reads: "HS2 Ltd will continue to engage actively with Transport for London and the Council to seek to identify further traffic management measures to manage the remaining HGV movements." But LBH had seen no evidence of any firm commitments to manage the traffic at peak times, and HS2L appeared to think it unnecessary anyway.

81. The Swakeleys Roundabout Study, required under the Legal Agreement, was then discussed in detail. It was to look at the effects of 550 HGVs per day at Swakeleys Roundabout, and assess the advantages and implications of partial signalisation. The scenarios considered included baseline flows in 2021 without HS2 traffic, then with HS2 traffic, and finally the latter with signalisation. LBH considered that the first two showed the degree of peak hour worsening in congestion which HS2 construction traffic would bring. The traffic inputs broadly reflected the levels LBH relied on in these submissions. The traffic levels on the approach and exit routes to and from the Roundabout in the AM and PM peaks were summarised, and the conclusion drawn that there would be a detrimental impact on the already congested network from HS2 traffic. This would lead to some road users taking different routes, the consequences for which were not shown, but at least one route to which they could reassign was itself already heavily congested. Partial signalisation would help reduce the delays, and assist HS2 construction traffic access the sites. But LBH considered that that would be at the expense of others on the network, and that those effects had not been developed properly in the Study; signalisation could simply move the problem to somewhere else on the network, without a "more holistic study of the entire network with remedies identified elsewhere" before signalisation could proceed. But the Study had provided:

> "an updated appraisal of HS2 traffic movements, broadly as presented in this submission. It shows that HS2 LGV movements would result in adverse impacts on the road network in the local area. There is no alternative conclusion to be reached."

82. Parliament had only agreed that the scheme could go ahead on the basis that further work would be undertaken, (pursuant to the Legal Agreement) and that arrangements would be "agreed" under Schedule 17, as well as through the EMRs. ("Agreed" meant "resolved.") Parliament had not simply said that the impact in the ES was acceptable. HS2L had never undertaken work to update the modelling to determine:

> "the exact level of impacts of their scheme and demonstrate that the HS2 would no longer have a prejudicial effect on the network.

> 3.3.7 It would be entirely guess work and contrary to the evidence to suggest that the numbers presented in this submission would no longer have a prejudicial effect on the free flow of traffic."

83. The problems with vehicles turning into or out of the construction sites on to the highway were described.

84. LBH then defended its proposed conditions. First, condition 1 and the control on the movement of vehicles. Outside the submission process, HS2L had confirmed in a "Telecon Note" the proportions of LGVs entering and leaving the sites, overall, in the two peak hours. It did not give any site specific proportions, or apply to any actual numbers. HS2L's reliance on the VMS, for limiting the numbers in peak hours so as to ensure free flow and to avoid LGVs queueing on the highways to enter the sites, was criticised on the grounds that the VMS had never been disclosed, the system would not be accessible by LBH, the data would not be shared except as summaries at Transport Liaison Group, TLG, meetings, and LBH said that its object was clearly not to manage the impacts on the road network, rather than on the sites themselves, and had no means of addressing problems caused by peak flows away from the site but in the local area. HS2L had to acknowledge the impacts before the VMS could be said to be a solution to them. The EMRs, LTMP and VMS were not intended to transfer powers away from the Highway Authority to HS2L:

> "4.2.12. The need for condition 1 is therefore to ensure that the highways authority secures the arrangements missing from the current suite of controls to achieve an objective that is not shared by HS2 Ltd i.e. managing the network for everyone.
>
> 4.1.13. Clearly the Council cannot set a specific target in the Peak hours because of the limited information provided in the submission. [The condition] is therefore worded to ensure a collaborative approach between the parties there does not unreasonably prejudice HS2 Ltd's programme but also does not prejudice other road users."

85. The monitoring and reporting part of condition 1 was necessary because HS2L proposed that, at meetings of the TLG, only 4-weekly averages would be reported. But LBH would not be part of the VMS process. There was therefore no means under the EMRs or other obligations on HS2L for suitable and reasonable compliance with the intended limits on LGV movements to be achieved.

86. The second condition, dealing with the access and egress arrangements on to the highways at the individual sites, was necessary because HS2L had not proposed any detailed management there. Further information had been provided in a "Telecon Note" about arrangements at the individual sites. But it had not formed part of the request for approval. Its plans were not safe or clear, nor did they cover each of the five sites.

87. In this case, LBH were not putting forward a specific number of LGVs permitted to enter or leave the sites in peak hours, as it had done on its previous appeal and which

the Inspector had rejected as unwarranted in the absence of evidence. And the numbers involved there were far smaller than here. LBH added:

> "However, it must be noted that to provide specific evidence of the numbers outlined in the submission would require the Council to undertake a full assessment of HS2 Ltd's proposals; given HS2 Ltd does not disclose full details of their traffic movements, then this would be an unreasonable position to place the Council in."

88. The debate about who had to produce what evidence continued. LBH set out HS2L's position as being that it was for LBH to justify the changes or conditions which it sought; HS2L was not required to set a peak hour limit, but was required to ensure that there were no significant new adverse construction effects arising from an exceedance of what was in the ES. LBH said that it had provided the evidence that meant that effective arrangements were required to avoid disrupting the road network and putting lives at risk. HS2L said that it needed such evidence, but also that it was not material anyway, and denied that any evidence had been provided. It reiterated what it had already said about the conclusions of the ES, Select Committee and of the Swakeleys Roundabout Study.

89. No EMRs existed for controlling peak hour LGV movements or to do so, as LBH sought to do, in the interests of all road users. This had not been assessed in the ES or controlled in the Legal Agreement. The minimum information which was required to accompany a request had been supplied, but not the information reasonably necessary for LBH to understand what arrangements HS2L would put in place to address the issues before the Council of free flow and safe operation of the highway network. HS2L had presented no arrangements, but LBH thought that they would not be difficult to develop further. HS2L did not appear to consider one problem which LBH had to consider which was the potential effect of measures which enabled relatively easy access for HS2 LGVs on other road users including on the wider network, from reassignment.

90. LBH could not provide further detail about access arrangements because of the lack of information from HS2L: how it would manage the movements to and from the sites, and how many LGVs might need to queue to enter and where. The network did not lend itself to safe idling or stopping in the middle of the road, or the problem of multiple LGVs arriving at once, or, in the PM peak, leaving one after the other, crossing either fast moving traffic or joining slow moving congested lines.

91. HS2L replied. The notion that LBH needed to be satisfied that the arrangements would prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area was "a fundamental misunderstanding", indeed the reverse of how Schedule 17 was intended to operate. It was for LBH to "demonstrate that its proposed modifications would prevent or reduce prejudicial effects; it is not the Appellant's role to demonstrate to the Council's satisfaction that the Submission would prevent or reduce them." HS2L accepted that some local roads in the vicinity of the sites may be "busy" at certain times and that introducing extra traffic on to them "could have an effect." But that was not the relevant legal threshold under paragraph 6 of Schedule 17; that was whether any effect was so prejudicial as to require the submission to be modified. Therefore, LBH had to demonstrate with

sufficient evidence that the use of the routes would, and not might, lead to a prejudicial effect on road safety or traffic flow, that the submission ought to be modified to prevent or reduce that effect and how and where those modifications ought to be, and that the submission was reasonably capable of being modified in that way.

92. LBH had improperly elided its functions as a planning authority with its functions as a highway authority. Its involvement in paragraph 6 was only as the former. LBH had failed to have regard to the statutory guidance, which it had not mentioned once, which included what it said about conditions in paragraph 26. Its approach represented a continuing failure to operate the approval scheme in Schedule 17 as it was intended to operate. Parliament had recognised that the LTMP and RTMP were not fixed but had to evolve to meet changing conditions.

93. The documents relied on by LBH as evidence did not support it. The ES Additional Provision was based on a figure of 1460 LGV movements daily, (down from 1860). The peak LGV movements in the present submission was limited to 480 daily, as a crude aggregation of peak LGV movements for each site. This was a worst case scenario as the construction peaks could not coincide at all sites. Hence, the conclusion in the ES that 1860 or 1460 LGV movements daily would lead to a prejudicial effect on traffic flow in terms of congestion "does not demonstrate or provide evidence for the Council's contention that the much lower level now proposed in the Submission would also have a prejudicial effect on traffic flow."

94. The Parliamentary record did not afford any objective data to support LBH, but was "a subjective overview of the current general character of the road network in the vicinity of the Worksites." They could not provide evidence at the proposed LGV movements would have a prejudicial effect on traffic in the future.

95. The TfL Swakeleys Roundabout Report had been fundamentally misunderstood. LBH treated it as having considered 550 daily LGV movements, against the 480 proposed in the submission. Its conclusions could not simply be read across, as even this was a material difference, and which meant that it provided no evidence of the impact of the proposed movements, or that the proposal should be modified. But, more fundamentally, the Report did not assume a level of 550 either. It followed on from earlier modelling work by other consultants which in fact used the 1460 figure, over three times larger than the figure now proposed, and which was not relevant to the assessment of the proposal.

> "Since the levels assumed in the TfL report bear no relation whatsoever to the actual numbers of LGV movements envisaged by the Submission, the Appellant submits that this clearly cannot provide sufficient evidence to demonstrate that the approval of the routes would -not might- have a materially prejudicial impact on traffic flow whether alone or in combination with the other 'evidence' put forward by the Council in this Appeal ."

96. As to the peak periods, given by LBH as 8-9am and 4.30-6pm, these appeared to be "completely arbitrary." TfL had differed, but only in taking 5-6pm not 4.30-6pm. There was no evidence to justify treating those hours differently from TfL's "Inter

Peak", as there was evidence, albeit anecdotal, that local roads were very busy even during off-peak hours. There was therefore no evidential basis for seeking special limitations during peak traffic hours.

97. The reasons LBH gave for not proceeding with partial signalisation of Swakeleys Roundabout were not supported by the conclusions of the TfL Report. The underlying purpose of the proposal was not in itself to mitigate the effects of construction traffic, but rather to improve the capacity of the roundabout and the surrounding road network more generally, which had been considered across other west London boroughs. LBH's reasons were given in a letter, the contents of which were considered at a Council Cabinet meeting. The conclusions the letter ascribed to the Report were not in the Report. Its key conclusions were that signalisation would allow traffic at Swakeleys Roundabout to be managed most effectively in response to changing flow patterns, would reduce delays, queueing and environmental impacts, lead to shorter routes being chosen as traffic currently avoiding the Roundabout would no longer be delayed, without adversely affecting any other junctions, and would mitigate much of the adverse impacts from the HS2 construction traffic on the network.

98. The Inspector had the full TfL Report and it is convenient to refer to it here. It used the West London Highway Assignment Model, WeLHAM, which covered routes over five London Boroughs for some distance around Swakeleys Roundabout. It stated that the model was well validated in the vicinity of Swakeleys Roundabout. The baseline traffic flows modelled for 2021 were shown. The traffic effects of LGVs were converted to car equivalents for the model. At the assumed level of LGVs, the model showed the effect on baseline traffic of HS2 LGVs in the AM and PM peaks in 2021. The effect of partial signalisation was then modelled.

99. In the vicinity of the Roundabout, three links were over capacity in the AM peak: westbound off-slip off the A40 on to the Roundabout, southbound approach to the Roundabout on Swakeleys Road, and southbound approach on Breakspear Road South to the Roundabout at Swakeleys Road. All arms of the Harvil Road/Swakeleys Road roundabout and the northbound approach to Swakeleys Roundabout from Park Road were over capacity in the PM peak. Once the HS2 LGV traffic was added, the Report concluded that AM peak "delays don't increase significantly for most road sections apart from on Warren Rd and The Drive where they meet Swakeleys Rd….In the PM Peak there are increases in the delay on all arms of the Harvil Road roundabout and on the northbound approach to Swakeleys roundabout on Park Rd." Partial signalisation was proposed to help alleviate the increased delays in the area around Swakeleys Roundabout. "The Roundabout is a principal hub for other parts of the network; if it is congested then problems filter to the wider network." It concluded, in the light of what the model showed in terms of queue length, delays and travel times:

> "These show that the HS2 construction traffic will cause a small increase in queues, travel times and fuel consumption when compared to the 2021 base case. The signalisation of Swakeleys Roundabout will reduce these adverse impacts…When the construction is finished the signalisation will provide significant benefits over the 2021 base case."

100. Returning to HS2L's submissions, the Planning Memorandum made it clear that if a planning authority thought that a proposal should be modified, it was for the authority to explain, and with evidence, why, how and where. The conditions proposed did not set out how the proposals should be modified; they required HS2L in effect to tell LBH how they should be modified. On condition 1, LBH contended that there would be an uneven spread of movements across the 10 hour working day, with more during the peak traffic hours. This was based on the percentage figures from the Telecon Note, but they were one-way movements, whereas the total daily movements quoted were two-way movements. 480 evenly spread over 10 hours would be 48 per hour, 24 in and 24 out. The percentages quoted by LBH meant that the movements in the 8-9AM peak would be 15% of the total inbound and 5% of the total outbound, 36+12= 48, matching the notional even spread at 10% of the 10 hour total. In the 5-6PM peak, the figures would amount to 60, with 48 outbound, 12.5% of the daily two-way total, a slightly higher than even proportion, as all the LGVs which had arrived throughout the day needed to be away, [4.7-4.10].

> "4.11 As set out in detail in the ASC [Appellants Statement of Case], the RTMP and the LTMP, the on-going monitoring and management of these LGVs will be undertaken by the Appellant through the operation of the VMS and, as made clear before the Select Committee, where improvements can be made then the EMRs will be updated. This is precisely the system envisaged by Parliament in passing the Act notwithstanding the Council's continued protestations."

101. The decision on the appeal on an earlier lorry route approval showed there to be no basis for the sort of condition proposed here, demonstrating the limited role for LBH, as Lang J had found. Further monitoring, if required, was for the EMRs. HS2L was not a private developer but a statutory undertaker, wholly controlled by the Department for Transport. It was the public body entrusted by Parliament with policing these issues, and it would ensure that its contractors abided by the controls set by Parliament. The contractual controls were not available to LBH.

102. On condition 2, there was again no evidence that the use of the access points would- not might- materially prejudice road safety. There was no evidence that the present use of those routed by LGVs created any risks, or that the turning movements would do so. Detailed comments on photographs produced by LBH followed.

> "4.21 As set out in the meeting note between the Appellant and the Council, the Appellant has already given consideration to traffic marshal arrangements and is actively considering other potential measures that could be taken on Breakspear Road South. To the extent that further measures are required, these will be subject to approval under Schedule 4 of the Act and added to the LTMP to secure ongoing compliance.
>
> 4.22 It is important to note that safety measures of this type are provided for in the EMRs which is why they were not provided with the original Submission. In seeking to specify such measures through the imposition of a condition, the Council is attempting to duplicate this process which is not appropriate."

## The Decision

103. The appeal was made on written representations without a site visit; Covid restrictions would have meant that the Inspector could not see "normal" traffic conditions anyway. In DL5, he set out the "central test" as he saw it:

> "The central test in respect of the main issues in the appeal is whether or not the council has produced sufficient evidence to substantiate its concerns with regard to the alleged prejudicial effects on the free flow of traffic and highway safety. My own assessment of whether or not the local highway network and specific junctions are busy or congested is not relevant to whether or not that test has been met."

104. The main issues, DL8, were:

> "a) Whether a refusal of the application is justified on the grounds under paragraph 6(5) and 6(6) of schedule 17; and
>
> b) Whether the council has produced sufficient evidence to demonstrate a need for the proposed conditions and whether these are appropriate, having regard to the relevant guidance."

105. Next, the Inspector set out the statutory scheme, noting that LBH was a qualifying authority, having given the necessary undertakings on the handling of planning matters under Schedule 17. It was a member of the Planning Forum which was intended to help secure the expeditious implementation of the planning provisions of Schedule 17. LBH undertakings included that it would have regard to:

> "…construction, cost and programme implications" and would not seek to impose any "unreasonably stringent requirements on the request for approval which might frustrate or delay the project (paragraph 7.2.1);
>
> -shall state clearly and precisely the full reasons for the refusal of an application made to it (paragraph 7.2.1);
>
> -if its decision has been reached on the grounds that the proposed details ought to and could be modified it should include an explanation of how it considers that the modifications should be made (paragraph 7.7.2);
>
> -shall also take into account the assessment and finding set out in the [ES], the [CoCP], and any Undertakings and Assurances given by HS 2 Limited in relation to the construction of the project (paragraph 9.1.1); and
>
> -shall have regard to the [statutory guidance] (paragraph 9.3.1)."

106. This was all to be considered in the light of Lang J's judgment, which represented the law until overturned. He knew that permission to appeal had been granted. The Inspector summarised his understanding of that judgment:

> - the decision-making function the local planning authority was unusually restricted in comparison with other types of application;
>
> - the onus was on the local planning authority to demonstrate that the Schedule 17 submission ought to be and was reasonably capable of being modified, as the Planning Memorandum stated in paragraph 7.7.2;
>
> - there was no express provision enabling the authority to seek further information but such a power could "readily be implied as part of a local authority decision-making function" along with an implied obligation on the applicant to "cooperate with reasonable requests for additional information; "
>
> - it was not the purpose of the Schedule 17 procedure to replicate or police the process of investigation set out in the EMRs, but rather to determine the application on the basis "that any requirements of the EMRs would be applied by HS2 Ltd or its contractors. "It is not the role of the planning authority to seek to enforce controls within the EMRs by withholding approval."

107. The Inspector commented on the role of PFN6 and, he pointed out, LBH had had "full opportunity to attend [Planning Forum] meetings and participate in the discussion and approval of PFN6. The Council should therefore be fully aware of the contents of the note." He also pointed out, correctly, that the powers in Schedule 17 were given to local planning authorities and not to highway authorities. He accepted that the route approval process permitted the Council "to raise concerns about the effects of the use of the proposed routes on the free flow of traffic and on highway safety and to contemplate the use of conditions to remedy specific issues", provided that they satisfied the requirements of paragraph 6 of Schedule 17, and the onus was on the Council to demonstrate that the proposal ought to be and was reasonably capable of being modified in that way.

108. In DL31, the Inspector summarised the concerns of LBH leading to the refusal:

> " …its concerns relate primarily to the lorry routes that would use that part of the network including Swakeleys Road, Swakeleys Roundabout, Harvil Road, Breakspear Road South and Ickenham Road. In essence, the objection is that the routes form part of a busy road network which is already heavily used and at capacity, particularly at peak times, and that the additional HS2 LGV movements would result in a prejudicial effect on the free flow of traffic. Suggested Condition 1 seeks that a cap should be placed on the number of HS2 LGVs using

> specific junctions on the network at peak times in order to reduce the effect of that additional traffic on other road users."

109. The Inspector, DL35, accepted HS2L's contention that LBH only had powers as planning and not as highway authority, which is correct, though I cannot see what difference it makes, given the remit relating to free flow and safety which it had as planning authority. He accepted that the upshot of two earlier appeals and Lang J's judgment was that approval should only be refused where there was "clear evidence that the proposed arrangements would be prejudicial to free flow and safety. The burden of proof falls on the Council to demonstrate that the proposed arrangements would be so prejudicial as to require [the submission to be modified]." He plainly rejected LBH's approach that "it needs to be satisfied that the arrangements will prevent or reduce prejudicial effects on road safety or the free flow of traffic in the local area." Instead he agreed with HS2L's approach set out in its Reply to the LBH Statement of Case.

110. He noted, DL36, that LBH's case was that HS2L was:

> "well aware of problems on the local road network, including that of peak time congestion, and relies upon the Appellant's own evidence to justify the proposed peak time cap on movements. This evidence comprises the ES that formed part of the evidence before Parliament when it passed the Act, [and the TfL study on partial signalisation of Swakeleys Roundabout]."

111. The Inspector then considered what those two sources of evidence showed. He accepted that the evidence before him clearly showed that the level of LGV movements assumed in the original and then additional ES reports, were significantly higher than the level now envisaged and which formed the basis of the HS2L submission; DL38. He noted that, despite the reductions between the original ES figures and those in the Additional ES Report in peak HGV flows, the conclusion remained that there would continue to be "major adverse significant effects on Swakeleys Road and Harvil Road." But it was those figures which he accepted were significantly higher than those in the submission before him on appeal. LGV traffic to sites other than the South Ruislip Vent Shaft Main Compound, SRVSMC, would have to use that link, and that comment from the ES Reports applied only to those four; DL39. The figures for that link had reduced from 1860 daily two-way movements over a 12 month period in the original ES to 1460 over a 9 month period in the Additional ES Report, and down to 480 at the peak of construction activity in the submission, on a "crude aggregation of the peak [construction] level of movements for each of the [four sites, excluding the SRVSMC,]"; DL41. But this took the maximum figures for each site, in the range of forecasts. The peak duration of construction activity varied at the sites from 2 to 16 months, and would not coincide. He accepted HS2L's point that 480 was a worst case scenario; DL42.

112. The average traffic levels in the submission would not be experienced other than for a relatively short period in the near 5 year construction period. On the part of Swakeleys Road between Swakeleys Roundabout and Harvil Road, the busiest period could see 480 two-way trips on the network as a whole; the average HS2L flow on that link would be about 420 LGVs; DL43. His conclusion from this at DL44 was:

> "Even the 480 daily total is substantially lower than either of the figures used in the original ES or Additional Provision 2 assessments. Both assessments concluded that the additional LGV movements would have a prejudicial effect on the free flow of traffic in this part of the network. However, given the very much higher daily flows that were assumed in those assessments, those findings do not demonstrate that the much lower level of movements now envisaged would also have that effect. The original ES and Additional Provision 2 conclusions cannot, in my view, be relied on as evidence that the use of the lorry routes as now proposed would, as opposed to might, result in the prejudicial effect on the free flow of traffic."

113. The Inspector also concluded, DL46, that, as Parliament had granted permission after considering the LBH evidence of adverse construction traffic impacts and without imposing specific limits, but taking into account the EMRs and the various undertakings and agreements, it had to be assumed that Parliament regarded the assessed impacts as acceptable "notwithstanding its expectation that additional work will be undertaken to try to further reduce those impacts."

114. He then turned to the TfL report, which was produced pursuant to a legal agreement between LBH, HS2L and the Secretary of State for Transport. This required further work to be undertaken to reduce the impact of construction traffic on the road network in the Borough. It had a target of reducing two-way LGV movements to 550 per day or fewer. The contention by LBH, that the commissioning of this study was itself evidence that the reduced traffic numbers arising from the agreement were still likely to cause problems, was unfounded as the study arose from the legal obligations. The presence of "likely problems" was insufficient to show that the 480 daily peak flows now assumed would result in a prejudicial effect on the free flow of traffic or highway safety."

115. The Inspector summarised LBH's case that the baseline flows with the HS2L traffic showed that existing capacity problems would be exacerbated in the peak hours, and that the difference between the assumed daily flows of 550 and the current proposed 480 was not such as materially to alter the analysis. He accepted that 550 reflected the 480 Schedule 17 submission figures as closely as reasonably possible in the absence of further modelling. But it was unclear what figures TfL had actually used, or that it was in fact 550.

116. After close analysis of the sources, however, the Inspector concluded that HS2L were right that TfL could not have used the 550 figure. Instead, he concluded that:

> " 53…The TfL Report's conclusions about the likely effect of HS2 LGVs on the free flow of traffic were, therefore, based on the Additional Provision 2 flows of 1,460 extra LGV movements per day. This is a substantially greater number than the 480 peak figure underpinning the Schedule 17 application. Accordingly, I find that the TfL report does not provide clear evidence that the use of the lorry routes as now envisaged would result in the prejudicial effects alleged by the Council.

> 54. In the absence of other evidence, I conclude that the Council has not demonstrated that the proposed arrangements with regard to the routing of LGVs to the [4 worksites excluding the SRVSMC] would have a prejudicial effect on the free flow of traffic on the local road network. There is, accordingly, no justification for the refusal of the application on this ground."

117. The Inspector then turned to the SRVSMC, saying that it was not fully clear from the Council's submissions that it had no objection to the route to that site, as HS2L suggested. After analysing draft condition 1, which excluded the site from the list of sites, but included a link which only it could use, the Inspector decided that LBH did seek a modification in that respect. But he concluded at DL57:

> "No separate evidence of congestion problems on that part of the network has been submitted. I can, accordingly, only assume that the Council relies upon the original ES and the Additional Provision 2 Assessment to substantiate those concerns. As they assumed much larger figures than the flows now proposed, I do not consider that these assessments serve to demonstrate that the additional LGV movements now envisaged would have a prejudicial effect on the free flow of traffic [on the relevant link and junction] ."

118. The representations of interested parties did not provide the clear evidence required either.

119. The Inspector's consideration of the conditions drew upon those earlier conclusions. He did not consider that the half hour difference in the PM peak period between the TfL Report and the Council's proposal was of any real significance in view of the much higher figures on which the TfL Report had been based, and which he had already concluded did not provide the necessary evidence to demonstrate prejudicial effects on free flow at peak hours. He continued, DL61:

> "This finding is supported by the TfL Report's conclusion that the adverse effects of those higher traffic flows could be mitigated to a large extent by the partial signalisation of Swakeleys Roundabout without an adverse effect on other junctions. Had the Council decided to progress with that mitigation, it seems unlikely that it would be concerned about the lower level of LGV movements now proposed or see a need for the proposed condition. Irrespective of its reasons for not proceeding with the mitigation that was expressly identified in the Hillingdon Agreement, those conclusions do not support the Council's contention that the TfL report serves as evidence that unacceptable peak time effects would result from the lower level of daily movements now proposed."

120. As to LBH's concern of an uneven spread of the 480 daily movements resulting in elevated levels in the peak hours, he said in DL62:

> "I am satisfied that, for the reasons set out in paragraphs 4.7-4.10 of the Appellant's response to the Council's Statement, this reflects a misunderstanding of the data. The Appellant accepts that there would be a slightly higher flow than the hourly average in the evening peak hour but this does not, on its own, serve as evidence of a prejudicial effect at the PM peak.
>
> 63. On this basis alone, proposed Condition 1 does not satisfy the paragraph 6 requirement that conditions be imposed only on the ground that the proposed arrangements '*ought to be modified'*. There is no clear evidence that the number of movements now envisaged would have such a prejudicial effect as to require the proposed routing arrangements to be modified in the way that the Council suggests."

121. The Inspector also rejected Condition 1 because it conflicted with the advice in [4.4] and [10.4] of the statutory guidance. It sought to replicate or modify controls already in place in the EMRs or would conflict with them, because *"these controls would have been considered necessary or sufficient by Parliament when it approved deemed planning permission*." He elaborated this in the next ten paragraphs. This is important for Mr Howell Williams' submissions.

122. DL 65: HS2L and its contractors were contractually bound to comply with the EMRs, which included the General Principles, the CoCP, the RTMP, LTMP and VMS which provided information relevant to the Schedule 17 application and the decision maker should have regard to them. Lang J's judgment meant that "The correct approach is for the application to be determined on the basis that any requirements of the EMRs will be applied by HS2 Ltd and its contractors. It is not the role of the Schedule 17 planning process to seek to enforce controls within the EMRs by withholding approval."

123. DL 66: The EMR General Principles required the EMRs to ensure that the environmental effects of construction works were no greater than those assessed in the ES, and that HS2L should use reasonable endeavours to adopt mitigating measures reducing any adverse environmental impacts.

124. DL 67: Further work had resulted in the number of predicted daily LGV movements being reduced to 480, from either the 1860 or 1460 considered by the Select Committee, consistently with the obligation in the Hillingdon Agreement to use reasonable endeavours to limit the two way daily LGV movements at Swakeleys Roundabout to 550.

> "It is reasonable to assume that, as a result of that reduction in LGV movements, the adverse impacts of HS2 construction traffic will also have been reduced below those predicted in the ES and Additional Provision 2 assessments."

125. DL 68: "There is no specific limit on peak hour movements in the EMRs." But HS2L was contractually bound to LBH, by the Hillingdon Agreement, which has the status of an EMR, to reduce, as far as reasonably possible, the number of LGV movements

at Swakeleys Roundabout during the AM and PM peaks. HS2L is also contractually bound to the Secretary of State to comply with the EMRs. "The Council is, therefore, already empowered to require the Appellant to demonstrate, with appropriate monitoring data, how far that commitment is being achieved."

126. DL 69 and 70: The Hillingdon Agreement:

> "does not specify a maximum number of LGV movements at any junction or on any part of the network at peak times. Neither does it require that any specific number of movements should be agreed. Together with the other controls within the Act and the EMRs, the Hillingdon Agreement reflects the settled position regarding the traffic concerns raised by the Council in its evidence to the Select Committee. It was on this basis that Parliament was content for the Act to be given Royal Assent and for deemed planning permission to be granted.
>
> 70. Through its proposed Condition 1 the Council seeks to renegotiate that agreed position by introducing new and additional controls. A condition requiring that maximum peak time numbers be set would equate to a modification of controls that are already provided within the EMRs. That would conflict with the statement in the SG (paragraph 4.4) that planning authorities should not come up through the exercise of the schedule, seek to modify or replicate controls already in place within the EMRs or elsewhere. Having regard to the basis on which Parliament gave its consent, the proposed condition is also inconsistent with the requirement, in that same paragraph, that Schedule 17 applications should not be used to revisit matters settled through the parliamentary process. The proposed requirement for recording and reporting LGV peak time movements on a weekly basis also represents a modification or duplication of controls that are already in place."

127. DL 71: The Act made HS2L responsible for monitoring and managing traffic movements, not the Council, through the CoCP, the large number of controls on LGV traffic agreed with highway authorities in the RTMP, which includes a requirement for a monitoring and compliance team, and a Traffic Liaison Group, TLG, including highway authority representatives.

128. DL72: The Hillingdon Agreement required HS2L to collect data on traffic movements, including at Swakeleys Roundabout to ensure that the 550 limit was not breached.

> "This was confirmed in the Appellant's email to the Council, dated 3 March 2020….This stated that, as the ES was based on average flow assumptions in peak hours, reporting to the TLG will include average figures for flows to and from the work sites at these times. It also confirmed that flows in any one hour will be managed to ensure that no new significant adverse

> effects arise. The Council will, therefore, be provided with data on LGV flows at the peak times that it is concerned about."

129. The TLG provided "the mechanism for monitoring data to be shared and for the Council to raise concerns about particular issues that might be experienced as a result of the construction traffic movements." The CoCP and RTMP required HS2L to engage with such concerns "and take reasonable measures to address any issues that are agreed to be causing an unacceptable effect on the free flow of traffic or on highway safety." The LTMP was also subject to annual review and could be amended to introduce new measures.

130. DL74: The VMS enabled HS2L and its contractors to make changes quickly if significant issues arose. HS2L had emailed LBH on 7 February 2020 confirming that

> "the VMS will limit the number of LGVs able to book into each of the work sites during peak periods and that this will ensure the free flow of traffic. The contractor advised that the VMS can be amended to reduce the number of vehicles able to book in certain time slots, should there be a specific issue or evidence of traffic disruption, and that updates on the predicted and actual figures will be given at TLG meetings.

131. DL75-77:

> "I note the Council's concern that the VMS has not been shared with the Council and is not before me but I do not consider that this prevents me from placing reliance on it as part of the controls that are already in place. The Appellant and their contractors are required to adopt and operate a VMS and this can, reasonably, be considered to form part of the existing controls provided for within the EMRs. B
>
> Both the Council, and I as the decision maker in respect of the appeal, should proceed on the basis that this suite of controls will be implemented and applied with by the Appellant.
>
> 76. Given that these mechanisms already in place I see no justification for the more onerous requirement of weekly reporting as sought in the proposed condition. I consider that, in proposing this requirement, the Council is seeking to use the Schedule 17 process as a means of policing the traffic monitoring and management requirements set out in the EMRs. That is not the purpose of the Schedule 17 application and approval process.
>
> 77. For these reasons I find that proposed Condition 1 seeks to modify or replicate controls already provided for in the EMRs and is contrary to paragraph 4.4 of the SG. The condition is, therefore, unnecessary and fails to meet the tests of acceptability for planning conditions set out in paragraph 55 of the National Planning Policy Framework …."

132. LBH's proposed condition 2 came in for critical analysis too. As drafted, it unlawfully delegated powers to the Highway Authority to approve and enforce conditions. It also failed to set out how the Schedule 17 submission should be modified, instead "it places responsibility on the Appellant for defining appropriate measures." There was therefore no explanation of why and how the submission should be modified.

133. DL 80 and 81 commented further.

> "80. The Council asserts (paragraph 4.3.1 of its Statement) that the evidence demonstrates justification for 'significant concerns' about the access and egress arrangements from all of the worksites. That evidence comprises statements about the nature of the roads from which access would be gained and how busy these are, and a set of photographs …which identifies some of the specific movements that LGVs would need to perform while travelling to or from the worksites. No accident records or other data has been submitted to identify specific risks or hazards on the relevant sections of the network.
>
> 81. Having carefully considered the Council's submissions, my conclusion is that, overall, they constitute general assertions about the nature and sensitivity of certain parts of the network. They do not, however, serve to demonstrate that the movement of LGVs to and from work sites would, as opposed to might, have a prejudicial effect on the free flow of traffic or highway safety. Those submissions do not meet the evidential burden, under paragraph 6, that is required to demonstrate that the ambulance Schedule 17 submission ought to be modified."

134. The Inspector adopted HS2L's submission that the earlier lorry route appeal decision, in which a condition banning right turns was imposed on appeal, was to be distinguished. The need had been contemplated in the LTMP but not provided for, and the condition was agreed.

> "84. The current appeal, although the Council has raised general concerns about the movement of LGVs across all the traffic, it has not provided sufficient evidence to demonstrate a strong highway safety reason for imposing any restrictions on specific movements. There is, therefore, no clearly demonstrated need for the imposition of proposed condition 2. I consider that it would also conflict with the SG requirement that planning authorities should not use the Schedule 17 process to modify or duplicate controls that are already in place."

135. Those other controls were then discussed. The CoCP required LTMPs to be produced in consultation with highway authorities and others. LTMPs were to include access routes for all construction traffic, main access and egress points for worksites, and the proposed traffic management strategy. The RTMP set out some detailed requirements for vehicle access management, including vehicle booking, marshals and data recording. Construction traffic would be managed, stated the LTMP, through the

VMS. Its central purposes, through measures such as vehicle booking and traffic marshals, included ensuring the safe operation of the access points and the avoidance of construction traffic queueing on the highway.

136. Further details of its operation had been provided in a telephone discussion between LBH and the main contractor; the Inspector had a transcript.

> "87. In that discussion the presence of gate marshals and the operation of VMS at each of the sites was confirmed. Confirmation was also given that access from Ickenham Road would be left turn only with no need for LGVs to cross the highway; that swept path analysis had shown that LGVs can egress from Clacks Lane safely; and that the turning point would be manned. In relation to Harvil Road, the contractor confirmed that signage would be used to alert other road users to the presence of the axis; that there would be gate staff at the access; and that an assurance of no queueing on the highway is a key part of the mitigation measures.
>
> 88. Only in relation to Breakspear Road South did the contractor indicate that further assessment was required to determine where the signalling or additional signage would be needed on the highway to ensure that LGVs could manoeuvre safely. [If so, HS2L would have to seek LBH approval as highway authority.]
>
> 89. I consider that the various measures already in place are sufficient to ensure the safe operation of the work site access and egress points and avoid the need for LGVs to queue on the highway. The Council's stated objectives in respect of the proposed condition could, therefore, already be met through the operation of these measures. Should any issues or concerns be identified, the Council would be able to raise these with the Appellant. Such matters could be aired and discussed at the TLG with subsequent changes being made to the VMS and, if appropriate to the LTMP to introduce any necessary remedial measures.
>
> 90. The operation of the LTMP and VMS is secured through the EMRs and Schedule 4 requires the Council's approval (as highway authority) for certain works to interference with the highway. As in respect of other parts of the Act and the EMRs, it should be assumed that the Appellant and its contractors will implement and comply with these measures so as to avoid or minimise adverse effects.
>
> 91.Taking these various provisions into account, I find that proposed Condition 2 would have the effect of duplicating and modifying controls already provided for within the EMRs and would conflict with paragraph 4.4. of the SG. By definition the

> condition is, therefore, unnecessary and does not meet the tests set out in paragraph 55 of the Framework."

**The Submissions on ground 1**

137. Mr Howell Williams submitted that the Inspector had taken an unlawful approach because he had relied on the judgment of Lang J which had been overturned by the Court of Appeal. The Inspector had considered that there was an "evidential burden of proof" on LBH such that "in the absence of information sufficient to allow an evaluative judgment to be made, he was required to approve the proposed arrangements, placing complete reliance on the EMRs as sufficient to safeguard the interests identified in paragraph 6 of Schedule 17." He had failed to take material considerations into account and his decision was irrational.

138. Mr Howell Williams summarised the key principles which he submitted were to be derived from the Court of Appeal judgment in *Hillingdon 1*, against which the lawfulness of the decision should be tested, and found wanting:

- HS2L had to provide sufficient information to allow the decision-maker to evaluate the proposal for the purposes of the issues with which it was tasked under the relevant paragraph of Schedule 17, [68 and 70 CA];

- if HS2L declined to provide it, the decision-maker was not bound to determine the request at all, [70 CA];

- no burden of proof was imposed on LBH by the Act such as would require it to justify a refusal, thereby reversing the responsibility to provide information, [75 CA];

-HS2L could not deprive the local authority of the control given to it by Schedule 17, by failing to provide the information necessary for a decision on the substance of the request, [76 CA];

-it was for HS2L to provide the information necessary for the judgments required of the local authority by Schedule 17, [77CA].

- matters which the local authority had to consider in reaching its decision could not be left to the EMRs, [81-2 CA].

139. Mr Howell Williams put his case on the basis that the Inspector had misconstrued paragraph 6 of Schedule 17. First, he had imposed either an evidential or a legal burden of proof on the local authority to demonstrate that the impact of LGV traffic would be so adverse on the free flow of traffic or on road safety as to warrant refusal, or to do so in the absence of an agreed condition. The Court of Appeal in *Hillingdon 1*, [70 and 75-9], had found there to be neither such burden, contrary to what the Inspector had found in a variety of paragraphs of his DL, applying Lang J's judgment. He submitted that there was no guidance on the burden of proof. Indeed, Mr Howell Williams went so far as to submit that the Inspector had applied a criminal standard of proof, which is plainly wrong. The Inspector had to reach a judgment on the interests in paragraph 6(5), free flow and safety, before turning to conditions. He had ignored

the arguments, substituting a burden of proof which he found LBH had not met. He had carried out no evaluation; instead he had decided the case on the burden of proof, before carrying out any evaluation. Having acknowledged that there might be harm, he should have found that there was insufficient information for him to determine the appeal in favour of HS2L.

140. The Inspector's second error had been to interpret paragraph 6 of Schedule 17 as requiring or permitting the decision maker to grant approval for lorry route arrangements with inadequate substantive information about the impact of those arrangements on the highway network, "even where there is prima facie evidence of a harmful impact on the free flow of traffic" although "prima facie evidence" did not have be provided to the decision-maker. Mr Howell Williams identified several paragraphs of the DL where he claimed that that is what the Inspector had required: DL 34-5, 44-6, 48, 53-4. Rather, as the Court of Appeal found in [68,70, 74-9] it was for HS2L to provide "the necessary information to allow an evaluative judgment to be made at the time of decision, failing which, the decision-maker is not in a position to reach a lawful decision", i.e. presumably to make a decision at all. I note that this is not saying that that information had to be available when the request was made. His submissions, together, accept that there is a difference between what has to be supplied with the request and what can come later; as indeed there is.

141. He submitted that LBH had sought but failed to obtain information which it thought necessary to reach the judgment which it was for it to make under paragraph 6, and that remained the position at the appeal: there was insufficient information for the Inspector to make a "proper evidence-based decision". HS2L had simply contended in the appeal that it was for LBH to show that the proposal ought to be and could reasonably be modified, providing no information about the numbers of LGVs which would use the network in the peak traffic periods, or an assessment of their impact, or of how mitigation measures would affect that impact. There were no baseline movements, no peak hour LGVs, no impact assessment on the proposed routes, and none for the safety measures. The information was subject to change, and lacked any reference to caps or limits, and only provided daily movements. This was not really a case about conditions but about the provision of necessary information and the consequences of it not being provided.

142. All that HS2L had provided on road safety were references to the operation of the EMRs. The Inspector's task in relation to the issues in paragraph 6 was to reach an evaluation of the issues, which he could only do if he had sufficient information. The ROMIS was all for the future. In this fundamental aspect, *Hillingdon 1* could not be distinguished. The TfL Report did not deal with the traffic from the proposal, assess the location or severity of the impact on traffic flows, or road safety arrangements. It showed that there would be an impact but could not show that this enabled a conclusion to be reached on the nature or level of the harm which the HS2L traffic would do. It was not, seemingly from Mr Howell Williams' further and written reply, accepted that the TfL Report was based on the much higher figures which HS2L said, and the Inspector had found, it was. The Inspector had found the TfL Report not relevant.

143. Mr Howell Williams disputed the contention of Mr Mould and Mr Elvin that his real complaint was that the Inspector had not accepted the evidence before him; the Inspector had in effect, in DL54,63 and 81, said that the evidence showed that there

might be problems but that it fell short of showing that there would be problems. The shortfall led to him allowing the appeal. It should have led him to dismiss it or to impose conditions as proposed.

144. The Inspector's third error had been to place complete reliance on the EMRs as sufficient to safeguard the interests within the scope of paragraph 6, which gave the qualifying authorities no "meaningful" control over the works. He was wrong to find that the local authority should determine the application on the basis that the requirements of the EMRs would be applied by HS2L or its contractors, and to hold that local authorities should not try to enforce the EMR controls by refusing permission. *Hillingdon 1* had established that matters requiring consideration on a Schedule 17 application had to be resolved within that framework and not left to the EMRs; [73,76,81-2 CA.] The Inspector had not just considered the EMRs; his decision on conditions had been wholly reliant on them. As permitted by the Inspector, there were no limits on LGVs of any description which LBH could enforce, contrary to every expectation that LBH would have control over LGV limits. None of the documents such as EMRs or LTMPs provided for peak hour limits, and even the current version, LTMP5, (not before the Inspector) had a daily LGV limit of 550 rather than 480.

145. The Inspector's fourth error had been in his appreciation of the relationship between Schedule 17 and the procedures in Parliament. An application under paragraph 6, and the restricted scope of the considerations material to its determination, came after and in the light of Parliamentary consideration of the impacts in the ES, and Additional Provisions 2 Assessment. It was wrong for the Inspector to assume, and accept HS2L's submission that he should do so, that the impacts there assessed represented a baseline of acceptability, as if there were no separate need for the Schedule 17 process it had enacted. Instead, it offered a separate and real control mechanism, as *Hillingdon 1* showed, [63,68,72-3 CA]. The ES preceded Schedule 17 and the factors it required to be considered, rather than setting a benchmark for what was prejudicial to free flow and road safety.

146. Mr Mould QC for the Secretaries of State submitted that the terms of the refusal meant that the main issue for the Inspector had been whether the conditions sought by LBH were justified to prevent or reduce prejudicial effects on free flow or road safety.

147. He analysed *Hillingdon 1* in this way. First, on the facts, it had been agreed that ground investigation and study were necessary but that had not been possible because of access difficulties, when the application under Schedule 17 was made. So essential information was wholly lacking. That fact defined the issues which the Court of Appeal had had to decide. LBH had said that that information was necessary for approval under paragraph 3 of the Schedule. The Secretaries of State argued, unsuccessfully, that they were entitled to rely on HS2L to obtain that information and evaluate it in due course, bringing forward such further application as might then be required, and as it was contractually obliged to do.

148. Second, the principles to be derived from *Hillingdon 1* were:

-Schedule 17 imposed a non-delegable duty on the decision maker to evaluate the limited matters within the scope of paragraph 6, [68,72-3],

-HS2L had to provide sufficient information to support the application for approval, i.e. "commensurate with the task that the local authority must perform", [70, 77];

- HS2L's contractual duty to comply with the controls imposed in the EMRs did not absolve it from that obligation to supply information, nor empower the authority to determine the application without it, that is without fulfilling the evaluative duty in Schedule 17, [76];

-it was not at issue but that, in reaching its determination, the local authority had to take account of the EMRs, particularly in view of paragraph 13 and 26 of Schedule 17.

149. Here, the Inspector had not erred in the ways asserted by LBH. He had not based his decision on some future planning evaluation, under the EMRs, of the issues within the scope of paragraph 6, by contrast with the position in *Hillingdon 1*. He had had, just as LBH had had, a substantial body of evidence about baseline flows, predicted numbers of LGVs, and the controls and monitoring that would be in place under the CoCP, Hillingdon Agreement, the RTMP, LTMP and VMS. He had carried out a planning evaluation of the information he had before him.

150. The Inspector, DL28, was right to hold that conditions could not be imposed unless they met the requirements of paragraph 6(5), and that where the local authority proposed a condition, it bore the burden of showing that it was justified, as [10] of the statutory guidance said, and that the proposed routeing arrangements ought to be and were reasonably capable of being modified through the condition proposed, as the undertakings by LBH in the Planning Memorandum, as well as general NPPF advice, made clear. None of that was materially altered by *Hillingdon 1*. The Inspector had adopted an orthodox approach to determining issues of fact, degree and planning judgment.

151. The Inspector had considered the evidence put forward by LBH in support of its contention that peak hour controls were required on LGVs, the ES and the TfL Report, and concluded that the evidence did not justify the imposition of the controls aimed at by the conditions sought. The Inspector's reference to the onus on the planning authority had no material impact on the lawfulness of his approach to his evaluative judgment on the main issues under paragraph 6. In an ordinary planning appeal, it would be for the authority proposing a condition to justify its imposition. In substance, LBH complained that he had not accepted the evidence it relied on. Here, the Inspector was entitled to look at the measures available to deal with LGV movements, in the light of what he found the state of the evidence to be, and to conclude that they were sufficient and so no conditions of the sort proposed were necessary. That was his evaluation and did not involve hiving off or delegating his functions to HS2L. He was not obliged to set specific numbers as a limit or find some way of doing so or of finding some enforcement mechanism for LBH to operate, if he did not consider that to be necessary. Nothing in *Hillingdon 1* so constrained the Inspector, and it would have been quite at odds with the statutory scheme and its associated Planning Memorandum, undertakings and EMRs to impose such a legal constraint. The Secretary of State can police controls, pursuant to his undertaking to Parliament, which would be particularly important where traffic flows crossed local authority boundaries.

152. The Inspector had the information necessary to reach a lawful judgment on those issues. There was a Traffic Impact Assessment with the ES. LBH was both highway and planning authority, and would also have its own data and experience to draw on as evidence. Whether evidence is adequate for a planning judgment to be made was itself a form of planning judgment, accepted as such in *Hillingdon 1*, [76-78]. LBH's assessment of its adequacy was not binding on the Inspector on appeal. In *Hillingdon 1*, there was no evidence at all, and neither LBH nor Secretaries of State could lawfully have concluded that there was evidence upon which anyone could determine the request.

153. The Court of Appeal in *Hillingdon 1* did not and could not hold that the decision-maker should not consider the requirements placed on local authorities by the EMRs and the other obligations undertaken by LBH in order to qualify them to take Schedule 17 decisions in the first place. Taking account of the traffic management and monitoring measures in place under the CoCP did not conflict with the Court of Appeal's judgment, but reflected the requirements of statutory guidance to which he, and LBH, were obliged to have regard, although it was not mentioned by LBH.

154. Mr Elvin QC for HS2L adopted Mr Mould's submissions. In particular, he emphasised that *Hillingdon 1* had not significantly affected the decision, and the question which the Inspector had had to answer was essentially the same as that which would have arisen if the conditions had been sought in the course of a normal planning appeal. The Sub-Committee Minutes, among other material, demonstrated the fact that LBH contended that it did have evidence to warrant the imposition of conditions giving it control over LGV movements in the peak hours.

155. Mr Elvin emphasised the undertakings given by LBH in the Planning Memorandum about how it would handle Schedule 17 applications, and the range and scope of the documents it undertook to take into account, (EMRs, ES, CoCP,) reinforced by the statutory obligation in relation to statutory guidance. The HS2 Development Agreement bound HS2L to comply with the controls set out in the EMRs.

156. Mr Elvin characterised this as a decision not to accept LBH's evidence as showing what it contended for, rather than a conclusion that no evidence had been provided sufficient to enable a judgment to be made. The Inspector was not wrongly imposing a burden of proof on LBH; he was asking whether it had made out its case that the information was inadequate for him to reach a decision on the request.

157. It was a matter for the Inspector as to whether the information he had was sufficient to warrant the imposition of the conditions sought. LBH wanted to impose a secondary consent regime outside of the HS2 Act, including in condition 2, by delegation to the highway authority. It was the arrangements which had to be modified to avoid prejudice to free flow and safety; that did not permit a secondary approval system to be required about how traffic would be managed to avoid that prejudice, and which, on LBH's own evidence it would be impossible for HS2L to do. It was a matter of planning judgment as to whether the evidence justified those conditions.

158. The Inspector had to consider the EMRs, but did so in the context of the evidence he had, rather than in "complete reliance" on them as Mr Howell Williams had submitted. That is what LBH had undertaken to do to obtain the status of a qualifying authority so that it could decide requests under Schedule 17. LBH seemed to set that

undertaking to one side, unlike the Court of Appeal. The Court had rejected any view that the powers and duties in Schedule 17 could be ousted by the EMRs, but that was not the same as judging whether the conditions proposed replicated or modified the EMRs without justification. *Hillingdon 1* concerned how a request under Schedule 17 should be approached where HS2L had failed to furnish the authority with "information and evidence sufficient to enable the authority to perform its duty". The Inspector had found that there was sufficient for him to do so. He saw the LTMP as a "living document" which was flexible and could change over time.

**Conclusions**

159. In the light of the very extensive submissions on the arguments and material before the Inspector and what it does or does not show, I consider it necessary to return first to certain fundamentals. This is an application for judicial review of the lawfulness of the Inspector's decision allowing an appeal on its merits; it is not a review or appeal on the merits of his decision. His decision was not a review of the decision by LBH, nor an appeal which he could only allow if the decision of LBH was "wrong", in the way in which that word is used in some appeals.

160. This was an appeal against a refusal of approval. The Inspector had to approach the appeal, as if the application had been made to him in the first place, save that he could impose conditions, without agreement from HS2L. He had to decide for himself how paragraph 6 should be applied, on all of the material before him. Although he had to make his decision within the confines of paragraph 6 of Schedule 17, as he saw the case before him, he had to assess and give the weight he thought appropriate to the various pieces of evidence or the absence of evidence, before him, and to do so in the light of various material considerations before him, including the Planning Memorandum and LBH's undertakings, statutory guidance, EMRs, RTMPs, LTMPs, VMS and the Secretary of State's undertakings. He was entitled to take a very different view of the evidence, and of the significance of the guidance and other material considerations, from that taken by LBH.

161. It was not an appeal about whether LBH had had sufficient information to enable it to determine the issues in the way in which it wanted to determine them, by seeking a scheme, which it would then approve and, on the basis of which, it would then enforce controls. LBH had not refused to entertain the application for want of the basic information necessary even to consider the application. The material required by the PFN6, issued by the Planning Forum of which LBH was a member, was supplied. The request for information arose out of LBH's consideration of the merits of the application, and its consequent view that it should have some form of control, to impose which further information was, it thought, necessary. I note that the judgment that further information was considered necessary to that end was very much affected by an earlier Inspector's decision, rather than supported by any analysis presented to this Inspector of why the information already supplied could not of itself provide a basis for some limit on the numbers of LGVs in the peak hours, or other measures specifically put forward.

162. The Inspector did not have to consider the appeal within the same framework as that fashioned by LBH for its own consideration of the case. He did not need to regard LBH's asserted need to have information about peak hour LGV movements on each of the lorry routes as justified, nor its desire to impose controls on their numbers. He

was not bound to treat the information sought by LBH as necessary for him to reach a decision, lawfully and rationally, on the issues raised under paragraph 6 of Schedule 17. He had to reach his decision on the appeal on the basis of the information before him.

163. Of course, he could no more reach a decision to allow or dismiss the appeal on legally inadequate information for that decision, than could the local authority; nor could he give the EMRs and LTMP or VMS a legal significance that the statutory scheme did not permit them to bear. But whether they were satisfactory as a form of control for what problems he found was for his planning judgment. He was not obliged, by the statutory scheme, to enable LBH by planning condition, to devise and enforce controls on numbers, movements and the system of road safety measures at site entrances. He could also conclude that there were other measures available which the conditions would modify or replicate.

164. With those comments, I turn to the essence of LBH's case to the Inspector. The Inspector had faced a lengthy written debate, to which I was fully exposed, about a confined aspect of the lorry route approval. It was not about the routes themselves, at all. It was about whether, and if so through what mechanism, controls on the numbers of LGVs using those routes, and on the operation of the site access and egress points, were to be put in place. It was not in issue but that such controls, directed to free flow and road safety, were within the scope of paragraph 6 of Schedule 17 as "arrangements" in accordance with which the "matters", that is the lorry routes referred to in paragraph 6, had to be carried out.

165. LBH's case in summary, and I have set it out fully as a reminder of all that Mr Howell Williams carefully took me through, was that it could prove that the routes were already at times and in places congested. It could also prove that the HS2L LGV traffic would materially worsen conditions, to the extent that controls over movement numbers and other controls were required. These were the foundation for its arguments about the need for the controls in the conditions. But LBH contended that it lacked the detailed information necessary to specify and then impose controls directly though conditions, limiting the number of daily or, more particularly, peak movements into each site, and providing for controls at the access and egress points. It said it could not impose such controls without knowing how many construction LGVs would be on each of the roads, and particularly during the peak hours, and how the numbers of LGVs would vary with the construction programme at each site, so that they could be limited to quieter periods of the year such as school holidays. Only HS2L could provide this information but had not done so. So, conditions were proposed which would require information to be provided by HS2L, which would then enable more specific conditions and controls to be imposed, through compliance with the schemes it would have to approve.

166. LBH's case was therefore not predicated on a complete absence of knowledge about the routes, their nature, the baseline or "existing" traffic, or about the daily overall construction LGV flows, and the percentage of turning movements, in and out, at the sites in the peak hours. It would have been improbable if, as highway and planning authority for those routes within its area, it had put forward such a stance. On its facts, this case is not remotely like the position in *Hillingdon 1*, to which the judgment was addressed. I note also, however, that HS2L did not contend that it did not yet have or could not provide the information, or that it would be too speculative at this stage, or

too liable to change to permit of inflexible conditions requiring rapid or frequent variations, the approval of which would be in the hands of LBH.

167. I now turn to the substance of the DL and analyse the essential basis upon which the Inspector reached his decision, to see to what extent it was based on the approach of Lang J and that of HS2L, as opposed to that of the Court of Appeal, where they differ. This is where I see crux of the issues between the parties.

168. The Inspector identified the issues which arose under paragraph 6; that is not in issue, and he reached decisions on them. The Inspector's conclusions start by considering what evidence LBH did have to support its contention that the roads and junctions in question would suffer from problems, as severe as LBH contended, and which were the basis for its proposals for conditions aimed at controlling, via schemes to be devised on the presentation of further information by HS2L, LGV numbers by site, day and peak hours, and access and egress mechanisms. There can be no doubt that LBH did advance this positive case, saying that it was supported by evidence as to the problems already existing from the baseline flows, and the general evidence as to the problems which construction LGVs would bring to the routes. He rightly identified the two main pieces of evidence upon which LBH relied, DL38, the ES and the TfL Report.

169. The Inspector found, and it had not been in dispute, that the ES and Additional Provision, which did refer to "major adverse effects" from peak construction traffic, were based on much higher daily two-way flows than now envisaged in the submission; (1869/1460/480.) That figure of 480, he accepted, was a worst case scenario, in view of the crude aggregation of levels at peak construction periods which could not coincide, and the aggregation of figures at the top of the ranges given for each site in the LTMP. These levels could not be experienced for more than a part of the construction programme anyway, the peaks in which varied from site to site and between 2-16 months.

170. Hence his conclusion in DL44, which for convenience I repeat;

> "Even the 480 daily total is substantially lower than either of the figures used in the original ES or Additional Provision 2 assessments. Both assessments concluded that the additional LGV movements would have a prejudicial effect on the free flow of traffic in this part of the network. However, given the very much higher daily flows that were assumed in those assessments, those findings do not demonstrate that the much lower level of movements now envisaged would also have that effect. The original ES and Additional Provision 2 conclusions cannot, in my view, be relied on as evidence that the use of the lorry routes as now proposed would, as opposed to might, result in the prejudicial effect on the free flow of traffic."

171. Mr Howell Williams did not contend that the conclusion on what the evidence showed was in some way unlawful. Thus, the Inspector has rejected one piece of the evidence which LBH put forward as demonstrating its case for the conditions. He has rejected the first main piece of evidence after evaluating it and finding it wanting.

172. Mr Howell Williams did not take issue with the Inspector's evaluation, in DL45, of the comments of the Select Committee as not carrying any weight as "clear evidence" of prejudicial effect, from the currently envisaged levels of LGV movements. He suggested rather that the Inspector's language in DL45 showed the error of law he made passim about who had to prove what.

173. The second main piece of evidence put forward by LBH was the TfL Report. This was undertaken pursuant to the Hillingdon Agreement which required a further study to be done to reduce the impact of construction traffic on LBH, as Parliament expected. The Inspector rejected LBH's case that this, of itself, showed that the reduced traffic numbers were still likely to cause problems on the network; DL48, a conclusion not challenged as unlawful itself.

174. The principal reason that this piece of evidence failed to demonstrate the problems alleged by LBH is that LBH had misunderstood the basis upon which the problems the Report found had been modelled. It was the same as caused the Inspector to conclude as he did about the ES. The modelling, and hence the Report conclusions, had been based on very significantly higher figures than now envisaged. Mr Howell Williams thought that the Inspector might be wrong, in his further written submission to me, but that is a finding of fact or expert opinion which was open to the Inspector and has not as such been challenged on a legal basis. Again the Inspector concluded, and it is a conclusion which cannot be challenged in itself, that the Report did not provide "clear evidence that the use of the lorry routes as now envisaged would result in the prejudicial effects alleged" by LBH; DL53.

175. The Inspector was therefore entitled to say, DL54, and I repeat:

> "In the absence of other evidence, I conclude that the Council has not demonstrated that the proposed arrangements with regard to the routing of LGVs to [ the four worksites which would pass through Swakeleys Roundabout] would have a prejudicial effect on the free flow of traffic on the local road network. There is, accordingly, no justification for the refusal of the application on this ground."

176. LBH had not made clear where it stood on the route to the SRVSMC, as the Inspector explained. But he dealt with it on the basis that LBH relied on the ES. It could not rely on the TfL report which examined the flows using Swakeleys Roundabout, which was not material to this site. Again, he found that that evidence did not constitute "clear evidence" of problems.

177. At this stage, therefore, the Inspector had rejected the very basis for LBH's contention that there were problems, which merited the proposed condition, shown by the base flows and the general conditions which would be created by the HS2L construction traffic. He did so on his evaluation of what the evidence relied on by LBH actually showed. It was that evidence which had LBH urged so as then to argue that further controls were necessary especially during the peak hours, along with monitoring and reporting, but which it claimed that it could not specify until it had information from HS2L, which HS2L had failed to provide. But this first step in its argument was not one for which LBH required information from HS2L; the traffic flow information was available to it, and relied on by it. Its problem was that the Inspector judged that it

was just not good enough to make out the case that LBH thought it would. Fundamental to all the arguments before me, whether appreciated by LBH or not, is the failure of the evidential support which it thought that it had in place to persuade the Inspector. Those conclusions cannot be and were not challenged. The substratum for LBH's case had gone. It was not for HS2L to prove that there would be no problems, on any view of the law.

178. The Inspector however, went on to consider the conditions, which he did first on the basis of his earlier conclusions. He was right that the main purpose of condition 1 was to limit, or rather to enable the imposition of such limit, as LBH saw fit, on the number of LGVs in the peak hours. His analysis of the TfL Report had already shown that it did not provide the evidence needed to demonstrate that the LGV movements now envisaged would result in prejudicial flows, again a conclusion which could not be challenged. Neither that conclusion, DL60, nor the inference and conclusion in DL61, were challenged as unlawful. In the latter, he was rejecting LBH's contention that the TfL Report assisted its case; quite the reverse. The Inspector also rejected LBH's claim that there would be elevated peak hour levels of LGVs, as it had misunderstood HS2L's evidence, and the admittedly slightly higher levels in the PM peak did not provide evidence of itself of a prejudicial effect during that peak, DL63. Again, that conclusion as such was not challenged; indeed could not be challenged. Accordingly, the Inspector's first conclusion on condition 1 was that there "is no clear evidence that the number of movements now envisaged would have such a prejudicial effect as to require the proposed routing arrangements to be modified in the way that the Council suggests." On the evidence which he had, which dealt with peak flows, LBH's assertion that it showed an uneven spread of the daily 480 movements was rejected. The basis for the proposed condition had not been made out. This was not because of a want of evidence, but was a planning or evaluative judgment on the evidence before the Inspector, which included the baseline flows, baseline peak flows, and the evenness of the spread of the daily 480 LGVs.

179. The reference in DL63 to the absence of evidence that the proposal would have a prejudicial effect requiring modification of the arrangements, is not in essence a point about the burden of proof but a point about what the evidence shows or does not show.

180. However, the Inspector went on to consider, nonetheless, whether there should be such a condition. He rejected it on the grounds that it would seek to modify or replicate controls already in place within the EMRs. The conclusion that it would do so is not, as such, the subject of the challenge. Mr Howell Williams' contention was that it was wrong in law for LBH or the Inspector to treat those controls as a substitute for the controls which the scheme it wanted would give; they should not be imported into the statutory regime left to the authority under paragraph 6. But that is a point of a very different character.

181. The Inspector placed his conclusion firmly within the framework of the statutory guidance, the lawfulness of which has not been challenged, nor is it said that the Inspector misinterpreted it. He was duty bound to have regard to it, as LBH had been, though whether and how it did so remains veiled. The Inspector was entitled to give to that mandatory consideration the weight he thought fit, including decisive weight. The Inspector then went to considerable lengths to explain why the schemes put forward

by LBH did replicate or modify the controls available through the EMRs, and why they were in conflict with the statutory guidance.

182. First, HS2L was contractually bound to comply with the EMRs, to which he said, correctly, and as the Court of Appeal in *Hillingdon 1* also pointed out, he had to have regard. Second, the EMRs were intended to ensure that the impacts would not exceed those assessed in the ES, and that reasonable endeavours should be made by HS2L to reduce the impacts further. This was taken up in the case of LBH and lorry routes by the Hillingdon Agreement, itself with the status of an EMR, with which HS2L is bound to comply. This is also a contract enforceable by LBH, and by the Secretary of State. Crucially, DL68, "The Council is, therefore, already empowered to require the Appellant to demonstrate, with appropriate monitoring data, how that commitment being achieved." That commitment was the reduction of LGV movements at Swakeleys Roundabout during the AM and PM Peaks. He returned to the point in DL72, pointing out, again without challenge, that under the Agreement, the purpose of the data collection was to ensure that the limit of 550 at Swakeleys Roundabout was not breached. HS2L's email of 3 March 2020 had confirmed that the data would include average peak hour flows to and from the work sites, as the ES had been based on average peak hour flows. So that data of actual use would be available. He was entitled to give that the weight he saw fit in deciding whether the proposed condition was necessary.

183. It was not said by Mr Howell Williams that he had misunderstood the Agreement. His case was that it did not enable LBH to secure all the controls and data it wanted or might wish for, or when it wanted it.

184. Second, in DL69, the Inspector acknowledged that the Agreement did not specify a maximum number of LGVs at any junction or link at peak times, nor that a limit on movements should be agreed. But the Agreement, together with the controls in the Act and EMRs "reflects the settled position regarding the traffic concerns raised by the Council in its evidence to the Select Committee. It was on this basis that Parliament was content for the Act to be given Royal Assent and for deemed planning permission to be granted." DL69. There was an issue about how the passing of the Act and the grant of permission should be taken in assessing the need for further controls, but that is a reasonable approach for the Inspector to take. As the Inspector reasonably found, in DL70, LBH were seeking to renegotiate that agreed position by introducing new and additional controls requiring peak time numbers to be limited, and that amounted to a modification of controls within the EMRs; that was their purpose after all. The same applied to the requirement for recording and reporting LGV peak time movements on a weekly basis.

185. Third, the Inspector was also right that the EMRs made HS2L responsible for monitoring and managing traffic movements. He then instanced the roles of the CoCP, RTMP and TLG. There is no doubt but they had those roles. He was entitled to give to them and their effectiveness the weight he saw fit. The TLG provided the mechanism for sharing the monitoring data and for LBH to raise concerns about what it showed. He also regarded the CoCP and LTMP as important mechanisms requiring HS2L to engage with concerns and take steps to address them. That was a matter for his judgment. His view of the speed with which the VMS could respond was also for him.

186. The Inspector was also entitled to conclude, DL75, last sentence, that he "should proceed on the basis that this suite of controls will be implemented and complied with by the Appellant." He made the same point at the end of DL65.

187. That is a legitimate judgment of what will happen in the future. It is a commonplace in planning for local authorities to seek to control matters for which other bodies have responsibility, and for such conditions to be rejected for that reason. This is very commonly the case with other statutory regimes, but the principle applies here in relation to the unique range of non-statutory controls, assessed properly as they were by the Inspector. This is not removing a function from the authority; it is a question of whether the authority should be able, as planning authority, to control the measures via its approvals under its schemes as proposed in the conditions, or whether the alternative regime should be applied and suffice. The Inspector was entitled to make that choice as he did, without making an inevitable error of public law, or legal misunderstanding of the relationship between the statutory provision and other regimes. He saw no reason to impose the sort of condition which LBH sought. That was for him.

188. His conclusion in DL76 that these mechanisms meant that there was no justification for the more onerous requirement of weekly reporting sought in the proposed condition is a conclusion that he was entitled to reach.

189. It logically followed that LBH was correctly adjudged, and I did not see this as a point of disagreement but rather the whole point of the proposed condition, to be using the schedule 17 process to police the traffic monitoring and management requirements of the EMRs. His comment, DL76, that that "is not the purpose of the Schedule 17 application and approval process," is part of his reasoning, but not the main part; the main point is that the other controls suffice. There was no issue about the conclusion that LBH was seeking a modification or replication of controls established under the EMR regime, as the Inspector found in DL77, or that that would be contrary to the statutory guidance or the tests in [55] NPPF.

190. The challenge was not that he had misunderstood those controls or should have ignored them, or that the weight he gave them was unlawful. One can debate forever how the Parliamentary consent meshed with the ES data, the EMRs, and the Hillingdon Agreement but the Inspector's view is not unlawful, and indeed seems to me to be somewhat the better view. He is also right that this form of control was not included in the very agreement between LBH and HS2L to give effect to the object of reducing LGV movements at Swakeleys roundabout.

191. On a conventional approach to the lawfulness of an Inspector's decision about the weight to be given to various material considerations, and to the need for a condition in the light of the evidence and other controls which were available to deal with the issues, I would regard the decision on condition 1 as a clearly lawful judgment on the relevant considerations, regardless of the difference between Lang J and the Court of Appeal in *Hillingdon 1*, and the rejection of the approach of the Secretaries of State in that case.

192. Condition 2 was also considered very carefully. The Inspector started with two observations, the second of which is the more important. Under the Planning Memorandum, it was for LBH to explain how and why the submission should be

modified; yet the condition, as drafted, reversed this and required HS2L to define the appropriate measures. He then set out his assessment of the evidence with which LBH sought to justify the condition. It had asserted that its evidence demonstrated the justification for serious concerns, but he concluded, DL81, that they were "general assertions" which did not serve to demonstrate that movement "would" rather than "might" have a prejudicial effect on free flow or road safety. That is an evaluative judgment on what the evidence showed, asserted by LBH to show "significant concerns", and is plainly not an acceptance that that is what they showed. His comment that they do not meet the evidential burden under paragraph 6, DL81, has to be read as a comment that they justify less than "significant concerns." That is not sufficient to show that the proposals "ought to be modified". Again, there was no challenge to his conclusion on the evidence, or that paragraph 6 could not be met by less than justified significant concerns. As he said in DL84, the general concerns had "not provided sufficient evidence to demonstrate a strong highway safety reason for imposing any restrictions on specific movements", and so there was no need shown for the condition. This is not a statement about the role of other controls; it is a judgment about what the evidence showed.

193. It is then that he considered whether the condition would modify or replicate control already in place, again bearing the statutory guidance in mind. But as with condition 1, this is a separate, and not the second part of a single cumulative, reason why the condition should not be imposed. The LTMPs, produced in conjunction with the highway authorities, and it was LBH as Highway Authority whose approval would be required under its proposed condition, would cover the access and egress points and the traffic management strategy. The RTMP set out further requirements, and the VMS. The Inspector had had evidence about the operation of the individual site access points, which he summarised in DL87, with a further assessment required at one of them, DL88. With that specific evidence, he was entitled to conclude as he did, in DL89 and, giving weight to the material considerations as he saw fit, that "the various measures in place are sufficient to ensure the safe operation of the worksite access and egress points and avoid the need for LGVs to queue on the highway." The Inspector was then entitled to conclude that LBH's stated objectives could therefore already be met; concerns and issue could be raised with HS2L, aired at TLG meetings and the VMS or LTMP changed; DL89.Their operation was secured through the EMRs and the need for LBH approval as highway authority for certain measures. Again, he considered, DL90, that it should be assumed that HS2L and its contractors would implement and comply with these measures so as to avoid and minimise adverse effects. The proposed condition 2 replicated or modified those controls, conflicting with the statutory guidance and [55] NPPF.

194. I see no basis upon which those stages in the evaluations underlying his conclusions could be challenged, nor were they the subject of any direct challenge as to their reasonableness. The challenge was to the principle of his approach to the relationship between paragraph 6 and the other controls. Once it is read and understood as a decision on an appeal, in which it is for the Inspector to make up his own mind about the evidence and material considerations, this is not a seriously challengeable decision.

195. I do not see the points at which the Inspector referred to and applied what Lang J had said in *Hillingdon 1* as important to his reasoning, or that his reasoning, perhaps

differently expressed in a handful of places, would have differed in substance had he had the Court of Appeal judgment in *Hillingdon 1* before him, instead. Mr Howell Williams' submission did not grapple with the real basis of the decision but focussed, as perhaps they had to, on the seemingly fertile territory of the change in the judgments in *Hillingdon 1*, rather than on the more mundane but critical question of whether the Inspector had taken into account the material considerations, and had reached a conclusion on them and the evidence which was reasonably open to him.

196. I now turn to Mr Howell Williams' submissions; they overlap to a degree and I have dealt with them in the order I think best in view of my earlier conclusions. **First, the approach to conditions**: on the correct interpretation of paragraph 6(5), the Council has to show why the proposals should be modified and why that is reasonable. That is consistent with the normal approach to planning conditions. The Inspector's language about conditions would be normal for any planning appeal. It is not for the planning authority to impose whatever it wishes, and to leave it for the developer to strike it down by evidence. It is also in line with the Planning Memorandum, 7.7.3, to which the Council had to sign up in order to become a qualifying authority, and to be in a position to decide these applications for approval in the first place. It is not for the Council to adopt or to urge, with any legitimate expectation of success, a different approach while remaining a qualifying authority. LBH made its choice; Parliament did not leave local authorities with those functions; they had to qualify to be able to exercise them, by giving undertakings about their handling of applications. Their obligations in that respect are plainly material to an understanding of how its functions are to be interpreted. Indeed, the decision of the Court of Appeal in *Hillingdon 1* is predicated on the obligation on the Council to make good its proposed modifications, because that is how the contradiction highlighted in [75] was resolved.

197. **Second, the provision of information**: the other side of that coin however was that there was implied into the Schedule an obligation on HS2L, which was otherwise found within the Planning Memorandum and the Development Agreement, to provide sufficient information to enable the authority to carry out its task. However, on an appeal, it is for the Inspector to decide what the evidence showed and what he needed for his decision. As I have endeavoured to explain, he reached unchallengeable conclusions as to what it showed. He pointed out that LBH had asserted that the evidence supported it, and it was only after explaining why it did not do so to or do so to the extent LBH claimed that it would, that he concluded that LBH had not made out its case. It needs to be remembered, despite LBH's submissions to me, that it was not its case at all that it could say nothing, as it had no material. This was very different from the facts to which the *Hillingdon 1* judgment was addressed, where nothing of significance about the archaeological potential or its extent or whereabouts on the site, was known to LBH or indeed to HS2L.

198. Mr Howell Williams put considerable weight on what the Court of Appeal said about the obligation on HS2L to supply information to enable LBH to carry out its task. However, as I have explained above, the absence of information was not the basis upon which the Inspector found against LBH. LBH had evidence, presented it and it was found wanting. It was for the Inspector on the appeal to decide whether he had enough information to decide the appeal. He concluded rationally that he did have. That implies that, with that information, he thought LBH had had enough to come to a lawful decision, but that was not the essential question for him. He did not have to go

through an indirect process of asking whether LBH had had enough information for its duties. He had to judge that he had sufficient to reach the decision he did. He plainly reached that conclusion, and plainly was entitled to do so.

199. **Third, the purpose of seeking the information**: it needs to be understood what the real point of the debate about information was; LBH wanted to exercise controls over LGV numbers, particularly in the peaks. This was both for free flow on the roads and for the avoidance of queues or safety problems at the points of access and egress to the worksites. It considered it needed specific information to do that. This specific information, it said, it did not have. (This was not really debated, as the issue between the parties was more whether LBH should be seeking to exercise such controls at all.) Hence the schemes devised in its proposed conditions. But in order for it to show that that information was necessary, and that HS2L had to supply it, directly or via the schemes in the two conditions, it had to show the Inspector both that there were problems sufficient to merit that form of control, which it failed to do, and that the scheme was the proper form of control, which the Inspector rejected.

200. What this demonstrates is that the information sought was not necessary for the authority to reach a decision, because the Inspector reached a lawful decision, but was sought *in order to* impose the conditions it wished to do. The need for the information, and the alleged obligation to provide it, derived not from what was necessary for any decision to be reached, but for it to do what it wanted to do. There was no basis for such a test in *Hillingdon 1*. There, LBH simply had no material at all, yet faced the burden of proving that the scheme had to be modified.

201. The information sought by LBH and referred to in the Officer's Report, see para 60 above**,** related specifically to the details of the controls it wished to impose via the schemes, save the first item. The first item concerns "background information on the assessment of traffic along the routes in light of the changes to the project. How the existing flow of traffic will be impacted by the proposals." True it is that LBH did not have a modelled assessment of the submission flow levels on the specific routes, or the split of the 480 daily two-way movements to the four sites, let alone by peak hours. But that does not alter the fact that it claimed that it could prove the general point that the impacts would be so serious that further controls would be required. The Report, and Minutes, and the appeal submissions are replete with confident assertions that the evidence as to the base flows was clear and that the evidence showed that in general HS2L LGVs would be a significant addition, worsening the congestion significantly. The very first sentence of the reason for refusal is that the Council and HS2L have evidence that HS2L LGV traffic "*will* [my italics] result in congestion and therefore prejudice the free flow of traffic particularly in the AM and PM peak." Hence its arguments that the controls were required; and detail was needed for them to be specified usefully. But there can be no doubt as to what LBH were saying it could prove. Its problem is that the Inspector did not agree that it had proved what it had hoped.

202. I do not consider that the strictures of the Court of Appeal in *Hillingdon 1* have any bearing on this issue. LBH were not asking HS2L to provide information to show whether or not there would be problems with HS2L LGVs; LBH thought that it had it. LBH did not contend that that it lacked information to make good its first general assertion. It did not say that it could not decide the application without that information. It wanted more detail as the first item in the request showed, but did not

suggest that it needed it to know what the position on the roads at present was, or that the additional LGVs would prejudice free flow and safety. And it relied on the obvious sources for its case. The Inspector's words to the effect that the evidence failed to show that the movements "would" have a prejudicial effect does not show any unlawfulness in approach.

203. The Inspector had the task of deciding whether he could decide the appeal without it. He judged that he could reach the decision he did without it. This was not a case in which the authority was faced with a requirement to prove a problem when it had been provided with neither the information nor the means of finding out. This aspect was not one where the relevant information was within the knowledge of HS2L, which was refusing to disclose it. It was neither unfair, illogical or contrary to any general public law principles, let alone the obligations implied into the Schedule in *Hillingdon 1*, on the basis of the non-statutory obligations which the Court of Appeal so firmly put in their place in other respects, to give significance to the failure of LBH to show that the free flow and safety of the lorry routes *would* be prejudiced by the numbers proposed in the submission.

204. **Fourth, the sufficiency of information**: I do not accept Mr Howell Williams' submission that once the Inspector had found that the evidence showed that there *might*, but not *would*, be prejudice to the paragraph 6 interests, DL44 for example, he should have dismissed the appeal, or imposed the sort of conditions proposed by LBH. That seems to me to be untenable on the face of what he had, as I have explained at some length.

205. The sufficiency of the information is not to be measured by what the authority may want to achieve a particular preferred outcome, but by what it needs to reach a lawful decision, not necessarily its preferred decision, in the exercise of its functions under paragraph 6, or as the case may be. It may therefore be reasonable for a local authority to ask for certain information, but a refusal to supply it may not mean that the local authority has insufficient information to reach a decision one way or the other. The fact that the local authority has sought and failed to obtain information which it wanted, and which led it to refuse permission, does not mean either that it is unlawful for an Inspector on appeal to hold that that information is unnecessary for a decision the other way. Nor does that mean that the issue on the appeal was whether the authority was right to seek that information.

206. I also consider that the extent of the implied obligation here must take into account the nature of the factors being considered. Some material may be exclusively in the hands of HS2L e.g. the construction programme, but it may not have been developed so that a usefully firm or precise answer can be given. I do not see the Court of Appeal as holding that that means that the application is premature. It may be in the nature of, for example, a construction programme lasting over four years that the range of possible figures and daily variations needs flexibility, but it has to get underway. It must also take into account the information already available to the local authority, or reasonably obtainable by it. There is plenty of scope for debate also over what it can sensibly make of what it has; this was illustrated here. It had misunderstood what it had.

207. I am satisfied that the Court of Appeal is not requiring HS2L to supply the sort of information which LBH wanted here, or else face the impossibility of a decision both

by LBH and by an Inspector. I emphasise that the Inspector is reaching his own decision on the material, and is not reviewing the request for information. The Inspector was not saying that LBH did not achieve the control it wanted for want of information which HS2L had refused to supply, nor did he say that the schemes might well be merited but that he could not take the point further for want of information from HS2L.

208. I wish however, and with great respect, to enter a note of reservation about the obiter comments in [70] of the Court of Appeal judgment, and the suggestion that the local authority can refuse to entertain a request until it has had the information it requires, all of which has to be supplied when the application is made. If the PFN6 is set aside, for these purposes, the local authority would have greater powers here than in a normal planning application. The suggested approach does not allow for the fact that information is commonly supplied, as here, in stages. First a certain amount is required to accompany the application or to be part of it. In fact, under PFN6, it was a considerable volume of material. Then, the local authority considers that and may or may not seek more but it would be for a specific purpose and of a specific nature. It can be supplemented as time goes by with further material as either seeks it or it is supplied, as here; it can be enlarged on appeal. I do not think that the Court of Appeal intended that all of that, including the telecon notes, had to supplied before the application was entertained. In reality, entertaining and considering how to decide the application is just what LBH were doing in making its requests for information. The Court of Appeal was directing its remarks to a very different factual situation.

209. The professed aim of the step suggested by the Court of Appeal was to stop time running for the making of a decision, and hence to postpone the appeal rights. Yet the point of or need for the information may be highly contested, and may derive as here from the particular outcome which the authority, considering the outcome, desires. Requests lead to further requests, clarification, documents, evidence. This procedure, however, would leave HS2L without the sort of appeal rights it would have even on a normal application, leaving it able to contest the request only on an application for judicial review, which is not a merits review, or contractually, or by seeking the removal of the qualification of the authority. If the Inspector agrees with the need for the information which has not been supplied, it will succeed on appeal, and if not, not. The decision on the appeal in *Hillingdon 1* was successfully challenged on the basis that the Secretaries of State erred in law in finding that the duty had been complied with; this did not require LBH to refuse to entertain the application. I do not think that in the circumstances of this case, as opposed to the circumstances of that rather extreme case, the suggested approach could be applied without collateral litigation and costly delays, which the Court of Appeal clearly did not intend.

210. **Fifth, role of the non-statutory regimes**: the Inspector's comment, DL76, that policing the monitoring and management requirements of the EMRs "is not the purpose of the Schedule 17 application and approval process," is precisely the sort of point which is grist to another of Mr Howell William's submissions. This was part of his more overarching point that that non-statutory framework, although undeniably material, could not interfere with the Council's functions under paragraph 6, which had to be treated as something apart from these documents.

211. There is no doubt but that all the other documents referred to by the Inspector, ES, guidance, EMRs and undertakings, were material considerations to his decision. If so,

I cannot see how Mr Howell Williams can avoid the conclusion that the Inspector gave the material considerations the weight he thought fit, and reached a lawful decision. If he should, in law, have treated the paragraph 6 powers as something separate, and to which those material considerations did not apply, that amounts to a contention that they were immaterial to his decision which is not what was argued, nor would that be consistent with the Court of Appeal in *Hillingdon 1*.

212. The vice in *Hillingdon 1* was the way in which the functions of the local authority *in total* were devolved on to HS2L, and this was because of the failure of HS2L to obtain the requisite information for a lawful decision. The fundamental point was that the approach of the Secretaries of State and HS2L, in relation to information, prevented the local authority fulfilling the task which statute had left to it, even with the limitations of paragraph 6 and the undertakings necessary to be a qualifying authority. It could not begin its task of evaluation and so, on their analysis simply had to pass it over. I am not surprised at the tone of constitutional affront which runs through the Court of Appeal judgment. To make matters worse, HS2L and the Secretaries of State had then required the local authority to fulfil that task and required it to do so on the basis that non-statutory guidance, and undertakings, and the like would fulfil the duties instead. The strictures of the Court of Appeal were well-merited in the circumstances of that case.

213. However, I do not consider that that problem, although it affected some of HS2L's submissions to LBH and to the Inspector, affected the essence of the approach of the Inspector. I do not accept the submission that he, applying Lang J, erred in relation to the application of the Court of Appeal in *Hillingdon 1* to the facts of this case. I agree that he would have phrased certain sentences differently, but he would not have altered the decision, based as it was on the evidence and material considerations. The Inspector plainly appreciated the need to consider and decide the issues on the factors in paragraph 6. In my judgment he set out to perform the evaluative analysis required by paragraph 6; he was not bound to stand in LBH's shoes as to what was required.

214. He did have, in clear contrast to *Hillingdon 1*, the PFN6 information and plenty more, including that from LBH which it said proved its case that the conditions, and further information for necessary controls, had been made out. That was rejected on the basis of his consideration of the paragraph 6 factors. He did not leave that to the evaluation of some other body. He considered the information he had adequate for that evaluation. He did not decide as he did because of an insufficiency of information on a point which it was for LBH to prove, although HS2L had refused to obtain or supply it. He decided as he did on the merits of the case put forward by LBH. He did not consider, in the light of that, that the case for the conditions had been made out. That was an evaluation for him, and he did not leave it to someone else. He considered that the other forms of control sufficed and that the schemes proposed fell foul of the statutory guidance to which he, and LBH, were bound to have regard.

215. He was obliged, by statute, to consider the statutory guidance in reaching his judgments and especially when considering whether the conditions would meet it or breach it. He was obliged to consider how the various controls would operate, as he did, and whether the conditions proposed would modify or replicate them. That was a matter for his evaluation. There was no suggestion in *Hillingdon 1* that any aspect of that guidance was unlawful, or that it should not be taken into account in the decision making under the Schedule. It was not suggested that when the paragraph 6 factors

were being considered, they became irrelevant, which would have been an impossible approach, flying in the face of the Act and the statutory structure. The Inspector notably did not say that the conditions were wholly irrelevant, because of the other arrangements. He found that the conditions modified them, contrary to the guidance, and did not regard the modifications as justified or necessary.

216. This is not hiving off or delegating functions in the way found unlawful in *Hillingdon 1*. *Hillingdon 1* was about the whole of the paragraph 3 functions. Here, although LBH may wish to have controls, it did not identify any specific controls but instead sought a scheme under which it would approve and enforce controls. The Inspector did not hold that *specific* controls, if identified, which *would* resolve traffic problems which *would* otherwise interfere with free flow or road safety *could* not be imposed.

217. What LBH sought to do was to disapply a whole suite of controls, into which it would have some input but which it could not define or enforce. That suite of controls was adjudged to be effective and enforceable by the Inspector. The guidance required regard to be had to those controls; it would have required a reasoned and justified exception for the Secretary of State to modify or replicate them. The same applied to the local authority. *Hillingdon 1* did not say that once the purpose of controls lay within the permitted scope of paragraph 6, those other controls were legally irrelevant or that the statutory guidance was unlawful in what it required. Of course, the guidance does not have the force of law, and it cannot and did not strip away the powers of the planning authority. It was not so treated by the Inspector here either in relation to his powers or those of LBH. But the fact that the guidance and other controls did not have the force of law, did not make them irrelevant to the exercise of functions under paragraph 6. The guidance does not, by itself or with the EMRs, in that legal sense prevent a local authority seeking information or asking for controls which modify or replicate what other controls would do, although public law principles would require a specific justification for such an approach. But complying with the guidance, absent a good reason not to do so, was the point of making LBH sign up to an undertaking to have regard to the guidance, if it were to exercise those functions at all. After all, Parliament enacted a regime in which, without such an undertaking, the authority would be stripped of powers, or rather given none. Paragraphs [69] and [76] of the Court of Appeal's judgment in *Hillingdon 1* cannot be read as if they disregarded the statute and public law principles. Besides, they do not deal with the position on an appeal. There, the Inspector is obliged to apply the guidance, absent a good reason not to do so; he too has his role under the statute; he is not obliged to give the local authority the powers which it wants just because they come within the scope of paragraph 6. He is not obliged to see them as they see themselves, and can focus more on what they have undertaken to do in order to exercise the powers, than on disregarding the very obligations which they undertook so as to be able to exercise those powers.

218. There is nothing odd, moreover, about a planning authority not having power to impose controls on the range of matters which it might, as planning authority have to consider. It is not the highway or pollution control authority for example. It is not necessary for the other controls to be ones it operates under a different hat, or to be statute based, for the decision maker to be satisfied that controls by way of planning condition are not required. The nature of the applicant, and other controls over it, may rationally be treated as sufficient assurance. That was for the decision maker to judge.

Here, the authority's direct involvement as the enforcing authority for those controls was not seen as a necessary part of ensuring that the limits were met.

219. **Sixth, the significance of the Bill**: Mr Howell Williams took issue with the Inspector's conclusion in DL46 about the significance of the enactment of the Bill. I repeat the passage in DL46, summarised above in [113], that, as Parliament had granted permission after considering the LBH evidence of adverse construction traffic impacts and without imposing specific limits, but taking into account the EMRs and the various undertakings and agreements, it had to be assumed that Parliament regarded the assessed impacts as acceptable "notwithstanding its expectation that additional work will be undertaken to try to further reduce those impacts." As I have said, this is not an irrational conclusion on the material which the Inspector had. But the Inspector did not use that conclusion in a way which was objectionable as a result of *Hillingdon 1*. He treated it as material to how he should approach the justification for further controls. It is relevant to that, but it was by no means as important as his evaluation of the evidence of prejudice, or the other forms of control. He did not say that there was no need for controls to ensure that the levels were kept to those in the submission.

220. If my analysis is correct, then the errors in the DL are immaterial, and without them I am clear that the decision would have been the same, albeit differently expressed in places. If it were necessary to do so, I would apply s31(3C) Senior Courts Act 1981. Had the Inspector applied the judgment of the Court of Appeal, it is highly likely that the outcome would have been the same because his substantive evaluation of the issues would have been the same, leading to the same outcome. That cannot apply if I have misunderstood the intent of *Hillingdon 1*, and its application here.

**The other grounds**

221. These do not give rise to any further issues. Ground 2 was that the Inspector had failed to take into account the mandatory considerations of free flow and road safety: he had failed to identify and reach conclusions on the effect of the proposals on them. This is a different framework for making the same points.

222. Ground 3 was that the decision of the Inspector was irrational because the information, which he did have, did show that the proposals would be prejudicial to free flow and road safety, and he had no evidence to contradict that. This seems to me to be another way of putting the submissions about the evidential burden and the burden of proof.

223. The Inspector, in any event, had plainly considered the issues material to a decision under paragraph 6, and based his conclusion on them, reaching a rational decision. There is nothing in either of those grounds.

**Overall conclusion**

224. This application is dismissed.