Combined Bundle of Authorities Model Farm Inquiry Prepared by the Appellant and VCU, for the attention of Inspector Richard Clegg

1. Kentucky Fried Chicken (GB) Ltd v Secretary of State for the Environment and Anor [1978] 1 EGLR 139
2. City of Edinburgh Council v the Secretary of State for Scotland [1997] 1 WLR 1447
3. R v North Yorkshire County Council ex parte Brown [2000] 1 AC 397
4. R v Rochdale MBC ex parte Milne (No.1) [2000] Env LR 1
5. R v Rochdale MBC ex parte Milne (No.2) [2001] Env LR 22
6. R (Bedford and Clare) v Islington LBC [2002] EWHC 2044 (Admin)
7. R (Blewett) v Derbyshire CC [2004] Env LR 29
8. R (oao Morge) v Hampshire County Council [2011] UKSC 2
9. Georgiou v Secretary of State for Communities and Local Government [2011] EWCA Civ 775
10. Macarthur v Secretary of State for Communities and Local Government [2013] EWHC 3 (Admin)
11. Bagshaw v Wyre BC [2014] EWHC 508 (Admin)
12. R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC [2014] EWCA Civ 567
13. Barnwell Manor Wind Energy Ltd v East Northamptonshire DC [2014] EWCA Civ 137
14. R (oao Friends of the Earth) v Heathrow Airport [2020] UKSC 52
15. Abbotskerswell Parish Council v Secretary of State for Housing, Communities and Local Government [2021] EWHC 555 (Admin)
16. R (oao Macintosh Village (Management) Ltd) v Manchester City Council [2022] EWHC 3002 (Admin)

Kentucky Fried Chicken (GB) Ltd v Secretary of State for the Environment and another [1978] 1 EGLR 139

Estates Gazette March 11 1978(1977) 245 EG 839

QUEEN'S BENCH DIVISIONAL COURT

(Before Lord WIDGERY CJ, Mr Justice O'CONNOR and Mr Justice WATKINS)

June 2 1977

Town and Country Planning Act 1971 — Appeal against enforcement notice — Appellants required to close down hot food takeaway shop after complaints of smell, noise etc — Expert evidence called at inquiry before inspector to show that nuisance could be alleviated — Inspector decided against appellants — Submission that inspector was bound to accept opinion of appellants' experts in the absence of contrary evidence — Inspector held entitled to use his commonsense and not bound to accept experts' evidence

This was an appeal by Kentucky Fried Chicken (GB) Ltd under section 246 of the Town and Country Planning Act 1971 against the decision of an inspector dismissing their appeal against an enforcement notice served by Lambeth Borough Council as planning authority. The Council was the second respondent to the present appeal to the Divisional Court. The first respondent, the Secretary of State, did not appear and took no part in the proceedings.

N Wise (instructed by Reimann & Cummins) appeared on behalf of the appellants; C Whybrow (instructed by S J G Smith, Director of Administration and Legal Services, Lambeth) represented the second respondent.

Giving judgment, **LORD WIDGERY C J** said: This case comes before the court as a purported appeal under section 246 of the Town and Country Planning Act 1971 by the appellants, who are known as Kentucky Fried Chicken (GB) Ltd, against the decision of an inspector appointed under the Town and Country Planning Acts, which decision was given on May 6 1976 and referred to premises in part occupied by the appellants at 36 Brixton Road in South London.

In this instance, although the matter is in every sense a planning appeal, it has not taken the more common course of being heard by an inspector at an inquiry, the inspector making a report and the Secretary of State basing his decision on that report. This is a case in which the inspector is himself charged by delegated authority with the duty of reaching a conclusion upon all the facts which the Secretary of State would normally have to deal with on the more conventional method of appeal.

The cause of all the trouble is that on the ground floor at 36 Brixton Road there is a shop operated by the appellants, which is described as a hot food take-away shop. In other words, as that description implies, food is cooked in this shop and is handed over the counter in a hot state to customers who then take it away and eat it. Not altogether surprisingly, the value of the shop is apparently good and the customers numerous.

The collection of people and their activities resulting from the opening of this shop has given rise to complaints both from the local authority and from the occupiers of adjacent buildings. The sort of complaints which have been made are that there is smell of fumes and from the cooking, noise from the pan, noise from people who come as customers, and noise from people who slam doors in the early hours of the morning and foul the area with waste paper and other things.

On discovering that this change of use had been made the planning authority served a notice in brief complaining of the development occasioned by the opening of this shop and requiring it to be shut down. In answer to that enforcement notice, the appellants (as they were perfectly entitled to do) have brought this appeal, and it has come to us, as I have indicated, from the inspector who conducted the inquiry and who reached a conclusion.

The gist of what happened before the inspector is this. The appellants called a quantity of expert evidence, no doubt of very high quality, containing recommendations as to what should be done to alleviate the nuisance created by the activities of this shop to which I have referred. References were made to British Standards and so on in demonstration of the adequacy of the proposed remedial measures, and I am prepared to approach this case on the basis that the appellants made out a strong case for saying that they could alleviate some, if not all, of the nuisance which had been proved to exist.

The council thought differently, and so did one or two of the adjoining occupiers, and the inspector's conclusions come to this. He said:

> On the evidence and from my own observations I am satisfied that fumes and smells from cooking in the appeal premises penetrate to the residential accommodation above and that this is seriously damaging to the amenities that the occupants of that residential accommodation can reasonably expect to enjoy. Although it has been stated on behalf of the appellants that improvements can be made which would substantially reduce the smell and fumes, in my view this would not entirely eliminate or reduce to a satisfactory degree the damage to the amenities now being caused.
>
> I am also satisfied that the amenities of the occupants of the residential accommodation above the premises are being seriously damaged by noise from the air duct and from the general activities within the premises. By the nature of the building and the close proximity of the residential accommodation to the seat of the commercial activities, it does not appear to me that it would be feasible to reduce the noise levels sufficiently, whatever structural alterations are made, so as to eliminate this justifiable source of complaint.

Finally, he says:

> While I accept that the appellants are unable to control the activities of their customers outside the premises, it seems to me that this shop,

> which is open seven days a week until a very late hour at night, inevitably attracts customers who are likely to cause disturbance outside the premises by slamming of car doors, playing of radios and other activities. Such noise, in my opinion, is likely to be more disturbing to the amenities of residents than the fairly constant traffic noise to which they are accustomed. Moreover, I do not accept the argument that the emanation of additional noise is permissible because of the already high level of noise in the area; and I am not convinced that it would be practicable to control the activities outside the premises by the imposition of conditions on a planning consent.

At that point the court was prompted to ask counsel appearing for the appellants where the point of law was, because section 246 authorises an appeal to this court on a point of law, and so far we have only considered the merits. The answer given by counsel was, in substance, if he will forgive me for paraphrasing it, that the appellants having called high-level experts who had expressed opinions about this, the inspector, without any evidence to contradict those opinions, was bound to accept them.

That just is a complete and total fallacy. The inspector (who is a man of experience, and, above all, specialised qualifications, who is sent to assess a problem of this kind) is supposed to use his own knowledge and, if I may say so, commonsense as well. He is intended to use his commonsense and he is not bound to accept the evidence of experts. It is exactly the same situation that justices and juries find themselves in when experts of great distinction go into the witness box before them. The inspector is no more bound to accept the evidence of the experts than are they.

Accordingly, the plea that there was no evidence to support the conclusions of the inspector is a plea which is totally inapt for the circumstances. He was entitled to reach his own conclusion and unless it could be shown that he had taken into account something which he should have ignored, or ignored something which he should have taken into account, his decision must stand.

I would dismiss the appeal.

O'CONNOR and **WATKINS JJ** agreed and the appeal was dismissed with costs.

[HOUSE OF LORDS]

*CITY OF EDINBURGH COUNCIL . . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR SCOTLAND . . . RESPONDENT

AND

REVIVAL PROPERTIES LTD. . . . . . . APPELLANTS

CITY OF EDINBURGH COUNCIL . . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR SCOTLAND . . . APPELLANT

AND

REVIVAL PROPERTIES LTD. . . . . . . RESPONDENTS

[CONJOINED APPEALS]

1997 June 23, 24; Oct. 16 — Lord Browne-Wilkinson, Lord Mackay of Clashfern, Lord Steyn, Lord Hope of Craighead and Lord Clyde

Town Planning—Development—Local authority's development plan—Development of local shopping facilities and demolition of listed building—Whether description of listed building inconsistent with name on list—Whether priority accorded to plan overcome by other material considerations—Town and Country Planning (Scotland) Act 1972 (c. 52), ss. 18A (as inserted by Planning and Compensation Act 1991 (c. 34), s. 58), 52

In 1993 the applicants sought outline planning permission for the development of a food store and petrol filling station and ancillary works, and listed building consent for the demolition of a former riding school building on the site. Both were refused by the local planning authority, and the applicants appealed to the Secretary of State. The list contained, under "Name of Building," "Redford Barracks . . . (original buildings of 1909–15 only)." Under "Description," it referred to the riding school building, but the reporter found that that had probably been built after 1915. He held that precedence should be given to the entry under "Name of Building" and that accordingly the riding school building was excluded from the list and listed building consent was unnecessary. In relation to the application for planning permission, he held under section 18A of the Town and Country Planning (Scotland) Act 1972[1] that greater weight should be attached to other material considerations than to the local planning authority's development plan, which consisted of the 1985 structure plan and the 1993 local plan, namely expressions of policy and planning guidance more recent than the 1985 plan. He found that, while there was not a significant shortage of food stores or petrol filling stations in the area in question, other stores were performing at levels significantly higher than company averages and that, accordingly, there was an expenditure surplus and thus a quantitative deficiency in local shopping facilities within the meaning of the 1994 structure plan, not yet approved by the Secretary of State. He concluded that outline planning permission should be granted. The Second Division of the Court

[1] Town and Country Planning (Scotland) Act 1972, s. 18A, as inserted: see post, p. 1458A.

of Session, by a majority on the issue of planning permission, allowed an appeal by the local planning authority. A

On appeals by the applicants and the Secretary of State:—

Held, (1) dismissing the applicants' appeal in respect of listed building consent, that the words "original buildings of 1909–15 only" under "Name of Building" in the list did not necessarily refer to buildings completed during the specified years but could be read as referring to the processes of planning, conception, design and the realisation of the architect's work and on that B construction the riding school was consistently included under "Description" as a listed building (post, pp. 1449C–F, 1454E–G, 1456F–H).

(2) Allowing the appeals of the applicants and the Secretary of State in respect of planning permission, that the reporter had been entitled in principle to decide that the priority given to the development plan by section 18A of the Act of 1972 was overcome C by other material considerations; that a quantitative deficiency in relation to consumer expenditure was most readily established by the fact that other stores were trading above the expected level; that there had been no obligation on the reporter to quantify the extent of the deficiency; and that he had been entitled to decide that a quantitative deficiency was established (post, pp. 1449C–F, 1450H, 1461A, 1463D–E, F–G, 1464A–D).

Decision of the Second Division of the Court of Session D affirmed.

The following cases are referred to in the opinions of Lord Hope of Craighead and Lord Clyde:

Bolton Metropolitan District Council v. Secretary of State for the Environment (1995) 94 L.G.R. 387, H.L.(E.)
Hope v. Secretary of State for the Environment (1975) 31 P. & C.R. 120 E
Loup v. Secretary of State for the Environment (1995) 71 P. & C.R. 175, C.A.
Poyser and Mills' Arbitration, In re [1964] 2 Q.B. 467; [1963] 2 W.L.R. 1309; [1963] 1 All E.R. 612
Simpson v. Edinburgh Corporation, 1960 S.C. 313
Tesco Stores Ltd. v. Secretary of State for the Environment [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636, H.L.(E.)
Wordie Property Co. Ltd. v. Secretary of State for Scotland, 1984 S.L.T. 345 F

The following additional cases were cited in argument:

Debenhams Plc. v. Westminster City Council [1987] A.C. 396; [1986] 3 W.L.R. 1063; [1987] 1 All E.R. 51, H.L.(E.)
Reg. v. Camden London Borough Council, Ex parte Bellamy, [1992] J.P.L. 255, D.C.
Reg. v. Hillingdon London Borough Council, Ex parte Puhlhofer [1986] A.C. G 484; [1986] 2 W.L.R. 259; [1986] 1 All E.R. 467, H.L.(E.)
Save Britain's Heritage v. Number 1 Poultry Ltd. [1991] 1 W.L.R. 153; [1991] 2 All E.R. 10, H.L.(E.)
Shimizu (U.K.) Ltd. v. Westminster City Council [1997] 1 W.L.R. 168; [1997] 1 All E.R. 481, H.L.(E.)

CONJOINED APPEALS from the Second Division of the Court of Session. H

These were conjoined appeals by the applicants, Revival Properties Ltd., and the Secretary of State for Scotland respectively from the Second Division of the Court of Session (Lord Ross, Lord Justice-Clerk, Lord Morison and Lord McCluskey) who on 16 January 1996 allowed an appeal by the local planning authority, the City of Edinburgh District Council, under sections 231 and 233 of the Town and Country Planning (Scotland) Act 1972 relating to listed building consent sought by the applicants and by a majority (Lord Morison dissenting) an appeal by the local planning authority under sections 231 and 233 relating to a planning application made by the applicants. The appeals had been brought against the decision of a senior reporter, Mr. John H. Henderson. The City of Edinburgh District Council was succeeded under the Local Government etc. (Scotland) Act 1994 by the City of Edinburgh Council.

The appeals were conjoined by order of the House of Lords dated 7 October 1996.

The facts are stated in the opinion of Lord Clyde.

C. M. Campbell Q.C. and *C. J. Tyre* (both of the Scottish Bar) for the Secretary of State.

R. L. Martin Q.C. and *P. S. Hodge Q.C.* (both of the Scottish Bar) for the applicants.

W. S. Gale Q.C. and *M. G. J. Upton* (both of the Scottish Bar) for the local planning authority, the City of Edinburgh Council.

Their Lordships took time for consideration.

16 October. LORD BROWNE-WILKINSON. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Clyde. For the reasons he gives I would make the order which he proposes.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Clyde. For the reasons he has given I would also make the order which he proposes.

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Clyde. For the reasons he has given I would also make the order which he proposes.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Clyde. I agree with it, and for the reasons which he gives I also would allow the appeal on the planning law issue and dismiss the appeal on the issue about listed building consent.

I should like however to add a few observations about the meaning and effect of section 18A of the Town and Country Planning (Scotland) Act 1972, and to say rather more about the listed building consent issue which has revealed some practical problems about the way buildings are listed for the purposes of the statute—as to which I am unable, with respect, to agree with the approach taken by the judges in the Second Division.

The planning issue

Section 18A of the Act of 1972, which was introduced by section 58 of the Planning and Compensation Act 1991, creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972. Under the previous law, prior to the introduction of section 18A into that Act, the presumption was in favour of development. The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised in the light of all the material considerations for and against the application for planning permission. It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the development plan.

It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in *Simpson v. Edinburgh Corporation,* 1960 S.C. 313, 318, "slavishly to adhere to" it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.

The presumption which section 18A lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility thus lies with the decision-taker. The function of the court is, as before, a limited one. All the court can do is review the decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision-taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control. That section, like section 26(1), is addressed primarily to the decision-taker. The function of the court is to see that the decision-taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the development plan.

As for the circumstances of the present case, I agree that the reporter was entitled in the light of the material which was before him to give priority to the more recent planning guidance in preference to the development plan, and that the reasons which he gave for his decision in the light of that guidance to grant planning permission were sufficient to explain the conclusions which he had reached.

The listed buildings issue

The applicants' argument was that the list of buildings of special or historic interest which the Secretary of State for Scotland has compiled under section 52 of the Act of 1972 did not include the former riding school at Redford Barracks and that the reporter was entitled to make a finding to this effect. Their approach was that the question whether the building was a listed building was a question of fact which the reporter was entitled to decide as part of the case which was before him in the appeal against the refusal of listed building consent. Yet it became clear in the course of counsel's argument that the issue which the applicants regard as one of fact depends upon the proper construction of the entries in the list. So it seems to me that the underlying question—if it is truly one of construction—is one of law.

The structure of the legislation which is contained in sections 52 to 54 of the Act is to this effect. It is the responsibility of the Secretary of State to compile or approve of the list. He may take account, in deciding whether or not to include a building in the list, of the building itself and its setting. Any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part may be taken into account. So also may be the desirability of preserving any feature of the building fixed to it or comprised within its curtilage on the ground of its architectural or historic interest. The building itself must be identified in the list, but section 52(7) also provides that, for the purposes of the Act, any object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building shall be treated as part of it. Thus it is not necessary to do more than to identify the building—or, in cases such as the present, the principal buildings—in order to extend the statutory protection to these additional elements. The details of the procedure are set out in the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1975 (S.I. 1975 No. 2069 (S.277)) as amended by the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Amendment Regulations 1977 (S.I. 1977 No. 255 (S.35)).

The control which the Act lays down of works for the demolition of a listed building, or its alteration or extension in a manner which would affect its character as a building of special architectural or historic interest, is the prohibition of any such works which have not been authorised. The question whether works of alteration or extension should be authorised can be dealt with as part of an application for planning permission. Section 54(2) provides that, where planning permission is granted for such works, that permission shall operate as listed building consent in respect of those works. But in this case what the applicants wish to do is to demolish the building, so a separate application for listed building consent under Schedule 10 to the Act of 1972 was required. Paragraph 7(2) of that Schedule provides that a person appealing against a decision by the local planning authority to refuse consent may include in his notice as the ground or one of the grounds of his appeal a claim that the building is not of special architectural or historic interest and ought to be removed from the list. But there is no provision in that Schedule or elsewhere in the Act which enables a person aggrieved to include as one of his grounds of appeal that the building to which his application for consent relates is not included in the list as a listed building. The Act assumes, in regard to

the statutory procedures, that the question whether or not a building is a A
listed building can be determined simply by inspecting the list which the Secretary of State has prepared.

The list itself is not the subject of any prescribed form. The only prescribed form for which the Act of 1972 provides is that for the form of notice which is to be served on every owner, lessee and occupier of the building under section 52(5) stating that the building has been included in, or excluded from, the list as the case may be. The prescribed form of B
notice is set out in Schedule 5 to the Regulations of 1975. It is in these terms:

> "Notice is hereby given that the building known as............................
> situated in the..
> has been included in the list of buildings of special architectural or historic interest in that area compiled by the Secretary of State under C
> section 52 of the Town and Country Planning (Scotland) Act 1972 on .... 19 ....
> Dated .... 19 ....
>
> (Signature of Authorised Officer)."

It can be seen from this form of notice that the only information which D
is communicated to the owner, lessee and occupier to indicate the identity of the listed building is the name by which the building is known and the place where it is situated. The effect of section 52(7), as I have said, is to require any object or structure fixed to that building or forming part of the land and comprised within the curtilage of the building to be treated as part of the building for the purposes of the provisions in the Act relating to listed buildings. But the form of notice does not require a E
description of the building to be given. The assumption is that the name of the building will be sufficient to identify what is in the list.

The list which is available for public inspection under section 52(6) is a more elaborate document, and it is this aspect of the matter which appears to have given rise to some confusion in the present case. It comprises six columns, headed respectively "Map reference," "Name of F
Building," "Description," "References," "Category" and "Notes." In the column headed "Name of Building" there appears this entry: "REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909–15 only)." The column headed "Description" contains a very detailed description of the premises. It begins by naming the architect, who is said to have been Harry B. Measures, Director of Barrack Construction, 1909–15. There then follows a comprehensive G
description of the barracks and the various buildings comprised therein, together with references to various features of architectural or historic interest. In the middle of this description, which occupies nearly four pages on the list, there appears this passage: "Other buildings to S. with large riding school at extreme S.E., all tall single-storey, simple treatment." The column headed "References" contains this entry: "Information H
courtesy Buildings of Scotland Research Unit."

My impression is that the list which I have been attempting to describe was intended to serve several functions. First, it was intended to identify the listed building. It did this by stating its name and its location. That was all it needed to do in order to record the information which had been given in the prescribed notice to the owner, lessee and occupier. Then it was intended to provide a description of the building. There is no requirement for this—nor is there space—in the prescribed form of notice. But a description is a useful thing to include in the list, as decisions may have to be taken from time to time as to whether authorisation should be given under section 53(2)(*a*) of the Act of 1972 to a proposal to demolish, alter or extend the listed building. Both the decision-taker and the developer will, no doubt, find it helpful to know what the features were which persuaded the Secretary of State that the building should be listed as being of special architectural or historic interest. Lastly, it was intended to provide a list of references to the sources of information, if any, which had been used in compiling the description. On this analysis I would regard the columns headed "Description" and "References," while informative, as subservient to the column headed "Name of Building." In my opinion it is the latter column which serves the statutory function of identifying the listed building in the list which the Secretary of State is required to keep available for public inspection under section 52(6) of the Act of 1972. In their printed case the applicants state that the inclusion of the words of limitation in this column reflects a practice of compiling the list so that the "Name of Building" column is the official entry which defines the scope of the listing. That observation is consistent with my understanding of the list.

The Lord Justice-Clerk mentioned in his opinion that counsel for the Secretary of State had pointed out in the course of the hearing before the Second Division that it has been the practice for some time now for the list of buildings of special architectural or historic interest to be set forth in a different form from that which has been used in this case. A specimen form was produced in the course of that hearing from which it appeared that the list now contained eight columns. The first, which was entitled "Name of Building and/or Address," was headed as being the "Statutory List." The remaining seven columns contained information under various headings not dissimilar to those used in the present case, including "Description," "Reference" and "Notes." They were the subject of a separate heading which read: "The information (cols. 2–8) has no legal significance, nor do errors or omissions nullify or otherwise affect statutory listing." We were not shown a copy of this form, as the Secretary of State did not appeal against the decision of the Second Division on this point. But the applicants refer to this passage in the Lord Justice-Clerk's opinion in their printed case, in order to make the point that the modern form of list has merely formalised the practice that it is the "Name of Building" column which defines the scope of the listing. The description which we have been given is sufficient to indicate that the more modern form is an improvement on the previous form, as it removes the possibility of a misunderstanding about the function which the columns headed "Description" and "References" were intended to serve.

It is plain from the way in which the judges of the Second Division approached this issue that they regarded all the columns on the list which was before them in this case as forming part of the statutory listing. For my part—although counsel for the applicants was content to adopt this approach in presenting his argument—I think that they were in error in taking this view. It does not seem to me that there is any real difficulty in understanding the functions of each of the columns, if the list is read in the context of the legislation which it was designed to serve. But my conclusion that the only column which sets out the statutory listing is that which is headed "Name of Building" does not solve all the problems which have arisen in this case.

The listing of Redford Barracks was in itself sufficient, with the benefit of section 52(7) of the Act of 1972, to include within the statutory listing all objects or structures forming part of the land and comprised within the curtilage. Unless some words of limitation were included every building within the curtilage, however modest or unimportant, would be the subject of the statutory controls. It was no doubt for this reason that the words "(original buildings 1909–15 only)" were included in the column headed "Name of Building." But this was not an entirely satisfactory method of distinguishing between those buildings which were intended to be included in the statutory listing and those which were not. The words which were selected were ambiguous. The dates 1909–15 are the same as those mentioned in the next column as being those between which Harry B. Measures was the Director of Barrack Construction. But it is not clear whether they were intended to refer to the period of design of the buildings or the period of their construction, and if the latter whether the buildings had to be completed by 1915 in order to qualify or it was sufficient that they were commenced before or during that year. In this situation I think that it is permissible to examine the contents of the column headed "Description" in order to see whether it can help to resolve the ambiguity. Phrases are used in various parts of the description such as "some lesser buildings" and "other buildings" which suggest that this was not intended to be a definitive description of the entire premises comprised within the curtilage. But the fact that the riding school is mentioned in the description is sufficient, in view of the ambiguity, to put in issue the question whether that building was included in the statutory listing.

The reporter concluded, on the evidence which was before him, that the riding school was one of the last buildings to be erected, and that this took place after 1915. It was for this reason that he held that the riding school was not covered by the statutory listing and that listed building consent was not required for its demolition. He noted that the view of all the experts who gave evidence at the inquiry was that, if the riding school was built after 1915, it was not covered by the barracks listing. It seems to me however that this evidence was insufficient to resolve the difficulty which had been created by the ambiguity in the list. That evidence did not address the possibility that the riding school was part of the original design for which Harry B. Measures was responsible. Unless it could be asserted that this structure had no part to play in the original design it would not be safe to assume that it was not included in the statutory listing. I would therefore hold, albeit for different reasons, that the result at which the Second Division arrived was the right one, as the reporter had insufficient information before him in the evidence to entitle him to resolve this issue in favour of the developer.

I should like, finally, to add this further observation in regard to the ambiguity in the list. The problem which has arisen in this case suggests that the list, even in its new form, may require some reconsideration in order to remove such ambiguities. It is important that words of limitation which are used to exclude parts of a building from the statutory listing are sufficiently clear to enable those who are interested to identify what parts of the building are subject to the statutory controls and what are not. The fact that the controls are the subject of criminal sanctions provides an added reason for seeking greater clarity in the composition of the list than has been exhibited in this case.

LORD CLYDE. My Lords, in 1993 the applicants who are the second appellants in this appeal sought outline planning permission for the

A development of a food store, petrol filling station and ancillary works at a site in Colinton Mains Drive in Edinburgh. They also sought listed building consent for the demolition of a former riding school building which was on the site. The City of Edinburgh District Council refused planning permission and also refused listed building consent. The applicants then appealed to the Secretary of State. A senior reporter was appointed to determine the appeal. He held a public local inquiry and B thereafter issued a decision letter dated 7 March 1995. He decided that listed building consent was not required for the demolition of the former riding school building. On the matter of planning permission he allowed the appeal and granted outline planning permission subject to certain conditions. The council then appealed to the Court of Session both on the matter of the listed building consent and on the matter of planning C permission. After hearing the appeal the Second Division of the Court of Session by a majority allowed the appeal on both of those matters. The Secretary of State and the applicants have now appealed to this House.

The matter of listed building consent can conveniently be dealt with at the outset. It has been seen and treated as a distinct and separate issue from that of the planning permission. The reporter considered a preliminary question whether listed building consent was required for the D demolition of the former riding school building. It has not been suggested that he was not entitled to explore that question and I express no view on the propriety of his doing so. Section 52 of the Town and Country Planning (Scotland) Act 1972 provided for the compilation of lists of buildings of special architectural or historic interest. The provisions of that Act have now been superseded by the recent consolidating statute, E the Town and Country Planning (Scotland) Act 1997, but it will be convenient for the purposes of the present case to refer to the legislation in force at the time of the appeal processes. In terms of section 52(1) the lists may be compiled by the Secretary of State or by others with his approval. Section 52(5) provides for notice to be given to the owner, lessee and occupier of a building of its inclusion in or exclusion from the list. That notice is to be given in a prescribed form. But there does not F appear to have been any prescribed form for the lists themselves.

There was produced to the reporter a document relating to the City of Edinburgh District headed "List of Buildings of Architectural or Historic Interest." The list was set out in six columns. The first and the last three are not of importance. The second was headed "Name of Building" and the third was headed "Description." In the second column there was G entered:

> "REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909-15 only)."

The third column commenced with the words:

> "Harry B. Measures, Director of Barrack Construction, 1909–15. H Two large complexes of building on exceptionally spacious layout . . . comprising chiefly . . ."

There then followed descriptions of a variety of buildings with some architectural detail. Included here, under the subheading "Farriers' Shops and Riding School", were the words "other buildings to S. with large riding school at extreme S.E. . . ." The view taken by the reporter was that in the light of the evidence the building in question had probably been erected after 1915, that precedence should be given to the entry in the second column, and that on account of the reference to "original buildings of 1909–15 only" the riding school building was excluded from the list notwithstanding its specific mention in the third column. Having taken the view that listed building consent was unnecessary the reporter did not address the question whether the demolition of a listed building should be permitted. A

The judges of the Second Division unanimously held that the reporter was not entitled to hold as he had done that the building was not covered by the entry for Redford Barracks in the list. An appeal against that decision was taken only by the applicants. Counsel for the Secretary of State did not address the issue. It should be observed that it would have been useful to have had more evidence about the form used for the compiling of such lists and the relative significance of the respective columns. Plainly it is desirable to compile the list with sufficient clarity and precision to avoid the kind of question which has arisen here. The insertion of a complex of buildings as one entry in a list may well give rise to problems. Even the provision of section 52(7) of the Act which extends the identification to buildings within the curtilage of a building may not produce sufficient clarity, particularly in a case such as the present where the building in question had passed into the separate ownership and occupation of the local authority and had in some way at least become separated from the barracks and other buildings still in military occupation. The argument, however, which was presented in the appeal was essentially that the matter was one of fact for the reporter, or at least was not one which could be open to review. But the critical question here is one of the interpretation of the list and if the reporter has misconstrued it and so misdirected himself that is undoubtedly a matter on which he may be corrected on appeal to a court of law. B C D E

On the face of the list there is no evident problem. It was agreed by counsel for the applicants that the whole document with its six columns comprised the "list" and his argument was presented on that basis. The building in issue is specifically mentioned in the document and can readily be taken to be entered on the list. The dates in the second column can be seen to echo the dates in the third column, indicating that it is the work of Harry Measures which is to be listed, and the riding school is noted in the description of the buildings for which he was presumably responsible. F

A problem may be thought to arise when it is found that the riding school was built after 1915. But it also appears that the barracks were not completed until the end of 1916. Ambiguity only arises if the words in the brackets are read, as the reporter read them, as if they were intended to refer to buildings built during the specified years. But that is not what is stated and that is not the only possible construction. Even if there was a conflict between the two parts of the list it would be proper to find a construction which would make sense of the whole and that can be readily done by accepting that the period of years to which the passage in brackets refers is a period not of the completion of the building but of the processes of planning, conception, design and, at least to an extent, the realisation of Harry Measures's work. In that way there is no difficulty in recognising that the riding school may consistently with the text in the second column be entered in the third column as a listed building. In my view the judges of the Second Division reached the correct view on this matter and I would refuse the appeal on the matter of the listed building consent. G H

A I turn next to the appeal on the matter of the planning permission. The first point raised on behalf of the Secretary of State in opening his appeal concerned the meaning and effect of section 18A of the Act of 1972. It was stated on his behalf that this was the principal purpose of his appeal. The section had excited some controversy and guidance was required. Neither of the other parties however was concerned to challenge the submission advanced by counsel for the Secretary of State. The views
B which I would adopt on this part of the appeal accord with his submission and at least in the absence of any contradiction seem to me to be sound.

Ever since the introduction of a comprehensive system for the control of land development in Scotland by the Town and Country Planning (Scotland) Act 1947 planning authorities have been required to prepare a plan which was to serve as a guide for the development of their respective
C areas. These plans required to be submitted to the Secretary of State for his approval. Following on the reorganisation of local government introduced by the Local Government (Scotland) Act 1973 planning functions became divided between the regions, who were required to prepare "structure plans," and the districts, who were required to prepare "local plans." For the purposes of the present case the structure plan was the Lothian Regional Structure Plan 1985 and the local plan was the
D South West Edinburgh Local Plan ("S.W.E.L.P."). But the old terminology was also preserved. Section 17 of the Act of 1972 provided that for the purposes of the planning statutes the development plan shall be taken to consist of the structure plan approved by the Secretary of State with any approved alterations and the provisions of the approved local plan with any adopted or approved alterations. In and after the Act
E of 1947 provision was made for the recognition of the development plan in relation to determinations of applications for planning permission. Section 26(1) of the Act of 1972, echoing the language of section 12(1) of the Act of 1947, required a planning authority in dealing with the application to

> "have regard to the provisions of the development plan, so far as material to the application, and to any other material
F considerations . . ."

The meaning of this formulation in the context of section 12(1) of the Act of 1947 was set out in a decision in the Outer House of the Court of Session by Lord Guest in *Simpson v. Edinburgh Corporation*, 1960 S.C. 313. His Lordship stated, at pp. 318–319:

G "It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. 'To have regard to' does not, in my view, mean 'slavishly to adhere to.' It requires the planning authority to consider the development plan, but does not oblige them to follow it. . . . If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it. . . . In
H my opinion, the meaning of section 12(1) is plain. The planning authority are to consider all the material considerations, of which the development plan is one."

Section 18A was introduced into the Act of 1972 by section 58 of the Planning and Compensation Act 1991. A corresponding provision was introduced into the English legislation by section 26 of the Act of 1991, in the form of a new section 54A to the Town and Country Planning Act

1990. The provisions of section 18A, and of the equivalent section 54A A
of the English Act, were:

> "*Status of development plans.* Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

Section 18A has introduced a priority to be given to the development B
plan in the determination of planning matters. It applies where regard has to be had to the development plan. So the cases to which section 26(1) of the Act of 1972 applies are affected. By virtue of section 33(5) of the Act of 1972 section 26(1) is to apply in relation to an appeal to the Secretary of State. Thus it comes to apply to the present case. C

By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now
a presumption that the development plan is to govern the decision on an D
application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in paragraph 15 of the Planning Policy Guidance Notes PPG1 (January 1988), as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of section 18A if the
application accords with the development plan and there are no material E
considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a
mere mechanical preference for it. There remains a valuable element of F
flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court
can properly intervene. It has introduced a requirement with which the G
decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-
maker. It is for him to assess the relative weight to be given to all the H
material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

Correspondingly the power of the court to intervene remains in principle the same as ever. That power is a power to challenge the validity of the decision. The grounds in the context of planning decisions are contained in section 233 of the Act of 1972, namely that the action is not within the powers of the Act, or that there has been a failure to comply with some relevant requirement. The substance of the former of these grounds is too well-established to require repetition here. Reference may be made to the often quoted formulation by Lord President Emslie in *Wordie Property Co. Ltd. v. Secretary of State for Scotland,* 1984 S.L.T. 345, 347-348. Section 18A has not innovated upon the principle that the court is concerned only with the legality of the decision-making process. As Lord Hoffmann observed in *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 W.L.R. 759, 780:

> "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.

Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.

This chapter in the appeal was presented as a criticism of the approach adopted by the majority of the judges in the court below. But that criticism comes at the most to criticism of particular expressions rather than any allegation of error in principle. Lord McCluskey criticised the description given by the reporter in paragraph 181 of his decision letter of the effect of the section. His Lordship stated:

> "But section 18A did not simply 'enhance the status' of development plans; it made the development plan the governing or paramount consideration; and it was to remain so unless material considerations indicated otherwise."

But while the expression used by the reporter may have been somewhat imprecise in not stressing the priority inherent in the enhanced status it does not appear that the reporter fell into error in any misunderstanding of the effect of the section. The submission made by counsel for the Secretary of State on the construction of section 18A was correctly seen by the respondents as not constituting any serious attack on the decision which they sought to defend. The judges in the Second Division correctly recognised that it was competent for the reporter in principle to decide that the more recent material should overcome the priority given to the development plan. The issue was whether he was entitled to take that course on the material before him. The reference to paragraph 181 of the decision letter leads immediately to the substantial dispute in the appeal regarding the reporter's treatment of the problem of retail trade and impact.

In paragraph 181 the reporter begins to set out his conclusions on the chapter of the decision letter which concerns the issue of retail trade and impact. It should be observed at the outset that the structure plan of 1985 indicated a prohibition of developments such as that proposed by Revival except in existing or new shopping centres, and that S.W.E.L.P. expressed at least a presumption against out-of-centre shopping development. The reporter however stated:

> "Dealing first with the question of policy, I should say that, although there is no dispute that the statutory development plan consists of the 1985 structure plan and the S.W.E.L.P., and although recent

legislation enhances the status of development plans, I believe that in this case it is appropriate to attach greater weight to other material considerations."

That he was entitled in principle to decide that the presumption in favour of the development plan had been overcome by other material considerations was recognised in the court below. The criticism of the majority of the court was directed rather at his entitlement to take that course in the circumstances of this case. The other material considerations to which the reporter looked consisted of expressions of policy and planning guidance more recent in date than the structure plan of 1985. He noted that while the S.W.E.L.P. was only adopted as recently as 1993 it was required to conform generally with the provisions of the 1985 structure plan. The more recent material of which the reporter considered account should be taken consisted of the National Planning Guidelines 1986, the Planning Policy Guidance Notes PPG6 (July 1993) and the latest version of the Lothian Region Structure Plan (1994) which had been finalised and sent to the Secretary of State but had not yet been approved. A view was expressed in the court below that it was not appropriate to have considered PPG6 because it applied to England and Wales and not Scotland. No question was raised in that regard in the present appeal and I refrain from expressing any view about it. The new version of the structure plan represented in the view of the reporter the regional council's most recent thinking on the subject of retailing and it was to the policies set out in that document that he applied his mind.

Chapter 7 of the new structure plan deals with shopping. In paragraph 7.37 it was stated that free-standing developments, such as large convenience stores, could generate unacceptable traffic levels and affect residential amenity. The paragraph later states that:

> "new stores can only be justified to provide consumer choice or where there will be significant local population increase . . . new developments outside existing or proposed centres should be permitted only if they meet strict criteria."

The plan then sets out a policy identified as "S17." That policy related to proposals for major retail developments not in or adjacent to existing or proposed strategic shopping centres. It is understood that the proposed development at Colinton Mains Drive is such a proposal. The policy provides that in considering such proposals "district councils should be satisfied that all of the following criteria are met. . . ." There are then set out seven criteria of which only two need be quoted:

> "A. Local shopping facilities are deficient in either quantitative or qualitative terms . . . C. They would not, individually or cumulatively, prejudice the vitality and viability of any strategic shopping centre."

The strategic shopping centres are listed earlier in the document, but it is unnecessary to refer to that in detail.

The reporter was satisfied that all of the seven criteria were met and it was on that basis that he granted the planning permission. It is with criterion A that the present dispute is concerned. The reporter dealt with the matter of quantitative deficiency in paragraph 184 of his letter as follows:

> "The first matter relates to quantitative or qualitative deficiencies in the area. It appears that there may be a slight increase in both population and expenditure per head on convenience goods in the

near future in the study area, but the most obvious indicator of an expenditure surplus is the calculation that certain stores (notably Safeway at Cameron Toll, Morningside and Hunter's Tryst) are performing at levels significantly higher than company averages. Even allowing for the opening of stores at e.g. Straiton (which may be in doubt) and for turnover levels at Colinton Mains substantially higher than would probably be achieved by Tesco in a relatively small store, there would appear to be a quantitative case." A B

In paragraph 185 he considered the matter of qualitative deficiency and took the view that the argument for such a deficiency was not strong. The case would accordingly have to rest on the basis of a quantitative deficiency. Finally in this part of his letter he added in paragraph 186:

"Many local residents and organisations claim that there is no need for either the proposed foodstore or the [petrol filling station]. I accept that there is not a significant shortage of either, such as might establish a strong presumption in their favour in the public interest which might outweigh relevant objections. However, planning approval does not have to be based on a case of need. I have explained why I consider the policies in the more recent version of the structure plan are to be preferred, and there remains a general presumption in favour of development unless demonstrable harm is shown to interests of acknowledged importance." C D

The majority of the judges in the Second Division held that the reporter had erred in this part of his decision. The Lord Justice-Clerk was satisfied that the reporter was entitled to regard the National Planning Guidelines and the draft structure plan as justifying a departure from the development plan but considered that the reporter had not had a proper factual basis for overcoming the presumption in section 18A. In particular he considered: E

"merely to say that certain stores within the area are trading at exceptionally high levels does not justify the conclusion that there is a deficiency in local shopping facilities in the area in question." F

He noted that of the three stores mentioned in paragraph 184 only one, Hunter's Tryst, was, as the reporter had recognised in paragraph 185, within the study area. He also noted that the reporter had accepted in paragraph 186 that there was not a significant shortage of food stores or petrol filling stations. Lord McCluskey questioned whether the reporter had properly addressed the problem of quantitative deficiency at all. G

"If he has then he has not even begun to explain how a quantitative deficiency coexists with no significant shortage and a failure to make out any case of need."

He considered that even if a finding of a quantitative deficiency was justified the reporter had given no indication as to why that circumstance should overcome the presumption in favour of the terms of the development plan. Both the Lord Justice-Clerk and Lord McCluskey suggested that the final words of paragraph 184 lacked the conviction of a positive finding. H

In my view it is critical to an understanding of the reporter's decision to have a clear understanding of the concept of "quantitative deficiency." This is a matter of the interpretation of the policy S17. It may well be that the point was not made sufficiently clear in the presentation of the

A appeal before the Second Division. Certainly it appears that, as the Lord Justice-Clerk records, counsel were not at one as to what was meant by the reference to quantitative terms and it was on his own initiative that reference was made to paragraph 7.9 of the draft structure plan for a clue to its meaning. That paragraph starts with the sentence "In quantitative terms, demand is determined by trends in consumer expenditure." This is far from providing a definition but it does, as Lord Morison appreciated, B point to the fact that it is consumer expenditure which is being considered as reflected in the turnover in the available shopping facilities. As I understand it from the helpful explanations given to us by counsel for the Secretary of State quantitative deficiency has to do with a comparison between the amount of shopping facility and the amount of customers. It seeks to express a situation where there is a shortage of shopping C floorspace as compared with the number of customers in the locality. It is measured by reference to consumer expenditure. Quantitative deficiency is a concept different from that of need, where what is meant is the kind of necessity which would, for example, justify the sacrifice of some amenity for the purpose of the development. There can be a quantitative deficiency even although there is no "need" for the development in so far as everyone in the area is able to do their shopping albeit with the delay and D inconvenience of a possibly overcrowded shop or of travelling some distance to get there. Once the definition is understood there is no discrepancy between paragraphs 184 and 186 of the decision letter.

The next question is how a quantitative deficiency should be established. Where the approach is one of considering consumer expenditure a quantitative deficiency is most readily established by the E discovery that other stores are trading at a level which is above what would be expected of them, the inference being that there is room to accommodate a further shopping facility. As Lord Morison observed:

> "No other way of demonstrating a quantitative deficiency in a particular area, determined only by consumer expenditure, was suggested to us, and none occurs to me."

F That was the kind of evidence which was led in the present case and it appears that while there was dispute about the reliability of the inferences to be drawn from the figures adduced there was no objection taken to the use of that material in principle as a method of establishing the alleged deficiency.

It was suggested that the reporter was not entitled to find some G deficiency without going on to quantify the extent of the deficiency. I see no obligation on him to do that. The policy S17(A) does not require the finding of any particular extent of the deficiency. If the deficiency is too slight to enable the whole of the proposed new shopping facility to be accommodated then the matter will be covered by criterion C. If the development is greater than can be absorbed by the deficiency then the result may well be to cause prejudice to the vitality and viability of H the existing strategic shopping centres. In that respect criterion C secures the adequacy of the extent of the deficiency identified for the purpose of criterion A. In the present case the reporter indeed went further in his assessment of the deficiency than he strictly needed to go. In the final sentence of paragraph 184 he takes into account not only the possible further store at Straiton but also higher levels at the development site at Colinton Mains than were likely to be achieved by the proposed Tesco store. Even taking these into account he finds that "there would appear to be a quantitative case." It is evident from that passage that the deficiency was such as to enable the proposed store to be wholly accommodated within it and when account is taken of the hypothesis on which he is proceeding the passage indicates a very positive finding of a quantitative deficiency. What was suggested to be only a tentative finding is in reality clear and certain. A

It was argued that the reporter was not entitled to draw the conclusion which he did from the evidence before him. Counsel for the respondents suggested a variety of reasons which might account for the expenditure surplus. He also sought to criticise the quality of the evidence on which the reporter had relied. But it was not suggested that there was no evidence before the reporter which could entitle him to discount such other explanations and to hold that there was an expenditure surplus which pointed to a quantitative deficiency. Whether the evidence did or did not so point was a matter wholly for him to determine. Provided that the evidence was there it was for him to assess it and draw his own conclusions from it. It is no part of the function of a reviewing court to re-examine the factual conclusions which he drew from the evidence in the absence of any suggestion that he acted improperly or irrationally. Nor is it the duty of a reviewing court to engage in a detailed analytic study of the precise words and phrases which have been used. That kind of exercise is quite inappropriate to an understanding of a planning decision. B C D

Counsel for the respondents also sought to argue that the reporter had not given proper or adequate reasons for his decision. In part this point was related to matters to which I have already referred, such as a specification of the extent of the deficiency, the allegedly "tentative" nature of the conclusion on the critical issue, the finding of the quantitative deficiency in the face of the absence of need, and the link between the expenditure surplus and the quantitative deficiency. But in any event the pursuit of a full and detailed exposition of the reporter's whole process of reasoning is wholly inappropriate. It involves a misconception of the standard to be expected of a decision letter in a planning appeal of this kind. As Lord President Emslie observed in *Wordie Property Co. Ltd. v. Secretary of State for Scotland,* 1984 S.L.T. 345, 348: E F

> "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

It is worth reiterating the observations made by Lord Lloyd of Berwick in *Bolton Metropolitan District Council v. Secretary of State for the Environment* (1995) 94 L.G.R. 387 in the context of the requirement on the Secretary of State to notify the reasons for his decision. His Lordship said, at p. 394: G

> "There is nothing in the statutory language which requires him, in stating his reasons, to deal specifically with every material consideration. . . . He has to have *regard* to every material consideration; but he need not mention them all." H

As to what should be mentioned his Lordship gave two quotations. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478 Megaw J. said:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not

only be intelligible, but which deal with the substantial points that have been raised."

In *Hope v. Secretary of State for the Environment* (1975) 31 P. & C.R. 120, 123 Phillips J. said:

"It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues."

It is necessary that an account should be given of the reasoning on the main issues which were in dispute sufficient to enable the parties and the court to understand that reasoning. If that degree of explanation was not achieved the parties might well be prejudiced. But elaboration is not to be looked for and a detailed consideration of every point which was raised is not to be expected. In the present case the reporter dealt concisely but clearly with the critical issues. Nothing more was to be expected of him.

The reporter satisfied himself as he was entitled to do that there was quantitative deficiency and that criterion A was met. He then went on to consider the other criteria. He gave careful consideration to criterion C, including in that an assessment of the effect of the development on Hunter's Tryst and at some length its effect on the shopping centre at Wester Hailes. He was satisfied that criterion C was met and no challenge is made to that conclusion. His unchallenged finding on that matter affirms the adequacy of the deficiency which he found for the purpose of criterion A. He had already decided that the statutory presumption should be overcome by the more recent expressions of policy and in particular the draft structure plan. It was the existence of that recent guidance, not his finding of a quantitative deficiency, which justified the overcoming of the presumption. It is not in dispute that if the seven criteria were met the reporter was then entitled to grant planning permission.

For the foregoing reasons I would refuse the appeal by the appellant Revival Properties Ltd. on the matter of the listed building consent and I would allow the appeal by both appellants on the matter of the planning permission.

The Secretary of State should be entitled to his costs from the council here and one-half of his expenses in the court below. Revival Properties Ltd. should be entitled to one-half of their costs from the council here and one-half of their expenses in the court below.

Appeal of applicants in respect of listed building consent dismissed.

Appeals of applicants and Secretary of State in respect of planning permission allowed.

Local planning authority to pay Secretary of State's costs in House of Lords and one-half of his expenses in Court of Session and one-half of applicants' costs in House of Lords and one-half of applicants' expenses in Court of Session.

Solicitors: Treasury Solicitor for Solicitor to Secretary of State for Scotland, Edinburgh; Berwin Leighton for Brodies W.S., Edinburgh; Rees and Freres for Solicitor, City of Edinburgh Council.

M. G.

A [HOUSE OF LORDS]

REGINA v. NORTH YORKSHIRE COUNTY COUNCIL, *Ex parte* BROWN AND ANOTHER

1999 Jan. 13, 14; Feb. 11

Lord Nicholls of Birkenhead, Lord Goff of Chieveley, Lord Jauncey of Tullichettle, Lord Lloyd of Berwick
B and Lord Hoffmann

Town Planning—Development—Environmental assessment—Old mining permissions—Requirement for registration of permissions with mineral planning authority to allow continued use—Authority attaching conditions on registration—Whether process amounting to "development consent"—Whether requiring environmental assessment—Planning and Compensation Act 1991 (c. 34), s. 22,
C *Sch. 2—Council Directive (85/337/E.E.C.), arts. 1.2, 2.1, 4.2*

In 1992 the owners of a quarry, which was operating by virtue of an old planning permission which had been deemed to be granted under Part III of the Town and Country Planning Act 1947 by virtue of section 77 of that Act, made applications pursuant to section 22 of and Schedule 2 to the Planning and Compensation Act 1991,[1] which required owners of such old
D permissions to apply within a stipulated period to the local mineral planning authority for registration of the permission and for a determination of the conditions to which it was thereafter to be subject, failing which the permission would cease to have effect. The authority duly registered the permission in respect of the quarry and, after initiating a consultation process, determined the conditions. The applicants, who owned properties nearby, applied for judicial review of the authority's decision, seeking, inter alia, a
E declaration that the determination of conditions was unlawful on account of the authority's failure to conduct an environmental impact assessment in accordance with articles 1.2 and 2.1 of Council Directive (85/337/E.E.C.),[2] which required such assessment before "development consent" was granted for "projects likely to have significant effects on the environment," or the Town and Country Planning (Assessment of Environmental
F Effects) Regulations 1988 (S.I. 1998 No. 1199), which gave effect

[1] Planning and Compensation Act 1991, s. 22: "(1) . . . 'old mining permission' means any planning permission for development—(*a*) consisting of the . . . working of minerals . . . which was deemed to be granted under Part III of the Town and Country Planning Act 1947 by virtue of section 77 of that Act . . . (4) An old mining permission shall—(*a*) if no application for the registration of the permission is made . . . cease to have effect . . . (5) An old mining permission shall, if—(*a*) such an application is granted; but (*b*) an application under that Schedule to determine the conditions to which the permission is to be subject is
G required to be served before the end of any period and is not so served, cease to have effect . . ."

Sch. 2: "1(1) Any person who is an owner of any land to which an old mining permission relates . . . may apply to the mineral planning authority for the permission to be registered . . . (4) On an application under this paragraph, the mineral planning authority must—(*a*) if they are satisfied that . . . the permission authorises development consisting of the . . . working of minerals . . . grant the application . . . 2(1) The conditions to which an old mining permission is to be subject—(*a*) may include any conditions which may be imposed on a grant of planning permission for development consisting of the . . . working of
H minerals . . ."

[2] Council Directive (85/337/E.E.C.), art. 1.2: see post, p. 401F.

Art. 2.1: See post, p. 401G.

Art. 4.2: "Projects . . . [for the extraction of mineral resources] shall be made subject to an assessment . . . where Member States consider that their characteristics so require."

to the Directive in England and Wales in respect of the grant of planning permissions and set out the criteria for determining which projects fell within its ambit. The judge, dismissing the application, held that since the entitlement to quarry arose from the 1947 permission, the imposition of conditions by the authority under the Act of 1991 was neither a planning permission for the purposes of the Regulations nor a development consent within the meaning of the Directive. On the applicants' appeal, the Court of Appeal held that the determination of conditions under the Act of 1991 was a development consent within the meaning of the Directive and reversed the judge's decision.

On the authority's appeal:—

Held, dismissing the appeal, that the purpose of Directive (85/337/E.E.C.) was to ensure that decisions entitling developers to proceed with projects which might affect the environment were made on the basis of full information; that although it did not apply to decisions which were no more than detailed regulation of activities for which the principal consent, raising the substantial environmental issues, had already been given, a determination under section 22 of and Schedule 2 to the Act of 1991, though not in itself a decision allowing a developer to proceed, was a necessary condition for an entitlement to proceed which involved a new and freestanding examination of the environmental issues, and as such was a "development consent" within the meaning of the Directive; and that, accordingly, upon the Secretary of State establishing, in accordance with article 4.2 of the Directive, the necessary criteria for identifying those projects within the ambit of the Act of 1991 procedure which required an environmental impact assessment, the authority would be required to apply those criteria to decide whether to undertake an assessment in respect of the quarry (post, pp. 400C–E, 404C–D, 405C–F, 406A–B).

Reg. v. Secretary of State for the Environment, Ex parte Greenpeace Ltd. [1994] 4 All E.R. 352 distinguished.

Decision of the Court of Appeal [1998] Env.L.R. 385 affirmed.

The following cases are referred to in the opinion of Lord Hoffmann:

Aannemersbedrijf P.K. Kraaijeveld BV v. Gedeputeerde Staten van Zuid-Holland (Case C-72/95) [1996] E.C.R. I-5403, E.C.J.

Reg. v. Secretary of State for the Environment, Ex parte Greenpeace Ltd. [1994] 4 All E.R. 352

The following additional cases were cited in argument:

British Railways Board v. Secretary of State for the Environment [1993] 3 P.L.R. 125, H.L.(E.)

Bund Naturschutz in Bayern eV v. Freistaat Bayern (Case C-396/92) [1994] E.C.R. I-3717, E.C.J.

Burgemeester en wethouders van Haarlemmerliede en Spaarnwoude v. Gedeputeerde Staten van Noord-Holland (Case C-81/96) (unreported), 18 June 1998, E.C.J.

Commission of the European Communities v. Federal Republic of Germany (Case C-431/92) [1995] E.C.R. I-2189, E.C.J.

Pye v. Secretary of State for the Environment [1998] 3 P.L.R. 72

Secretary of State for Transport v. Haughian [1997] Env.L.R. 59, C.A.

APPEAL from the Court of Appeal.

This was an appeal, by leave of the House of Lords (Lord Browne-Wilkinson, Lord Steyn and Lord Hutton), by the mineral planning authority, North Yorkshire County Council, from the decision of the Court of Appeal (Evans, Hobhouse and Pill L.JJ.) allowing an appeal by the applicants, Marilyn Brown and Lesley Cartwright, from the decision of Hidden J. dismissing their application for judicial review of the authority's determination of an application by Mr J. B. Hall made under section 22 of and Schedule 2 to the Planning and Compensation Act 1991 for conditions for quarrying at Preston-under-Scar, North Yorkshire, without the matter having been subject to an environmental impact assessment in accordance with Council Directive (85/337/E.E.C.) on the assessment of the effects of certain public and private projects on the environment.

The facts are stated in the opinion of Lord Hoffmann.

Timothy Straker Q.C. and *Philip Kolvin* for the authority. Directive (85/337/E.E.C.) is concerned with identifiable and formal applications for development consents made after 3 July 1988 and does not seek to disturb existing legal rights. Its rationale is the need for legal certainty and the inconvenience of halting projects or consent procedures already under way: see *Commission of the European Communities v. Federal Republic of Germany* (Case C-431/92) [1995] E.C.R. I-2189; *Burgemeester en wethouders van Haarlemmerliede en Spaarnwoude v. Gedeputeerde Staten van Noord-Holland* (Case C-81/96) (unreported), 18 June 1998 and *Bund Naturschutz in Bayern eV v. Freistaat Bayern* (Case C-396/92) [1994] E.C.R. I-3717.

Development consent signifies permission which initially authorises the project. A subsquent decision or approval, albeit necessary to enable the continuation of the project, is not a development consent. [Reference was made to *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72 and *British Railways Board v. Secretary of State for the Environment* [1993] 3 P.L.R. 125.] It is a commonplace of the English planning system for planning permission to be granted with conditions requiring subsequent approval of certain matters. Thus, where a project was in the pipeline on 3 July 1998 it does not require an environmental impact assessment, notwithstanding the need for the further consents to proceed: see *Secretary of State for Transport v. Haughian* [1997] Env.L.R. 59 and *Reg. v. Secretary of State for the Environment, Ex parte Greenpeace Ltd.* [1994] 4 All E.R. 352. Such reasoning applies with greater force to old mining permissions which have been legally binding for 50 years.

In the present case, the decision authorising the project occurred in 1947. That remains the source of the developer's right to proceed, not the procedure under the Planning and Compensation Act 1991, which merely registers the entitlement of the developer to proceed. Although the purpose of that Act was to subject pre-1948 permissions to modern planning conditions, full consideration can be given to the nature of the conditions to be imposed without mistaking that consideration for a development consent. There was extensive consultation and deliberation before the conditions were imposed. The Act of 1991 was not enacted to comply with the Directive.

A *Richard Gordon Q.C.* and *William Birtles* for the applicants. There is nothing in Directive (85/337/E.E.C.) to limit its application to initial authorisations. Without a determination of conditions under the Act of 1991 the permission to quarry would cease to have effect. Such determination therefore falls within the definition of development consent in article 1.2 of the Directive as a decision which entitles the developer to proceed with the project. The definition cannot be given a narrow meaning since the Directive has a wide scope and broad purpose: see B *Aannemersbedrijf P.K. Kraaijeveld BV v. Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] E.C.R. I-5403, 5444, para. 31.

Straker Q.C. replied.

Their Lordships took time for consideration.

C 11 February. LORD NICHOLLS OF BIRKENHEAD. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons he gives, and with which I agree, I would dismiss this appeal.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord D Hoffmann. For the reasons he gives I, too, would dismiss the appeal.

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons he gives I, too, would dismiss the appeal.

E LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For the reasons he gives I, too, would dismiss the appeal.

LORD HOFFMANN. My Lords, Preston-under-Scar is a village in North Yorkshire, designated as a conservation area. It lies just outside the Yorkshire Dales National Park. Near the village is Wensley Quarry, from F which limestone has been extracted for many years. Planning permission was granted in 1947. This old permission is not subject to any time limit or conditions. It allows quarrying not merely in the existing quarry but over some 322 hectares of the surrounding countryside.

Section 22 of and Schedule 2 to the Planning and Compensation Act 1991 gave the North Yorkshire County Council, as "mineral planning authority," power to impose conditions upon the operation of the quarry. G The council consulted widely and advertised its intention to determine the conditions. Many people sent written representations. But the council did not undertake an environmental impact assessment in accordance with the European Union Council Directive of 27 June 1985 (85/337/E.E.C.). This Directive was adopted to protect the environment throughout the European Union by requiring member states to ensure that planning H decisions likely to have a significant environmental effect were taken only after a proper assessment of what those effects were likely to be. It requires that before the grant of "development consent" for specified kinds of

A project, member states should ensure that an environmental impact assessment is undertaken.

On 6 June 1995 the council determined the conditions. The respondents, who are householders in the village of Preston-under-Scar, applied for judicial review to quash the determination on the ground that no environmental impact assessment had been undertaken. The council says that an assessment was not required because the imposition of B conditions is not a "development consent" within the meaning of the Directive. The consent which allows the quarry to operate was the planning permission granted in 1947. This remains in force. The United Kingdom government has given effect to the Directive by making the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988 No. 1199), which determine the circumstances C in which an environmental impact assessment will be required. But they apply only to cases in which planning permission is granted. The council takes the view that the Directive does not require anything more.

The appeal therefore turns upon the meaning of the concept of "development consent" in the Directive. This is a concept of European law, which has to be applied to the planning systems of all the member states. To ascertain its meaning, it is necessary to examine the language D and in particular the purpose of the Directive. One must then examine the procedure for determining conditions as part of the United Kingdom planning system and decide whether it should be characterised as a granting of development consent" within the meaning of the Directive.

I start, therefore, with the Directive. The sixth recital states the objective:

E "Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the F project in question."

"Development consent" is defined in article 1.2 as "the decision of the competent authority or authorities which entitles the developer to proceed with the project." The term "project" is widely defined to include, specifically, "the extraction of mineral resources."

The general obligation imposed by the Directive is contained in G article 2.1:

"Member states shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in article 4."

H Article 4 distinguishes between certain types of major project (such as oil refineries, nuclear power stations and motorways) which are conclusively presumed to have significant environmental effect and other

A kinds of project which may or may not have such an effect, depending upon the circumstances. For projects of the former kind, which are listed in Annex I, an assessment is mandatory. For the latter kind, listed in Annex II, an assessment must be undertaken "where member states consider that their characteristics so require." For this purpose the member state must specify which projects have such characteristics or establish criteria by which the question can be decided. Articles 5 to 10 specify the kind of information needed for the assessment and the procedure which B must be followed.

Quarrying (mineral extraction) falls within Annex II. So the United Kingdom is required to establish criteria for determining whether a grant of "development consent" for quarrying should require an environment impact assessment. As I have said, the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 were intended to C establish such criteria. These provide that an assessment shall be required for developments falling within Annex II if the development "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location." But they apply only to a grant of planning permission.

I consider next the procedure by which the conditions are determined under the Planning and Compensation Act 1991. Old mining permissions D such as that for Wensley Quarry exist in many parts of the country. They were granted under the Town and Country Planning (General Interim Development) Order 1946 (S.R. & O. 1946 No. 1621) or preceding legislation and continued in force by section 77 of the Town and Country Planning Act 1947 and subsequent legislation. Forty years later, in a time of greater environmental consciousness, of which the Directive is one E manifestation, they gave rise to two kinds of problem. First, there was no register from which their existence could be discovered. A register of planning applications was first introduced by the Act of 1947 but did not record earlier permissions which were deemed to continue. So the commencement or resumption of mining or quarrying sometimes came as an unpleasant surprise to people who had bought property in the area many years after the permission had been granted. Secondly, the old F permissions were frequently (as in the case of Wensley Quarry) indefinite in duration and subject to no conditions for the protection of the local environment, such as limits on hours of working, noise, vibrations, dust emissions and so on.

Section 22 of and Schedule 2 to the Planning and Compensation Act 1991 addressed both these points. First, it required the owners of land with G the benefit of old mining permissions to apply to the local mineral planning authority for their registration within six months of 25 September 1991, the date on which Schedule 2 was brought into force: paragraph 1(3). If they did not do so, the permission ceased to have effect: section 22(4)(*a*). If they applied in time and the mineral planning authority was satisfied that the permission existed, it was obliged to grant the application: paragraph 1(4). By this means, a register of all extant H permissions was created.

The next stage was to settle suitable conditions. Once the application for registration had been granted, the owner of the land became entitled to apply to the mineral planning authority to determine the conditions to which the permission was to be subject: paragraph 2(2). The application had to be made (subject to any agreed extension) within 12 months of the grant of registration or the determination of an appeal against its refusal: paragraph 2(4)(*b*). If no application was made within such period, the permission ceased to have effect. The land owner was required in the first instance to propose his own conditions, but the mineral planning authority was entitled (subject to an appeal to the Secretary of State) to include any conditions which may be imposed on a grant of planning permission for development consisting of the winning and working of minerals or involving the depositing of mineral waste:" paragraph 2(1)(*a*). These words plainly confer a very wide discretion to impose conditions for the protection of the environment, subject of course to any policy guidance which may be given by the Secretary of State. In addition, the mineral planning authority was required to impose a condition that working should cease not later than 21 February 2042: paragraph 2(1)(*c*).

The Schedule gave the mineral planning authority three months in which to determine the conditions. If it failed to do so, it was treated as if it had determined that the permission was to be subject to the conditions set out in the application: paragraph 2(6)(*b*). Once the conditions had been finally determined, the conditions were required to be registered (paragraph 3(2)) and the old permission had effect as if it had been granted subject to those conditions: section 22(2).

In the period before the final determination of the conditions, section 22 distinguishes between what is sometimes called a "dormant permission," where in the period of two years before 1 May 1991, no development had been carried out to any substantial extent on the land to which the permission related, and a permission by virtue of which extraction had been going on. In the case of a dormant permission, no extraction could take place until the conditions had been finally determined: section 22(3). In the case of an active permission, the owner could continue to operate as before, subject to having to comply with the conditions when they were determined or to cease operations if the permission lapsed on account of his failure to apply for their determination.

Pursuant to these provisions, the owners of the land enjoying the benefit of the Wensley Quarry permission applied to the council for registration, which took place on 30 September 1993. They then applied for the determination of conditions and the council, after the consultation to which I have referred, determined the conditions.

The imposition of conditions upon the exercise of a planning permission usually takes place concomitantly with the grant of the permission. There is no question of having to characterise the nature of the imposition of the conditions separately from the grant of the permission. Section 22 is, so far as I am aware, unique in United Kingdom planning law in conferring a general duty upon planning authorities to consider whether to impose conditions upon a class of planning permissions which may have subsisted untrammelled for half a century. This duty to consider arises because the legislature has created a machinery by which, on penalty of forfeiting the benefit of the permission, owners of land have to register and then submit themselves to the decision of the mineral planning authority as to what conditions should be imposed. Unless the planning authority is given the opportunity to impose such conditions, the planning permission becomes void.

Can it therefore be said that the decision imposing the conditions is a "decision of the competent authority or authorities which entitles the developer to proceed with the project"—the definition of a "development consent" in the Directive? The imposition of conditions is not a decision *that* the developer shall be entitled to proceed. Mr. Straker, who appeared for the authority, was quite right in saying that the source of the developer's right to proceed with the project was and remained the planning permission of 1947, even after conditions had been imposed. Section 22(2) expressly says that the effect of the registration of conditions is that the old mining permission has effect as if granted subject to the conditions. On the other hand, the developer cannot proceed unless the planning authority has determined (or is deemed to have determined: paragraph 2(6)(*b*)) the appropriate conditions. So that although the determination does not decide *whether* the developer may proceed but only the manner in which he may proceed, it is nevertheless a necessary condition for his being entitled to proceed at all.

Is this sufficient to bring it within the European concept of a development consent? I think it is. The purpose of the Directive, as I have said, is to ensure that planning decisions which may affect the environment are made on the basis of full information. In *Aannemersbedrijf P.K. Kraaijeveld BV v. Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] E.C.R. I-5403, 5444, para. 31 the European Court of Justice said that "the wording of the Directive indicates that it has a wide scope and a broad purpose." A decision as to the conditions under which a quarry may be operated may have a very important effect on the environment. It can protect it by imposing limits on noise, vibration and dust, requiring the preservation of important natural habitats or the reinstatement of damage to the landscape and in many other ways. Without such conditions, the unrestricted operation of the quarry might well have a significant effect on the environment. It cannot therefore be said that the environmental effect of the quarry was determined once and for all in 1947. One of the purposes of the Act of 1991 was to allow mineral planning authorities to assess those effects in the light of modern conditions.

The position would be different if, upon a proper construction of the United Kingdom legislation, the determination of conditions was merely a subsidiary part of a single planning process in which the main decision likely to affect the environment had already been taken. In such a case, the environmental impact assessment (if any) would have been made at the earlier stage and no further assessment would be required. Or in the case of a project in which an application for the principal consent had been made before the Directive came into force on 3 July 1988, no assessment would be required at all. This is the effect of the "pipeline" cases in which it has been unsuccessfully argued that assessments should be undertaken for projects in which the procedure for obtaining consent (or the principal consent) was already under way before the commencement date. The only one of these cases to which I need refer is the decision of Potts J. in *Reg. v.*

Secretary of State for the Environment, Ex parte Greenpeace Ltd. [1994] 4 All E.R. 352. The case concerned the British Nuclear Fuels Ltd. ("B.N.F.L.") nuclear waste reprocessing plant at Sellafield. Outline planning permission for the construction of the plant had been granted in 1978. Full planning permission was granted in 1983 and the plant completed by 1992. But in order to operate the plant, B.N.F.L. required authorisation under the Radioactive Substances Act 1993. Without such authorisation, B.N.F.L. could not lawfully dispose of radioactive waste from its premises. Potts J. held that the granting of authorisation under the Act of 1993 was not the decision which entitled B.N.F.L. to proceed with the "project" of disposing of nuclear waste. He said that the construction of the plant and its use for disposal of nuclear waste were all part of one project for which consent had been given before the Directive came into force.

The principle in this and similar cases seems to me to be clear: the Directive does not apply to decisions which involve merely the detailed regulation of activities for which the principal consent, raising the substantial environmental issues, has already been given. I express no view about the way in which this principle was applied to the different facts of the various cases which were cited. It seems to me clear, however, that it can have no application to this one. The procedure created by the Act of 1991 was not merely a detailed regulation of a project in respect of which the substantial environmental issues had already been considered. The purpose of the procedure was to give the mineral planning authority a power to assess the likely environmental effects of old mining permissions which had been granted without, to modern ways of thinking, any serious consideration of the environment at all. It is true that the power to deal with these effects was limited to the imposition of conditions rather than complete prohibition. But the procedure was nevertheless a new and freestanding examination of the issues and could therefore, in my opinion, require the information provided by an environmental impact assessment. It was therefore a "development consent" within the meaning of the Directive.

I add two footnotes. First, it was suggested in argument that there might be a distinction between "dormant permissions," where work may not start until the conditions have been determined (section 22(3)) and "active permissions" in which it may go on unrestricted until either the conditions are imposed or the permissions lapse on account of failure to apply for their determination. I do not think that this distinction matters. In either case, a determination of conditions is a decision necessary to entitle the developer to commence or continue with the development. Secondly, it was submitted that in a case in which a mineral planning authority fails to deal with an application to determine conditions and a deemed determination on the conditions proposed by the developer takes effect under paragraph 2(6)(*b*) of Schedule 2, the court should disapply the deeming provision on the ground that it would enable a mineral planning authority merely by inaction to avoid its European law obligation to undertake an environmental impact assessment. This question does not arise in the present case and I say nothing about it.

For these reasons, which are, I think, no more than an elaboration of the reasons given by Pill L.J. in the Court of Appeal and with which I agree, I would dismiss the appeal. This does not of course mean that the council is necessarily obliged to undertake an assessment. That depends upon whether it takes the view that the characteristics of the decision require one. It is, however, for the Secretary of State to establish the criteria for making this decision in accordance with article 4.2 of the Directive, as he has done for planning permissions in the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, and for the council to apply those criteria. A B

Appeal dismissed with costs.

Solicitors: Rees & Freres for Head of Legal Services, North Yorkshire County Council; Richard Buxton, Cambridge. C

C. T. B.

D

[HOUSE OF LORDS]

BRUTON . . . . APPELLANT

AND E

LONDON & QUADRANT HOUSING TRUST . . RESPONDENTS

1999 March 8, 9; June 24

Lord Slynn of Hadley, Lord Jauncey of Tullichettle, Lord Hoffmann, Lord Hope of Craighead and Lord Hobhouse of Woodborough F

Licence or Tenancy—Exclusive occupation—Grantor without proprietary interest—Housing trust providing short-life accommodation in council property allocated for redevelopment and held by trust under licence—Agreement to occupy self-contained flat on weekly licence—Occupier aware of housing trust's use of property under licence from council—Whether occupier licensee or tenant

G

A housing trust was granted a licence by the local authority to use a number of properties acquired by the authority for redevelopment as temporary accommodation for homeless persons. The trust undertook to ensure that no occupier was given security of tenure without the prior consent of the local authority and that no occupier should acquire such rights once in occupation. The plaintiff signed an agreement with the trust for the occupation of a self-contained flat in one of the properties on a temporary basis on a weekly licence. The agreement noted that the trust held the property on licence from the local authority pending development, required the occupier to vacate the premises upon receiving reasonable notice from the trust and provided that H

R. v. ROCHDALE M.B.C., EX P. TEW AND OTHERS

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

(Sullivan J.): May 7, 1999

Environmental assessment—application for outline planning permission for a business park—Town and Country Planning (Assessment of Environmental Effect) Regulations 1988—provision of environmental information—whether failure to provide sufficient information made any grant of planning permission unlawful

The applicants ("T") were residents living in the vicinity of a site which was the subject of a planning application to develop a business park. The application for this permission was made in "bare outline" as the first step towards the construction of the business park with all detailed matters reserved for further consideration. The permission gave a period of 10 years within which application was to be made for approval of reserved matters. In addition, there was an application for a full planning permission for the construction of a spine road to serve the business park. An environmental statement together with an ecological survey was submitted in support of the applications. The Respondent Council (R.M.B.C.) granted outline planning permission on 6 August 1998 for both applications, subject to numerous conditions, some of which required further details to be submitted which would address the minimisation of certain environmental impacts. In particular, one condition required the preparation of a Framework Document which would show the design and layout of the proposed development with plans for phasing different aspects of the development.

T sought to challenge the grant of planning permission by way of judicial review. There were five grounds:

1. There was a failure to give the particulars required under the Town and Country Planning (Applications) Regulations 1988 ("the Applications Regulations") and so the application for the business park did not satisfy the requirements of section 62 of the Town and Country Planning Act ("the 1990 Act").
2. There was a failure to give the information required under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the Assessment Regulations") which implemented E.C. Directive No. 85/377 on the assessment of the

effects of certain public and private projects on the environment ("the Directive").

3. R.M.B.C. erred in law in treating the planning permission for the business park as though it secured the use of part of the site for public open space and, therefore, as being in compliance with both the District Plan and the draft Unitary Development Plan.
4. R.M.B.C. failed to consider whether the spine road was appropriately designed to serve the business park as it might be developed under the Framework Document; alternatively, whether the spine road would constrain the development of the business park.
5. A number of conditions imposed on the planning permissions were unlawful because they required things to be done on land which was not under the applicants' control.

Held, in granting the application and quashing the decisions to grant planning permission:

1. It was not necessary in every case to specify the scale, expressed in terms of its floor space, of a proposed building in order to fulfil the requirement to describe the development which was the subject of the application as imposed under reg. 3 of the Application Regulations. It was for the local planning authority to decide whether an outline application gave a sufficient description of the proposed development. Regulation 3 imposed a requirement to include the particulars specified in the application form, but only in so far as they were appropriate to the kind of development that was being proposed. It was in the nature of an outline application that many of the particulars sought would not be available at the outline stage, and hence it would not be appropriate to provide them on the form. In these circumstances, the application under ground 1 failed.
2. The application did not contain any information as to the design, size, or scale of the development. The fact that the environmental assessment was based on the illustrative masterplan and indicative schedule of uses was a tacit acknowledgement that the description of the development in the application was inadequate for the purposes of supplying "environmental information" in accordance with the Assessment Regulations. Once it was decided that a project fell within Sched. 2 of the Assessment Regulations, there was a requirement that the "environmental information" submitted with the application should permit the assessment of the likely impact of the development which was proposed. Whilst R.M.B.C. took into consideration "environmen-

tal information" about the effects of carrying out a business park development in accord with an illustrative masterplan and an indicative schedule of land uses, that was not the development which was proposed to be carried out in the application for planning permission, nor was it the development for which planning permission was granted; nor was the information sufficient in any event to comply with the requirements of Sched. 3 of the 1988 Assessment Regulations. The council did not have power to grant planning permission for the business park. The application under ground 2 succeeded.

3. R.M.B.C. could not, under the terms of the outline planning permission, insist on the provision of public open space. A fresh application for change of use to those purposes would be required if such space was to be provided. It could not reasonably be concluded that this application complied with the relevant policy of the U.D.P. However, it would be for R.M.B.C. to decide whether the failure of the application to meet all of the criteria of the relevant U.D.P. was contrary to either the District Plan or the emerging U.D.P. To the extent that R.M.B.C. erred in concluding that the application complied with the relevant policy in the U.D.P., the application under ground 3 was successful but that would not necessarily be a reason on its own for quashing the decision.
4. There were policies in the U.D.P. which constrained the flexibility in alignment of the spine road. Consequently, there was nothing before the decision makers which would have suggested that an alternative alignment, or a different positioning of the spine road, might have been desirable or possible. There was therefore no substance in T's arguments and accordingly the application under ground 4 failed.
5. The enforceability of any planning condition had to be considered in the light of the particular facts. The problem with enforceability was a practical one, and it was undesirable to fetter the broad discretion conferred upon decision makers by section 70(1)(a) of the 1990 Act any more than was strictly necessary. Although broad classification of conditions as "positive" or "negative" was a useful indicator, but should not be regarded as determinative without regard to the circumstances of the individual case. So considered, the conditions imposed by R.M.B.C. in the present case were not unenforceable. The application under ground 5 failed.

Given, in particular that the argument on ground 2 had succeeded, the court would not exercise its discretion not to quash the decision. The fact that there might well be a strong economic imperative to grant planning permission for major development projects and thereafter to proceed with development at a rapid pace meant that it was all the more important that their likely effects on the environment were properly assessed in accordance with the directive and the Assessment Regulations. The assessment procedure was a fundamental part of the E.C.'s environmental policy and it was essential that it was carried out.

Legislation considered:

Town and Country Planning (Applications) Regulations 1988, regs 2, 3.

Town and Country Planning Act 1990, sections 58(1)(b), 62, 70(1)(a).

Town and Country Planning (General Development Procedure) Order 1995, art. 3.

Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, regs 4(2), Sched. 2, Sched. 3.

E.C. Directive No. 85/377 on the assessment of the effects of certain public and private projects on the environment: Arts 1.2, 3, 5.1, 5.2, Annex III.

Legislation referred to:

Town and Country Planning (Applications) Regulations 1988, reg. 4.

Town and Country Planning Act 1990; sections 65(2), 75(2) and (3), 172(2).

Cases considered:

R. v. Newbury D.C. and Newbury and District Agricultural Society, ex p. Chieveley Parish Council [1999] P.L.R. 51.

R. v. North Yorkshire C.C., ex p. Brown and Another [1999] Env.L.R. 623.

W.W.F.-U.K. Ltd and Another v. Secretary of State for Scotland [1999] Env.L.R. 632.

British Airports Authority v. Secretary of State (1979) S.C. 200.

Birnie v. Banff C.C. [1954] S.L.T. 90.

Cases referred to:

Slough B.C. v. Secretary of State [1995] 17 P. & C.R. 560.

Bernard Wheatcroft Ltd v. Secretary of State for the Environment [1980] 43 P. & C.R. 23.

Inverclyde D.C. v. Inverkip Building Co. Ltd [1982] S.L.T. 401.

M. J. Shanley Ltd v. Secretary of State for the Environment and Another [1982] J.P.L. 380.

Proberun Ltd v. Secretary of State for the Environment and Another [1990] 3 P.L.R. 79.

Mouchell Superannuation Fund Trustees v. Oxfordshire County Court [1992] 1 P.L.R. 97.

Newbury D.C. v. Secretary of State for the Environment [1981] A.C. 578.

Policy considered:

Circular 15/88: paras 42–44.
Circular 11/95: para. 28.

Mr J. Howell Q.C. and *Ms K. Markus* appeared on behalf of the applicants.
Mr T. Straker Q.C. and *Mr P. Kolvin* appeared on behalf of the respondent.

JUDGMENT

This is an application for judicial review of two planning permissions granted by the respondent council on August 6, 1998. The two planning permissions were, firstly, an outline planning permission for:

> "Proposed business park consisting of general and light industry, offices distribution and storage, research and development with associated and complementary retail, leisure, hotel and housing land between Kingsway (A664), motorway M62, Broad Lane (B6194) and the Rochdale/Oldham ailway line."

Secondly, a full planning permission for:

> "Construction of spine road to serve business park including highway connection to Kingsway (A664) and alterations and connection to the north side of Junction 21 of the motorway (M62).
> Land between Kingsway, motorway (M62), Broad Lane (B6194) and the Rochdale Oldham railway line."

The site of the second planning permission is wholly contained within the 213 hectare site of the planning permission for the business park. That 213 hectares includes land to the south of the M62, the motorway itself and Junction 21. Those areas included in the application to facilitate construction of the spine road. The remainder of the site consists of approximately 170 hectares of generally open land.

There are some dwellings within that 170 hectares. The applicants for judicial review are either resident on, or frequently visit, the site and would be affected by its development as a business park. The site is located between the built-up area of Rochdale to the West/North West and the M62 to the South/South East. The Council has had a long standing policy that it should be developed as a business park—the Kingsway Business Park. There are policies to that effect in both the South Rochdale Local Plan, which was adopted in June 1989, and the Deposit Draft U.D.P., published in 1994. It is a strategic employment site, and is intended to attract substantial inward investment for the benefit of Rochdale and the North West region generally.

The applications for planning permission were made by Wilson Bowden Properties Limited and English Partnerships on February 23, 1998. The application for the Business Park described the proposed development as:

> "Kingsway Business Park consisting of high quality general and light industry, offices, distribution and storage, research and development in use classes B1/B2/B8, associated and complementary uses including retail in use classes A1 and A3, leisure, hotel and housing."

The site area was given and a site plan showing 213 hectares edged in red was provided. The application is stated to be an outline application, and it was indicated that approval was not being sought for any of the reserved matters.

In answer to subsequent questions in the application form relating to such matters as diversion of public rights of way, the felling of trees, the demolition of existing buildings, the type and colour of materials to be used for roofs and walls, the processes to be carried on, plant and machinery to be installed and vehicular traffic flow, it was stated that the application was in outline and that details were not available or were to be subsequently provided or agreed. An estimate was given of the likely employment, a total of 7,800 jobs, and in answer to question 11, as to the total amount of floor space involved in the proposal, it was said:

> "Indicative land use schedule and floor space figures attached."

In addition to the site plan, a master plan accompanied the application. The role of the latter was explained in a letter which accompanied the application, and which stated that:

> "A master plan has been prepared for illustrative purposes which is enclosed for your information and assistance in consultations. This plan aims to demonstrate the general form of development, showing the integration of the access proposals, principal highways alignments, possible patterns of land use, initial proposals for the integration of landscape and open space and adjustments to Rights of Way through the site."

It was clearly stated upon the master plan itself that it was for illustrative purposes only.

So far as floor space is concerned, there was a statement supplementary to section 11 of the planning application form, which said this:

> "The application is in outline only with all matters reserved. However, in order to assist in consideration of the application, assessments have been

> made of the likely allocation of uses within the development and associated floor space totals. An indication of these areas are summarised below ..."

Then under the various use classes, hectarage was given and a gross floor space was given. In the case of the housing, a number of dwellings was given at approximately 60. The total hectarage given for built development was 113.6 hectares and the total gross floor space, 356,880 square metres. The statement added:

> "In addition an area of 32.0 Hectares is set aside for recreational use within the development."

Thus the application was that what is sometimes called a "bare outline", an application to construct a business park, as described above, within the extensive area edged red on the application plan, with all detailed matters reserved for further consideration.

The application for planning permission for the spine road was for:

> "Construction of infrastructure associated with the Kingsway Business Park including highway connection to Kingsway, central spine road and improvements to the north side of Junction 21 of the M62."

Since the application was not for the erection of a building, but for engineering operations, it was a full application. In addition to the site plan and the illustrative master plan there were a series of drawings showing both the horizontal and vertical alignment of the road and the position of proposed roundabouts along its length.

An environmental statement prepared by Environment Resources Management together with an ecological survey was submitted in support of the applications. I will return to the basis on which the Environmental Statement was prepared in due course.

The application for the business park was the subject of a lengthy report to the Environment Committe by Mr Beckwith, the council's Director of Environment. He also prepared a report about the spine road. It was a brief report because, as he explained:

> "Essentially this application is a first step in the construction of the Kingsway Business Park. The issues of principle are considered in the report on the outline application."

He then noted that the two applications were "essentially interlinked" and recommended that planning permission be granted in both cases subject to numerous conditions. Council members accepted his recommendation.

The planning permission for the business park gives a period of 10 years within which application must be made for approval of reserved matters. This extended period is a reflection of the fact that, as explained in the environmental statement, it was envisaged that "it may take in the order of 15 years before the whole site is comprehensively developed."

For present purposes, three conditions are of particular significance. Condition 1.3 states:

> "The development shall be carried out in accordance with the mitigation measures set out in the environmental statement submitted with the application, unless otherwise agreed in writing by the local planning authority and unless otherwise provided for in any other condition attached to this planning permission."

Condition 1.7:

> "No development shall be commenced until a scheme ('the Framework Document') has been submitted to and approved by the local planning authority showing the overall design and layout of the proposed business park, including details of the phasing of development and the timescale of that phasing. The Framework Document shall show details of the type and disposition of development and the provision of structural landscaping within and on the perimeters of the site. The business park shall be constructed in accordance with the approved Framework Document unless the local planning authority consent in writing to a variation or variations."

Condition 1.11:

> "This permission shall be not be construed as giving any approval to the illustrative master plan accompanying the application."

Within condition 7, conditions 7.1 to 7.12 address a number of ecological concerns that were identified in the ecological survey. They are in common form and condition 7.1 will suffice as an illustration of what the council required:

> "No works pursuant to this permission shall be commenced until a scheme for the conservation and enhancement of Stanney Brook Site of Biological Importance and other watercourses through the site has been approved by the local planning authority. Such a scheme shall be completed in accordance with the approved scheme, including timescales."

Condition 1.3 in the spine road permission replicated condition 1.7 in the business park permission. Condition 7 in the spine road permission was in similar form to condition 7 in the business park permission. For example, condition 7.4 says:

> "The highway crossing of the Stanney Brook corridor shall be designed to minimise the impact of the crossing on the corridor to the approval of the local planning authority."

Against that background Mr Howell Q.C., on behalf of the applicants, challenges the grant of planning permission on five grounds:

1. There was a failure to give the particulars required under the Town and Country Planning (Applications) Regulations 1988 ("the Applications Regulations") and so the application for the business park did not satisfy the requirements of section 62 of the Town and Country Planning Act ("the 1990 Act").
2. There was a failure to give the information required under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the Assessment Regulations") and so the council was not entitled to grant planning permission for the business park.
3. The council erred in law in treating the planning permission for the business park as though it secured the use of part of the site for public open space and, therefore, as being in compliance with both the District Plan and the draft Unitary Development Plan.
4. The council failed to consider whether the spine road was appropriately designed to serve the business park as it might be developed under the Framework Document; alternatively, whether the spine road would constrain the development of the business park.
5. A number of conditions imposed on the planning permissions were unlawful because they required things to be done on land which was not under the applicants' control.

I will deal with each of those grounds in turn.

Ground 1:

Section 58(1)(b) of the 1990 Act provides that:

> "Planning permission may be granted—
> (b) by the local planning authority ... on application to the authority in accordance with a development order ..."

By section 62:

> "Any application to a local planning authority for planning permission—
> (a) shall be made in such manner as may be prescribed by regulations under this Act;
> (b) shall include such particulars and be verified by such evidence as may be required by the regulations or by directions given by the local planning authority under them."

The regulations are the Applications Regulations, reg. 3 of which states:

> "1. Subject to the following provisions of this regulation, an application for planning permission shall—
> (a) be made on a form provided by the local planning authority;
> (b) include the particulars specified in the form and be accompanied by a plan which identifies the land to which it relates and any other plans and drawings and information necessary to describe the development which is the subject of the application . . .".

Sub-paragraph (c) deals with the number of copies required:

> "2. In the case of an application for outline planning permission, details need not be given of any proposed reserved matters."

An "outline planning permission" is defined in reg. 2 as meaning:

> ". . . planning permission for the erection of a building, subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters, that is to say—
> (a) siting,
> (b) design,
> (c) external appearance,
> (d) means of access,
> (e) the landscaping of the site."

Mr Howell notes that reg. 4 enables the local planning authority to direct an applicant to supply further information, but he points to the mandatory terms of reg. 3. The application shall be made on the local authority's form. Whilst the local authority has a discretion as to what information is requested on the form (there being no nationally prescribed form for making an application for planning permission), once the local planning authority has provided the form, the application for planning permission shall include the particulars specified within it. That requirement he submits, still stands in the case of an application for outline planning permission, save that the applicant is not required to give details of the reserved matters as set out in reg. 2. An application for outline planning permission may only be made for the erection of a building, not for a change of use, and there is no absolute right to have one's application for planning permission to erect a building considered in outline, because art. 3 of the Town and Country Planning (General Development Procedure) Order 1995 ("G.D.P.O.") provides:

> "1. Where an application is made to the local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for the authority's subsequent approval.

2. Where the authority who are to determine an applicaton for outline planning permission are of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any of the reserved matters, they shall within the period of one month beginning with the receipt of the application notify the applicant that they are unable to determine it unless further details are submitted, specifying the further details they require."

Paragraph 3B–3010 of the Encyclopedia of Planning Law sets out the background to the introduction of the concept of an application for outline planning permission by the 1950 General Development Order. It says:

> "... The process is well explained in Circular 87 of the Ministry of Town and Country Planning, which accompanied the 1950 Order:
>
> > 'Since consideration at the approval stage is limited by the terms of the initial permission, it is essential that that permission should not take the form of a blank cheque, and, correspondingly, the authority must be furnished with sufficient information to enable them to form a proper judgment of what is proposed; there can be no question of entertaining propositions which are still in embryo. The application should indicate the character and approximate size of the building to be erected, and the use to which it is to be put, *e.g.* "a three-bedroomed house", a "two-storied factory for light industrial purposes with an aggregate floorspace of 30/35,000 square feet".' "

Mr Howell submits that in order to determine whether the erection of a building is acceptable in principle one needs to know the scale of, or the floor space proposed in, the building which it is proposed to erect. There is no dispute that information as to the proposed floor space is not provided as part of the description of the development in this outline application. Mr Howell submits that it is not a matter which can be reserved for subsequent approval. In support of the latter proposition he cites certain dicta of Pill L.J. in *R. v. Newbury D.C. and Newbury and District Agricultural Society, ex p. Chieveley Parish Council* [1999] P.L.R. 51.

The Society had made an application for outline planning permission for the erection of two exhibition halls with a total floor space of 5,644 square metres. Siting and means of access were not reserved. The District Council granted outline planning permission subject to conditions reserving (*inter alia*) siting, design and external appearance of the buildings, and the means of access thereto. The planning permission also stated that:

> "... the ... council hereby grants planning permission for the proposal provided that the proposal is carried out strictly in accordance with the submitted application and plans and the above conditions."

Pill L.J. identified the issues which arose in that case on page 55. The second issue was:

> "Was the outline permission a nullity and/or unlawful in purporting to reserve matters particularised in the application in breach of the provisions of the Town and Country Planning Act 1990..."?

Pill L.J. added at the foot of page 55:

> "In the course of submissions on those issues, other questions arose. The most important of them was whether the scale or quantum of development was a reserved matter within the meaning of that term in the legislation."

In answer to those questions Pill L.J. said at page 59:

> "I agree with the judge that condition was unlawful. Upon the wording of art. 1, there was no power to reserve matters of which details had been given in the outline application. I do not accept the submission that the details should be treated as withdrawn. I am not able to treat this requirement as a technicality which can be ignored, even though, at any rate with respect to 'means of access', there is no complaint of substance about the detail as such. The procedure whereby application may be made for outline permission is a valuable one in that, subject to the power of the local planning authority under art. 7 to decline to consider an outline application in the absence of detail, and the power to require more detail, it enables the principle of development and land use to be established without the need to investigate detailed matters at that stage. If the planning authority wish to determine the scale of development at that stage, they may impose conditions, for example as to the number of houses per hectare in a residential development, or the permitted floor space of a building.
>
> Because of its value, it is important that the correct procedure be followed. If the applicant wants reserved matters such as siting and means of access to be decided at that stage, he may apply accordingly. The procedure has value only in so far as the provisons of art. 1 are followed. It was important to be clear as to what has been applied for and what has and has not been granted. Whether, in this case, the outline permission should be quashed for this defect remains for further consideration. I only add that I am not doubting the legality of the practice of including details 'for illustrative purposes only' with an outline application as contemplated in Circular 11/95.
>
> Before leaving issue 2, I should comment upon the judge's finding, supported by Mr Purchas, that the scale or quantum of development, in this case the gross floor space, is a reserved matter. I do not accept that conclusion. Gross floor space cannot in my view be brought within the words of 'siting' or 'design' as submitted by Mr Purchas, especially when those words are read with the works 'external appearance', 'means of access' and 'landscaping of the site'. None of these words is appropriate to govern the scale of development in the statutory context. If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which

specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance. I do not read Stuart-Smith L.J. as having said more than that in *Slough B.C. v. Secretary of State* [1995] 17 P. & C.R. 560 when he said that 'it is possible when detailed application is considered that the size of the development can properly be reduced having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping'. While I agree with the conclusion of Carnwath J. on issues 1 and 2, I consider wrong his conclusion that, as a result, floor space is still to be determined. Floor space could not be treated as a reserved matter."

The 1990 Act, section 62, says that an application for planning permission, which includes an application for outline planning permission, shall include the particulars required by the regulations; the Applications Regulations in turn require that the application shall include the particulars specified in the form, and any other information necessary to describe the development. Thus, it is essential that the application describes the proposed development. If that is done by the particulars specified in the application form, well and good. If not, other information has to be supplied.

Mr Howell submits that not merely are the particulars specified on the form not provided, for example floor space figures and the extent of each use are not specified in answer to question 11 on the application form, but in the absence of such information the application does not describe the proposed development. In order to know what development is proposed the local planning authority needs to know its scale in terms of floor space, because scale is bound to effect the impact of the development on the landscape, the amount of land left available for landscaping and such matters as traffic and employment generation. In short, one needs to know the scale of a proposed building before one can decide whether or not it is acceptable in principle. If an outline application is made for B1 or B8 development, without specifying the amount of floor space involved, the resultant planning permission will, in reality, be saying no more than "B1 or B8 development is acceptable in principle on this site". But that is tantamount to seeking permission for a change of use to B1 or B8 or planning permission for a change of use cannot be granted in outline.

Mr Howell says that it is no answer to say that conditions can be imposed on the grant of outline planning permission, either limiting the amount of floor space or reserving that matter for consideration at the detailed stage. For conditions to be imposed on the grant of planning permission, there has to be a valid application for permission, that is to say, one which describes the development and contains the particulars in the application form; and conditions must not alter the substance of that which was applied for: see *Bernard Wheatcroft Ltd v. Secretary of State for the Environment* [1980] 43 P. & C.R. 233 at 241. In any event, save in respect of certain of the uses (see conditions 1.4, 1.5 and 1.10 in the business park planning permission) no such conditions were imposed to limit the scale of the proposed buildings in the present case.

Whilst I accept the proposition that by virtue of reg. 3 of the Applications Regulations an application for planning permission must describe the development which is the subject of the application. I do not accept that it is necessary in every case to specify the scale (expressed in terms of its floor space) of a proposed building in order to fulfil that requirement.

In many cases it will be essential to specify the floor space so that, for example, matters such as retail or traffic impact or impact on landscape or townscape can properly be assessd. In other cases the scale of the proposed building (in terms of its floor space) may be of little consequence for planning purposes. What may be of importance will be the extent to which the building complies with certain design parameters—as to height, siting or external appearance. The local planning authority may take the view that provided such parameters are met, the resulting floor space can be left to the architect's ingenuity. Circular 87 advised that a planning permission should not take the form of a blank cheque. Although the Circular has long since been repealed, the advice contained therein is, in general terms, still sound. I stress the words "in general terms". There is a spectrum. At one end of the spectrum, for exmple in Conservation Areas, a great deal of detail will be required; but I can also envisage cases where under the present Development Plan-led system, land has been allocated for a particular land use, and where the local planning authority might be prepared to sign a planning permission for the erection of buildings for that use which was close to, if not amounting to, a "blank cheque". For example, for the erection of dwellings, or for buildings for B1 or B8 purposes, on land allocated for such purposes in the Development Plan.

Such a planning permission is not simply a planning permission for a change of use to residential or to B1 or B8 purposes (for which an outline application could not be made). It permits the erection of buildings for such purposes upon the site in question. Once erected, those buildings may then be used for the specified purpose or for the purpose for which they have been designed: see section 75(2) and (3) of the 1990 Act. The likely characteristics of that type of building may be sufficiently well known to enable the local planning authority to assess the acceptability in principle of permitting such buildings on the site without information as to the proposed floor space.

It is for the local planning authority to decide whether an outline application for, for example, the erection of a dwelling is a sufficient description of the proposed development given the characteristics of the particular application site and the authority's ability to impose conditions addressing any particular matters of concern, for example, preventing the construction of a dwelling over a certain height.

I would be relucant to place local planning authorities in a legal straightjacket, of having to insist on floor space figures in every case, particularly in view of the fact that it may be impractical to determine the amount of floor space that would be acceptable on a particular site until the detailed work on reserved matters relating to design, external appearance, siting and landscaping has been carried out. Requiring floor space figures in the outline application might commit the local planning authority to too much development; alternatively, it might unduly constrain the development potential of a site in the light of detailed study at the reserved matters stage.

I do not read Pill L.J.'s judgment in *Chieveley* as suggesting that it is necessary to specify the proposed floor space in every outline application. In that case the proposed floor space had been specified in the application, so the local planning authority in granting planning permission had committed themselves to development on that scale. Whilst Pill L.J. stated that floor space was not one of the reserved matters as defined in reg. 2 of the Applications Regulations, he made it clear that a local planning authority could limit the amount of floor space by imposing an appropriate condition at the outline stage if it wished to do so: see page 60 of the judgment. Thus, it is clear that Pill L.J., with whom Hobhouse L.J. (as he then was) and Judge L.J. agreed, envisaged that an outline application could be made for the erection of a building without specifying a proposed floor space, and if the local planning authority was concerned to limit the amount of floor space that could come forward in any subsequent submission of reserved matters, it could impose an appropriate condition. There is no bar to the imposition of further conditions on an outline planning permission in addition to the standard reserved matters conditions: see *Inverclyde D.C. v. Inverkip Building Co. Ltd* [1982] S.L.T. 401.

If the amount of floor space is specified in an application, the imposition of a condition significantly reducing that floor space may well fall foul of the *Wheatcroft* principle, but if the applicant for planning permission is content to leave the amount of floor space at large in his application, it is difficult to see how the imposition of a condition of the kind referred to by Pill L.J. would alter the substance of that which was proposed.

Thus, for the purposes of reg. 3 of the Applications Regulations, I am satisfied that the application form did describe the development which was the subject of the application. It was or the local planning authority to decide whether or not that description was adequate. It was entitled to conclude that it was, notwithstanding the lack of information as to the scale of the proposed development.

It is to be noted that in respect of those uses within the description of the business park, which the council was concerned to ensure should be restricted to a small scale, either floor space or other limitations were imposed: see conditions 1.4, 1.5 and 1.6 which deal with retail, food and drink, and leisure uses respectively. Condition 1.10 limits the hectarage of B8 uses to 30.8 hectares, a substantial reduction on the illustrative figures of 45.4 hectares, for reasons which are explained in the Director's report.

Whilst reg. 3 of the Applications Regulations is expressed in mandatory terms, an application for planning permission "shall" include the particulars specified in the form provided by the local planning authority, I do not accept that failure to include one or more of those particulars means that the application is invalid, so that the local planning authority is unable to grant planning permission even if it wishes to do so. The mandatory terms of reg. 3 are addressed to a practical problem and are intended to ensure that the local planning authority is able to require that certain particulars are provided as part of the application for planning permission. It would be an unduly literal reading of reg. 3 to construe it so as to require an applicant to provide particulars merely because a question was asked on a local planning authority's form, a form which will have been prepared for a very wide range of applications for planning permission, if the local planning authority itself did not require those particulars in the circumstances of the applicants' case.

Moreover, reg. 3 of the Applications Regulations enables an applicant to apply for outline planning permission. If all matters are reserved, it will not be possible to answer many of the subsequent questions on this local planning authority's application form: how many trees would be felled; how many existing buildings demolished, and so forth. The fact that certain particulars requested in the form cannot be provided if an application is made for a "bare" outline planning permission does not mean that such an application may not lawfully be made. Such an approach would ascribe too great a significance to the precise terms of the application form, and negate the right which is expressly conferred by reg. 3 to apply for an outline planning permission. Adopting a purposive, rather than a literal, interpretation of reg. 3, an application for planning permission must include the particulars specified in the form, but only in so far as they are appropriate to the kind of development that is being proposed. It is in the nature of an outline application that many of the particulars sought will not be available at the outline stage, and hence it will not be appropriate to provide them on the form.

In the case of these two applications, all the questions asked in the application form were answered, in the case of the business park to the effect that details would be provided at a later stage. It was for the local planning authority to decide whether or not they were satisfied with such answers. Subject to ground 2 of Mr Howell's challenge (to which I will now turn), the local planning authority were entitled to be satisfied with the description of the development in these applications forms. I, therefore, conclude that the grant of planning permissions for the business park was not in breach of section 62 or reg 3 of the applications regulations, and ground 1 fails.

Ground 2:

It is common ground that the business park application was one to which reg. 4 of the assessment regulations applied. Regulation 4 applies to any Sched. 1 or Sched. 2 application as defined in reg. 2. Ignoring exempt development, which is not relevant for present purposes, a Sched. 1 application is an application to carry out development of any description mentioned in Sched. 1. A Sched. 2 application is an application for planning permission for the carrying out of development of any description mentioned in Sched. 2 "which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

The "Descriptions of Development" in Sched. 2 are expressed in broad terms: "Development for any of the following purposes." A number of broad purposes are set out in 11 categories. They include, under category 10:

> "Infrastructure projects.
> (a) an industrial estate development project."

Regulation 4(2) provides that:

> "The local planning authority ... shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration [and state in their decision that they have done so]."

By art. 2, "environmental information" means:

> "... the environmental statement prepared by the applicant or appellant ..., any representations made by any body required by these Regulations to be invited to make representations or to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development."

"Environmental statement" means:

> "... such a statement as is described in Sched. 3."

Schedule 3 then describes an environmental statement as follows:

> "1. An environmental statement comprises a document or series of documents providing, for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out, the information specified in para. 2 (referred to in this Schedule as 'the specified information');
>
> 2. The specified information is—
>
> (a) a description of the development proposed, comprising information about the site and design and size or scale of the development;
>
> (b) the data necessary to identify and assess the main effects which that development is likely to have on the environment;
>
> (c) a description of the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on—
>
> human beings;
> flora;
> fauna;
> soil;
> water;
> air;
> climate;
> the landscape;
> the inter-action between any of the foregoing;
> material assets;
> the cultural heritage.
>
> (d) where significant adverse effects are identified with respect to any of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects; and
>
> (e) a summary in non-technical language of the information specified above."

By para. 3:

> "An environmental statement may include, by way of explanation or amplification of any specified information, further information on any of the following matters—
>
> (a) the physical characteristics of the proposed development, and the land-use requirements during the construction and operational phases . . ."

Thus, the environmental statement must provide the specified information and may provide further information.

As explained in Circular 15/88 the Assessment Regulations implement the requirements of E.C. Directive No. 85/377 on the assessment of the effects of certain public and private projects on the environment ("the directive")

The recitals to the directive refer to the need to take effects on the environment into account at the earliest possible stage in all technical planning and decision-making processes, to the need for principles of assessment to be harmonised, for systematic assessment and for certain minimum information to be supplied concerning projects subject to assessment and their effects.

The 9th recital states:

> "Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question."

Article 1.2 defines the "project" as:

> "... the execution of construction works or of other installations or schemes ..."

It also defines what is meant by "development consent". There is no dispute in the present case that the relevant development consent for the business park is the outline planning permission to which I have referred.

Article 3 provides that:

> "The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Arts 4 to 11, the direct and indirect effects of a project on the following factors ..."

Then the factors which are to be found in para. 2(c) of Sched. 3 to the Assessment Regulations are set out.

Article 5.1 provides:

> "In the case of projects which, pursuant to Art. 4, must be subjected to an environmental impact assessment in accordance with Arts 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:
> (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected. ..."

Article 5.2:

> "The information to be provided by the developer in accordance with para. 1 shall include at least:

— a description of the project comprising information on the site, design and size of project,
— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
— the data required to identify and assess the main effects which the project is likely to have on the environment,
— a non-technical summary of the information mentioned in indents 1 to 3."

Art. 6 makes provision for public consultation. Annex III lists the information referred to in Art. 5.1. It includes, as the first item:

> "Description of the project, including in particular:
> — a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases ..."

Thus, the information to be provided by the developer must include the information listed in Art. 5.2, which includes a description of the project, comprising information of its site, design and size; other information in Sched. 3 may also be required if it is relevant to the particular characteristics of the project in question.

The directive has been amended by Directive 97/11. The latter is not directly relevant for present purposes, but the first recital contains a convenient summary of the aims and importance of the earlier directive. It:

> "... aims at providing the competent authorities with relevant information to enable them to take a decision on a specific project in full knowledge of the project's likely significant impact on the environment; ... the assessment procedure is a fundamental instrument of environmental policy as defined in Art. 130 of the Treaty ..."

In *R. v. North Yorkshire C.C., ex p. Brown and Another* [1999] 1 All E.R. 969, Lord Hoffmann (with whom the remainder of their Lordships agreed) said at page 971G:

> "... This directive was adopted to protect the environment throughout the E.U. by requiring member states to ensure that planning decisions likely to have a significant environmental effect were taken only after a proper assessment of what those effects were likely to be. It requires that before the grant of development consent for specified kinds of project, Member States should ensure that an environmental impact assessment is undertaken."

At page 974H he said:

> "... The purpose of the directive, as I have said is to ensure that planning decisions which may affect the environment are made on the basis of full information."

It will be remembered that environmental information includes not merely the environmental statement prepared by the applicants for planning permission, but also only representations made by others about the likely environmental effects of the proposed development. In order to implement the requirements of art. 6 of the Directive, Art. 8 of the G.D.P.O. provides that an application for planning permission for development within Sched. 2 of the Assessment Regulations must be publicised by site notices and local advertisements.

Against that legislative background Mr Howell submits that no application for planning permission to which reg. 4 of the Assessment Regulations applies may be granted unless the applicant includes a description of the development proposed, which must comprise, at the minimum information as to the "design and size or scale of the project", as well as the data necessary to identify the main effects which that development is likely to have on the environment. Without information as to the scale of the development, the siting, design, external appearance, means of access and landscaping, it will not be possible to assess what effect the proposed development will have on the environment. What has to be assessed is the development which is proposed to be constructed, not some abstract concept or illustration of what might be constructed. It follows that an application for outline planning permission may not be made if the development falls within Sched. 2 or 3 of the Assessment Regulations. The environmental assessment conducted by E.R.M. in the present case was based on the illustrative masterplan, and the indications given as to floor space, as was explained in paras 2.8 and 2.9 of the environmental statement:

> "A proposed masterplan for the site layout has been adopted by the planning applicants for the development of the business park ..."

The purposes of the masterplan is then set out:

> "Consequently, the masterplan has been used in the E.S.A., allowing assumptions to be made on where certain uses of the park may be located within the business park.
>
> The principal proposed land uses within the site, and which comply with the South Rochdale Local Plan and emerging Rochdale U.D.P. allocations, are ..."

Then the indicative figures provided are set out. Mr Purnell, the Technical Director at E.R.M., responsible for preparing the environmental statement, confirms in his affidavit that:

> "... in preparing the E.S. regard was had to the submitted masterplan and consideration given as to what would be the impact of the proposed development in accordance with the masterplan. ... From the mas-

terplan, reasonable assumptions could be made on where certain uses of the development may be located . . ."

He goes on to say:

"The master plan provides an illustrative scheme that shows a way the site could be developed pursuant to a consent. However, it also serves to illustrate or show the environmental importance of a development permitted on the site. By this, I mean it does in fact serve to illustrate the environmental effects of the type of development described in the language of the consent on the land."

A similar approach was adopted towards the preparation of the ecological survey.

Mr Beckwith's report to members made it clear that alternative detailed forms of development had not been considered in the environmental statement. Mr Howell submits that the fact that a masterplan and indicative floor space figures had to be used demonstrates that the description in the application for planning permission of the development proposed to be constructed was inadequate for the purposes of Sched. 3. The likely environmental effects of the illustrative proposals were assessed, but those proposals were not incorporated in the application and were not, therefore, the development which was proposed to be constructed.

As I have mentioned when setting out the terms of the planning permission for the business park, condition 1.11 said:

"This permission shall not be construed as giving any approval to the illustrative masterplan accompanying that application."

The reason given for that was:

"The plan is submitted for illustrative purposes and gives insufficient detail on which to determine the layout of the site."

The reason given for the imposition of condition 1.7 which required the submission and approval of a Framework Document which was to show the overall design and layout, including details of the type and disposition of development and provision of structural landscaping was:

"To ensure that a satisfactory form and quality of development is achieved for this strategically important site."

Thus, Mr Howell submits, not only is the outline planning permission not tied to the illustrative masterplan which described a form of development which was subject to environmental assessment and whose effects on the environment were described in the environmental statement, it expressly envisages that a different layout and disposition of uses will emerge in due course when the Framework Document is provided. The need for preparation of a Framework Document reinforces his argument that the description of the development in the application for planning permission was insufficient for the purposes of Sched. 3. The decision to grant planning permission has to be taken in "full knowledge" of the project's likely significant effects on the environment. It is not sufficient that full knowledge will be obtainable at some later stage. By then it will be too late to go back on the principle of development having been granted by the outline planning permission, and the public will not have the same statutory right to be consulted and so to contribute to the environmental information which must be considered by the local planning authority before planning permission is granted. Article 5.1(a) of the directive envisaged that Member States might wish to make provision for consideration of environmental information at different stages, but the Assessment Regulations do not make such provision. The specified information must be provided prior to the grant of planning permission and that applies whether the application is for full or for outline planning permission. Where significant adverse effects on the environment are identified an environmental statement must include a description of the measures envisaged to avoid, reduce or remedy them. It is important that such mitigation measures are described in the environmental statement so that consultees are able to comment upon their adequacy. Their comments will then form part of the environmental information which the local planning authority is obliged to consider. Mr Howell points to the manner in which the ecological impacts identified in the survey area dealt with in condition 7: schemes are to be prepared, surveys are to be carried out and the approval of the local planning authority is to be sought. For example, condition 7.10 requires a scheme for the recreation of a marshy habitat to be submitted for approval, but there is no indication as to where the habitat may be recreated within this very large site. He submitted that these conditions reflect the fact that the environmental statement does not describe the proposed mitigation measures. It says that mitigation measures will be proposed, but the planning permission then provides that they will be described at a later stage. This, however, enables the information to be provided in a piecemeal fashion and at different times, thus frustrating the object of the directive that there should be a comprehensive and systematic assessment of all the significant environment effects of a proposed development project, including the mitigation proposed, at the earliest possible stage.

So far as the spine road is concerned, Mr Howell concedes that it was a full application and so there was a description of the highway development proposed to be carried out, but the council erroneously adopted the same approach to mitigation measures as it did in the planning permission for the business park. He refers to conditions 7.1 to 7.10 in the planning permission for the spine road. It's not in dispute that the spine road was interlinked with and formed the first step in the business park proposal. Schedule 3 required an environmental statement in respect of that, overall, proposal. If the environmental statement for the business park was not in accord with Sched. 3, and so planning permission could not lawfully have been granted for the business park, then the planning permission for the spine road could not stand on its own.

Mr Straker Q.C., for the respondent council, pointed to the wide-range of developments described in Scheds 1 and 2 to the Assessment Regulations and to the fact that the different kinds of development are described therein in very general terms. Hence, he submitted, a very general description of the development proposed to be carried out should suffice for the purposes of Sched. 3. He points to para. 3 under which further information as to the physical characteristics of the development may, not must, be given.

The approach urged by Mr Howell makes it very difficult, if not entirely impractical, to seek planning permission for the development of large schemes. The outline application procedure is particularly valuable for such schemes, which may evolve over many years. It is the large schemes which are likely to require environmental assessment. Although the G.D.P.O. refers both to outline applications and to applications requiring environmental assessment, it does not preclude an outline application being made for a Sched. 2 project; nor do either the assessment or the Applications Regulations.

In issuing guidance on the Assessment Regulations in Circular 15/88 the Secretary of State assumed that outline applications could be made for projects requiring environmental assessment. Paragraph 42 of Circular 15/88 says:

> "The preparation of an environmental statement is bound to require the developer to work out his proposals in some detail; otherwise any thorough appraisal of likely effects will be impossible. It will be for the planning authority to judge how much information is required in the particular case. The information given in the environmental statement will have an important bearing on whether matters may be reserved in an outline planning permission. Where the information states or implies a particular treatment of any matter, it will not be appropriate to reserve that matter in the planning permission."

Mr Straker also pointed to paras 43 and 44:

> "43. There is no statutory provision as the form of an environmental statement. The requirement is to provide the information specified in Sched. 3 to the Regulations, which reflects arts 3 and 5 of, and Annex III, to the directive. It will be for the local planning authority to decide whether the information provided by the developer is sufficient to

> enable it to determine the planning application. The authority will be able to use its powers to call for further information and supporting evidence under reg. 21 and under art. 5 of the General Development Order.
>
> 44. It will not be open to the local planning authority to take the view that a planning application is invalid because an inadequate environmental statement has been supplied or because the application has not provided further information when required to do so under Regulation 21 or under Article 5 of the General Development Order. In that event, if further information cannot be obtained from the developer, it will be for the local planning authority to decide whether to refuse permission. If so, or if the local planning authority fail to give a decision on the application within the 16 week period, the developer will have the normal right of appeal to the Secretary of State."

The Assessment Regulations provide a mechanism for the collation of, and consultation upon, environmental information. That information does not have to be contained within the application for planning permission itself.

It is sufficient for the purposes of Sched. 3 if one has illustrative information, that is to say information as to how the project, for which approval is sought in principle, might be carried out. He points to art. 3 in the directive, which recognises that individual cases will vary, and submits that in the case of development, such as the proposed business park, information is bound to be illustrative. As with a traffic impact assessment, one will be modelling likely impacts.

It is for the local planning authority to decide whether they are satisfied with such information, and they are entitled to be satisfied if they consider that conditions can be imposed upon the grant of permission which will ensure that the eventual environmental impact will not be significantly different from that which has been assessed on an illustrative basis. Here, the council was satisfied that it had such control. He points to conditions 1.3 and 1.7, and by way of illustration to condition 7 dealing with ecology.

In his affidavit Mr Beckwith said that, in his view, the conditions give the council "a high degree of control over content of development". The council had "total control over the siting, design and scale of the development amongst other things". He also expressed the view that "it is not appropriate at this stage to try to guess the details of a development which will evolve over a decade". He considered that the material submitted enable the environmental effects of development to be assessed whether or not the ultimate scheme followed the layout shown on the illustrative masterplan. Through the Framework Document the council had retained tight control over the development, and in his professional view sufficient information had been given to enable all reasonably likely environmental impacts of the scheme to be appraised.

Mr Straker also pointed to para. 12 of Mr Purnell's affidavit to which I have referred. He submitted that the applicants for judicial review were, in reality, seeking certainty as to the environmental consequences of the proposed development and that such certainty could not be achieved. He referred to the observations of Lord Nimmo Smith in *W.W.F.—U.K. Ltd and Another v. Secretary of State for Scotland* [1998] T.L.R. 716 at 78:

> "There could never be an absolute guarantee about what would happen in the future, and the most that could be expected of a planning authority was to identify the foreseeable potential risks and to put in place a legally enforceable framework with a view to preventing them from materialising."

That, says Mr Starker, is what the council has done here. Instead of incorporating the masterplan into the description of development for which planning permission was granted, the council imposed controls by way of conditions to ensure that the environmental impact would not be significantly different from that which was assessed in the environmental statement. Having summarised the rival submissions, I now set out my conclusions on this issue.

In view of the underlying objective of the directive, which is implemented by the Assessment Regulations—to ensure that projects which are likely to have significant effects on the environment should be granted development consent only after prior assessment of the likely significant environmental effects has been carried out—it is not surprising that the descriptions of those developments which fall within Scheds 1 and 2 are expressed in general terms. Such descriptions are intended to forestall any argument that environmental assessment is not required in what might otherwise be borderline cases. It does not follow that a similarly generalised description of the development proposed to be carried out will suffice for the purposes of Sched. 3, once it has been established that a project does fall within Sched. 1 or Sched. 2.

Earlier in this judgment I referred to a purposive approach to reg. 3 of the Applications Regulations. Applying a similar approach to Sched. 3 to the Assessment Regulations, the specified information contained in an environmental statement is provided for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out. It is, therefore, not surprising that the first item of specified information in para. 2 is:

> "... a description of the development proposed, comprising information about the site and design and size or scale of the development."

Without such a description, the likely impact of the proposed development upon the environment could not begin to be assessed, and the underlining purpose of providing the information in the environmental statement would be frustrated. One is not seeking certainty as to the environmental effects of the project, which would be unattainable, one is merely seeking the specified information which will enable the likely significant effects to be assessed. Whilst it is for the local planning authority to judge the adequacy of the specified information, and any further information provided under para. 3 of Sched. 3, information which is capable of meeting the requirement for specified information in para. 2 must be provided.

In deciding whether the information provided about a proposed development does amount to "a description of the development proposed, comprising information about the site, design and size or scale of the development", regard must be had not merely to the underlying purpose of providing the information (to which I have referred above), but also to the remaining items of specified information which are set out in para. 2. Thus, the description of the proposed development must be sufficient to enable the main effects which that development is likely to have on the environment to be identified and assessed, to enable the likely significant effects on such matters as flora, fauna, water, air and the landscape to be described, and to enable mitigation measures to be described where significant adverse effects are identified.

Whilst a bare outline application is permissible on a purposive approach to reg. 3 of the Applications Regulations, an environmental statement based upon such an application could not begin to comply with the requirements of Sched. 3 to the Assessment Regulations, whether one adopts a literal or a purposive approach to para. 2(a) of Sched. 3. I would not wish to go as far as Mr Howell and say that it is not possible to make any application for outline planning permission for a development which falls within Sched. 1 or Sched. 2. An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested in para. 42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with the requirements of para. 2(a) of Sched. 3.

I have set out above the description of the development for which outline planning permission is sought, and granted in the present case. The application does not contain any information as to the design, size, or scale of the development. The fact that the environmental assessment was based on the illustrative masterplan and indicative schedule of uses is a tacit acknowledgment that the description of the development in the application was inadequate for the purposes of Sched. 3. I can understand the advantages of an illustrative masterplan in an ordinary outline application for a business park, but once it is decided that such a project falls within Sched. 2, Sched. 3 requires the environmental statement to assess the likely impact of the development which is proposed to be carried out, not the impact of a development which might or might not be carried out depending upon whether subsequent submissions for approval of reserved matters are or are not in accordance with an illustrative masterplan.

I realise that compliance with the requirements of Sched. 3 presents particular problems for projects such as a business park, which are demand-led and which may be expected to evolve over many years. Promoters of "urban development projects" may face similar difficulties. For such schemes the outline application procedure is particularly valuable.

Most of the other descriptions of development listed in Scheds 1 and 2 are either industrial projects for particular processes which will have had to have been defined in great detail at the outset, or they are engineering operations such as the construction of roads or railways where the outline application procedure would not be available in any event. Such proposals have to be the subject of detailed applications under the Planning Act and/or the Transport and Works Act, even though they may be very large in scale. The fact remains that industrial estate development projects and urban development projects were listed in Annex III to the directive, which is now transposed into the descriptions of development in Sched. 2 to the Assessment Regulations.

Notwithstanding the difficulties of describing the design, size or scale of such a project, the Members of the E.C. concluded that if it was likely to have significant effects on the environment, development consent should not be granted until a prior assessment of those effects had been carried out. In so far as such an assessment requires a greater degree of particularity in the description of the development that is proposed to be carried out, greater particularity must be provided. Thus, applications for such projects have been placed in a legal straightjacket. The reason for this is explained in Directive 97/11: the environmental assessment procedure is a "fundamental instrument" of the E.C.'s environmental policy.

Article 5.1 of the directive envisages that Member States may wish to make procedural arrangements for environmental information to be provided on a staged basis. That has not been done in the Assessment Regulations. By reg. 4(2) the local planning authoriy may not grant planning permission unless they have first taken the environmental information into account. A necessary part of that environmental information is the environmental statement which must contain the specified information whether or not the application is in outline. It is no answer to say that some of the specified information will be provided in due course at the reserved matters stage. This, no doubt, reflects the role of an outline planning permission under the 1990 Act. Once outline planning permission has been granted, the principle of the development is established. Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding.

Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in paras 2(c) of Sched. 3, and the reference to mitigation measures in para. 2(d), that it is intended that in accordance with the objectives of the directive, the information contained in the environmental statement should be both comprehensive and systematic, so that a decision to grant planning permission is taken "in full knowledge" of the project's likely significant effects on the environment. If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a "full knowledge" of the likely significant effects of the project. That is not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The directive and the Assessment Regulations require likely significant effects to be assessed. It will be for the local planning planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it, to a later stage would not be in accordance with the terms of Sched. 3, would conflict with the public's right to make an input into the environmental information and would, therefore, conflict with the underlying purpose of the directive.

That is, in effect, what has happened in the present case. There may well be scope for argument in some cases, as to the extent to which details of mitigation measures may be left for subsequent approval. I do not suggest that an environmental statement must contain every detail, provided the mitigation measures are described. In the present case, because there is no description of the development proposed to be carried out, nor any description of its design, size, or scale, it is not possible to describe the proposed mitigation measures. The conditions in the outline planning permission effectively require that descriptions shall be given in due course when the design, scale and size of the development to be constructed is known.

Condition 1.3 does not answer the problem. It ties the mitigation measures to the environmental statement (unless otherwise agreed), but those measures were a response to the environmental impacts of development in accordance with the illustrative masterplan. Recognising, as I do, the utility of the outline application procedure for projects such as this, I would not wish to rule out the adoption of a masterplan approach, provided the masterplan was tied, for example by the imposition of condition, to the description of the development permitted. If illustrative floor space or hectarage figures are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effects. Conditions may then be imposed to ensure that any permitted development keeps within those ranges.

The fundamental difficulty in the present case is that the environmental statement describes the environmental effects of a business park development carried out in accordance with the illustrative masterplan and the indicative schedule of land uses, but the outline planning permission was not tied in any way to either of those documents. Conditions 1.7 and 1.11 dispensed with the masterplan and replaced it with the Framework Document to be submitted and approved in due course. The reason given for the imposition of condition 1.11 explains that the masterplan was submitted for illustrative purposes only and that it gave insufficient detail on which to determine the layout of the site. If it was inadequate for that purpose, it is difficult to see how it could have been an adequate description for the purposes of para. 2(a) of Sched. 3 to the Assessment Regulations. The indicative hectarage and gross floor space figures for various uses are not specified in the planning permission. Moreover, in at least one respect, that of B8 development, the hectarage has been substantially altered by condition 1.10. That is bound to have a knock-on effect as to the hectarages available for other types of building. It is not at all clear how conditions 1.4 to 1.6 relate to the schedule of uses assessed in the environmental statement. Since there is no figure in the planning permission for either the overall hectarage of built development or the overall floor space, it is impossible to ascertain the scale or the size of the development. The amount of B1 and B2 development and the number of houses proposed to be erected are left wholly at large.

In summary, whilst the council took into consideration "environmental information" about the effects of carrying out a business park development in accord with an illustrative masterplan and an indicative schedule of land uses, that was not the development which was proposed to be carried out in the application for planning permission, nor was it the development for which planning permission was granted; nor was the information sufficient in any event to comply with the requirements of Sched. 3: see, for example, paragraph 2(d), as to mitigation measures. It follows that the council did not have power to grant planning permission for the business park: see reg. 4(2) of the Assessments Regulations, and I therefore accept ground 2 of Mr Howell's challenge.

Since on the council's own case the two planning permissions are inextricably interlinked, there is no case for a spine road, at least in the form proposed, unless there is to be a business park: see condition 1.3 in the spine road planning permission. It follows that the planning permission for the spine road stands or falls with that for the business park.

That disposes of the main issue in the case and I turn to Mr Howell's remaining arguments.

Ground 3:

Having allocated an area to be known as Kingsway Business Park, proposal E7 in the South Rochdale Local Plan states that certain criteria will be "strictly applied" to the development of the site. They include:

> "vi) ... the creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park."

That policy is repeated in policy E.C.6(d) of the Deposit Draft U.D.P. Mr Beckwith's report to the committee dealt with a number of issues raised in consultation by objectors. Responding to an assertion that there would be excessive site coverage, he said:

> "In addition, the supplementary statement on floorspace within [the] application... indicates the total area of land to be developed as 113.6 ha. with an area of 32 ha. to be set aside for recreational use which contradicts the objectors claim that 170 ha. is to be developed. There is no precise information provided on what will be the site coverage...."

In answer to a claim that the application did not include sufficient detail to enable the council to judge whether it accorded with policy E.C.6(d) in the U.D.P., he said:

> "With regard to criterion (d) it is inappropriate at this outline application stage to formulate detailed proposals."

The report then contains these passages:

> "... The objection suggests that areas of Kingsway provide outdoor recreation and that development would include the loss of accessible

> open space. This is not the case as the land is in private ownership and subject to other uses. The only areas with right of public access are Stanney Brook Park, and the lanes and footpath network. These would be retained within the scheme. The wider Stanney Brook Corridor is in private ownership and there is no right of access to large parts of it. However, the proposals indicate that this area will be safeguarded and enhanced for public informal recreation and thus increase opportunities for local residents."

In response to another objection, he said:

> "... There would be more than adequate open space retained to meet the needs of adjoining residents (in accordance with the council's standards) and users of the business park ..."

In the final sentence of his report Mr Beckwith expressed his view that the proposal was in line with the District Plan and the emerging U.D.P. and should be granted conditional planning permission. There is no indication that members dissented from that approach.

Mr Howell submits that the council erred in proceeding on the assumption that 32 hectares would be available for recreational uses and that details of public open space and the recreation areas to be provided in accordance with criterion (d) in policy E.C.6 of the U.D.P., could be dealt with at the detailed stage. The application did not seek planning permission for any change of use to open space or for use for informal recreation, thus no condition was or could have been imposed requiring the land to be set aside for such uses at the detailed stage. A condition requiring that open space be dedicated to public use would have been unlawful in any event: see *M. J. Shanley Ltd v. Secretary of State for the Environment and Another* (1982) J.P.L. 380. Such an objective could have been secured only by a section 106 obligation. Mr Straker submitted that the council could control any over-intensive proposal at the detail stage through the Framework Document. Nothing in the outline planning permission precluded provision of open space at the detailed stage.

In my judgment, Mr Howell's submissions under this ground are well-founded. I have set out above the description of development for which planning permission was sought. As an outline application, it was an application for the erection of buildings. Whilst landscaping ancillary to the erection of those buildings was included, as a reserved matter, within the application, it did not include any proposals to change the use of any land within the site to open space or for use for informal creation. Had an application for such a change of use been made, it would then have been necessary to devise a mechanism, probably by way of a section 106 obligation, if it was intended that any new or extended areas of open space should be dedicated as public open space in accordance with criterion (d) in policy E.C.6 in the U.D.P. The council could not lawfully insist on the provision of any open space or informal recreation areas in the Framework Document, save in so far as landscaping was required for the (unlimited) amount of building which has been permitted on site.

Specifically, the council could not, under the terms of the outline planning permission, insist on the provision of 32 hectares of land for open space for informal recreational purposes. The planning permission permits the erection of buildings, subject to normal constraints of density and landscaping over the whole of the site. If it was desired to provide open space or informal recreational areas on the site (save in so far as such areas might be incorporated in any landscaping around the buildings), a fresh application for change of use to those purposes would be required. There is very often an element of planning judgment as to whether or not a proposed development complies with a development plan policy. It could not reasonably be concluded that this application complied with criterion (d). However, that is but one of a long list of criteria in the policy. The council clearly considered that the remaining criteria within policy E.C.6 were fulfilled. The primary purpose of the policy is, after all, to allocate the land as a business park, not the creation of additional open space. It would be for the council to decide whether the failure of this application to meet one of the criteria in policy E.C.6 meant that the application was contrary to either the District Plan or the emerging U.D.P. To the extent that the council erred in concluding that criterion (d) in policy E.C.6 was met, ground 3 is made out.

Ground 4

Mr Howell submitted that the spine road was designed so as to accommodate a business park laid out as shown on the illustrative masterplan. Having granted planning permission for a business park subject to conditions 1.7 and 1.11, replacing the masterplan with the Framework Document, the council then gave no consideration when granting planning permission for the spine road as to whether it was appropriately designed to accommodate a business park as it might be designed under the Framework Document. By condition 1.3, development of the spine road has to await submission and approval of the Framework Document, but there is nothing to ensure that the design of the latter will be consistent with the design of the former. Alternatively, he submits, the council failed to take into consideration whether development of the spine road, in accordance with the planning permission, would constrain the appropriate development of the business park.

In my view, there is no substance in either of these arguments. Criteria (i) and (j) policy E.C.6 in the U.D.P. are as follows:

"i) ... vehicular access to the site to be from the A664 Kingsway and from Junction 21 of the M62 Motorway only. Significant improvements to the geometric layout of M62 Junction 21 will be necessary.

j) ... the site to be served by a main distributor road linking the A664 and Junction 21, which should avoid, wherever possible, important natural features and buildings and minimise its impact on surrounding areas."

As Mr Straker rightly submitted, there was a very limited degree of flexibility, if those two criteria were to be met. Whilst the Framework Document submitted in accordance with the planning permission for the business park is not required to conform to the spine road, as permitted, there is no reason why it should not do so, and it is wholly unrealistic to suggest that the line of the spine road and the positions of the roundabouts having been fixed, the Framework Document will not take the spine road planning permission as the basis for the highway infrastructure of the business park. To that extent, the adoption of any alignment for the spine road might be said to "constrain" the future development of the business park. However, I agree with Mr Straker that this is a fanciful argument if advanced as criticism of the planning permission for the spine road. In reality the spine road opens up the land and enables it to be developed as a business park. The adoption of a particularly disadvantageous alignment might have constrained the potential of the site, but there is no suggestion in the representations and objections, as set out Mr Beckwith's report, that the spine road permitted by the council is subject to such a criticism. I have read the passages in Mr Beckwith's report which make it clear that the spine road was to serve the business park which was being proposed in outline. In so far as flexibility in alignment was possible, given the policy constraints that I have mentioned, there was nothing before the members to suggest that an alternative alignment, or a different positioning of the roundbouts, might increase the sites' development potential. It follows that I do not accept ground 4 of Mr Howell's challenge.

Ground 5

It is common ground that the applicants for planning permission do not own all the land within the application sites. There are a large number of other land owners and it is now envisaged that it will be necessary to make a Compulsory Purchase Order under the 1990 Act to assemble the necessary land.

Mr Howell submits that a large number of conditions, for example condition 1.7 and the conditions within condition 7 require things to be done on land not under the applicants' control. They are, therefore, *ultra vires* because they are unenforceable. Altenatively, the council did not consider the issue of enforceability.

He refers to *British Airports Authority v. Secretary of State* (1979) S.C. 200, where the Secretary of State had imposed a condition on a planning permission for certain airport improvements, which was intended to control the direction of take off and landing. The Lord President, Lord Emslie, said at page 213:

> "... I am further of opinion that the 'conditions' are not condition within the meaning of the 1972 Act in respect that there are no steps which the appellants could take which would secure the desired result. At best they could merely try to persuade the Civil Aviation Authority to bring about the result ... The test must be whether the appellants had the power to compel the Civil Aviation Authority to bring about the desired control of the direction of take off and landing. The answer is that they had no such power and the so called conditions are quite incapable of enforcement."

That decision was approved by the House of Lords in *Grampian R.C. and Another v. City of Aberdeen D.C.* (1983) 47 P. & C.R. 633, *per* Lord Keith at page 636. Lord Keith went on to say this:

> "... there is a crucial difference between the positive and the negative type of condition in this context, namely that the latter is enforceable while the former is not. ..."

In *British Railways Board v. Secretary of State for the Environment and others* [1993] 3 P.L.R. 125, the House of Lords decided that the British Railways Board were entitled to apply for planning permission on land not owned by them, and that planning permission could be granted in the face of the landowner's opposition. But the condition which related to an access road was in the negative form in that case. Lord Keith said at page 134A:

> "... So the position is essentially that British Rail have applied for planning permission affecting land not in their ownership, a common state of affairs specifically contemplated by the Act. The proposed condition does not relate to land outside the ambit of the permission applied for. Even if it did, the relevant considerations would be the same as those to be applied where an application for planning permission relates to land not in the ownership of the applicant. If the condition is of a negative character and appropriate in the light of sound planning principles the fact that it appears to have no reasonable prospects of being implemented does not mean that the grant of planning permission subject to it would be irrational in the *Wednesbury* sense so that it would be unlawful to grant it ..."

Mr Howell accepts that in two cases the Court of Appeal has stated that a positive condition may be imposed in respect of land not under the applicants' control, provided such land is within the application site: see *Proberun Ltd v. Secretary of State for the Environment and Another* [1990] 3 P.L.R. 79, *per* Glidewell L.J. at 85, and *Mouchell Superannuation Fund*

Trustees v. Oxfordshire County Court [1992] 1 P.L.R. 97 at 105–106. He submits that those *dicta* were *obiter*, because the conditions related to land outside the application sites and the proposition that he advances was not argued before the court. Mr Howell submits that to be lawful a condition must be enforceable, and it must be enforceable whether it relates to land within or outside the application site. In *Birnie v. Banff* C.C. [1954] S.L.T. 90 planning permission had been granted for the erection of a house, subject to a condition requiring the construction of an access over land not belonging to the applicant. The access was not constructed, and the local planning authority took enforcement action. It was held that the authority had no power to impose as a condition of a grant of planning permission the carrying-out of works on land other than land under an applicant's control, and the Enforcement Notice was quashed. The Sheriff Substitute observed:

> "It seems to me to be an impossible reading of these relevant subss. [in the Town and Country Planning Act] to say that they empower an authority to impose as a condition the carrying-out of works other than on land under an applicant's control. To provide that the authority may impose a condition regarding any land, and then to add in particular regarding land under an applicant's control, just does not make sense. The assumption of subs. (2) is that the land must be under the applicant's control, and the purpose is to make it clear that it may be land other than the particular plot which is the subject of the application."

I add that subs. (2) referred to by the Sheriff Substitute corresponds with section 72(1)(a) of the 1990 Act.

Mr Straker refers to the broad terms in which the power to impose conditions is conferred by section 70(1)(a):

> "Where an application is made to a local planning authority for planning permission—
> (a) ... they may grant planning permission, either unconditionally or subject to such conditions as they think fit ..."

Section 72 is expressed to be without prejudice to the generality of section 70(1). He relies on *Muchell* and upon *Proberun*, although he concedes that the conditions in those cases required works outside the application site. The case of *Birnie* was also concerned with off-site works. He points out that Circular 11/95 envisages that positive conditions may, in some circumstances, be imposed on land within an application site. Under the sub-heading "Ability to enforce" para. 26 of the Annex to the Circular says this:

> "A condition should not be imposed if it cannot be enforced. ..."

Then under the sub-heading "Whether compliance is reasonable" para. 28 says:

> "A condition may raise doubt about whether the person carrying out the development to which it relates can reasonably be expected to comply with it. If not, subsequent enforcement action is likely to fail on the ground that what is required cannot reasonably be enforced. One type of case where this might happen is where a condition is imposed requiring the carrying out of works (*e.g.* construction of means of access) on land within the application site but not, at the time of the grant of planning permission, under the control of the applicant. If the applicant failed to acquire an interest in that land, and carried out the development without complying with the conditions, the local planning authority could enforce the condition only by taking action against the third party who owned the land to which the condition applied, and who had gained no benefit from the development. Such difficulties can usually be avoided by framing the condition so as to require that the development authorised by the permission should not commence until the access has been constructed."

He submits that the 1990 Act contemplates that Enforcement Notice action may be taken against an owner of land who is not the developer: see section 172(2) of the 1990 Act, and the owner will in any event have been notified of the planning application: see section 65(2) of the Act.

It is implicit in Mr Straker's submission that he accepts the proposition that to be lawful a planning condition must be enforceable. In my view, para. 28 of the Annex to Circular 11/95 is correct in considering enforceability, not on the basis of what is theoretically possible under section 172(2) of the Act, but on the basis of whether the person served with the Enforcement Notice can reasonably be expected to have to comply with it. In the example given in para. 28, it is inconceivable that the landower who had derived no benefit from the development, and might well have vigorously opposed it, would be required to comply with an Enforcement Notice. Requiring him to do so would amount to the expropriation of his land without compensation. A condition which is not reasonably enforceable is not a reasonable condition for the purpose of the *Newbury* test: see *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578.

It follows that if a condition is not reasonably enforceable, it is no answer to say that requires something to be done within the application site. The need for conditions to be enforceable has to be viewed against the background that applicants are entitled to apply for planning permission on land which is not under their ownership or control, and the mere fact that the landowner objects to the development does not necessarily justify a refusal of planning permission: see the British Railways Board case (above).

It will usually be possible to resolve the problem in the manner described in para. 28 of the Annex to Circular 11/95, that is to say by the imposition of negative conditions. It does not follow that all positive conditions will necessarily be unenforceable in such cases. In the example given in para. 28, planning permission to construct a building subject to providing a means of access, a positive condition requiring the incorporation of some feature in the building itself might well be enforceable. Unless the applicant gained control of the land, he would not be able to erect the building. If he was in a position to erect the building, he would also be in a position to comply with a positive condition of that kind.

The enforceability of any condition has to be considered in the light of the particular facts. The problem with enforceability is a practical one, and it is undesirable to fetter the broad discretion conferered by section 70(1)(a) any more than is strictly necessary in the light of the principles set out in *Newbury*. It is true that some of the conditions imposed on the business park permission do not precisely follow the format recommended in para. 28 of Circular 11/95 in the sense they are not straightforward negative conditions: prohibiting the erection of a building until, for example, an access has been provided. The highway conditions are in that form. Other conditions prohibit development until the submission and approval of an overall scheme, the Framework Document, or in condition 7, until the submission and approval of a series of schemes dealing with particular aspects of environmental mitigation for the enhancement of Stanney Brook Site of Biological Importance, for the recreation of a marshy habitat, etc., and thus do contain a "negative" element. They also contain a positive element, in that the schemes having been approved, development is then to be carried out in accordance with them.

However, it will be noted that the Framework Document will have to show details of phasing, and a number of the conditions (for example, 7.1, 7.9.9 and 7.10) envisage that timetables or timescales will be submitted for carrying out the works proposed in the schemes. Such a flexible approach is entirely appropriate for a scheme of this magnitude and complexity. In practical terms the council would be able to ensure, in particular through the phasing proposals and the Framework Document, that the requirements of the conditions could be enforced, even though the application site includes land which is not under the applicants' control. In addition, there are significant limitations on the amount of floor space that can be developed before the spine road is brought into use. In order to construct the spine road the applicants will have to gain control over a substantial amount of the site. Thus, on its particular facts, the present case is wholly different from the position that prevailed both in the *B.A.A.* case, where *B.A.A.* had no power whatsoever to control the direction of take off or landing, that power being vested in the Civil Aviation Authority, and the *Grampian* case, which was concerned with off-site road works. I repeat my view that enforceability should be considered in a pragmatic and not in a theoretical manner, and should be considered by reference to the terms of the particular conditions, the specific development, and the particular site in question. Broad classification of conditions as "positive" or "negative" is a useful indicator, but should not be regarded as determinative, without regard to the circumstances of the individual case. So considered, the conditions imposed by the council in the present case were not unenforceable.

Overall Conclusion

My overall conclusion is, therefore, that Mr Howell's challenge succeeds on grounds 2 and 3, but fails on the remaining three grounds. The court has a discretion as to whether to grant relief in proceedings for judicial review. Mr Straker did not submit that I should exercise my discretion not to quash these planning permissions if I upheld Mr Howell's submissions. I have nevertheless considered whether I should exercise my discretion not to quash the planning permissions. I might well have done so had Mr Howell succeeded on ground 3 alone. Criterion (d) in Policy E.C.6 is but one aspect of a much broader policy and the council was satisfied that the remainder of the policy objectives were met.

The position is different in respect of ground 2. Regulation 4(2) of the Assessment Regulations is clear: a local planning authority shall not grant planning permission for a Sched. 2 application without first taking the environmental information into account. That information must include an environmental statement. That environmental statement must contain specified information. This environmental statement did not contain such information, for the reasons set out above.

In seeking expedition the council laid emphasis upon the importance of the planning permissions in terms of the economic regeneration, not merely of Rochdale but of the North West region generally. The council's Director of Regeneration, Mr Zuntz, stresses how vital it is that development contracts are signed in 1999, so that funds may be obtained from the E.U.

I bear those arguments very much in mind, but they could be advanced, with greater or lesser force, in respect of most of the descriptions of development that are set out in Sched. 1 or Sched. 2. Such developments will very often be of major significance in economic and/or in employment terms. The fact that there may well be a strong economic imperative to grant planning permission for such projects and thereafter to proceed with development at a rapid pace means that it is all the more important that their likely effects on the environment are properly assessed in accordance with the directive and the Assessment Regulations, and that planning permission is granted "in full knowledge of the project's likely significant effect on the environment". The assessment procedure is a fundamental part of the E.C.'s environmental policy, and it is essential that it is carried out. I realise that that there is a long-standing Development Plan policy for development of this site as a business park, but that does not obviate the need to comply with the requirements of Sched. 3 before planning permission is granted for that purpose.

It follows, that planning permission for the business park must be quashed, and since the granting of the planning permission for the spine road expressly relied on the granting of the planning permission for the business park and was inextricably linked to it by condition 1.3, it too must be quashed.

Solicitors—Fatema Patwa; Rochdale M.B.C.

COMMENTARY

After a large number of cases where the courts have rejected a wide interpretation of the applicability of the Environmental Assessment directive, this case comes hard on the heels of the House of Lords decision in *ex parte Brown and Another* (see [1999] Env.L.R. 623) as an affirmation of the fundamental importance of the substantive aspects of the Directive. This is particularly important given the previous emphasis on the procedural aspects of the directive (see, *e.g. R. v. Poole B.C. ex parte Beebee* [1991] J.P.L. 643). If the court in this case had taken that approach, it is not difficult to see how a different conclusion might have been reached on the basis that the information which accompanied the outline application was sufficient to allow the planning authority to reach its decision.

This decision will have tremendous practical implications for developers of large schemes. In many situations, it will be impossible to provide detailed information about the specific nature of a development as the construction of a major park may take place in a number of distinct phases with funding being released over a long period. The judge made it quite clear that the provision of environmental information based upon an illustrative masterplan which purported to identify potential land uses was not sufficient to comply with the terms of the Environmental Assessment Directive. In addition, as if to rub salt into developers' wounds, the Judge was happy to identify the problem which his decision would cause without giving any real solution.

The Judge does leave us with some interesting issues. For example, the definition of "urban development projects" could be construed very widely. Indeed, Sullivan J. points out that in this respect it can be distinguished from other development projects which are subject to the environmental assessment regime. In such circumstances, it could be argued that no development which could properly fall within the description of an "urban development project" could be the subject of an outline application (as by its very nature such an application could not be accompanied by the requisite environmental information which was necessary for the purposes of the Directive).

One final point can be made in relation to the environmental assessment issue. There is a significant distinction which can be drawn between outline applications for whole projects and the salami slicing of major development project. In the latter case, cumulative proposals which do not have any significant environmental effects individually and therefore fall outside the requirement for environmental assessment even in cases where the aggregated proposals would have fallen within the assessment rules, are submitted sequentially. In *R. v. Swale B.C. ex parte R.S.P.B.* [1991] 1 P.L.R. 6, Simon Brown J. held that any application would have to be viewed in isolation unless it was a Schedule 2 project where the planning authority had a discretion to consider the cumulative environmental effects of a number of separate projects if they were, in fact, part of the same project.

R. v. ROCHDALE METROPOLITAN BOROUGH COUNCIL ex p. MILNE

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

(Sullivan J.): July 31, 2000[1]

[2001] Env. L.R. 22

H1 *Environmental assessment—information as to scale provided but design of development to be a reserved matter for planning authority—whether sufficient description of proposed development provided for purposes of environmental assessment regulations—whether proposals in accordance with the development plan*

H2 In 1998, the respondent council ("R") granted 'bare' outline planning permission for a business park and full permission for a spine road to serve the business park. R considered that an environmental assessment was required and the developer had provided an environmental statement, based upon an illustrative masterplan and indicative schedule of uses of the business park. The permissions included conditions as to the submission of further details which would address the minimisation of certain environmental impacts, and one in particular which required the preparation of a Framework Document which would show the design and layout of the proposed development with plans for phasing different aspects of the development. Local residents challenged the decisions to grant planning permission, *inter alia*, on the grounds that there had been a failure to provide the information required under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988, No. 1199). The High Court held (in *R. v. Rochdale MBC, ex p. Tew* [2000] Env. L.R. 1) that, whilst R took 'environmental information' into account about the effects of carrying out a business park development in accordance with an illustrative masterplan and schedule of land uses, that was not the actual development proposed, nor for which permission was granted. The court further held that, in any event, insufficient information as to mitigating measures had been provided so that the Regulations had not been complied in that respect, and that R therefore, did not have the power to grant the planning permissions. R did not appeal against that decision.

[1] Paragraph numbers in this judgment are as assigned by the court.

H3 The developers substantially revised the application for the business park, amendments were made to the spine road application, and both were then renewed, together with an application regarding estate roads and ancillary services. A new environmental statement covering the project as described in the three applications was presented to R, which then granted permission. A new application for judicial review was then made by the applicant ("M"), submitting: that a sufficient description of the development had not been provided in the revised applications in accordance with the Regulations, the scale or size of the development being provided, but design being a reserved matter; that outline planning permission could not be granted for a project which required environmental assessment; and that the development did not accord with the development plan with regard to creation of public open space and/or recreational areas.

H4 M argued that to comply with the requirements of paragraph 2(a) of Schedule 3 the development proposed had to be described in such detail that nothing was omitted which could be capable of having a significant effect on the environment if comprehensively assessed, and that since it was impossible to say that the ultimate treatment of any of the reserved matters in an outline application was incapable of having a significant effect on the environment, the outline application procedure was inconsistent with the requirements of environmental assessment. Directive 85/337 was not aimed at permitting decisions to be taken "in principle" on relevant projects, but only after a comprehensive assessment of them.

H5 **Held**, in refusing the application:

H6 The proper starting point was the Regulations themselves, rather than the Directive, since it was not suggested that they did not fully and accurately transpose the Directive into domestic law, although the Regulations should be construed, so far as possible, to accord with the objectives of the Directive. The objective of the Directive was that the likely significant environmental effects of such projects should be comprehensively assessed before development consent was granted, and not to frustrate the carrying out of important projects.

H7 It was for the decision maker to determine whether a sufficient description had been provided in an environmental statement, not the courts. The requirement in Article 5(2) to provide "information on the site, design and size of the project" was intended to be sufficiently flexible to accommodate the particular characteristics of the different types of project listed in Annexes I and II. It could be possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed. If a particular kind of project was, by its very nature, not fixed at the outset, but was expected to evolve over a number of years depending on market demand, there was no reason why "a description of the project" for the purposes of the Directive should not recognise that reality. What was important was that the environmental assessment process should then take full account at the outset of the implications for the environment of this need for an element of for flexibility. The assessment process could well be easier in the case of projects which were "fixed" in every detail from the outset, but the difficulty of assessing projects which did require a degree of flexibility was not a reason for frustrating their implementation. It was for the authority responsible for granting the development consent to decide whether the difficulties and uncertainties were such that the proposed degree of flexibility was not acceptable in terms of its potential effect on the environment. Provided the outline application had acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment had taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposed conditions to ensure that the process of evolution kept within the parameters applied for and assessed, the project, as it evolved with the benefit of approvals of reserved matters, remained the same as the project which was assessed.

H8 The Directive sought to ensure that as much knowledge as could reasonably be obtained, given the nature of the project, about its likely significant effect on the environment was available to the decision taker. It is not intended to prevent the development of some projects because, by their very nature, "full knowledge" was not available at the outset. This did not give developers an excuse to provide inadequate descriptions of their projects. It would be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has "full knowledge" of its likely significant effects on the environment. The local planning authority was entitled to say that it had sufficient information about the design of a project to enable it to assess its likely significant effects on the environment, and that it did not require details of the reserved matters because it was satisfied that such details, provided they were sufficiently controlled by condition, were not likely to have any significant effect. Whilst R had deferred a decision on some matters of detail, which could have some environmental effect, it had not deferred a decision on any matter which was likely to have a significant effect, or on any mitigation measures in respect of such an effect.

H9 It was sufficient that the proposed development was in accordance with the development plan as a whole, and did not have to accord with every relevant policy within it. Policies could pull in different directions and it was for the local planning authority to make a judgement, bearing in mind the importance of the various policies and the extent of compliance or breach.

Legislation considered:

H10 E.U. Treaty, Art. 174 (ex 130r).

Town and Country Planning (Assessment of Environmental Effects) Regulations (S.I. 1988 No. 1199), reg. 21, Sched. 3, paras 2(a), 3(a).

Town and Country Planning Act 1990, ss.54A, 70

Legislation referred to:

H11 Town and Country Planning (Scotland) Act 1972, s.18A.

Directive 85/337, Arts. 2(2), 3, 5(2), Annex I, II.

Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988, No. 1199), Regs 2(1), 4(2), Schedules 1–3.

Town and Country Planning Act 1990, s.70(2).

Directive 97/11, 1st and 11th Recitals.

Regional Development Agencies Act 1998.

Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999 No. 293).

Cases considered:

H12 *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 W.L.R. 1447.

R. v. Rochdale MBC, ex p. Tew [2000] Env. L.R. 1; [1999] 3 P.L.R. 74

Berkeley v. Secretary of State for the Environment [2000] 3 W.L.R. 420; [2001] Env. L.R.

World Wide Fund (WWF) v. Autonome Provinz Bozen (Case C–435/97) [2000] 1 C.M.L.R. 149; [2000] Env. L.R. D14.

Cases referred to:

H13 *Kraaijfeld v. Gedeputeerde Staten van Zuid-Holland* (Case C–72/95) [1997] Env. L.R. 265; [1999] 3 C.M.L.R. 1.

R. v. Bromley London Borough, ex p. Barker [2001] Env. L.R. 1.

R. v. London Borough of Hammersmith and Fulham, ex p. CPRE London Branch [2000] Env. L.R. 549.

R. v. North Yorkshire C.C., ex p. Brown [2000] 1 A.C. 397; [1999] Env. L.R. 623.

R. v. Secretary of State for the Environment, ex p. Webster [1999] J.P.L. 1113.

Policy considered:

H14 D.E.T.R. Circular 2/99, paras 48, 82.

Policy referred to:

H15 D.o.E. Circular 15/88, para.42.

H16 *Mr J. Howell* Q.C. and *Ms K. Markus* appeared on behalf of the applicant.

Mr T. Straker Q.C. and *Mr P. Kolvin* appeared on behalf of the first respondent.

Mr B. Ash Q.C. and *Mr P. Greatorex* appeared on behalf of the second respondent.

SULLIVAN J.:

Introduction

1 This is round 2 of the battle for Kingsway Park. Round 1 concluded with my judgment on May 7, 1999 reported as *R. v. Rochdale MBC, ex p. Tew* [1999] 3 P.L.R. 74. ("*Tew*") The applicant in the present proceedings was among the "others" in that title.

2 The background to the matter is set out in some detail in *Tew* and repetition in this judgment is unnecessary. For convenience, I will use the same definitions or abbreviations as were adopted in *Tew*. If no other source is cited, page references in parenthesis are to *Tew*.

3 In summary, two applications for planning permission were made by Wilson Bowden Properties Limited (Wilson Bowden) and English Partnerships on February 23, 1998. These were a bare outline application for a business park and a full application for a spine road to serve the park. The Council considered that the proposal required an environmental assessment under the assessment regulations. A detailed environmental statement was prepared by ERM. Having considered that environmental statement and a lengthy report by Mr Beckwith, the Council's Director of the Environment, the Council granted the two planning permissions on August 6, 1998.

4 The applicant and others challenged the validity of the planning permissions on five grounds set out on pages 79E to 80A. I upheld the challenge of grounds 2 and 3 and quashed both planning permissions. The Council did not appeal against this decision.

5 The applicants for planning permission made extensive revisions of the form to the business park application, minor amendments to the form of

the spine road application and added a new, full application for planning permission to construct the estate roads leading off the spine road together with surface water attenuation areas. A new environmental statement dealing with the project as described in all three applications was prepared by ERM. The three applications (two amended and one new) were submitted for approval accompanied by a new environmental statement on July 23, 1999. Mr Beckwith prepared a lengthy report recommending the grant of planning permission subject to numerous conditions. The Council accepted his recommendation and granted the three planning permissions on December 17, 1999. The applicant returns to the fray and challenges the validity of these planning permissions.

6 Before turning to the submissions advanced by Mr Howell Q.C. on behalf of the applicant, a brief explanation of the basis of the decision in *Tew* will be helpful.

The *Tew* decision

7 I have mentioned that the business park application as submitted an in 1998 was a "bare" outline, reserving all detailed matters for subsequent approval. It was accompanied by an illustrative masterplan and an indicative schedule of land uses. ERM's environmental assessment and the resulting environmental statement were based on the illustrative masterplan and indicative schedule.

8 Although condition 1.3 in the business park planning permission required the development to be carried out in accordance with the mitigation measures set out in the environmental statement, unless otherwise provided for by any other condition in the planning permission, the Council did not approve the illustrative masterplan. It was, effectively, rejected by condition 1.11 and the applicants for planning permission were required by condition 1.7 to submit a new "Framework Document ... showing the overall design and layout of the proposed business park".

9 he indicative schedule of uses was not incorporated into the planning permission and the hectarage of B8 uses was substantially altered by condition 1.10 which would in turn have had a knock on effect for the amount of other uses in the schedule: see pages 98G to 99C.

10 Against that background, Mr Howell had submitted under ground 2 of his challenge that the application for planning permission did not contain "a description of the development proposed, comprising information about the site and design and size or scale of the development", as required by paragraph 2(a) of Schedule 3 to the assessment regulations.

11 In response to that submission I concluded:

> "In summary, while the council took into consideration 'environmental information' about the effects of carrying out a business park develop-

ment in accordance with an illustrative masterplan and an indicative schedule of land uses, that was not the development that was proposed to be carried out in the application for planning permission, nor was it the development for which planning permission was granted; nor was the information sufficient in any event to comply with the requirements of Schedule 3: see, for example, para 2(d), as to mitigation measures. It follows that the council did not have power to grant planning permission for the business park: see regulation 4(2) of the assessment regulations." See page 99C to E.

12 During the course of his submissions under ground 2 Mr Howell had argued:

> "That an application for outline planning permission may not be made if the development falls within Schedule 2 or 3 to the assessment regulations", see page 90F.

13 At page 96C to D I said this:

> "I would not wish to go as far as Mr Howell and say that it is not possible to make any application for outline planning permission for a development that falls within Schedule 1 or Schedule 2. An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested in para. 42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with the requirements of para. 2(a) of Schedule 3."

14 Paragraph 42 of Circular 15/88 is to be found on page 93F.

15 I then turned to the description of the development in the 1998 business park application and reached the conclusions set out above. At page 96H I acknowledged that the outline application procedure is particularly valuable for projects such as a business park which are demand led and which may be expected to evolve over many years (if the 1999 permissions are upheld the new environmental statement explains that construction will commence in 2001 and all the buildings are not expected to be occupied until 2013).

16 In response to the practical difficulties posed by such developments I said this at page 98F to G:

> "Recognising, as I do, the utility of the outline application procedure for projects such as this, I would not wish to rule out the adoption of a masterplan approach, provided the masterplan was tied, for example, by the imposition of conditions, to the description of the development permitted. If illustrative floorspace or hectarage figures are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effects.

> Conditions may then be imposed to ensure that any permitted development keeps within those ranges."

17 Turning from the assessment regulations to the UDP, policy EC/6 allocates the application site for business park use but says that:

> "The Council will strictly apply the following criteria to the development of the site (to be known as the Kingsway Business Park): ...
> (c) the creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park."

18 The Council had proceeded on the basis that the business park application complied with this criterion and was therefore in accordance with the provisions of the UDP. At pages 100H to 101D I concluded that the 1998 business park application did not comply with criterion (d): specifically it did not include any proposals for open space and the Council could not, under the terms of the outline planning permission granted, insist on the provision of 32 hectares of land for open space for informal recreation purposes. However, I added this at page 101D to F:

> "There is very often an element of planning judgment as to whether or not a proposed development complies with a development plan policy. It could not reasonably be concluded that this application complied with criterion (d). However, that is but one of a long list of criteria in the policy. The council clearly considered that the remaining criteria within policy EC/6 were fulfilled. The primary purpose of the policy is, after all, to allocate the land as a business park, not the creation of additional open space. It would be for the council to decide whether the failure of this application to meet one of the criteria in policy EC/6 meant that the application was contrary to either the district plan or the emerging UDP. To the extent that the Council erred in concluding that criterion (d) in policy EC/6 was met, ground 3 is made out."

The amended/new applications

19 As amended in 1999 the business park application, whilst still an application for outline planning permission, is no longer a "bare outline" application. It comprises the application form which cross refers to and incorporates into the application:
(i) an Attachment which describes the development.
(ii) a Schedule of Development.
(iii) a Development Framework.
(iv) a Masterplan.

20 The attachment describes the proposed development as:

> "Outline application together with certain Reserved Matters for a proposed Business Park including buildings on Plots C to X inclusive as identified on the masterplan for:
> General and light industrial uses in classes B1 and B2.
> - Offices in use Class B1.
> - Distribution and storage use in Class B8.
> - Research and development facilities in use Class B1.
>
> Uses ancillary to the Business Park uses including:
> - Retail in use Classes A1, A2 and A3.
> - Leisure in use Classes D2 and *sui generis*.
> - Housing in use Class C1.
> - Hotels in use Class C3.
>
> Other commercial and local service uses."

21 Details of landscaping, design and external appearance of all the buildings were reserved. The application sought approval for siting and means of access to seven out of the 20 plots (there is no plot V). Thus, on 13 of the 20 plots all matters were reserved. It has been explained that access requirements dictated the need to fix the siting of and means of access to the buildings on the seven plots where approval was sought for those matters. Reference is made to the schedule of development, and Note 1 says this:

> "This Outline Planning Application also includes a masterplan and a framework document showing the overall design and layout of the whole site."

22 Other notes refer to the environmental statement, to traffic impact assessments and to the full applications for the spine road and estate roads and other infrastructure.

23 The Schedule of Development lists each of the plots, dividing them into those plots where approval is sought for siting and means of access and those plots where those matters are reserved for detailed approval. A summary of the total hectarage and floorspace is given, which is then broken down by reference to use class.

24 Using plot T (which is proposed to contain the largest building in the business park) as an example: the schedule sets out the hectarage, 19.46; the use, B8; the floorspace, 80,412 square metres; the unit size, in the case of plot T 80,412 since there is proposed to be only one very large building on this plot; the height of the building, 25 metres; and the car parking numbers, 804. Assessments are also provided of traffic flows and employment generation.

25 More than one plan is described as a "Masterplan" in the application, but the plans build up to "The Masterplan", which is identified in and annexed to the development framework. It shows, within the framework provided by the spine and estate roads, the buildings proposed on each

plot together with their associated car parking and servicing areas, levels, the areas set aside for landscaping within and structural landscaping around, each plot, and areas to be left undeveloped along the Stanney Brook corridor, and the surface water attenuation measures proposed in that corridor.

26 Having described the site, the development framework (63 pages) sets out the "Development Concept" under a number of subheadings, such as, "Land uses", "Urban design framework", "Open space network", etc. ERM's assessment of the environmental effects of the proposed business park was based on the development described in these documents. The 1998 environmental statement was reviewed where necessary and new information was provided. Subject only to the criticisms advanced in the applicant's grounds of challenge, which I consider below, the new environmental statement would appear to be a model of its kind, meeting in full measure the aim set out in directive 97/11: to provide the Council with relevant information to enable it to take a decision on the business park project "in full knowledge of the project's likely significant impact on the environment", (see page 89G for the full text of the directive).

27 Similarly, apart from the matters raised in the applicant's grounds, Mr Beckwith's report to the Council is not, and in my judgment could not fairly be, criticised. In a comprehensive report running to 116 pages he deals with all relevant aspects of the three applications and recommends a series of conditions which are intended, *inter alia,* to tie the outline planning permission for the business park to the documents which comprise the application and which I have set out above. These recommendations were accepted, so in addition to incorporating the masterplan and the application and documents submitted therewith into the description of the development permitted, the following conditions, *inter alia,* were imposed:

28 Condition 1.7:

> "The development on this site shall be carried out in substantial accordance with the layout included within the Development Framework document submitted as part of the application and shown on (a) drawing entitled 'Master Plan with Building Layouts'."

29 The reason given for the imposition of this condition was:

> "The layout of the proposed Business Park is the subject of an Environmental Impact Assessment and any material alteration to the layout may have an impact which has not been assessed by that process."

30 Condition 1.8:

> "No building within any plot shall exceed the height specified for

buildings within that plot as set out in the 'Schedule of Development . . . submitted with and forming part of the application."

31 Conditions 1.9 and 1.10 modified this by reducing the maximum eaves height of certain buildings in the interests of the amenity of residents in adjacent dwellings.

1.11:

"The development shall be carried out in accordance with the mitigation measures set out in the Environmental Statement submitted with the application unless provided for in any other condition attached to this permission."

1.12:

"The development shall be carried out in accordance with the principles and proposals contained in the Development Framework document submitted as part of the application unless provided for in any other condition attached to this permission."

1.13:

"The phasing of works within the site shall be carried out in accordance with the details set out in the Section entitled 'Phasing' in the Development Framework document, subject to the detailed requirements of other conditions in this permission."

32 In respect of the Stanney Brook Corridor, condition 1.15 said:

"The area of the Stanney Brook Corridor (as defined on (a) drawing and described in the Development Framework Document) shall remain undeveloped apart from the construction of surface water attenuation areas and footpaths/cycleways."

33 The reason given was:

"To ensure that an area of undeveloped open space is retained in the interests of amenity."

34 Conditions 1.16 to 1.18 effectively divided the corridor into three parts and required the different parts of the corridor to be enhanced and landscaped in accordance with the principles shown on three application drawings and in accordance with detailed treatment to be approved in writing by the local planning authority, concurrently with the construction of buildings on certain of the plots. The reasons given were:

"In order to ensure the maintenance of areas of nature conservation interest and to create areas of wildlife habitat in a phased order prior to the loss of existing habitat within the application site."

35 Under the subheading "Policy Setting" Mr Beckwith set out the terms of policy EC/6 in the UDP in full. He added that other policies in the UDP

were also relevant in assessing the applications. Having concluded that the distribution of uses within the application accorded with the uses set out in policy EC/6 he examined each of the 16 criteria in the policy in turn and advised that, "The proposals accord with the relevant policies of the UDP and are not departures from the development plan".

36 His report responded to representations made by third parties. In response to a letter from the applicant's solicitor, which alleged that the proposal was a departure from the UDP. He said this:

> "In my view, it is only that part of criterion (d) relating to the creation of formal rights of access by the public which is not being achieved at this stage. I consider that this is not material to make the application contrary to the UDP. Recommended condition 1.15 requires that land within the Stanney Brook Corridor shall remain undeveloped, apart from the construction of water attenuation areas and footpaths and cycleways. Following on from that, recommended conditions 1.16, 1.17 and 1.18 require phased enhancement and landscaping of the corridor in accordance with the general principles in the submitted drawings. Therefore, the retention of the open nature of the land within the corridor, together with its enhancement and landscaping, would be secured by the recommended conditions. The securing of the formal rights of public access to the land cannot be achieved at this stage. This has been raised with applicants and North West Development Agency, which now encompasses English Partnerships, have commented as follows."

37 He then set out the text of the NWDA's letter. In summary, NWDA were supportive of the proposal to provide public open space and said this, in conclusion:

> "We will undertake that once we have control of the land we will then offer to transfer the ownership of the Stanney Brook Corridor to the Council, at no cost and in its improved state, so that the Council can secure public access, as appropriate, to the open space and thereby satisfy the requirements of this sub-section of UDP policy and allow the Council to decide on the management regime for the open space."

The legislative and policy framework

38 For practical purposes the legislative framework remains unchanged from that described in *Tew*. As from March 14, 1999 the assessment regulations referred to in *Tew* were replaced by the Town and Country Planning, (Environmental Impact Assessment) (England Wales) Regulations 1999, (the 1999 assessment regulations), which apply to any application received after that date. It is common ground that the estate roads application falls under the 1999 assessment regulations. The parties are not agreed as to whether the amended business park and spine roads applications fall under the assessment regulations or the 1999 assessment

regulations. It is not necessary to resolve that dispute since the parties are agreed that nothing turns on the minor differences of phraseology between the two sets of regulations. For convenience I will continue to refer to the assessment regulations which are set out in *Tew*.

39 Policy guidance on the implementation of the 1999 assessment regulations is contained in Circular 2/1999 entitled "Environmental Impact Assessment", which replaces Circular 15/88. For present purposes, the guidance remains substantially unchanged, paragraphs 48 and 82 of Circular 2/99 are as follows:

> "48. Where EIA is required for a planning application made in outline, the requirement of the Regulations must be fully met at the outline stage since reserved matters cannot be subject to EIA. When any planning application is made in outline, the local planning authority will need to satisfy themselves that they have sufficient information available on the environmental effects of the proposal to enable them to determine whether or not planning permission should be granted in principle. In cases where the Regulations require more information on the environmental effects for the Environmental Statement than has been provided in an outline application, for instance, on visual effects of a development in a National Park, authorities should request further information under regulation 19. This may also constitute a request under article 3(2) of the GDPO.
>
> ...
>
> 82. Whilst every E.S. should provide a full factual description of the development, the emphasis of Schedule 4 is on the 'main' or 'significant' environmental effects to which a development is likely to give rise. In many cases, only a few of the effects will be significant and will need to be discussed in the ES in any great depth. Other impacts may be of little or no significance for the particular development in question and will need only very brief treatment to indicate that their possible relevance has been considered. While each ES must comply with the requirements of the Regulations, it is important that they should be prepared on a realistic basis and without unnecessary elaboration."

The grounds of challenge

40 These fall under two heads: failure to comply with the requirements of the assessment regulations and failure to comply with UDP policy EC/6d.

41 Under the former, it is submitted that, notwithstanding the amendments to the form of the business park application, it still does not provide "a description of the development proposed", which is sufficient for the purposes of paragraph 2(a) of Schedule 3 to the assessment regulations, because although information is provided in respect of the size or scale of the development, design is a reserved matter. The submission that an application for outline planning permission may not be made for

development which requires environmental assessment is renewed and it is further contended that if this submission is not accepted, the description of the development provided in the 1999 outline application was insufficiently detailed to comply with the requirements of Schedule 3.

42 Under the second ground of challenge it is argued that criterion (d) was not satisfied, because the business park planning permission did not require the creation of new public open space and informal recreation areas or the extension and improvement of Stanney Brook Park. Since the UDP required the criteria in policy EC/6 to be "strictly applied", failure to meet criterion (d) meant that the development was not in accord with the development plan, even though it did not infringe other policies. Even if the failure to meet criterion (d) did not have that consequence, Mr Beckwith's report should have referred to the fact that the UDP inspector had specifically rejected a request made during the course of the UDP inquiry that (*inter alia*) what is now criterion (d) should be omitted, saying that the open spaces proposed in the policy "are an essential element of the scheme and of the plan's proposals for South Rochdale". Moreover, the Council failed to consider imposing a negative condition preventing the erection of some or all of the proposed buildings until such time as the relevant land had been made available for use as an open space by the public, and instead relied on the NWDA's offer which, since it was unenforceable, was an immaterial consideration.

43 I find it convenient to deal with this ground at the outset.

Ground 2

44 Section 54A of the 1990 Act is in the following terms:

> "Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

45 Section 70 deals with the determination of applications for planning permission. Subsection (2) provides:

> "In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

46 Since development plans contain numerous policies, the local planning authority must have regard to those policies (or "provisions") which are relevant to the application under consideration. The initial judgement as to which policies are relevant is for the local planning authority to make. Inevitably some policies will be more relevant than others, but section 70

envisages that the Council will have regard to all, and not merely to some of the relevant provisions of the development plan.

47 In my judgment, a similar approach should be applied under section 54A. The local planning authority should have regard to the provisions of the development plan as a whole, that is to say, to all of the provisions which are relevant to the application under consideration for the purpose of deciding whether a permission or refusal would be "in accordance with the plan".

48 It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: "is this proposal in accordance with the plan?". The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. In *City of Edinburgh Council v. the Secretary of State for Scotland* [1997] 1 W.L.R. 1447, Lord Clyde (with whom the remainder of their Lordships agreed) said this as to the approach to be adopted under section 18A of the Town and Country Planning (Scotland) Act 1972 (to which section 54A is the English equivalent):

> "In the practical application of section 18A, it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it."

49 In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be "in accordance with the plan". Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes etc., it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the

development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.

50 For the purposes of section 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein.

51 Mr Howell points to the fact that policy EC/6 requires criterion (d) to be "strictly applied". He accepts that some policies may be expressed in somewhat less forthright terms. They may, for example, merely "encourage" certain kinds of development. Other policies may say that certain forms of development will "normally" be refused. In the green belt planning permission will not be given for most kinds of development save in "very special circumstances". I accept that the terms of the policy—how firmly it favours or sets its face against—the proposed development is a relevant factor, so too are the relative importance of the policy to the overall objectives of the development plan and the extent of the breach. These are essentially matters for the judgement of the local planning authority. A legalistic approach to the interpretation of development plan policies is to be avoided: see *R. v. Secretary of State for the Environment, ex p. Webster* [1999] J.P.L. 1113 at 1118.

52 In the present case, policy EC/6 was the most, but not the only relevant policy in the UDP. The application was assessed against 23 separate policies in the UDP, one of which was EC/6. The introduction to EC/6 is as follows:

> "Land is allocated between the A664 Kingsway, M62 motorway, B6194 Broad Lane and the Rochdale-Oldham Railway line for high quality general and light industry, offices, distribution and storage, research and development, and associated and complementary uses.
>
> The Council will strictly apply the following criteria to the development of the site (to be known as the Kingsway Business Park)."

53 The criteria are then set out, including criterion (d):

> "The creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park."

54 No complaint is made about the Council's judgement that the proposal was in accordance with the remaining policies and with all of the criteria in EC/6 save for criterion (d). Mr Beckwith correctly advised the Council that the business park planning permission, subject to conditions 1.16 to 1.18 (above), would achieve all that was required by criterion (d) save for the creation of formal rights of public access. An extensive area of land along Stanney Brook Corridor, where Stanney Brook Park is located, would not merely be left open, it would be appropriately landscaped.

55 Pausing there, it could not sensibly be concluded that failure to achieve part of what was required by criterion (d) meant that the proposal was not "in accordance" with the UDP or was a departure from that plan. Indeed, such a conclusion by the Council would have been vulnerable to a challenge on the grounds of *Wednesbury* unreasonableness. Mr Beckwith was not required to draw the Council's attention to the views of the UDP inspector, since that inspector's recommendations had been incorporated into the text of the policy EC/6 as adopted, which was set out in full in Mr Beckwith's report.

56 Dedication of the open land along Stanney Brook Corridor as a public open space could not have been achieved by the imposition of a condition. It is true that the Council could have considered whether dedication should be secured by the imposition of a negative condition, but it was not required to do so, because it was fully entitled to place reliance upon the assurance given by the NWDA, which is a non-departmental public body with a statutory responsibility to promote sustainable economic development and social and physical regeneration in the north-west of England under the Regional Development Agencies Act 1998. Planning conditions should not be imposed on a "belt and braces" basis, but only if they are required. There is no suggestion that the NWDA will fail to honour its undertaking. Mr Howell makes the point that a planning permission runs with the land. That is true, but the background to the NWDA's undertaking was that the application site is in a number of ownerships and, as was foreshadowed in 1998, the Council has authorised the making of a compulsory purchase order to facilitate the carrying out of the business park development, see page 102G.

57 Of course, those compulsory purchase order proceedings might fail, in which case the business park would not be able to proceed, but if the development does proceed the Council will be in a position to dispose of the necessary land to the NWDA, which will then be in a position to honour its undertaking. For all of these reasons I reject ground 2.

Ground 1

58 Turning to ground 1, Mr Howell submits, correctly, that the conclusion at page 96C to D of *Tew* (which is set out above) was *obiter*, because in that decision I was dealing with a bare outline application where all matters had been reserved.

59 He referred to the directive. In addition to the provisions set out between pages 88D to 89 H, he referred to a number of the recitals, laying particular stress upon the 10th:

> "Whereas, for projects which are subject to assessment, a certain minimum amount of information must be supplied concerning the project and its effects."

60 As mentioned on page 89C, Article 5.2 of the directive requires the developer of a project subject to assessment to provide "at least":

> "a description of the project comprising information on the site, design and size of a project."

61 It is this minimal amount of information which must, in all cases, subject to environmental assessment, be provided by the developer, according to Mr. Howell's skeleton argument which, "the information specified in paragraph 2 of Schedule 3 to the assessment regulations is intended to specify".

62 Mr Howell referred to regulations 2 and 3 of the applications regulations (page 80D to G)) emphasising that whereas a "full" application for planning permission must include the information "necessary to describe the development", an outline application did not have to describe the development in respect of any matter reserved for subsequent approval. It cannot be said that reserved matters, that is to say siting, design, external appearance, means of access and landscaping, can have no significant effect on the environment.

63 The purpose of the directive is "to ensure that planning decisions which may affect the environment are made on the basis of full information": see *per* Lord Hoffmann at page 404 of *R. v. North Yorkshire C.C., ex p. Brown* [2000] 1 A.C. 397, as amplified on page 430 of *Berkeley v. Secretary of State for the Environment* [2000] 3 W.L.R. 420.

64 Lord Hoffmann's speech in the latter case stressed the importance, both of the public being able to participate in the environmental assessment process, and of the need for "a single and accessible compilation, produced by the applicant at the very start of the application process", see pages 430H to 431E, and 432F.

65 A partial description of the development proposed, omitting a description of a reserved matter, does not enable that objective to be achieved. A description of the development proposed is also required to ensure that the project which is executed is the project which has been comprehensively assessed: see *Tew* at page 99D.

66 Mr Howell argued that one should not be influenced by the "commercial imperative" for there to be a measure of flexibility in applications for industrial estate developments, or urban development projects, even though he recognised that such projects might well be developed over a period of many years. He submitted, in effect, that all details of a project had to be described at the outset. If, subsequently, it was desired to change those details, then a fresh application for planning permission, accompanied by a fresh environmental statement, should be submitted. In this context he said that assistance could be derived from the decision of

the European Court in *World Wildlife Fund v. Bozen* [2000] 1 C.M.L.R. 149. The respondents in that case had contended that the project for the restructuring of Bolzano Airport (transforming it from a military to a commercial civil airport) had been authorised by "a specific act of national legislation" falling within Article 1(5) of the directive and did not therefore require environmental assessment. The extent to which modifications to projects could be excluded from environmental assessment was also in issue. Citing the *Dutch Dykes* case [1999] 3 C.M.L.R. 1, the European Court said this:

> "[40] Thus observing that the scope of the Directive was wide and its purpose very broad, the Court held that the Directive covered 'modifications to development projects' even in relation to projects falling within Annex II, on the ground that its purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment when, by reason of their nature, size or location, they were likely to have significant effects on the environment.
>
> . . .
>
> [49] In view of the foregoing considerations, the answer to the first and second questions must be that Articles 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2,100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.
>
> . . .
>
> [62] It follows that the details of a project cannot be considered to be adopted by a Law, for the purposes of Article 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project."

67 Mr Howell derives two propositions from *Bozen*:

(1) Any development consent for the purposes of the Directive must be defined in detail, so as not to omit any element which could be capable of having a significant effect on the environment.
(2) Any later modification to a project must be subject to a further environmental assessment unless it is not likely to have a significant effect on the environment.

68 It follows, he says, that to comply with the requirements of paragraph 2(a) of Schedule 3 the development proposed must be described in such detail that nothing is omitted which may be capable of having a significant effect on the environment if comprehensively assessed.

69 Since it is impossible to say that the ultimate treatment of any of the reserved matters in an outline application is incapable of having a significant effect on the environment, the outline application procedure is inconsistent with the requirements of environmental assessment. Put shortly, the Directive's aim is that decisions should be taken "in full knowledge of the project's likely significant effects on the environment" (see the first recital of Directive 97/11 which is set out in full on page 89G of *Tew*). It is not aimed at permitting decisions to be taken "in principle" on relevant projects, but only after a comprehensive assessment of them.

70 Assessment on a "worst case" basis is no answer, because the assessment regulations require the "likely significant effects" to be assessed. The objective of environmental assessment is not to see whether the "worst case" is tolerable but to optimise effects on the environment: see the 11th recital of the Directive which refers to the contribution "of a better environment to the quality of life" and Article 174 of the Treaty which states that "community policy on the environment shall contribute to the pursuit of the following objectives ... preserving, protecting and improving the quality of the environment".

71 If the submission that an outline application is in principle incompatible with the requirements of paragraph 2(a) of Schedule 3 to the assessment regulations is not accepted, it is argued that this particular outline application did not provide a sufficient description of the development proposed, because notwithstanding the information supplied about size and scale, information on "the design ... of the development" was not provided. Mr Howell accepts that "design" in paragraph 2(a) of Schedule 3 may extend to more than the design of individual buildings within an industrial estate project. It may, for example, encompass such matters as the layout shown on the masterplan, but he submits that it includes their detailed design. In the case of all the plots details of design, external appearance and landscaping were reserved and in the case of the majority of plots, siting and means of access will also be reserved. Mr Howell

examined the implications of this under a number of headings: Design, Landscaping, effect on listed buildings, the larger building on plot T and the mitigation measures proposed.

72 Under "Urban Design Framework" the Development Framework mentions the need for "Landmark buildings" to be located at the locations which form "gateways" to the park. Important views are identified. For example, it is important to ensure that the development "becomes a landmark along the motorway". Under "Building Design" it is said that "A high quality of design of buildings will be required". Among the design and layout principles is a desire to encourage "innovative roof forms and profiles" where appropriate. One finds the following under "Materials":

> "External materials should be of a high quality, commensurate with the use of each building. Consideration should be given to the use of masonry at low level and on principal elevations in combination with cladding and glazing.
>
> The use of colours that blend with the surrounding landscape will be necessary and therefore dense dark or bright colours will be discouraged. Primary colours should be restricted to window and door frames and will not be allowed for major elevational treatment. A preferred colour range will be made available to ensure continuity within the overall development.
>
> Particular attention should be paid to the design of the elevational treatment of larger scale buildings, which are require to be of high quality and design. The articulation of the facade through the use of contrasting tone, colour and texture is required to provide an attractive appearance."

73 In describing the developments proposed on the defined plots table 2.3 in the environmental statement relies on high quality design. Thus, for plot T we find:

> "A single building for B8 use. The building is located on the flattest and least intrusive part of the development site and the layout incorporates large setbacks from the plot boundaries and the Stanney Brook Corridor. The elevational treatment of the building will be of high quality and design with articulation of the facade by use of a contrasting tone, colour and texture to provide an attractive appearance."

74 Under "Mitigation of impacts" the environmental statement acknowledged that "The phasing and external landscaping will be critical to reducing potential landscape and visual impacts and this is shown in figure 6.9. The principal mitigation measures which will be adopted are also listed in table 6.3". It is said that table 6.3 is far too general, thus under "Mitigation Description" we find such entries as:

> "Create integrated structural, infrastructure and plot landscape throughout the site in accordance with the Development Framework."

75 Under "Building design and materials" we find in paragraph 6.59:

> "The visual impact, particularly of high sided warehouse buildings can be substantially reduced by appropriate detailed design choices. Each elevation needs to be considered in the context of both short, middle and long distance views. Dark coloured finishes should generally be used for those buildings (or parts of buildings) which will be seen against a landscape or urban backdrop, with light colours where the building will be seen against the sky. Potential nuisance from reflective materials must be avoided. White (as against pale) finishes are also generally unsatisfactory."

76 Both the impact on the setting of three listed buildings within the development site and the mitigation measures proposed are also dealt with in very general terms. That, says Mr Howell, is because design and landscaping on adjoining plots are reserved matters. Without detailed information about those reserved matters the public cannot make any meaningful representations about the effects of the project on the listed buildings. The B8 building proposed on plot T, at over 80,000 square metres, will be a very large building indeed and the environmental statement acknowledges that it will have "a significant impact" on certain views from within the development site, although the impact on views from outside the site is assessed as moderate. It is submitted that without details of the design and elevational treatment of this building one cannot sensibly assess its impact on the environment.

77 Finally, in respect of mitigation measures, Mr Howell points to the Outline Ecology Management Plan which formed part of the environmental statement. It contains a table which summarises, "Key management proposals" under three headings: "Objective", "Outline management prescription" and "Timetable". By way of example, the first objective is:

> "Ensure that all affected areas have been appropriately surveyed for protected species."

78 The prescription is:

> "Undertake further bat survey work in all buildings to be demolished and inspect all appropriate trees which are to be removed. The findings will be discussed with English Nature to determine the need for any specific mitigation measures.
>
> Re-survey the site for great crested newts. The findings to be discussed with English Nature to determine the need for mitigation measures."

79 Timescales are given for both surveys.

80 It is submitted that paragraph 2(d) of Schedule 3 to the assessment regulations requires a description of mitigation measures. The environ-

mental statement does not describe measures. It is said it merely sets out objectives.

81 I have set out the submissions made on behalf of the applicant in some detail. I find it unnecessary to rehearse the submissions made by Mr Straker Q.C. on behalf of the Council, the first respondent, and Mr Ash Q.C. on behalf of Wilson Bowden and the NWDA, the second respondents. No discourtesy is intended. It is unnecessary to rehearse their submissions, because, in substance, I accept them and their principal points are reflected in my own conclusions which I now set out.

My conclusions

82 Although Mr Howell laid great stress on the Directive, the proper starting point is the assessment regulations themselves, since it is not suggested that they do not fully and accurately transpose the directive into our domestic law: see the decisions of the Court of Appeal in *R. v. London Borough of Hammersmith and Fulham, ex p. the Trustees of the London Branch of the CPRE* June 12, 2000 paragraphs 24 and 39 to 41 (unreported) and Jackson J. in *R. v. London Borough of Bromley, ex p. Barker* April 3, 2000 paragraph 105 (unreported).

83 I accept that the assessment regulations should be construed, so far as possible, to accord with the objectives of the directive. If one looks to see what the relevant objectives are, it was plainly not the objective of the Council in including "industrial estate development projects" or "urban development projects" in annex II to the directive, to frustrate the carrying out of such important projects. The intention was that the likely significant environmental effects of such projects should be comprehensively assessed before development consent was granted. The technique of environmental assessment is an important procedural tool whose underlying purpose is to help secure the Community's environmental policies. As Article 174 of the Treaty makes clear, in preparing its policy for the environment, which includes the objective of "preserving, protecting and improving the quality of the environment", the Community:

> "Shall take account of ... the economic and social development of the Community as a whole and the balanced development of its regions", see Article 174.3.

84 The directive does not require environmental assessment of every industrial estate, or urban development project, only those "where Member States consider that their characteristics ... require" assessment. In general terms, it is likely that assessment will be required for substantial projects of this kind. The test adopted in the assessment regulations is

whether such a project "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location", see the definition of Schedule 2 application in regulation 2(1).

85 Save in an old style Soviet command economy, such as would not have been in the contemplation in the framers of the directive, a substantial industrial estate development project is bound to be demand-led to a greater or a lesser degree. The second respondent's evidence explains in some detail why this is so in the case of Kingsway Business Park. Mr Ward, a Director of Wilson Bowden explains:

> "For a scheme such as the Kingsway Development to succeed commercially, it is necessary to have an outline planning permission which establishes the principle of development on the whole site. Indeed, this is necessary to give the developer, the occupiers, the grant agencies and the investment institutions the certainty which they require to proceed. For some smaller sites it may be possible, in particular where end users have been identified, to submit a detailed planning application for the whole development. However with a scheme of the size of the Development this would not be possible as it is anticipated that the whole Development will not be completed for approximately 15–20 years. Within that forecast period, it is inevitable that a variety of end users will seek plots to suit their own business requirements and it is therefore necessary for the scheme to remain sufficiently flexible to cater for such users if it is to meet its planning objectives. If one were required to submit a detailed permission for the whole site it would simply be a paper exercise, for at this stage, it is quite impossible to anticipate what the matter can bring forward in future years."

86 I have already mentioned the fact that it is not expected that the business park will be completely occupied until 2013. There is no challenge to this evidence and no reason has been advanced as to why the points made by the respondents should not hold good for other substantial projects of this kind.

87 At pages 96G to 97H of *Tew* I mentioned the contrast between projects such as this and most of the other descriptions of development that are listed in annex II to the directive and repeated in Schedule 2 to the assessment regulations. The other projects are either industrial projects for particular processes, or "one off" infrastructure projects, such as the construction of roads, tramways, dams or pipelines, which will, by their very nature, have to be defined in considerable engineering detail at the outset.

88 Article 2(2) of the directive allows Member States to integrate environmental impact assessment into their existing procedures for giving development consent, or to devise new procedures. Article 3 (which is set out on page 88H) states that the environmental impact assessment will

identify, describe and assess the environmental effects of projects "in an appropriate manner, in the light of each individual case".

89 Since the "description of the project" required by Article 5(2) is a means to that end, in that it provides the starting point for the assessment process, there is no reason to believe that the directive was seeking to be unduly prescriptive as to what would amount to an appropriate description of a particular project. The requirement in Article 5(2) (see page 89C to E) to provide "information on the site, design and size of the project" is, and is intended to be, sufficiently flexible to accommodate the particular characteristics of the different types of project listed in annexes I and II (Schedules 1 and 2 to the assessment regulations). It may be possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed.

90 If a particular kind of project, such as an industrial estate development project (or perhaps an urban development project) is, by its very nature, not fixed at the outset, but is expected to evolve over a number of years depending on market demand, there is no reason why "a description of the project" for the purposes of the directive should not recognise that reality. What is important is that the environmental assessment process should then take full account at the outset of the implications for the environment of this need for an element of for flexibility. The assessment process may well be easier in the case of projects which are "fixed" in every detail from the outset, but the difficulty of assessing projects which do require a degree of flexibility is not a reason for frustrating their implementation. It is for the authority responsible for granting the development consent (in England the local planning authority or the Secretary of State) to decide whether the difficulties and uncertainties are such that the proposed degree of flexibility is not acceptable in terms of its potential effect on the environment.

91 In *Tew* I said at page 97C that projects such as industrial estate developments and urban development projects have been placed "in a legal straitjacket" by the assessment regulations, in transposing the requirements of the directive into domestic law. The directive did not envisage that the "straitjacket" would be drawn so tightly as to suffocate such projects.

92 It has to be recognised that even if it was practical (despite the commercial realities described by Mr Ward) to prepare detailed drawings showing siting, design, external appearance, means of access and landscaping for every building within the proposed business park, the resulting environmental statement would be an immensely detailed work of fiction, since it would not be assessing the effect on the environment of any project that was ever likely to be carried out. All concerned with the

process would have to recognise that in reality such details could not be known until individual occupiers came forward for particular plots.

93 In my judgment, integrating environmental assessment into the domestic procedure for seeking outline planning permission, which acknowledges this need for flexibility for some kinds of building projects, is not contrary to the objectives of the Directive. There is no analogy between the procedure for obtaining outline planning permission, with certain matters reserved for detailed approval, and the procedure which was in issue in *Bozen*. In that case, not only was there no environmental assessment, the legislative act which authorised the project was generalised in the extreme, amounting to little more than a proposed programme, which was subject to preliminary feasibility assessments, see paragraphs 5, 71 and 79 of the Advocate General's opinion in that case. The European Court was also concerned with proposed "modifications to development projects". If such modifications have not been subjected to environmental assessment, the Court's conclusion that they should be "when by reason of their nature, size or location they were likely to have significant effects on the environment" (see paragraphs 40 and 49) is readily understandable. Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed, it is not accurate to equate the approval of reserved matters with "modifications" to the project. The project, as it evolves with the benefit of approvals of reserved matters, remains the same as the project which was assessed.

94 Much stress has been laid on the words: "In full knowledge of the project's likely significant impact on the environment..." in Directive 97/11, see page 89H. These words should not be regarded as imposing some abstract state or threshold of knowledge which must be attained in respect of all projects, but should be applied to the particular project in question. For some projects it will be possible to obtain a much fuller knowledge than for others. The directive seeks to ensure that as much knowledge as can reasonably be obtained, given the nature of the project, about its likely significant effect on the environment is available to the decision taker. It is not intended to prevent the development of some projects because, by their very nature, "full knowledge" (in the sense of an abstract threshold level of detail) is not available at the outset.

95 This does not give developers an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for

issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has "full knowledge" of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility, and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail, or refuse consent.

96 Having stated that the proper starting point was the assessment regulations, I am conscious of the fact that I have spent some time discussing the directive. I have done so to demonstrate that there is no basis for the submission that the application by a Member State of a procedure such as the United Kingdom's procedure for obtaining outline planning permission for projects which require environmental assessment is in some way inimical to the objectives of the directive.

97 With that introduction, I turn to the assessment regulations.

98 The full text of the relevant paragraphs in Schedule 3 is set out on pages 87E to 88C. The flexibility inherent in the directive's approach to "a description of the development proposed" is faithfully transposed into paragraph 2(a): the description must comprise "information about the site and design and size or scale of the development".

99 On any sensible interpretation of those words, one may provide "information about" those matters without providing every available piece of information about them.

100 That the description of the proposed development which must be provided under paragraph 2(a) need not to be exhaustive in terms of the information supplied is reinforced by paragraph 3(a) which enables, but does not require, the developer to include by way of explanation or amplification of (*inter alia*) the description of the development further information in the environmental statement about "the physical characteristics of the proposed development and the land use requirements during the construction and operational phases".

101 The role of the public in contributing to the "environmental information" which must be considered by the local planning authority (see regulation 2(1)) was emphasised in *Berkeley* above. Members of the public with local knowledge may well be able to add significantly to the information about the site, thus supplementing the "description of the development" provided by the developer in the environmental statement.

102 If the local planning authority or the Secretary of State is dissatisfied with the amount of information provided in the environmental statement about the site, design, size or scale of the project, they may under regulation 21 require such:

> "Further information (as) is reasonably required to give proper consideration to the likely environmental effects of the proposed development."

103 The fact that the developer then has to supply such further information does not mean that he will have failed to provide "a description of the development proposed" and thus failed to provide an environmental statement.

104 If one asks the question "how much information about the site, design, size or scale of the development is required to fall within 'a description of the development proposed' for the purposes of paragraph 2(a)?", the answer must be: sufficient information to enable "the main", or the "likely significant" effects on the environment to be assessed under paragraphs 2(b) and (c), and the mitigation measures to be described under paragraph 2(d).

105 In addition, the development which is described and assessed in the environmental statement must be the development which is proposed to be carried out and therefore the development which is the subject of the development consent and not some other development. An assessment of an illustrative masterplan, accompanying a "bare outline" application, which is not tied by condition to the resulting outline planning permission could not meet these requirements: see page 99C to E (cited above).

106 Whether the information provided about the site, design, size or scale of the development proposed is sufficient for these purposes is for the local planning authority, or on appeal or call in, the Secretary of State, to decide. I reject Mr Howell's submission that the issue is one for the court to decide, as a question of primary fact. That would be contrary, not merely to the structure of the regulations, but to the statutory Town and Country Planning framework of which they are but a part. Under the regulations it is for the local planning authority, or the Secretary of State, to decide whether a proposed development falls within the descriptions of the development set out in schedules 1 and 2, and in the case of the latter whether it would be likely to have significant effects on the environment: see the speech of Lord Hoffmann at page 429H to 430A in *Berkeley*. The local planning authority's or the Secretary of State's decision is subject to review on *Wednesbury* grounds. Regulation 4(2) requires the local planning authority or the Secretary of State to take the environmental information (which includes the environmental statement) into consideration before granting planning permission. Against this background the regulations plainly envisage that the local planning authority or the Secretary of State will also consider the adequacy of the environmental information, including any document or documents which purport to be an environmental statement.

107 The assessment regulations are part of a statutory planning framework which requires the local planning authority in dealing with an application to have regard to all material considerations: see section 70(2) of the 1990 Act above.

108 It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to review by the courts, but the courts will defer to the local planning authority's judgment in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; "environmental information" which has been provided pursuant to the assessment regulations.

109 There is no reason why the adequacy of this information, which includes the sufficiency of information about the site, design, size and scale of development should not be determined by the local planning authority: see paragraph 48 of circular 2/99 above.

110 The question whether such information does provide a sufficient "description of the development proposed" for the purposes of the assessment regulations is, in any event, not a question of primary fact, which the court would be well equipped to answer. It is pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality, of local planning policies and the essential characteristics of the various kinds of development project that have to be assessed.

111 I do not accept the applicant's argument based on regulations 2 and 3 of the applications regulations, see page 80D to G. Reserved matters as defined in those regulations are not "information necessary to describe the development" which may, as a matter of concession, be omitted from an outline application. Such details may be omitted precisely because they may not be necessary to describe some developments for the local planning authority's purposes. The local planning authority will need to be satisfied that the description of the proposed development in the outline planning permission is adequate, given that it will be able to impose conditions in respect of reserved matters so that matters of detail can be dealt with at a later stage.

112 It will be noted that an outline planning permission is defined as a planning permission for the erection of a building which contains "one or more reserved matters". Thus, a planning permission which simply reserves one matter, for example details of means of access or landscaping is still an outline planning permission. It is difficult to see why an application for outline planning permission that includes details of siting, design and external appearance, should not be able to provide the basis for an environmental statement containing "a description of the development proposed, comprising information about the site and design, size or scale of the development".

113 Mr Howell submits that reserved matters, details of the means of access or landscaping, are capable of having an effect on the environment, that is why they are reserved for subsequent approval. That ignores the fact that

the environmental statement does not have to describe every environmental effect, however minor, but only the "main effects" or "likely significant effects". It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, "losing the wood for the trees". What is "significant" has to be considered in the context of the kinds of development that are included in Schedules 1 and 2. Details of landscaping in an application for outline planning permission may be "significant" from the point of view of neighbouring householders, and thus subject to reserved matters approval, but they are not likely to have "a significant effect on the environment" in the context of the assessment regulations

114 The local planning authority are entitled to say, "We have sufficient information about the design of this project to enable us to assess its likely significant effects on the environment. We do not require details of the reserved matters because we are satisfied that such details, provided they are sufficiently controlled by condition, are not likely to have any significant effect".

115 That is the conclusion which was reached by the local planning authority in the present case. Mr Beckwith says this in his witness statement:

> "My judgment and that of the Council was that the information given enabled assessment of all the significant effects of the Kingsway Business Park development, and that it amounted to a description of the development comprising information on its site, design and size.
>
> The design information given was adequate for the significant environmental effects to be considered. The information included size and mass of the buildings, and the location of the structural planning. In the case of a substantial business park, I consider that such information is key to an understanding of the significant visual impacts of the development. While the number and position of apertures and choice of construction materials are all liable to affect visual impact to some slight degree, they will not alter the appraisal of the significant impacts of development. The simple point is that one can clearly envisage the design and size of the development."

116 ERM's expertise in conducting environmental assessment is not challenged. Mr Gilder, its Technical Director and Head of Planning, has provided a detailed witness statement to explain why, in his professional opinion, the environmental statement:

> "Considers a development proposal which was sufficiently well defined to enable a robust assessment of the potential significant impacts."

117 He said this:

> "The environmental statement considers an almost fully defined development. Given the overall scale of the development, any significant visual impacts will arise from the overall massing of the buildings not from the details of their elevational treatments. With the nature of the development clearly defined in the applications, I could make sensible assumptions about the minor details of the elevations, the colour of the surface finishes and the likely growth of the landscaping and hence the residual visual impacts that might affect nearby residents ...
>
> Across the whole proposed development, the level of detail defined was more than sufficient to identify the 'likely significant effects', both in relation to design and the worst case that could arise in relation to other environmental effects, for example, archaeology, ecology, traffic, noise, water and air pollution. In my view, only minor matters have been reserved for subsequent approval. The Council, when it considered the applications, was fully informed about the worst environmental impact that could arise and was able to make a decision in the knowledge that only minor matters of design and implementation were to be left as reserved matters."

118 The approach of Mr Beckwith and Mr Gilder accords with the advice in paragraph 82 of circular 2/99 above. Whilst it is important that a "full factual description" of the development is provided, it is equally important that an environmental statement should be prepared "on a realistic basis and without unnecessary elaboration".

119 It has to be remembered that the project which required assessment was an "industrial estate development", in this case a business park. Plainly, there is a great deal of information about the design of the business park in the documents forming part of the application, see above. Whether information should also be provided about the detailed design of the individual buildings that are to comprise the park is a separate question. In some circumstances such details might be required because they could reasonably be expected to have a significant effect on the environment. The local planning authority concluded that this was not so in the present case. That is not a surprising conclusion. The extent of the information supplied about the site, size and scale of the project is not criticised. The local planning authority had as much information about "the design" of an industrial estate development project of this kind as could reasonably have been expected.

120 Acknowledging the uncertainties that are inherent in a project of this nature and scale Mr Gilder explained that the environmental statement had considered "the worst environmental impacts which would arise from the development, the so-called worst case".

121 He explained that although the definition of the worst case might differ according to which environmental effect was being assessed:

> "Where details were to be reserved for subsequent approval by the local planning authority, the worst case was defined as the minimum standards which a reasonable local planning authority might require, taking account of all other matters already fully defined in the applications.
>
> In the case of construction impacts, such as noise and dust, the worst case was taken to be the minimum standards which would be required by the regulatory authorities under, for example, the Control of Pollution Act 1974 and/or the relevant British Standards."

122 Mr Howell criticised this approach, even though, as Mr Gilder explained, it is regarded as a "proper professional approach", which is regularly used by those engaged in the process of environmental assessment. Both the directive and the regulations recognise the uncertainties in assessing the likely significant effects, particularly of the major projects, which may take many years to come to fruition. The assessment may conclude that a particular effect may fall within a fairly wide range. In assessing the "likely" effects, it is entirely consistent with the objectives of the directive to adopt a cautious "worst case" approach. Such an approach will then feed through into the mitigation measures envisaged under paragraph 2(c). It is important that they should be adequate to deal with the worst case, in order to optimise the effects of the development on the environment.

123 Mr Howell pointed to the passage at page 98A of *Tew*:

> "If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a 'full' knowledge of the likely significant effects of the project."

124 He submitted that the environmental impact of the project could be significantly affected by detailed design at the reserved matters stage, for example, by the materials used—reflective glass, by the colours adopted, by a particularly "innovative" form of roof design, or a particularly striking "landmark" building.

125 The passage in *Tew* continues:

> "That is not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The directive and the assessment regulations require the likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms of Schedule 3, would conflict with the public's right to make an impact into the environmental

information and would therefore conflict with the underlying purpose of the directive."

126 Whilst the Council has deferred a decision on some matters of detail, which, as Mr Beckwith acknowledges, may have some environmental effect, it has not deferred a decision on any matter which is likely to have a significant effect, or on any mitigation measures in respect of such an effect.

127 It is true that at the reserved matters stage the council might theoretically approve a building in a particularly shocking colour, or with a particularly visually intrusive roof design, but that is not the test, since it can be satisfied that it is not likely to do so, hence the effect, for example, of a rainbow coloured building T, or a bizarre "landmark" building is not a "likely effect", let alone a "likely significant effect" on the environment.

128 Any major development project will be subject to a number of detailed controls, not all of them included within the planning permission. Emissions to air, discharges into water, disposal of the waste produced by the project, will all be subject to controls under legislation dealing with environmental protection. In assessing the likely significant environmental effects of a project the authors of the environmental statement and the local planning authority are entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority: see, for example, the assumptions made in respect of construction impacts, above. The same approach should be adopted to the local planning authority's power to approve reserved matters. Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the "likely significant effects", not every conceivable effect, however minor or unlikely, of a major project.

129 For all these reasons, I am satisfied that Mr Howell's primary submission that an application for outline planning permission does not satisfy the requirement in paragraph 2(a) of Schedule 3 to the assessment regulations because it does not provide "a description of the development proposed" is not well-founded.

130 I can deal very shortly with the remaining argument that the 1999 application for outline planning permission did not contain sufficient information about the design of the development. As is explained above, a great deal of information was provided in the application documents about the design of the business park, even though details of the design and external appearance of individual buildings were not given. Taking building T as a convenient example, since it is the largest proposed building in the business park, its proposed use (B8), its siting, its size and scale are all known. In particular its principal dimensions, including its height to eaves from a defined plateau level are known. The plot size is known, together with the number of car parking spaces that are to be accommodated with the building on that plot. The position of the spine

and estate roads, from which it will obtain access, are fixed. The area that is left for landscaping within the plot once access, servicing and car parking requirements have been met, can be seen on the masterplan and other plans contained in the Development Framework. Those plans also identify areas for structural landscaping around the boundaries of the plot. The Development Framework describes in some detail how these areas are to be treated. It also describes the kinds of materials, colours and elevational treatments that are likely to be adopted, see above.

131 The Council has power to ensure that the details which come forward at the reserved matters stage are in "substantial accordance" with the Development Framework: see condition 1.7 above. It will be noted that the effect of condition 1.7 is that even where siting and means of access are reserved they will have to be substantially in accord with the Masterplan. Armed with all of this information about the proposed building on plot T, ERM were able to carry out a comprehensive assessment of its likely significant effects on the environment including, for example, its likely effect on the setting of listed buildings, and the public were able to make informed comments about the reliability of that assessment and to suggest further mitigation measures if they wished.

132 Mr Howell's criticisms of the proposed mitigation measures illustrates the unreality of the applicant's approach. It is said, that there is no "description of the measures proposed", merely a statement of objectives. This criticism stems from an overliteral interpretation of the words in paragraph 2(d). In the case of the bats and the greater crested newts that may be on this site (see above), I do not see why the "measures envisaged to avoid, reduce or remedy" possible harm to them should not comprise the undertaking of further surveys, discussion of the findings of those surveys with English Nature and devising detailed mitigation in the light of those discussions. Where there are well established mitigation techniques for dealing with disturbance to the habitat of certain creatures, such a description will be perfectly adequate. Indeed, it is difficult to see what more could be done. As Mr Beckwith says:

> "The areas where further survey work is required are areas in which survey work had already been carried out and the results published, for example for the presence of badgers, bats or voles. But nature is dynamic and the presence or population of such species could (and does) vary over time. Bats do not permit themselves to the spot where they happen to be seen at a particular point in time. It is entirely appropriate, responsible and reasonable to ensure that surveys are carried out prior to the commencement of work on each development plot. The involvement of expert bodies such as English Nature is a reasonable approach and one that I would have thought most reasonable members of the public would expect."

133 It is to be noted that neither English Nature nor the Greater Manchester Ecology Unit objected to the application. They expressed certain detailed concerns. The Outline Ecology Management Plan was then prepared as a response to those concerns. Mr Beckwith's report explains that those bodies were satisfied with the response, together with the conditions that were imposed on the outline planning permission.

134 In short, there was "full knowledge", in the sense of there being available as much information as could reasonably be expected at this stage, about this kind of mitigation measure.

135 I repeat the view expressed in *Tew* that "full knowledge" does not mean "every conceivable scrap of information" about a project. Such an approach would not assist local planning authorities in identifying the likely significant environmental effects of major projects, and would merely serve to obstruct the development of such projects to no good purpose.

136 I therefore declare the respondents the victors in round 2 and dismiss this application for judicial review.

137 In conclusion I would like to pay tribute to the very able submissions of all leading counsel.

H17 *Solicitors*—Fatema Patwa, Smethwick; Borough Council; Pinsent Curtis.

R. (ON THE APPLICATION OF BEDFORD) v LONDON BOROUGH OF ISLINGTON

Queen's Bench Division (Administrative Court)

(Ouseley J.): July 31, 2002[1]

[2002] EWHC 2044 (Admin); [2003] Env. L.R. 22

H1 *Environmental impact assessment—judicial review—whether Environmental Statement so deficient that could not be regarded as an "Environmental Statement" within the meaning of Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999—whether criticisms as to assessment of impacts showed an error of law or breach of duty on the part of the Local Planning Authority*

H2 The interested party, Arsenal FC ("A"), planned to relocate its stadium to a site largely, but not wholly, owned by the defendant local authority ("LBI"). The proposed development included the new stadium, the relocation of a waste recycling centre, and the redevelopment of the existing stadium, and was the subject of planning briefs and a scoping opinion for the required Environmental Statement ("ES"). There was also a range of financially enabling development, including housing, business and community uses. The ES was subject to extensive public consultation, which included consultation on draft scoping reports, the placing of all application documents and the ES on public deposit in a number of locations, making these available on a CD-Rom, free or for a nominal charge, and the posting of the main report of the ES and key planning application documents on LBI's website. LBI instructed a number of consultants to provide it with further information in relation to this material, and the Institute of Environmental Management and Assessment was asked to provide its appraisal of the calibre of the ES. Following these, and other aspects of a very extensive consultation exercise, LBI's officers recommended that planning permission be granted, despite the proposals not complying with Unitary Development Plan policies in several respects. A resolution to grant was made following a Council meeting in December 2001, and permission granted in May 2002, following the conclusion of a "s.106 Agreement". Permission to seek judicial review challenging the resolution to grant permission was refused on the papers in April 2002, primarily on the basis that the challenges were effectively disputes as to planning merits which it was not for the court to resolve. A renewed application was made and the appli-

[1] Paragraph numbers in this judgment are as assigned by the court.

cations and consolidated grounds were ordered to be heard together at a substantive hearing.

H3 There were a great many grounds for challenge, including: that a Public Inquiry should have been held into the proposals; the non-disclosure of a consultant's report on financial matters; procedural unfairness at the December 2001 Council meeting and resulting from the late supply of information; criticism of the s.106 Agreement; and criticism of LBI's officers' reports. One such source of criticism was that e-mail correspondence allegedly showed that officers had views which were not included in the subsequent reports, so that councillors were alleged to have been misled. These views were submitted to include concerns that the noise and vibration impacts of the stadium use had not been adequately addressed. Another was that contaminated land surveys were not required, when under the eventual planning conditions remedial schemes were required instead. A further ground was that there were such deficiencies in the ES that it could not be regarded as an ES for the purposes of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293). The alleged deficiencies included that it had been assessed on a higher modal split between non-car and car transport (88:12) than that on which LBI considered transport impact (80:20); that the potential loss of waste-handling capacity in the area had not been specifically addressed; the concerns as to noise impact and contaminated land; and dust from the construction process.

H4 **Held,** in dismissing the application:

H5 (1) The criticisms made as to the e-mail correspondence in respect of noise could not support the view that the officers had views which were not properly represented to LBI in a way which meant that the Council was significantly misled. Nor could they stand in the light of the evidence that these concerns had been addressed by a combination of noise conditions and a noise protocol forming part of the s.106 Agreement. The final view on likely significant effects was set out in the overview report, rather than the e-mail correspondence.

H6 (2) Extensive conditions dealing with contaminated land remediation had been imposed, and the scheme for remedial works would show what surveys, if any, were necessary. The difficulty with the type of site in question was that, as the ES made clear, the location of all of the contaminated land problems would not become known until the works were started. It was clear that this was not seen as a likely significant effect and that the requirement for a scheme of working, which in reality may include a survey as work proceeded, had been considered sufficient to protect health or amenity.

H7 (3) The ES was not just the document to which the developer referred as an "environmental statement"; it was that document plus the other information which the Local Planning Authority thought it should have in order for the document to be an environmental statement. Accordingly, it was the Local Planning Authority which judged whether the documents together provided what Sch.4 of the 1999 Regulations required by way of a description or analysis of the likely significant effects (*R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 406 and

R. (on the application of Barker) v Bromley LBC [2001] EWCA Civ 1766). It was quite clear from the material before the court that LBI had concluded that the documents which it had received enabled it to say that it had before it an environmental statement. The Mayor of London had also been satisfied with it. It was inevitable that those who were opposed to the development would disagree with, and criticise, the appraisal, and find topics which mattered to them or which could be said to matter, which had been omitted or to some minds had been inadequately dealt with. Some of the criticism might have force on the planning merits. But that did not come close to showing that there was an error of law on LBI's part in treating the document as an environmental statement or that there was a breach of duty in reg.3(2) on LBI's part in granting planning permission on the basis of that environmental statement.

H8 (4) The criticism of the transport modal split in the ES was one of the few grounds which might have been considered arguable, though it could not succeed on its substantive merits. The s.106 Agreement required A to work towards a modal split of 88:12 compared to 80:20. In effect, LBI argued that the ES had assessed the worst case in terms of non-car modes (88 per cent); so that aspect had been covered in terms of pedestrian impact and bus and tube travel. As public transport improvements were implemented under the s.106 Agreement, the car split would be reduced in the longer term to 12 per cent. In effect, therefore, a likely effect in the short to medium term, namely the extra 8 per cent car split, had not been assessed. However, LBI was entitled to take the view that the anticipated medium term continuance of the same level of traffic in the same area, equivalent to 20 per cent split to car, but with a greater degree of dispersion, could not constitute a "likely significant effect" of the development and that the ES did cover, therefore, the likely significant effects. An absence of significant change was not a significant effect which required assessment. That in effect was an aspect which had been assessed as the baseline or existing condition, and could not be regarded as irrational.

H9 **Legislation referred to:**

Local Government Act 1972, ss.100D and Sch.12A

Town and Country Planning Act 1990, ss.12, 21, 36, 39, 54A and 70

The Town and Country Planning General Regulations 1992 (SI 1992, No.1492), reg.3

The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293), regs 2(1), 3(2), 13(1), 19, 21 and Sch.4

H10 **Cases referred to:**

Allen v City of London [1981] J.P.L. 685

Bushell v Secretary of State for the Environment [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608; 78 L.G.R. 269; (1980) 40 P. & C.R. 51; [1980] J.P.L. 458; 125 S.J. 168

City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447; [1998] 1 All E.R. 174; 1998 S.C. (H.L.) 33; 1998 S.L.T. 120; 1997

S.C.L.R. 1112; [1997] 3 P.L.R. 71; [1998] J.P.L. 224; [1997] E.G.C.S. 140; (1997) 94(42) L.S.G. 31; (1997) 141 S.J.L.B. 228; [1997] N.P.C. 146; 1997 G.W.D. 33–1693

Davies v London Borough of Hammersmith and Fulham [1981] J.P.L. 682

Great Portland Estates v Westminster City Council [1985] A.C. 661; [1984] 3 W.L.R. 1035; [1984] 3 All E.R. 744; (1985) 50 P. & C.R. 34; [1985] J.P.L. 108; (1984) 81 L.S.G. 3501; (1984) 128 S.J. 784

Hibernian Property Co v Secretary of State for the Environment (1974) 27 P.&C.R. 197

IBM (UK) Limited v Rockware Glass Ltd [1980] F.S.R. 335

McMichael v United Kingdom (1995) 20 E.H.R.R. 205

R. v Secretary of State for the Environment Ex p. Slot [1998] 4 P.L.R. 1; [1998] C.O.D. 118; [1998] J.P.L. 692; [1997] N.P.C. 168

P & O Property Holdings Ltd v Norwich Union [1994] P. & C.R. 261

Padfield v Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694; 112 S.J. 171

Phillips Petroleum Co UK Ltd v Enron Europe Ltd [1997] C.L.C. 329

R. (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions [2002] EWCA Civ 735; [2002] 1 W.L.R. 2515; [2002] H.R.L.R. 37; [2002] 2 P. & C.R. 28; [2002] J.P.L. 1379; [2002] 22 E.G.C.S. 135; (2002) 99 (26) L.S.G. 39; (2002) 146 S.J.L.B. 146; [2002] N.P.C. 73

R. (on the application of Barker) v Bromley LBC [2001] EWCA Civ 1766; [2002] Env. L.R. 25; [2002] 2 P. & C.R. 8; [2001] 49 E.G.C.S. 117; [2001] N.P.C. 170

R. (on the application of J A Pye (Oxford) Ltd) v Oxford City Council [2001] EWHC (Admin) 870; [2002] 2 P. & C.R. 35; [2002] P.L.C.R. 19

R. (on the application of J A Pye (Oxford) Ltd) v Oxford City Council [2002] EWCA Civ 1116; [2003] J.P.L. 45; [2002] N.P.C. 107

R. (on the application of Lichfield Securities) v Lichfield District Council [2001] EWCA Civ 304; (2001) 3 L.G.L.R. 35; [2001] 3 P.L.R. 33; [2001] P.L.C.R. 32; [2001] J.P.L. 1434 (Note); [2001] 11 E.G.C.S. 171; (2001) 98(17) L.S.G. 37; (2001) 145 S.J.L.B. 78

R. v London Borough of Camden Ex p. Cran [1995] R.T.R. 346; 94 L.G.R. 8

R. v North Devon Health Authority Ex p. Coughlan [2001] Q.B. 213; [2000] 2 W.L.R. 622; [2000] 3 All E.R. 850; (2000) 2 L.G.L.R. 1; [1999] B.L.G.R. 703; (1999) 2 C.C.L. Rep. 285; [1999] Lloyd's Rep. Med. 306; (2000) 51 B.M.L.R. 1; [1999] C.O.D. 340; (1999) 96(31) L.S.G. 39; (1999) 143 S.J.L.B. 213

R. v Rochdale MBC Ex p. Brown [1997] Env. L.R. 100; [1997] J.P.L. 337; [1997] C.O.D. 74

R. v Rochdale MBC Ex p. Milne [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note); [2001] J.P.L. 470; [2000] E.G.C.S. 103

R. v Secretary of State for the Home Department Ex p. Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; [1993] 3 All E.R. 92; (1995) 7 Admin. L.R. 1; (1993) 143 N.L.J. 991

Kingsley v Secretary of State for the Environment, Transport and the Regions (2001) 82 P. & C.R. 9; (2000) 97(45) L.S.G. 43

H11 **Policy referred to:**

Planning Policy Guidance Note (PPG) 12: "Development Plans and Regional Planning Guidance"

H12 *Mr R. McCracken*, *Mr G. Jones* and *Mr J. Pike*, instructed by Earthrights, for the claimants.

Mr R. Purchas Q.C. and *Ms K McHugh*, instructed by London Borough of Islington Legal Services, for the defendant.

Mr D. Elvin Q.C. and *Mr D. Kolinsky*, instructed by Gouldens, for the interested party.

JUDGMENT

OUSELEY J.:

Introduction

1 In 1913 Arsenal Football Club ("Arsenal FC") moved from Woolwich to Highbury Stadium in the London Borough of Islington. The advent of all-seater stadia for Premiership clubs caused a dramatic fall in its ground capacity, the seat revenue from which is a vital part of its national and international success. It concluded that the existing stadium site could not be redeveloped for a stadium of appropriate size, nor could the existing stadium be expanded to give it a capacity comparable to that of the club's major national and international rivals. Accordingly it needed to relocate. Arsenal FC wished to remain close to what for nearly 90 years has been its home location and is the largest concentration of its supporters, albeit but a small percentage of the total.

2 After consideration of a number of alternatives, it concluded that a site at Ashburton Grove, Highbury, near to its current ground, afforded it the best opportunity. The site is largely, but not wholly, owned by the London Borough of Islington.

3 The club's proposals emerged publicly and formally in 1999. The London Borough of Islington produced planning briefs for public consultation and a scoping opinion for the Environmental Statement which this development would need. The development would encompass not just the new stadium at Ashburton Grove, but redevelopment at nearby Lough Road to accommodate a waste recycling centre, to be displaced from Ashburton Grove and also the redevelopment of the existing Highbury stadium site. So three sites close to one another near Highbury were involved. The range of financially enabling or supportive development involved included housing, business and community uses. The combined proposals were to provoke controversy and division amongst residents near the three sites, and indeed amongst supporters of the club.

4 The Environmental Statement produced by the club is a lengthy document which was subject to extensive public consultation. Eventually Islington's officers recommended that, although the proposals did not comply in a number of respects with UDP policy, planning permission should be granted.

5 Following a Council meeting on December 10, 2001, at which local residents on both sides and the developer were heard, Islington resolved to grant planning permission for all three developments. On May 30, 2002, following the conclusion of an Agreement under s.106 of the Town and Country Planning Act 1990, Islington granted the planning permissions.

6 Although earlier threats of judicial review proceedings had not come to pass, judicial review proceedings which challenged the resolution of December 10, 2001 were launched by the Islington Stadium Communities Alliance ("ISCA") and four individual local residents. Sullivan J. refused permission on paper on April 19, 2002. The grounds before him were seen to have no merit and to amount to no more than a dispute about the planning merits which it was not for the court to resolve.

7 A renewed application for judicial review was heard by Richards J. On May 30, 2002, he ordered that the applications for permission should be dealt with at the same time as the substantive hearing. He ordered consolidated grounds to be served which would cover both matters newly raised before him and those previously raised before Sullivan J. insofar as they were still pursued.

8 The matter now before me is brought by only two residents. The other claimants have fallen by the wayside. The consolidated grounds in part were not really pursued, notably to the extent that they raised human rights grounds, which were misconceived and unsupported by any evidence. A number of additional grounds were sought to be raised. The grounds raised were refined and altered in the skeleton argument, and before me, from those set out in the claimants' skeleton argument. No possible point or permutation of a point has been overlooked by counsel for the claimants. I hope I do justice to the variety and ingenuity of his multifaceted arguments. They have put the decision-making process of the London Borough of Islington through a demanding legal audit as if a roving commission were being conducted on behalf of all objectors. I have examined all of those points. In the end I have concluded that these applications fail. Most of the points raised are indeed unarguable.

The Background

9 It is necessary in this case to set out a little of the process of the decision making in the light of the range of allegations which have been made, because one matter is clear. The London Borough of Islington has been concerned from the outset to consult very widely about this proposal at all stages and has been very open about its thought processes. Arsenal FC, too, has properly been concerned to consult widely in its own way. I take the following description of the processes briefly from the witness statement of Mr Harrington, the Council's Planning Officer who had overall responsibility for the three applications.

10 Mr Harrington describes how he established the Ashburton Grove Highbury Review Group after the proposals emerged. This group comprised around twenty representatives of community and business groups, Council officers, councillors and representatives of Arsenal FC. It has met a total of 23 times. Regular participants included the first claimant, Mr Bedford, and a number of other representatives who were at one time part of the original proceedings.

11 Mr Harrington describes the need to prepare supplementary planning guidance ("SPG") in respect of the proposals so as to guide the anticipated applications and to provide a basis for engaging local people and businesses in the debate about the proposals. He describes the very extensive arrangements put in place for consulting on the draft SPG. Invitations were sent to residents and property owners within the Ashburton Grove area. A summary leaflet was sent to 15,000 addresses and was displayed elsewhere. Newspaper advertisements were published and posters were put up. Three public meetings were held and there were discussions in neighbourhood forums. The draft SPG and the results of consultation were considered by the Council and the SPG was adopted in August 2000.

12 It was evident early on that an Environmental Statement would be required. In order to facilitate and inform the Council's approach, the scoping opinion which is envisaged by the Environmental Statement Regulations was initiated by the preparation of draft scoping reports in June and September 2000. Upon these reports the Council again consulted local community and business representatives and a variety of other interested parties. The June scoping report was also considered by the review group and the consultation responses were all taken into account when the scoping opinion for the Environmental Statement was adopted in October 2000.

13 The main Environmental Statement was produced in May 2001. It dealt with all three sites and comprised a main report of 252 pages, 13 technical annexes and a non-technical summary. As the plans were revised, supplements to the Environmental Statement were produced. All the application documents and the Environmental Statement were placed on deposit for public inspection in a number of locations. The application material was placed on CD-Rom which was made available free of charge to members of the review group and, subject to a nominal charge, to others living within a wide area around the three sites. The main report of the Environmental Statement and key planning application documents were posted on the Council's web site. The Council also instructed a number of consultants to provide it with further information in relation to this material. In addition, the Institute of Environmental Management and Assessment was asked to provide its appraisal of the calibre of the Environmental Statement, which it did. The Environmental Statement was said by the Institute to have sections that were good and sections that were satisfactory. None of the sections of the Environmental Statement as it finally stood was subject to significantly critical comment. The consultation responses were then considered by the Council.

14 The planning applications themselves were the subject matter of a very extensive consultation. These included the review group, drop-in centres, internet

information, public meetings, the leafleting of 45,000 local individuals, and various other projects. The Council received more than 2,000 comments in response to the first set of applications and nearly that number in response to the later variations. These were summarised in the reports to the Council meeting of December 10, 2001. The Council reports were also sent out to a number of statutory and other interested bodies, and were posted on the Council's web site and were made available on request at the same time. This was ten days before the meeting on December 10, 2001.

15 It is plainly a very extensive process that has been carried out. There is further detail which supports the thrust of that summary in other witness statements before me. I do not go further into them, but for those who are interested in the history and evolution of the Environmental Statement, that can be found in the first statement of Mr Hepher, the Arsenal FC Planning Consultant.

A Public Inquiry

16 From that background I turn to the first issue which is raised on behalf of the claimants. This is whether there should have been a public inquiry into the proposals. There were a number of bases upon which it was said that there ought to have been such an inquiry. The first basis concerned the way in which the proposals related to the UDP and to the UDP review. The point of law here was not entirely clear because this was not a challenge to the UDP or to the UDP review process on account of the failure of the UDP review to contain a proposal or policy for Arsenal FC to relocate to the Ashburton Grove site. The challenge is a challenge to the resolution to grant, and to the actual grant of planning permission. It is said that there was a failure to comply with a duty in relation to the UDP review. Mr McCracken said that the breach of that duty could lead to the quashing of the planning permission because were the law otherwise, the law would be a toothless tiger and the claimants would be without effective remedy for such a breach of duty as there was in the Council's failure to put the Arsenal FC proposal through the UDP review process.

17 Mr McCracken recognised that that was a bold submission, but submitted that the statutory structure in relation to the UDP and s.70 of the 1990 Act led to that conclusion. The starting point for that argument is the nature of the obligation on a Local Planning Authority in relation to a UDP.

18 Sections 12 and 21 of the 1990 Act were referred to. Section 12 so far as relevant provides:

> "(1) The Local Planning Authority shall, within such period (if any) as the Secretary of State may direct, prepare for their area a plan to be known as a unitary development plan.
> (2) A unitary development plan shall comprise two parts.
> (3) Part I of the unitary development plan shall consist of a written statement formulating the authority's general policies in respect of the development and use of land in this area.
> . . ..

(4) Part II of a unitary development plan shall consist of—

(a) a written statement formulating in such detail as the authority thing appropriate (and so as to be readily distinguishable from the other contents of the plan) their proposals for the development and . . . use of the land in their area . . ..

. . ..”

19 Section 21 provides so far as relevant:

“(1) A Local Planning Authority may at any time prepare proposals—

(a) for alterations to the unitary development plan for their area; or

(b) for its replacement.

. . ..”

20 Mr McCracken also relied on the decision of the House of Lords in *Great Portland Estates v Westminster City Council* [1985] A.C. 66, 674D–G, where Lord Scarman said:

> “The statute requires that a local plan shall formulate in such detail as the council thinks appropriate their proposals for the development and use of land: s.11 and Sch.4, para.11(2) of the Act of 1971. If a Local Planning Authority has proposals of policy for the development and use of land in its area which it chooses to exclude from the plan, it is, in my judgment, failing in its statutory duty. An attempt was made to suggest that the non-statutory guidance in this case went only to detail, as to which the council is given a discretion. But the council provides the answer to this point; it speaks in its guidelines of its non-statutory policies. In the Court of Appeal, Dillon L.J. demonstrated by his quotations from paras 3.2, 3.3 and 3.4 of the non-statutory guidelines that they do indeed, as the council itself says, contain matters of policy relating to the control of office development outside the central activities zone.
>
> It was the duty of the council under Sch.4 of the Act of 1971 to formulate in the plan its development and land use proposals. It deliberately omitted some. There was therefore a failure on the part of the council to meet the requirement of the Schedule. By excluding from the plan its proposals in respect of office development outside the central activities zone the council deprived persons such as the respondents from raising objections and securing a public inquiry into such objections.”

21 Mr McCracken submitted that the upshot of all this was to impose a requirement on the Local Planning Authority to include its proposals and policies in the UDP. Breach of that duty by a failure to put policies or proposals through a UDP could lead not just to the quashing of the UDP but also to the quashing of a planning permission in order that an effective remedy be provided for that breach in a case such as this. In support of that he relied on a passage from a

decision of the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 97, 1030B–D:

> "It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act."

22 Mr McCracken also referred to PPG12 entitled "Development Plans". This deals with the plan led system and in paras 2.22 and 2.23 deals with the importance of reviewing plans to make sure that they are up to date so that site allocations can be re-examined and alternative uses considered. It was expected that plans should be reviewed in full at least once every five years, but that partial or topic reviews could take place on a more frequent basis.

23 In order to counteract arguments in relation to the UDP timescale, Mr McCracken referred to paras 6.31 and 6.32 of PPG12. It says that where the plan is very close to adoption when new information becomes available, it may be preferable to adopt the plan and then to start an early review. "Close to adoption" meant where the modifications process had already been completed and where no further modifications were expected to be made. If a plan is adopted where it is too late to consider new information in the course of the plan, the guidance envisages that an early review could be instituted.

24 In his criticism of the local authority's approach, Mr McCracken referred to an e-mail in which the question of whether the proposal by Arsenal FC should be dealt with through the UDP review was the subject matter of legal advice. The e-mail, which is dated April 30, 2001, reads:

> "Thanks to Graham H for forwarding Richard Buxton's letter on behalf of ISCA threatening to Judicially Review the Ashburton Grove Planning Brief unless we revoke it in 14 days—on the grounds that the Brief is inconsistent with UDP policy (*i.e.* nature Conservation, Design and Employment policies for Ashburton Grove which may be breached by the proposals). RB points to PPG12 which advises that Briefs should be consistent with the UDP, and he asserts that LBI used the Brief, rather than changes to UDP policy, to 'promote' the Arsenal relocation proposals in order to avoid public scrutiny.

I have prepared a draft response which I attach. I understand the point RB makes. Our Leading Counsel advised in November 1999 that 'There is absolutely no doubt that proposals of this scale should normally evolve through the development plan process . . .. SPG is normally intended to supplement or elaborate on UDP policies—what is proposed here is wholly different'. However, bearing in mind the advanced stage of the UDP Review when the Arsenal relocation proposals emerged, and the fact that other arrangements for full public participation could be made, Counsel advised that the best course would be to proceed by way of a Planning Brief and planning application, not via the UDP. The UDP Inspector agreed with this approach when objectors raised Arsenal related issues during the UDP Inquiry (but he did not have much detail about the proposals or the UDP policies affected in reaching this conclusion). In the circumstances I think it is very unlikely that a JR seeking revocation of the Brief will succeed. Even if it does, it will not debar the Council from considering all the issues in the Brief in determining the applications, although they will carry less weight.

. . ..''

25 The question of whether Arsenal FC's proposal should be put through the UDP review was considered by the Local Planning Authority and its explanation was given to the UDP Inspector. The UDP Review Plan Inspector also considered the issue. Islington said to the UDP Inquiry:

> ''This proposal presented a dilemma from the UDP point of view, particularly as the loss of employment land at Ashburton Grove would be a departure from the Plan. It was decided not to include Arsenal's proposals in the Plan for the following reasons:
>
> - inclusion of the proposal would amount to an endorsement of the scheme, and this would be premature without knowledge of full details of the club's proposals.
> - inclusion would tend to sideline consideration of other important planning issues, and would delay adoption of the new plan.
> - the best way to judge a scheme of this complexity is to carry out a comprehensive assessment of its benefits and disadvantages, as measured against the policies and objectives of the UDP. This will help the Council (or the Secretary of State if the scheme is called in) to make an informed decision.''

26 At para.17 the London Borough of Islington continued by making clear how it saw the UDP review relating to the proposal:

"LB Islington Response

The Council accepts that proposals of this scale should normally evolve through the development plan process, in accordance with advice in PPG1 and PPG12. However, AFC's proposals are unique for Islington, in terms of both their scale and complexity, and first emerged last November (after proposed changes were first put on deposit at the First Deposit Stage). The Council, therefore, took the view that it would be inappropriate to introduce these major proposals at such a late stage in the UDP process. In the circumstances, the only ways in which the proposals could emerge properly through the UDP process would appear to be by (a) abandoning the review and starting again or (b) incorporating AFC's proposals in the next review of the UDP. The Council takes the view that either of these courses of action would be highly undesirable. Abandoning the review would prevent the Council from having an up to date development plan. Waiting for the next review in five or six years time would be too late for the club, which, as the Council understands, has a strong business case for a larger stadium to be open by August 2004. Without knowledge of full details of the proposals, which are only now emerging, it would continue to be difficult for the Council to promote the proposals via the development plan process."

27 The Inspector's comment is set out in his report:

"A possible relocation of the Arsenal FC stadium to Ashburton Road and the associated 'knock on' effects that may have on the Lough Road/Eden Grove area would provide a common linking theme to those three parts of the larger area referred to as the 'Holloway Transverse'. This possible relocation and associated development has not however been included in the review of the UDP for reasons set out in the Council's responses (see paras 49–50 of IS/C/General/1, paras 16–19 of IS/R/Proposals/2, para.15 of IS/R/Implementation/2 and para.20 of IS/O/Closing/3). Given the interim nature of the stadium relocation proposal, I concur with the approach the Council has taken on this matter in the review Plan."

28 It can be seen that the consideration given to this matter in the e-mail is consistent with what the local authority placed before the UDP Inspector, and consistent with the view to which he has come.

29 The relationship between the two was also considered in the Overview Report, Report A, to the Council on December 10, 2001:

"7. **Planning Policy**

Unitary Development Plan

7.1 Islington's Unitary Development Plan ('UDP') was adopted in 1994. It is the Council's development plan. Section 54A of the Town and Country Planning Act requires that planning applications shall be determined in accordance with the Plan, unless material considerations indicate otherwise.

7.1.1 The Council is currently reviewing its UDP. Arsenal's proposals emerged in the summer of 1999, after the proposed changes to the UDP were first placed on deposit for formal objection in June 1999. The Council did not know whether or not the proposals should be supported in principle. Furthermore, it was advised that should LBI have wanted to promote the proposals through the development plan process, it would have had to either abandon the review process and start again or wait for the next review of the UDP in around five years time.

7.1.2 Sometimes unexpected proposals emerge that are not provided for in the Plan, and in these cases the UDP provides the best (indeed, only) policy framework by which these proposals should be judged. Officers consider that, in the circumstances, the best way of responding to the club's proposals is within the policy framework set by the UDP. This approach was endorsed by the Inspector who presided over the Local Public Inquiry into objections to the proposed changes to the UDP, when he accepted that the uncertainties that apply to the proposed development package justify not having made it a proposal of the Plan.

. . ..

7.14 The review of Islington's UDP has reached an advanced stage, having had objections to the proposed changes considered at a Public Local Inquiry, and the subject of an Inspector's Report, which recommends further modifications to the Plan. The Environment and Conservation Committee agreed responses to the Inspector's report at its meeting on the June 25, 2001 and modifications were placed on deposit over the summer. The Policy Committee is being recommended to adopt the revised UDP at its meeting on the December 13, 2001 and it expected that the Council would adopt the revised UDP in mid January 2002.

. . ..

7.16 A number of the UDP policies reflect the Council's corporate priorities and strategies. These strategies are referred to, as appropriate, throughout this and the other reports."

30 Mr Hepher, in his first witness statement at paras 3.2(a) and (b), refers also to reasoning which would justify (at least on planning merits) the approach taken by Islington.

31 I do not accept Mr McCracken's submission. First, the duty under s.70 of the 1990 Act to determine applications made to a Local Planning Authority is a significant part of the Act. Whilst by virtue of s.54A the adopted UDP is the plan in

accordance with which decisions must be made in the absence of other material circumstances, the decision maker's obligation under s.70 does not simply operate after the adoption of a development plan. It is not suspended while a review plan is in preparation; nor is it suspended in relation to some category of major development which does not comply with the plan for so long as a review plan is going through its statutory processes. There is no such statutory provision. It would be a perverse reading of the statutory duty to determine an application, to hold that that duty in such circumstances was either suspended or was one which could only lead to a refusal of permission. Although Mr McCracken submitted that the discretion to which the *Padfield* principle would apply was that contained in s.70, the reality of his submission was that there would be no duty at all to determine an application by way of grant or refusal; there would simply be an obligation to do nothing or to refuse permission, notwithstanding any view that might be formed in relation to its merits.

32 It would mean that no decision could be made, and certainly no grant of planning permission made, so long as the review process of a plan continued. This so-called "discretion" in s.70 is however a duty to form a planning judgment; it is not a discretionary power to decline to determine applications.

33 Indeed, given the emphasis which Mr McCracken placed on the possibility of partial or topic reviews more frequently than the five-year cycle envisaged in PPG12, it is difficult to see how the effect of his submissions is confined to the period when the plan is in the process of being reviewed. It would be equally applicable where it could be said that a review or topic plan should be prepared and that a further review should have been under way. I do not consider that any such approach is warranted by the two related but distinct duties within the Act in relation to plan-making and planning application determination.

34 Moreover, proposals which are omitted from a UDP when they should be in it do not become for that reason unlawful. They do not become proposals the existence of which is to be ignored. They might become a basis for a call-in; but it is important to remember that there are two duties, notwithstanding that there is an interaction between plan making and decision taking. Mr McCracken's submissions involve a misunderstanding of the effect of the duty to include policies and proposals in the plan.

35 Second, there is no reason in law why a Local Planning Authority cannot determine applications while a UDP is progressing. The fact that it might do so in a way which pre-empted the independent scrutiny which a UDP Inspector's views might provide is a relevant factor for the Local Planning Authority to consider in relation to the exercise of its s.70 powers. But it is perfectly clear on the authorities that even where an Inquiry Inspector is seized of the matter as a proposal, the Local Planning Authority can nonetheless grant permission and so preempt any recommendation either way by the Local Plan Inspector. The mere fact that a UDP review is going through its processes does not mean that a major proposal, which, subject to timing, could form part of the UDP review, must be included in the plan or, failing that, that an inquiry must under some guise (statutory or non-statutory) be held into the proposal.

36 I was referred to two authorities which deal with the interaction between decision making and plan making. In *Davies v London Borough of Hammersmith and Fulham* [1981] J.P.L. 682, CA, Stephenson L.J. said:

> "That, he thought was common ground between counsel in this case, except that Mr Wilkie submitted that a local authority should never override an objection, that was to say, override or make impracticable the carrying out or enforcement of an objection to a development plan or part of it, except in circumstances of real urgent necessity. For instance, if this was a dangerous structure requiring to be pulled down for the safety of people, that would be a reason which would justify the council in doing what it did; but something of that sort it was argued, was required before a council acting in one capacity would deprive itself of the power to give effect to an objection made to it in another capacity.
>
> However, Mr Ouseley had submitted for the respondent council that there was no such exception, no such special requirement and, for his part, he agreed with him. It could not be said that because this decision was not a requirement of urgent public safety, it could not be justified and must be so unreasonable that no reasonable authority could have come to it. The decision must be considered in the light of the existence of the objections being made at the local inquiry, but if those objections were considered it did not follow that the decision was perverse or unreasonable and, this decision taken, as Woolf J. had gone on to find, for economic reasons, was not unreasonable and he agreed with the learned judge's decision on that part of the case."

37 That decision is also supported by the decision of Woolf J. in *Allen v City of London* [1981] J.P.L. 685.

38 If it be the case that a Local Planning Authority can grant permission for a proposal when the Local Plan Inspector is seized of an objection or proposal in the plan related to it, even more so can the Local Planning Authority do it where the matter is not actually before the UDP Inspector.

39 Third, in order for a complaint about the way in which a policy or proposal has been dealt with in the plan-making process, to constitute a basis upon which the grant of planning permission for it can be challenged, it is the discretion in relation to that latter decision-making process which has to be attacked; it would have to be shown that there was a failure to consider the possible advantages of the proposal first going through the UDP process, or that the only rational decision would have been a refusal of planning permission on the grounds of prematurity. There is no statutory obligation to reach that conclusion; the only issue is whether that material factor was considered. But no such basis has been shown for saying that the Local Planning Authority's exercise of its s.70 functions was unlawful. It was well aware of the position; it considered the relationship to the UDP; it reached a reasonable view on it. It was a view which the UDP Inspector supported. This was made clear to the councillors and they accepted it.

40 Indeed the objectors to the proposal here have the advantage that the appraisal of the applications by the Local Planning Authority was undertaken against the policy framework in the existing UDP which is less favourable to the proposal than an altered policy might have been. If the matter were considered at a UDP Inquiry, existing policy could have no added weight or be a primary determinant of the outcome of the consideration of the UDP Inspector.

41 The suggestion that the club or authority wished to avoid public independent scrutiny ignores both the extensive public consultation on the application, the scoping report for the Environmental Statement and the Environmental Statement itself, the investigation of all matters by the officers, the publicly available officers' reports and the role of the Greater London Authority and the Secretary of State.

42 The Inspector was content with the Council's approach, so the approach to the UDP at least had independent scrutiny.

43 Fourth, in any event, it is far from clear that a proposal to the UDP by Arsenal FC would have aided the public. The London Borough of Islington would probably have decided at that stage that it could not support or oppose the proposal yet; see is response at the UDP. Local residents, as counter objectors, might well have had merely a limited say. The Inspector's conclusion could easily be: this is a possible exception. Had that been said, it is difficult to see how in any way the objectors would have been advantaged.

44 What would be the value of just saying, as a tail piece to the relevant policies, that a possible exception to them could be made for Arsenal FC? It is clear anyway that exceptions are possible to policies and there is very limited value in identifying one, even if the potential grant of permission makes it more likely. A debate before the UDP Inquiry would not have provided the analysis of the proposal necessary at the application stage because the application itself would not have been the subject matter of debate. This is merely a peg upon which to hang the argument that there should be a public inquiry and that there should have been some device to achieve it.

45 Moreover, fifth, there was no legal obligation on the Council to formulate a proposal. Until it reached its decision in December 2001, the proposal was clearly only Arsenal FC's. The recommendation to grant permission does not turn the proposal into a proposal of the Council's. An exception to policy arising on a resolution to grant planning permission on the application of a developer does not thereby become a policy or proposal of the Council. Arsenal FC could have objected to the omission from the UDP of *its* proposal but the absence of such an objection does not constitute a legal flaw on the part of the Council.

46 The suggestion that there should have been a modification proposed to the UDP to include Arsenal FC's proposal shows how late in the day it was. The earliest the proposal could have been regarded as the Council's was when it reached the decision which is now challenged because it was not included in the UDP. It is fanciful to treat it as an error of law on the Council's part to fail to promote a modification to debate the development which after detailed consideration it had decided to support. This argument is but a device to secure a public inquiry on the false assumption that major proposals which in some

form could go through a UDP Inquiry must go through some public inquiry process and that some contrivance must be found to achieve that.

47 I reject Mr McCracken's further argument that the Inspector was misinformed about when the proposals emerged and that his views should accordingly be discounted. It is difficult to know the exact moment when something can be described as having "emerged", but the public press notice of November 1999 to which the UDP Inspector refers was not an unreasonable point for him to take. The existence of informal discussions between Arsenal FC and Islington beforehand, whether out of courtesy or to test the water, does not mean that the Inspector was misinformed. Nor indeed would it alter the significance of the point he made for him to have known, if he did not, that there had been such prior private discussion.

48 I reject Mr McCracken's further contention that the benefits of the proposal should have been ignored as a matter of law because they had not been through the testing process of a UDP Inquiry. This is just another attempt to say that there should have been an inquiry; the inevitable consequence of such an approach would have been a refusal of planning permission because there would have been nothing to outweigh the UDP policies.

49 This illustrates the fundamental error of Mr McCracken's arguments. They all amount to this. The Local Planning Authority should not have granted planning permission without an inquiry. There is no such statutory obligation in relation to Pt 3 applications. None of the mechanisms for an inquiry applied, whether appeal against refusal or directed refusal by the Mayor of London, or call in. Mr McCracken's submissions amount to a simple and misconceived re-writing of the statutory duty in s.70. In the guise of requiring a statutory power to be exercised according to law, it amounts to an obligation to ignore a duty to determine applications having regard to all the material considerations. Provided, as it did here, that the Local Planning Authority does consider the status of the UDP, the progress of its review, the potential for the use of the UDP review process, the timetable implications for the latter and for the decision-making process on the application, no complaint can be made.

50 I turn to the role of the SPG produced by the Council. Mr McCracken's contention is that the SPG here (that is the planning brief) had been unlawfully produced and should have been ignored. Mr McCracken says that it is inconsistent with the UDP, which in respect of many parts is true. He says that it is therefore something which should not have been produced without it going through the UDP process. It would on that basis have had more public scrutiny. This is the second basis upon which he says there should have been an Inquiry.

51 Mr McCracken relied on the recent decision of the Court of Appeal in *R. (on the application of J A Pye (Oxford) Ltd) v Oxford City Council* [2001] EWHC 870 (Admin), CA, in which at para.32 Pill L.J. said:

> "Local planning authorities should, however, bear in mind, and I would respectfully underline, Lord Scarman's comments in *Westminster*, reflected in para.3.17 of PPG12, the effect of which is that SPG must not be used as a device to avoid legitimate public scrutiny of local planning policies in

accordance with statutory procedures. It follows from the *Westminster* decision that what s.36 of the 1990 Act requires to be in a local plan must be in a local plan, and subject to the local plan review procedure. I consider this to be a continuing duty in the plan-led system and not one which applied only at the point of adoption, an expression used at one stage by the judge (para.67). The definition of supplementary planning guidance in PPG12, which has a statutory status by reason of reg.20(2) of the 1999 Regulations, supports that conclusion."

52 Until the decision of the Court of Appeal had been received, Mr McCracken had also relied on the judgment of mine at first instance in that case [2001] EWHC 870 (Admin), and in particular paras 61 and 62. For reasons which will become apparent when I deal with the *Pye* case it is necessary to set out what I said at paras 61–67:

> "61. I do not accept Mr Holgate's submission, assuming for present purposes that the contentious parts of the SPG are policies to which s.36(2) applies. I accept that the local plan as altered or as replaced must satisfy the requirements in s.36(2) to 36(11) as to its content. I also accept that a requirement that the plan shall contain the planning authority's policies, carries with it necessarily the negative requirement that planning policies must not be omitted from the plan.
>
> 62. Of course the statutory procedures for deposit draft, objections and independent consideration of those objections at an Inquiry, the independent Inspector's report on those objections, the consideration of his recommendations and the modification of the plan in consequence, indeed the adoption itself, all envisage that the plan at its various stages complied with the s.36(2) as to its contents, and that the planning authority did not have other policies kept away from that scrutiny. The existence of such policies other than in the plan, would be the subject matter of legitimate objection during the plan making process. Where the council adopts a local plan but fails to include in it all of the council's policies, there is a breach of the statutory requirement contained in s.36(2) and the plan is liable to be quashed under s.287 as in the *Westminster City Council* and *Kingsley* cases.
>
> 63. It is the local plan to which the statutory duties and remedies apply: breach of those duties leads to the plan being quashed, not some other policy documents.
>
> 64. However, the power to alter or replace a plan, coupled with the statutory provisions as to its content, cannot be transmuted into a negative obligation to produce nothing else. The duty is to include those policies in the plan. It is not a duty to forswear the production of policies in another document, whether on an interim basis or in parallel with the local plan, or instead of a replacement of alteration local plan.

65. Where a plan has been adopted and an authority promotes new policies without adopting a statutorily reviewed plan, it does not breach any duty as such; rather it merely has policies to which s.54A does not apply and to which the Secretary of State may decide to attach little weight. There would otherwise be an extraordinary fetter on the ability of a local authority to formulate or express its planning policies: it could not meet changed circumstances, a change of political complexion bearing on planning policy or new government policy other than by a review or alteration of its plan, however long that would take or however urgent the need. A planning authority could not even rely on consultation deposit or yet more advanced draft versions of its plan as policies for development control purposes. The statutory provisions simply do not support such a position.

66. Although a council might in certain circumstances act unlawfully in its approach to the exercise of its statutory discretion to produce a review, it is not alleged here that the City Council has acted unlawfully in the exercise of its power under s.39(1), although it seems to me that that is where a remedy would lie if it is contended at this stage that a local authority is seeking to develop policies in such a manner as to evade public scrutiny.

67. I do not consider that those conclusions are inconsistent with the decisions in the *Westminster City Council* and *Kingsley* cases. Those cases concern the content of plans at the point of adoption. They do not purport to deal with any discretion to produce a review plan or with a power of an authority to produce policies in advance of a review or indeed instead of a review; they do not preclude the production of policies in non local plan documents. The focus of those cases is the duty to include those policies in plans when they are produced.''

53 PPG12 discusses supplementary planning guidance. In para.3.15 it is said that SPG must be consistent with national and regional planning guidance as well as with the policies set out in the adopted plan. It has a role in supplementing plan policies and proposals. Paragraph 3.17 emphasises, however, that SPG must not be used to avoid subjecting to public scrutiny in accordance with the statutory procedures, policies and proposals which should be included in the plan. Plan policies should not attempt to delegate the criteria for decisions on planning applications to SPG or to Development Briefs.

54 I do not accept Mr McCracken's contention. It is important to understand what the SPG documents actually were. They were planning briefs, that is to say they were designed to assist in providing the framework for assessing these applications, their advantages and disadvantages, examining what were the important issues for the authority and for local residents, and setting criteria for their resolution. They were adopted after extensive public consultation. They were not the more detailed or supplementary policies to the UDP, which PPG12 considers. Nor indeed were they a set of substitute policies for those in the UDP. Rather they were a basis for examining a proposal against the UDP and UDP review policies.

55 In any event reliance on s.12, *Great Portland Estates* and *Pye* in the Court of Appeal or at first instance, which I have already set out, does not help Mr McCracken. His argument is that the obligation to put policies and proposals in the plan, and the negative requirement that they should not be omitted from the plan amounts to an obligation not to produce other policy documents; if that argument is good whilst a plan is in preparation, its logic makes it good if any one of the possible forms of review, topic or early review could be undertaken instead. It amounts, as Mr McCracken acknowledged, to an obligation to produce a plan or SPG within the terms of PPG12 and a prohibition on anything else.

56 Such an argument is simply misconceived. There is no such statutory prohibition. The statutory obligation on the Council is to put its policies or proposals in a plan if it has one. The plan can be challenged under statute on account of that omission. If the duty to produce a plan or the discretionary power to review a plan has not been fulfilled, judicial review lies to enforce that duty, rather than to prohibit the production of other documents such as planning briefs. I refer to what I said in *Pye* at paras 63–66.

57 I should also refer to para.67 in the light of what the Court of Appeal said in para.32 of its judgment. I do not consider that Mr McCracken's arguments here are advanced by that comment. He submitted that the comment by the Court of Appeal in para.32 together with its approach to the obligation to produce plans and not to evade that by the production of other documents reinforced his contention.

58 Although it is *obiter*, that comment holds that the sentence referred to in para.67 of my judgment was too narrow a view of both *Great Portland Estates* and of my own judgment in *Kingsley*. Elsewhere in my judgment I recognised a clear duty on the Council to put its policies and proposals in the plan and that that in effect applies through the plan-making process if the plan as adopted is to comply with the statutory obligations. My comment only deals with the specific point at which the breach of the duty leads to the quashing of a plan. Likewise, the judgment recognised that the power to review a plan is one which can be enforced by judicial review if it is being unlawfully evaded. The Court of Appeal's point in its comment in para.67 is clearly dealing with a local authority which is deliberately evading its responsibilities in a manner which would lead to judicial review of its failure to produce a plan; thus the continuing duty to review a plan is enforced. That point is made in the context of the sluggish approach of Oxford City Council to its local plan review.

59 I do not consider that the Court of Appeal with that one comment rejected the basic point which I had made over a number of earlier paragraphs. The statutory duty is to put the policies and proposals in the plan. If it does not have a plan, judicial review will lie to prevent evasion of that duty. Failure to put the policies and proposals in the plan will lead to its being quashed and to less weight being given to policies and proposals which have been omitted. That is the other real sanction.

60 Mr McCracken's submissions would involve such an extraordinary fetter on the local authority's ability to deal with changes in policy or new circumstances that I would have expected the Court of Appeal to have clearly stated that, if that was its view and to have disagreed with much more of my judgment, but it did

not. I accordingly see no support in what the Court of Appeal has said for the suggestion by Mr McCracken that a local planning authority is limited to producing a plan and supplementary planning guidance as defined by PPG12 coupled with a prohibition on producing anything else, regardless of what that something else might be called, or its role.

61 Moreover, Mr McCracken's submission is inconsistent with the point made by the Court of Appeal that a local authority can have draft policies and can give weight to those draft policies, even though they are inconsistent with the existing statutory policies. That is not said to be because those draft policies have initiated the statutory process of local plan review. Often the first draft plan is a non-statutory consultative document anyway. The Court of Appeal recognised that if the SPG had been called a draft local plan, account could be taken of it. The difference lay only in the terminology used to described the SPG. The same point applies here: if the planning brief had been called a planning brief and no reference had ever been made to supplementary planning guidance, Mr McCracken's argument would fall by the wayside. This illustrates the fallacy in his case: the lawfulness of the consideration of documents other than the statutory plan and non-statutory SPG within PPG12 is asserted by the Court of Appeal. If its production amounts to the evasion of the plan-making duty, judicial review lies. If the plan is adopted but policies are omitted, a statutory challenge lies. If the role of the emerging plan is ignored when an application is determined, the decision can be quashed. But planning documents other than SPG within PPG12 are not immaterial considerations, unlawfully produced and to be ignored on that account however pertinent and valuable the content.

62 The statutory provisions in ss.54A and 70 contemplate decisions which are not in accord with the development plan. There is no basis at all in any statutory plan-making duty for contending that a framework for the consideration of a specific application cannot be produced outside the plan making framework. Such an approach would be an utterly pointless inhibition to the coherent fulfilment of the duty to determine planning applications. Neither Parliament nor the Court of Appeal countenanced a restrictive approach which would have so inhibited public debate and rational decision making, pursuant to the obligation to determine an application having regard to all material considerations.

63 Accordingly, I take the view that a Local Planning Authority can produce a planning brief, whether or not it is called supplementary planning guidance and whether or not it is consistent with the statutory development plan. The weight it gives it is for the decision maker, whether planning authority or Secretary of State, who will so far as material be guided by PPG12. PPG12, it must be remembered, is not statute or law, but merely a material consideration.

64 This is not a case where the concern of the Court of Appeal in relation to the evasion of a duty applies. If it did so, it would lead to judicial review of the plan making decision and provide a good basis for quashing the planning permission. But one can get to that conclusion directly because one can quash a planning permission where the Local Planning Authority has failed to take into account the material consideration that the process or substance of decision making might be enhanced if the principles of a development had gone through the independent

scrutiny of the UDP process. That is the fundamental issue, but there is no warrant on the facts here for saying either that the local authority was seeking to evade its duty or had failed to consider the relationship of the UDP inquiry to the proposals when reaching its decision to grant planning permission.

65 The last issue in relation to SPG is whether that SPG should have been treated as of little or no weight. The basis for that argument was PPG12 and the references to no weight being given to SPG where it was inconsistent with the UDP. Such an approach is to ignore the function of this so-called SPG, which is quite different from that which PPG12 contemplates. PPG12 is not contemplating a bar on all other types of documents. If the SPG here had been called "planning brief, preliminary framework for assessment" (which is what it was), no such complaint could be made.

66 The Local Planning Authority were fully aware from the very contents of the planning briefs and from the Overview Report that the briefs were in a number of important respects inconsistent with the UDP. If they had been wholly consistent with the UDP, there would have been rather less purpose in them. The advice in PPG12 was wholly irrelevant to this issue and there was no need to draw that to the Local Planning Authority's attention. It would have been absurd if this considered document, upon which extensive public consultation had taken place, had not been given weight in deliberations and instead the Local Planning Authority had been obliged to say that its consideration of the application could not start in that way, however helpful it might have been to do so, that the consultation response on the SPG had to be ignored, and that it had to go instead straight to the equivalent of the overview and development specific reports.

67 There is a real danger in construing the PPG as if it were a statute and requiring application of it as if it were law. It cannot itself determine weight. The fact that a statutory instrument makes it a material consideration does not mean that it has become a subsidiary form of law. It is advice to be noted. Departure from it is to be justified with reasons where it applies, but it does not apply here on a purposive and broad reading of its contents. There has been no error of approach by the Local Planning Authority in relation to the planning brief and PPG12. The Council was in any event very well aware, as I discuss later, that the proposals did not accord with a number of UDP policies. The vice of some SPG is that it is used as a substitute for the statutory development plan. That was not the case here; it was used to guide a debate on what the Council fully appreciated would be an exception to the UDP in a number of respects.

68 The last point raised in relation to this first topic was that the nature of the issues required there to be an inquiry. However, the mere fact that a proposal is complex or, as here, unique for a borough, does not mean that an inquiry is necessary or that a decision not to hold one is unlawful. No statutory provision requires a Local Planning Authority to hold an inquiry. It is difficult to see how the statutory structure for decision making and appeals should rationally include some implied statutory obligation on an authority to hold an inquiry into a proposal which statute not merely does not require, but instead obliges the Local Planning Authority to determine. If the Secretary of State wishes to call a proposal in for an inquiry and for his own determination, he can do so. It

was referred to him as a departure application. He will look carefully at its relationship to the development plan and to the Council's interest as owner. He gave a reasoned decision as to why it would not be called in. If in Greater London the Mayor wants to direct a refusal which would lead to an inquiry, he can do so. He did not choose to do so here. It would be contrary to the statutory obligation in s.70 for a local planning authority to have to refuse an application which it supported, so that objectors could put their case to someone else. It is difficult to conceive of an implied statutory obligation to hold a non-statutory inquiry.

69 The fact that factual issues may have existed over the extent of, for example, the loss and the significance of the loss of private waste capacity does not generate any requirement for a public inquiry. Those are matters perfectly properly for consideration and weighing by the local authority.

70 As I have said, no Human Rights Act point was pursued here. There was wholly inadequate evidence of either claimant's human rights, whether under Art.8 or Art.1 of the First Protocol, being engaged. There merely was evidence that they were tenants and the following:

> "Both claimants made representations to LBI, and supported those of others, opposing the development. Edward Bedford lives close to the proposed new stadium. He has particular concerns about the effects of crowds, congestion, noise and pollution on his own and neighbour's homes. He is chairman of the Harvist Estate Residents and Tenants Association. He is a lifelong supporter of Arsenal as are many of the residents of the Harvist Estate. Elizabeth Clare lives on the Ring Cross Estate, next to which the new waste transfer station is to be built."

71 It is also quite clear from the decision in *R. (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 737, paras 31, 32, 39 and 40, that major developments do not by their nature require an inquiry to be held in order for a local authority lawfully to grant planning permission for them. There was many an opportunity for written and a specific one for oral representation.

72 I do not regard any part of this multi-faceted argument that there should have been a public inquiry, whether statutory, non-statutory or as part of a UDP inquiry, as seriously arguable. Insofar as any part of it is arguable, it is wrong.

The Disclosure and Relevance of the DTZ Report

73 This report is described in the witness statement of Miss Ebanja, who is the Senior Corporate Adviser to Islington, having been interim Deputy Chief Executive at the relevant times. She describes in paras 3 and 4 of that statement how the DTZ report came into existence. DTZ were appointed to assist the Council in its negotiations with Arsenal FC on land issues. Part of their instructions meant that they had to examine, therefore, the cost estimates relevant to the deliverability of the development. DTZ advised her, both orally and in writing, from time to time. They produced a draft report in November 2000 with various other updates. She

said that DTZ, it was plain, had been given full access to Arsenal FC's business plan; that Arsenal FC's cost estimates and figures had been carefully scrutinised; and that DTZ had come to a view as to the robustness of what they had seen. In correspondence it was also said on behalf of Islington that that document was available to five officers only within the Council.

74 An application for cross-examination was contemplated in relation to this matter, but it was not pursued. It would have been necessary to show that there was a factual issue which it was for me to resolve, which I could not fairly resolve without cross-examination, for such an order to be made. Mr McCracken recognised that he could identify no such issue.

75 An application was contemplated for disclosure of the DTZ report, but it was not pursued. The purpose of its disclosure would have been to enable essentially unspecified questions to be asked to see if some ground of challenge arose. This was closely linked to the possible application to cross-examine witnesses which, rightly, was not pursued.

76 In the original grounds, and in the consolidated grounds, the ground of challenge relating to the DTZ report was that it was unfair for the document not to have been disclosed to objectors. Mr McCracken before me developed a further argument, which I now deal with, relating to the Local Government Act 1972. Section 100D deals with the disclosure of background papers. It provides so far as relevant:

> "(1) Subject, in the case of s.100C(1), to subs.(2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required, by s.100B(1) or 100C(1) above to be open to inspection by members of the public—
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.
>
> . . ..
>
> (4) Nothing in this section—
>
> (a) requires any document which discloses exempt information to be included in the list referred to in subs.(1) above; . . ..
>
> . . ..
>
> (5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report,
>
> but do not include any published works."

77 Schedule 12A of the 1972 Act provides in Pt I, para.7, an exemption in relation to that duty. The exemption covers:

> "information relating to the financial or business affairs of any particular person (other than the authority)."

78 But there is a qualification to that exemption set out in para.7 of Pt II of Sch.12A:

> "Information falling within any paragraph of Pt I above is not exempt information by virtue of that paragraph if it relates to proposed development for which the Local Planning Authority can grant itself planning permission pursuant to reg.3 of the Town and Country Planning General Regulations 1992 (SI 1992/1492)."

79 Regulation 3 of the Town and Country Planning (General) Regulations 1992 provides:

> "Subject to reg.4, an application for planning permission by an interested planning authority to develop any land of that authority, or for development of any land by an interested planning authority or by an interested planning authority jointly with any other person, shall be determined by the authority concerned, unless the application is referred to the Secretary of State under s.77 of the 1990 Act for determination by him."

80 Mr McCracken submitted that the DTZ report was a document which should have been listed in the agenda for the meeting of December 10, 2001 and copies provided. As a matter of fact it was not listed as a background document in any agenda report. Mr Robin Purchas Q.C., for Islington, submitted that the document did not fall within the scope of s.100D (5), because, I should infer, the officer had concluded that it was not a background document. No judicial review ground was raised to challenge that judgment which, he said, I should infer had been made. The matter cannot now be dealt with directly in the evidence. That is by itself a sufficient answer to the claim raised by Mr McCracken because, following the directions of Richards J. in relation to revised consolidated grounds, no further grounds could be raised. No such grounds having been raised, it is a matter which could be dealt with in that short way. Had it been dealt with by evidence following grounds properly raised, I am not sure that Mr Purchas would have been correct in his submission in relation to action 100D, because of the references made to the document in para.5.1 of the Overview Report.

81 However, it is quite clear from the witness statement of Miss Ebanja that the DTZ report was shot through with the confidential information of third parties, and fell within Sch.12A, Pt I, para.7. It is perfectly obvious that it was assessed as confidential on a reasonable basis. Accordingly, s.100D(4)(a) operated so as to preclude the non-inclusion of that document in the list of background documents constituting a breach of duty.

82 I do not accept Mr McCracken's convoluted argument that the effect of Sch.12A, Pt II, para.7, together with reg.3 of the 1992 General Regulations, meant that Pt I, para.7, was disapplied. I note that the exemption in Pt I, para.7, is inapplicable to a local planning authority. The simple question is this: was this development for which the Local Planning Authority can grant itself permission pursuant to reg.3? The answer to that is: No. It was neither an application by an interested planning authority to develop any of its land, nor an application by an interested planning authority to develop any land, nor an application by an interested authority made with any other person. Regulation 4 is of no application or assistance.

83 Mr McCracken, as I understood it, submits in effect that it has to be supposed that the application for these purposes is made by an interested planning authority. If it were, it could grant itself permission because the larger part of Ashburton Grove and parts of Lough Road are its land (although it follows from that that part of those sites are not Council owned). There is no warrant for such a supposition. If such a supposition were made, all applications to develop a site which included any local authority land would fall within reg.3. But it is difficult, if one is making that supposition, to see why that would not also have to be made in respect of an application for development of any land, because on Mr McCracken's argument, it must be assumed to be an application by an interested planning authority. This would make a nonsense of the qualification to the exemption, and the exception to non-disclosure would in fact become a rule of disclosure.

84 The same answer follows if the test for whether something falls within para.7 of Pt II to Sch.12A was whether the application *could* be made by a local planning authority, which is another way of putting the same point. Nor is there a legislative justification for such an approach. The aim is to prevent a developer acting jointly with a local authority which can grant planning permission for the development, being able to avoid relevant financial scrutiny. The exemption does not apply to an authority's affairs anyway.

85 In any event, here the desire to examine the DTZ report was not to ensure that the local authority had enough money for its land, nor to see whether there was a planning implication which might arise from the funding gap in terms of the ability of the local authority to obtain the planning benefits. Those are all dealt with by the s.106 Agreement. What the objector wanted disclosure of was information peculiar to Arsenal FC's financial and funding position which supports my view that Mr McCracken was misreading this section, in a search for material about an applicant which it would be very unusual for the public to see in the normal way.

86 The alternative submission drew on common law fairness. It was said that this required the disclosure of the document by the Local Planning Authority to objectors. Mr McCracken relied on a number of authorities. He referred to the decision of the House of Lords in *R. v Secretary of State for the Home Department Ex p. Doody* [1994] 1 A.C. 531, 560, where it was said:

"(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification; or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

87 He also referred to the decision of Browne J. in *Hibernian Property Co v Secretary of State for the Environment* (1974) 27 P. & C.R. 197, 208, subsequently applied by the Court of Appeal in *R. v Secretary of State for the Environment Ex p. Slot* [1998] J.P.L. 692, 700–701. From it he drew the principles that the parties to an appeal or other proceedings must have a fair opportunity for correcting or contradicting any relevant statement prejudicial to their view, that a decision maker must not take into consideration extrinsic information from one party which a party with an opposing view has no opportunity of contradicting, and that a decision maker must not hear evidence or receive representations from one side behind the back of another.

88 There are a number of other authorities, not surprisingly, to the same effect. He placed particular reliance upon the decision in *McMichael v United Kingdom* (1995) 20 E.H.R.R. 205, at para.80. This was a case that was said to be important because the information of which Mr McMichael had been deprived, was said to be sensitive information relating to social work and care reports on his children. Mr McCracken pointed out the significance to this proposal of enabling development and said that economic benefits were being used to interfere with objectors' ECHR rights—a point which he had barely pursued and quickly abandoned. The development had been seen as a regenerating development but, if it could not be developed, the permission could be seen as having a blighting effect. The proposal might never be developed or, if developed, might not be finished. The deliverability of the proposal had been seen as a major benefit by Mr Hepher in his submissions in support of it. There was a funding gap of which he complained in other contexts, which supported Mr McCracken's concerns. Mr McCracken said that this might also mean that funds for transport works and for implementation of the measures required to achieve the high non-car modal split could be at risk, altering the basis of the approval by Islington. The planning authority should not have had this information without it being available to objectors.

89 I do not accept Mr McCracken's arguments. For the reasons which I have already given, I do not accept that the two claimants have shown that their human rights are in any way engaged here. There was very little evidence about them at all. Apart from the fact that they had a tenancy, one near the new proposed ground and the other near the new proposed waste recycling centre, there was no evidence whatsoever as to any effect which the proposals

might have on any right which they enjoyed. There was no more evidence than that they had certain concerns. That is wholly inadequate.

90 However, the question of what is fair depends on the context and circumstances. So far as the Council is concerned, the existence of the DTZ report was clear from para.5.1 of the Overview Report, as well as its conclusion and implications. It was produced, as Miss Ebanja makes clear, to deal with land values as between the Council and Arsenal FC and for those purposes DTZ had contact with Arsenal FC. Financing was also relevant to the issue as to whether Arsenal FC were providing too little for the transportation package and by way of affordable housing. Islington wanted as much as it could obtain and Arsenal FC was looking to reduce the funding gap between the value of the enabling development, the cost of development of the land, and what it and the institutions could raise and fund respectively. The GLA also examined carefully the extent of funding of commercial elements and planning benefits to ensure that there was no undue profit from those going to support the stadium rather than going to provide more planning benefits.

91 Although the DTZ analysis was referred to in the Overview Report, no request was made for it on behalf of the claimant until June 14, 2002. An earlier request in April 2002 was made on behalf of ISCA, who have ceased to be claimants in these proceedings.

92 The planning issues in relation to which the fairness or unfairness of non-disclosure has to be judged are the likelihood of the grant of planning permission itself causing blight, and the prospect of the package of benefits being delivered. But I was not shown any document in which, bearing in mind the conclusion of the Overview Report, concern was raised by either of these two claimants as to the potential for blight through the grant of planning permission. It was merely referred to briefly as a possible argument in the second witness statement of their solicitor, but essentially that was by way of submission after the event. If there were a grant of planning permission, but the proposal were not built, the objectors would be nearly as pleased as if the proposal were not permitted at all. This sort of point can be made in respect of any large complex development. It is very odd to suppose that Islington would refuse planning permission for what was a desirable development, with the benefits which it could bring, because it could not be certain that ultimately it would be started. There was no evidence that there would be any blighting effect were it not to go ahead; the claimants made no such point to the Council. The UDP would continue to provide policies for other developments.

93 Mr McCracken's point could not be, and was not, that the development might start but not finish. It could not be his point because the very sequence of development told against it. The development of the new stadium could not proceed without the expensive removal of the existing uses on the Ashburton Grove site and the creation of a new waste recycling centre at Lough Road. This substantial expenditure could not rationally be committed without Arsenal FC being satisfied that it could then proceed with the new Ashburton Grove stadium, the very aim of the project. Once the stadium had been built, it would only be in its

financial interest to bring about the agreed redevelopment of the existing stadium because that, too, would yield financial benefit.

94 The second planning issue raised in Mr Dunkley's witness statement to which the unfairness of non-disclosure related, and again raised more by way of submission after the event, was whether the package of benefits would be delivered. That depends upon a view being taken in relation to the effectiveness of the s.106 Agreement, and the degree to which the requirements are indeed variable according to the financial position of Arsenal FC. To the extent that they are variable according to its financial position, this is a point which could have been made in response to both the planning application and the s.106 Agreement reports. But I have not had my attention drawn to any such representations or assertions that that is what the claimants wished to say.

95 Moreover, as I later explain, the s.106 Agreement is reasonably regarded as satisfactory by Islington and the GLA in relation to the extent of affordable housing, after examination of the financial situation and the requirements of that Agreement are now fixed. The public transport requirements are fixed and the degree of financial leeway is less than the claimants contended. There was public consultation on the content of the s.106 Agreement.

96 There is no true parallel with *Doody* and *McMichael*. In both those cases the decision maker had, but one of the parties before him did not have, material of vital importance to the essence of the case, in the absence of which one of the parties' case could not be fairly presented.

97 Here the councillors were not better off than the objectors. They, too, did not have the DTZ report because it contained references to Arsenal FC's confidential business plan. Only five officers saw the November 2001 report, one of several advices and reviews, oral and written, which DTZ provided. I infer, precisely because of its confidential references and Arsenal FC's desire to limit the risk of its becoming public property, that the number of people who had access to it were limited. The planning issues to which the DTZ report gave rise were sufficiently clear for comment on those issues to have been made by the claimants (or indeed by anybody). It is difficult to see that this document can equate in significance to the absent reasons and missing report in *Doody* and *McMichael* respectively.

98 Further, I do not accept that councillors should be deemed to know what a handful of officers know and thus should be regarded as being in a different position from the objectors. In this context that point is artificial, especially as the number of officers was specifically limited and councillors were intentionally not provided with the document. The reliance by Mr McCracken on *Bushell v Secretary of State for the Environment* [1981] A.C. 75 is misplaced. It would be quite wrong to attribute knowledge to the councillors in order artificially to create an unfairness which does not, in reality, exist.

99 Moreover, fairness in the planning process is not confined to a consideration of the interests of the objectors. It also needs to respect the confidentiality of the applicant because it is to its figures rather than to DTZ's general appraisal that the claimants' point is addressed. It has the gist of the appraisal. It is this actual appraisal, and within that Arsenal FC's figures, that the claimants want. This is

emphasised by their constant references to a £50 million funding gap drawn from an e-mail in which that is referred to. But it would be unfair to Arsenal FC for the Local Planning Authority to be made to reveal what was handed to its advisers in confidence in the clear expectation that it would have a very carefully restricted circulation.

100 A planning authority needs to be able to examine matters in a confidential manner with applicants, as was done here, and for that purpose to use independent consultants to whom disclosure of the relevant information is made in confidence. This is the same process that the GLA went through. If a local planning authority cannot do that, it will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing and other legitimate benefits related to the value of the development and its funding. The public interest would be harmed.

101 It is quite clear that the information is confidential and disclosure of it would be in breach of confidence. There is nothing unfair in the non-disclosure of that document, with the gist of the DTZ appraisal being available.

102 Finally, I consider that s.100D(4)(a) provides for a local planning authority to be able to comply with its duties of openness without a breach of confidence. A specific statutory provision provides for non-disclosure of this document and is applicable in this context. Even if (which I doubt) there is scope for a common law duty of fairness to supplant rather than supplement that regime, that regime is a very powerful indicator as to the content of the common law duty of fairness. There is nothing arguably procedurally unfair here in the non-disclosure of that document.

Unfairness at the Council meeting

103 It was also said that there was unfairness procedurally at the Council meeting of December 10, 2001, which it is convenient to pick up here. It is said that the conduct of that meeting was unfair. The contention was that the local residents should have had the last word rather than Mr Hepher, Arsenal FC's planning consultant. If that had happened, it was said that the residents could have rebutted factual errors which he made. If the developer lost, he could appeal against the refusal of planning permission; but no such procedure was available to local residents. The time allowed to local residents was too short and many could not speak. Councillor Leigh, the ward councillor for Ashburton Grove, had to speak in a different section of the debate. The summary report was presented too late and in too few a number for it fairly to be dealt with. I deal with that later. I observe merely at this stage that some 300–400 copies were available at the meeting.

104 It needs to be borne in mind that this was not some run-of-the-mill public meeting. This was a Council meeting at which the public were permitted to speak. There was no entitlement on either side of the debate to speak. The meeting was conducted in accordance with standing orders and it was in accordance with those that the public were to be permitted to speak. The duration of their speaking and the order in which they spoke is a matter for the legitimate dis-

cretion of the chairman applying standing orders. Three minutes was a reasonable time for each of the people who spoke, other than the developer. That is what the standing orders envisage. The meeting lasted from 19.32 hours to 00.15 hours. It was divided into three sections for the three applications. 50 members of the public spoke, but it is obvious, if a meeting in relation to a matter as controversial as this is to be conducted within any sensible limits, that not everybody can speak for long or as long as they want to.

105 Councillor Leigh did not speak in the section she wanted, but she was able to speak. Both the claimants in these proceedings spoke. It is legitimate for the developer to go last in relation to each section, but that is a matter for the discretion of the chairman. If it was thought unfair to do that because the developer could appeal if unsuccessful, it might equally be said that it would have been unfair had the local residents gone last because they can take judicial proceedings, as they did, going first and last and taking two of three allocated days. The point is misconceived. It was obviously a fair meeting.

Unfairness and the late supply of information

106 The next matter raised was the late supply of information. It was said that very significant information was supplied at the last minute or not supplied at all, so that objectors were unable to make the full, proper and meaningful representations which they were entitled to make. Mr McCracken drew upon the judgment of Ognall J. in *R. v Rochdale MBC Ex p. Brown* [1997] Env. L.R. 100. In that case Ognall J. cited from the judgment of McCullough J. in *R. v London Borough of Camden Ex p. Cran* (1995) 94 L.G.R. 8:

> "The process of consultation must be effective. Looked at as a whole it must be fair. This requires that consultation must take place while the proposals are still a formative stage. Those consulted must be provided with information that is accurate and sufficient to enable them to make a meaningful response. They must be given adequate time in which to do so. They had adequate time for the response to be considered. The consulting party must consider the response with a receptive mind and in a contentious manner when reaching its decision."

107 In each of those cases a very substantial amount of material was produced in such a way that the opportunity to make adequate representations did not exist. In the *Cran* case a volume of material was also accompanied by a very crowded agenda in relation to which it was said that councillors had inadequate opportunity to absorb the material.

108 The documents that were said not to be available, and in respect of which complaint was made, are described by Mr Dunkley in his witness statement. They are: a document dated October 29, 2001 called "Matchday Pedestrian Crossing Capacity—Holloway Road" provided by Arsenal FC's Transportation Consultant; a response to Highbury Community Association by the same Consultant, dated October 5, 2001; a letter from Arsenal FC's planning consultants with

enclosures dated November 15, 2001; a detailed report from Arsenal FC's acoustic consultants; a bundle of documents that have been described as "the November Bundle"; and it was also said that an Environmental Statement appendix entitled "Further Information regarding extended stays in stadia resulting from post-match entertainment" have never been provided.

109 Miss Cluett, the Council's Planning lawyer, responds to this in her second witness statement at para.47:

> "Neither of the claimants, nor any other person on their behalf, ever sought or requested to inspect the documents. Specific documents were made available on request where appropriate.
>
> All documents required to be made available pursuant to reg.20 of the 1999 Regulations were made so available.
>
> As indicated in my first witness statement, during the Council's scrutiny of the proposals, detailed debate and analysis quite properly took place, some of which involved correspondence and memoranda. These documents did not form part of the Environmental Information required to be available for public inspection, but formed part of officers working files.
>
> At the request of Islington Stadium Communities Alliance, and in its wish to be open and transparent in the context of the legal challenge raised, parts of Council officers' internal working files were made available for inspection on request, as soon as the file documents could be collated in good order."

110 Mr Harrington states in his second witness statement that he believed that the November bundle was available before December 7, 2001. He attributes some of the difficulties which may have been experienced to the access which the public had to the files, which meant that they were not always in proper order. He received a letter from Mr Scott of ISCA on November 21, 2001 complaining about that. He says that he checked that all the supplementary material received by the Council, which would cover most of the material that has been referred to by Mr Dunkley, including the November bundle, was on public display. This issue was again raised by the review group on December 6, 2001. He checked the next day and the information was still there. There is therefore a clear factual issue underlying this ground of challenge.

111 Even if Mr Dunkley were right in relation to the factual position, in the light of the absence of any representations from the claimants seeking those documents and in the light of the extensive material publicly available well beforehand, those positions could not possibly be considered to be equivalent to the obstacles placed in the way of the public in *Brown* or *Cran*. The public (including the claimants) had ample opportunity to comment on the applications. The comment made in relation to consultation in *R. v North Devon Health Authority Ex p. Coughlan* [2000] Q.B. 213, 258–259 (para.108), is relevant here:

"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

112 Even if it were necessary for every piece of information from a developer to the Council to be put on public display, it is very important to bear in mind the practical reality of the effect of the desire of many to see these files. There was no common law unfairness here. Mr Dunkley's evidence does not deal with the claimants' involvement in, or interest in, or endeavours to obtain, the material or what they would have done with it if they had obtained it.

Unfairness and the Officers' Reports

113 I turn now to the many criticisms made of the officers' reports. The relevant reports are comprised in two substantial volumes: an Overview Report with appendices and Development Specific Reports. They were supported by a guide to the report. They were available to councillors and to the public ten days before the committee meeting of December 10. No breach of any statutory duty or standing order is alleged in relation to them. I do not accept the criticisms that they were confused reports, or that they were difficult to find their way around, or that they were poorly structured and difficult to follow, or that in consequence ten days was too little time for councillors to absorb them or for the public fairly to comment on them. This is not a case comparable, as I have said, to either *Cran* or *Brown*.

114 To some extent this is a matter of impression, but my firm impression, having had the opportunity to read those reports at some length, is that they are clear, well structured and straightforward, given the length and complexity of the subject matter. They follow a standard structure of a description of proposal, the setting out of policies, and the consultation response overall and then topic-related evaluation. The consideration of them is aided by the Overview Report with its indices and its coloured pagination to aid swift identification of relevant parts.

115 As an illustration of the difficulties, Councillor Leigh complained that she could not find where the height of the stadium, which was said to be an important concern, was set out. I found it where I expected to find it. It was early on in the description of the relevant proposal, that is the stadium. It is also to be found elsewhere. I accept that Councillor Leigh could not find it, and found the subject matter too complex to absorb in ten days. But I do not consider that that demonstrates the legal error contended for.

116 It is important to see all these submissions in the context of the discussion of this proposal over time and the extent of public involvement in these widely publicised proposals. I have already referred to the extent of that consultation. There

is nothing in the period of time which the public had to comment on the officers' reports which is unfair. After all, that is not the focus of public consultation. The focus of public consultation is the planning brief, the scoping opinion, the Environmental Statement and, above all, the applications themselves. The report is essentially a report for councillors, to enable them to consider all matters, including the public consultation responses themselves.

117 In any event, there was ample time for a very large number of people to prepare what they wished to say at the Council meeting. There is no evidence that the claimants had too little time. The various officer reports did in fact receive widespread dissemination. Ten days before the meeting the documents were sent out. People, including the claimants, commented orally upon them at the meeting and could, if they wished, have written in in relation to them. There was adequate time for conscientious councillors to absorb the material set out in those reports. They did not come to them out of the blue. They knew that the proposals existed. The matter had been already the subject of widespread public consultation.

118 Mr McCracken related that submission to his contention that a summary report, produced on the day of the meeting, was unfair and misleading and yet, because of the length and complexity of the full reports, he said it would, in reality, have been the basis of decision. He again referred to *Cran* in this context. He relied upon the evidence of Councillor Leigh.

119 I reject that submission. The principles in *Cran*, when applied here, do not show that there was any defect in the main reports. They were inevitably complex. Members were warned that they would be coming so they could prepare themselves, and they were given longer than normal to absorb them, for a lengthy meeting of nearly five hours devoted to just that one agenda item. This was but one item on a crowded agenda with lots of material which there was no time to absorb.

120 I also reject the application of the principles in *Cran* to the summary report. The basis of that submission was that the main reports were so complex that councillors inevitably would look to the summary reports. I see no factual basis for drawing any such conclusion so far as the generality of councillors is concerned.

121 The summary report contains an executive summary drawn from the main report. It is the summary required by reg.21 of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 in respect of the grant of planning permission for development subject to an Environmental Statement. This covers the main reasons and considerations on which the decision was based, and a description of the main measures to mitigate the major adverse impacts. It is not illegitimate to describe that as a summary, although it is not a summary of the content of the main reports.

122 In that context, however, as a summary in relation to reg.21, no complaint is made of that report. It is true that the summary report does not deal with the development plan. It does not list disadvantages. It does not deal with a number of points about which criticism was later made by the claimants: for example, waste handling capacity, which was raised by others at the Council meeting.

But the true answer to that point is that the summary report and the consideration by the Council is not unlawful for that reason. The summary report did not have to deal with all those matters. It was not, and did not purport to be, a substitute for the main reports. It was only available on the day of the meeting and could not, therefore have been, a substitute for reading the full reports. Miss Leigh's complaint is that she did not see one at the meeting, but many copies were provided, 300–400. Her task was to grapple with the meeting reports. This is not remotely comparable to the circumstances in *Cran*. It is quite inadequate just to point out that certain parts unfavourable to the development were not in that summary. It is an overall useful summary because it is the one required by statute to be provided and I see no reason why, in order to assist people, it should not have been produced, and made widely available at the meeting on the day.

123 There was a complaint that the summary report was not available in time for local residents to comment on it, but that allegation misses several points. First, it was not the basis for consideration by councillors. Second, there is a very limited role for public comment on such reports because they are not the focus of consultation. Third, it was an aid to the public in dealing with complex issues, constituted by a statutorily required document, if planning permission were granted. Fourth, it was in any event already available as the executive summary in the main reports, and indeed also in the guide to the Arsenal reports which was produced with the main reports, if anybody had wished to comment on its substance. Fifth, There was no obligation whatsoever to make it available. The fact that at a crowded meeting not everyone received a copy is not a matter of legal error; 300–400 were distributed.

124 It is entirely reasonable for the summary report not to deal with the UDP, given the extent to which it is analysed in the Overview Report and in the application specific reports.

Errors in the Officers' Reports

125 Mr McCracken relied on a range of specific omissions and errors in the reports. It is important to recognise that these were reports to the Council. Councillors will also have knowledge derived from other occasions when the issues are considered: from the planning brief, the Environmental Statement and public debate (including debate at the meeting).

126 In order for a judicial review challenge to succeed on the basis of defects in the reports, it would have to be shown that the omission was significant and not made good, or that the matter was presented in a significantly misleading way and was not made good. Courts are, rightly, very cautious about reading officers' reports other than in a broad and common sense way. They are not contracts or statutes; they do not call for refined, let alone legalistic, analysis. With that in mind, I turn to the submissions actually made by way of specific criticism.

127 First, it was said that there was no reference to whether the development would accord with the UDP. The importance of that derives from s.54A of the 1990 Act. The appropriate approach to such a question is to be found in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, 1459–1460:

"Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section, two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."

128 I recognise that there is no use of the specific statutory words of s.54A. But the message that the development does not comply with the UDP is clear and unmistakable, as was the need for other factors to outweigh that non-compliance. It is unnecessary to provide all the references in that respect; the matter can be seen sufficiently clearly from para.7.1 in the Overview Report and paras 7.1.8 and 7.1.9:

Unitary Development Plan

"7.1 Islington's Unitary Development Plan ('UDP') was adopted in 1994. It is the Council's development plan. Section 54A of the Town and Country Planning Act requires that planning applications shall be determined in accordance with the Plan, unless material considerations indicate otherwise.

. . ..

Departures from Adopted UDP Policies

7.1.8 Arsenal's proposals raise a number of fundamental policy issues. These are a number of general policies where arguably it could be said that the proposals do not comply and there are assessed in this report and Reports B, C and D. However, officers consider that they depart from the specific adopted (*i.e.* 1994) UDP policies outlined in the table below.

. . ..

Departures from Proposed UDP Policies

7.1.9 Government advice makes clear that where there is both an adopted plan and an emerging plan (as in this case), the decision whether an application is a departure must be considered against the adopted plan. Nevertheless, given the decision to assess AFC's proposals against the UDP as proposed to be adopted, officers wish to draw attention to those proposed policies which they consider the proposals would depart from. These are set out below.

. . ..''

129 Although the UDP in para.7.1.8 is the plan directly engaged by s.54A, both the UDP and the draft UDP review references are followed by a list of policies which would not be complied with. Paragraph 7.1.10 deals with making decisions on departure applications:

Making Decisions on Departure Applications

"7.1.10 The fact that the applications depart from the Plan does not mean that the Council could not make exceptions and resolve to grant planning permission for the proposals. However, before doing so, Members would need to satisfy themselves that other material planning considerations justified such a decision. If Members do resolve to grant planning permission, the departure applications would need to be referred to the Secretary of State for his consideration.''

130 These were referred to the Secretary of State as such.

131 As an instance (and there are others), the policy evaluation highlights the departures. For example, para.17.11 of the Overview Report on employment states:

"Ashburton Grove Area

The stadium, Queensland Road and Northern Triangle proposals would change the use of the whole of the Queensland Road/Ashburton Grove Industrial Warehousing Area into a mixed commercial/residential area. This would represent a wholesale departure from UDP Policy E11. Proposals for this area also do not accord with UDP Policy E4 or the advice in the SPG on Business to Residential in that they would result in the loss of B1 (office/light industrial) floor space. Proposals for these development parcels, together with Drayton Park, are also not in accordance with UDP Policies E8 and E11 in that they would result in the loss of B2 (general industrial) and B8 (storage and distribution) uses.''

132 The individual reports also set out policies and appraise them. For example, the Ashburton Grove Report (Report B), between pp.88 and 90, deals with the breach of UDP policy and concludes in para.40.1.8–40.1.9:

> ''40.1.8 My conclusion is that the application fails to meet a number of the policy tests of the SPG and the UDP and to that extent I am in agreement with ISCA and the other objectors.
>
> 40.1.9 The applicants have, however, put forward a number of reasons, based on policy, as to why the failures are not significant in the circumstances of these cases. The first of these is that existing businesses are relocated.''

133 It concludes that it would be a breach, but it would not be significant. I interject that Mr McCracken said that it was an error of law for the UDP appraisal to come after the SPG or planning brief appraisal. I regard that as a trivial point.

134 One can also see the point in relation to height on p.108 of the Ashburton Grove Report:

> ''47.2.4 Four parts of this application break the UDP rule: the stadium itself, part of the northern Queensland Road blocks, the block to Benwell Road and the building at the northern triangle. I discuss these in turn but it is quite clear that each amounts to a departure from the UDP.
>
> . . ..
>
> 47.2.18 I am therefore satisfied that an exception to the Council's tall buildings policy is acceptable and, equally important, approval would not set a precedent for further tall buildings.''

135 It is unnecessary to go through further citations in relation to other policies because those are the parts which might be said to have the greatest degree of non-compliance with UDP policies.

136 There is a clear direction given in relation to the approach to and degree of non-compliance. It is non-formulaic, but the approach is plain. It was made clear finally (if there was any doubt hitherto) by what was said by officers at the meeting of December 10, 2001:

> ''Following discussions at the Arsenal Review Group meeting on December 6, I would like to emphasise that the identified departures from policy in the proposed unitary development plan, which is set out in table A6 in the Overview Report, are in addition to the identified departures from the policies in the adopted UDP, so the two tables should be read together as an indication of where the proposals depart from both the adopted unitary development plan and the proposed revised unitary development plan.

These are large and complex proposals relating to three sites. Officers have carefully considered them, both in terms of the proposals for each site and their overall cumulative effect. The proposals depart from a number of policies in both the adopted UDP and the proposed, revised UDP, as outlined in tables A5 and A6, as I have just referred to.

Section 54A of the Town and Country Planning Act requires that planning applications shall be determined in accordance with the unitary development plan unless material considerations indicate otherwise. Hav[ing] considered all other material considerations, including the comments made from interested third parties, officers consider that there are material considerations that outweigh policy breaches.''

137 Next it was said that there was irrationality and a misdirection in para.59.2 on p.129 of Report B, where it was said:

> ''The objectors raise a large number of concerns but a number of their issues have kept coming time and time again. These are included in the Executive Summary at the head of the Report. This makes explicit the issues. What I should make clear here, however, is that whilst the scale of comment can be material consideration, this is not a referendum, not a simple count of numbers in favour or against. The Development Plan has primacy here.''

138 It was said to be irrational to describe the Development Plan as having primacy when the Council officers were putting forward a proposal contrary to it, or else that the reports had misdirected members as to the degree of compliance of the proposals with the UDP. They did no such thing, in my judgment.

139 In context, the putting of the Development Plan first was emphasised because the officer was seeking to counter any question that this was an issue to be resolved by means of a head count, given the large number of residents on both side of the debate. It was a perfectly proper comment in that context. It is clear in context that it is not suggesting that the proposal complied with the UDP. Such a conclusion would be a perverse reading of the reports as a whole. It is clear also that the reports are not inviting rejection of the proposal; it is clearly therefore seen as an exceptional development. This submission involved a level of textual criticism beyond what can properly be levelled at such a document.

140 Nor is it irrational for Policy E8 in particular to be in the UDP, strengthened by modification in the UDP review through the removal of the word ''normally'' so that exceptions to it would be even less likely, whilst simultaneously proceeding with the ultimately favourable analysis of a proposal contrary to it. This is not irrational, first, because the Council would not know until the decision in December 2001, or indeed the grant of permission in May 2002, that planning permission would be granted. It is necessary to have a policy in force in case such exceptional development were not to be permitted or, if permitted, were perhaps not to be implemented, and other proposals or variations came along.

141 Second, it is necessary in any event to have a policy in force against which an exceptional proposal can be judged. As I have said in another context, it scarcely advances the claimants' position to contend for a policy structure which on their logic could be generally permissive of this development, arrived at through a review of the merits of that policy, rather than to have an assessment carried out in a context in which the policy merit of E8 is a given fact and against which the proposal has to be justified as an exception.

142 The third ground of criticism raised by Mr McCracken was that officers' views expressed in e-mails were not views that figured in the reports to Committee. The underlying theme was that councillors had been misled by the tone of the reports into thinking that the case for the development was clear and that the issues had been further resolved than in fact the officers thought they were. Mr McCracken gave six instances. First, he pointed to the e-mail dated April 30, 2001, to which I have already referred, and which shows the advice given in relation to the role of the UDP inquiry. That e-mail goes to the reasonableness of the approach adopted to the UDP inquiry. This is in substance set out in the reports and the approach was a reasonable one to follow.

143 Second, Mr McCracken referred to an officer comment that the planning proposals were marginal. In an e-mail of November 15, 2001 it is said:

> "Graham is also deeply concerned that it is yet another erosion of planning policy that will make what is already a marginal scheme (in planning terms) that much more marginal."

144 Mr McCracken issued a forensic challenge to his opponents to show where in the main reports any officer had said that the proposal was marginal. The challenge in those terms could not be met. The word does not appear in that way in the reports. But the challenge was amply disposed of by the description of the balance of policy, impacts and benefits as set out, for example, in the Overview Report at para.17.24.3:

> "The proposals do represent clear departures from the UDP (Policies E4, E8 and E13A). However, there are potential economic benefits associated with the proposals which, when considered along with the other benefits of the proposals, officers consider justify permitting the proposals."

145 It was also rebutted by the passage from the transcript of the Council meeting on December 10, 2001 which is set out above.

146 Mr McCracken's argument needs to be tested against whether the reports are significantly misleading in relation to the views of officers. Manifestly the reports are not, and I say so having had the opportunity of reading these reports. Besides, it is to the Overview Reports and to the debate, that it is legitimate to look for the officers' final and considered view, rather than to prior e-mails passing internally in the course of a debate on a specific issue.

147 Mr McCracken's third point under this head was that there was no reference in the officers' report to a £50 million funding gap. The source for that point is the two e-mails dated November 15, 2001 in which it is said:

> "I believe that you are aware of much of the nuances and issues surrounding this application. In particular the current position whereby there is probably a £50 million funding gap based on the level of financing that can [be] secured for the new stadium and associated developments.
>
> AFC frequently express their view that the gap can be reduced by minimising s.106 requirements. Indeed it can be, but not to any significant level, unless one is prepared to reduce the 'biggies' which are affordable housing and transport.
>
> Can we please meet at 3.30 to discuss this. It has to be resolved in the next two days. Are Arsenal really going to potentially let this all unravel for want of an additional £2 million towards transport? (notwithstanding David Cooper's continuing mantra about the £50 million 'gap')."

148 The first e-mail discusses ways in which the funding gap might be reduced. Mr McCracken reinforces his contentions as to the significance of the omission by reference to the delay cost. He says that the timetable for development on p.7 of the Overview Report, with a new stadium operational by August 2004, was obviously impossible even in January 2002 because of the 33-month timetable as of that date. Failure to meet that opening date would add a cost of £20 million on Arsenal FC's own figures for a delay of one year, for which no funding had been identified. The gap was also increased by a further £2 million for the cost of various packages.

149 I do not consider that the e-mails demonstrate the existence of a material factor of which the Council were unaware, or of an unaddressed concern. There is a comment in relation to these e-mails by Miss Cluett, which is true here as elsewhere, to be found in her first witness statement dated May 27, 2002:

> "8. Officers were concerned to ensure that the planning evaluation was robust. They were also concerned to ensure that negotiations in respect of proposed planning obligations should deliver the most comprehensive obligations that could be properly sought from the developers, and obligations that would be compatible with the viability and deliverability of the project. The emails should also be read in the context of the Council's attempts to seek further concessions from the developer, which process required the Council to press its case as robustly as it could be argued. All outstanding concerns were resolved to the satisfaction of officers."

150 In her second witness statement dated July 8, 2002 she says:

"23. As indicated in my first witness statement, the contents of the emails to which the claimants refer were not, in my view, material considerations which it was necessary or helpful to report to members. Rather, what was material to members was the advice of officers arrived at after those deliberations had taken place and after any issues of concern had been raised and satisfactorily resolved. In all instances the final views of officers were accurately reported to members and all relevant considerations were before them when they made their decisions. Given the detailed and extensive scrutiny of the proposals, much of which took place at meetings and via e-mail exchanges, it would be wholly unworkable if members were required to examine each and every detail of the entirely proper debate between applicants and officers, and every element of negotiations about planning obligations. It is officers' definitive views at the end of the evaluation and negotiation process which are important and relevant."

151 DTZ had examined the financial position, had reached a view in relation to it and had put it forward. The funding position was dealt with in the Overview Report as follows:

Inter-dependence

"5.1 The overall development of the three sites is inter-dependent. Building a stadium at Ashburton Grove is dependent on building replacement facilities for displaced services at Lough Road, and both these elements are dependent on money generated from the sale of land for housing at Highbury, Ashburton Grove and Lough Road. Indeed, in submitting its June 2001 applications, AFC make clear that it has sought to ensure that in combination, the proposals will provide sufficient resources to contain the financial losses of the scheme to a level which the club is prepared and able to fund so that development will be achieved.

5.1.1 In other words, the proposed housing and other commercial uses at all three sites is, in financial terms, 'enabling development' in that funds secured from the sale of these development parcels would generate money which would be used to help fund other elements of the proposals. The Council's property consultants (DTZ) and the Mayor (GLA, TFL and LDA), after undertaking separate analysis of AFC's business case, agree that AFC needs to develop all three sites to ensure that the overall proposed development is deliverable and capable of being funded."

152 It is true that those paragraphs do not refer to £50 million or to any other figure. It is important to see the references to the funding gap and the figure of £50 million in the context of negotiations between Islington and Arsenal FC over land, and between Islington, the GLA and Arsenal FC over transportation and affordable housing which would naturally tempt an overstated position from Arsenal FC for negotiating purposes. In relation to that Miss Cluett continued at para.23 of her second witness statement:

> "The e-mails should also be read in the context of negotiations to ensure that the proposed s.106 Agreement should deliver the most comprehensive obligations that could be properly sought from AFC and that would be compatible with the viability and deliverability of the project. The e-mails were written within the context of the Council's attempts to seek further concessions from AFC, which process required the Council to present its case as robustly as could be argued even if, in the course of negotiations, a modified final stance on some aspects was eventually adopted."

153 Both Islington and the GLA were satisfied in terms of the benefits, having gone through the analysis. It is not sensible to suppose that officers were of the view that there was a gap between costs on the one hand and enabling development, Arsenal FC's own resources and the money which it could raise on the other hand, such that the development had no probability of being built. There is no planning matter to which that risk could go in terms of the buildings being left half complete in view of the inter-dependent sequence of development which I have already described. The only possible relevance of that point is blight and deliverability of planning benefits, which I have dealt with already.

154 It is also said that the true funding gap it revealed might also show that the authority had got less than it should have. There is a contradiction between that argument and the blight argument. Only one of those can be good. It is important also to remember that in November 2001, the s.106 Agreement package had yet to be finalised. The Council had expert input in relation to those matters and could judge later, as indeed could the GLA who had its own views, whether it was satisfied with what it was getting by way of package before granting permission.

155 The fourth point raised under this head concerns noise. Mr McCracken referred to the following extracts from e-mails. The first, dated November 1, 2001, reads:

> "If the EA had provided evidence that in the locality of the new stadium Sundays and bank holidays are no quieter than other days of the week (unlikely) there may have been a case to support use of the stadium on these days. However because the EA is so lightweight there is no such information or consideration of the impacts of use of the stadium on Sundays and bank holidays. Therefore we have insufficient information to be able to properly assess the impacts of use of the stadium on Sundays and bank holidays and therefore our advice is to refuse this request. If AFC come back with a proper EA study of the impacts of use of the stadium on Sundays and bank holidays for sports, pop concerts or other uses we can then re-assess the issues and come to an informed decision.
>
> Again the EA does not address the issue of hours of operation for major non-sporting events/pop concerts etc, and little information is provided regarding noise impacts both from the stadium or crowds leaving late at night, etc. Therefore we have insufficient information to be able to properly

assess the impacts of use of the stadium late at night and therefore our advice is to refuse this request. If AFC come back with a proper EA study of the impacts of use of the stadium late at night for non-sports major events, pop concerts etc we can then re-assess the issues and come to an informed decision.''

156 In an e-mail dated November 7, 2001 it is said:

> ''The noise and vibration impacts of use of the stadium on Sundays, bank holidays and in the late evening has not been adequately addressed in the ES accompanying the application. My view is that we should follow the advice of para.51 of the DETR guidance note 'Environmental Assessment—a guide to procedures: Nov 1999' (copy attached) which states that:
>
> > 'if the developer fails to provide enough information to complete the Environmental Statement, the application can only be determined by refusal'
>
> Pointing the above out to AFC may motivate them to actually do something about the defects with the ES and provide us with the information we need to assess the impacts of use of the stadium on Sundays, bank holidays and in the late evening.''

157 Finally, in an e-mail dated November 12, 2001 it is said:

> ''My view is we should not be preparing noise conditions for consent for the stadium whilst there are still major problems with the noise and vibration elements of the ES. We have repeatedly asked for extra information and AFC have chosen not to provide it. We therefore can not properly assess the noise and vibration impacts of the stadium (or WRC) development or draft meaningful conditions, and should therefore recommend refusal of planning permission. (see para.51 of the attached DETR guide to EIA procedures)''

158 The concerns related to bank holidays, Sundays, late nights and noise from non-sports events. There is criticism in the e-mails of the Environmental Statement for not addressing those issues. A conclusion is drawn that the Environmental Statement is deficient and that conditions are inadequate to deal with the position. In this context I am considering the question of whether the officers had views which were not properly represented to the Council in a way which meant that the Council was significantly misled.

159 That criticism cannot stand in the light of the evidence of Mr Fiumicelli in his first witness statement dated May 27, 2002, in paras 6–15, which I summarise as showing that there were discussions after the e-mails between the developer's consultant and the London Borough of Islington's own specialised acoustic consultant. Further information was provided which satisfied the consultant and

which led to the matter being dealt with, to the satisfaction of Mr Fiumicelli, by a combination of conditions and the noise protocol.

160 There are extensive conditions in relation to these matters, as can be seen in relation to Ashburton Grove in conditions 17–21, 24 and 26. They provide for extensive controls for music and other non-sporting events, sporting events and other measures in relation to the time of matches. The noise protocol forms part of the s.106 Agreement and deals with the PA system and the control of major non-sporting events in very considerable detail. The approach which was adopted in the main reports, for example the Ashburton Grove Report at pp.126–7, wholly reflects that. Mr Fiumicelli makes clear the extent of the noise controls in relation to this and other aspects of noise, for example video screens, crowd noise and the design of the stadium. This complaint is misconceived.

161 The fifth matter under this head related to contaminated land surveys. Once again Mr McCracken founded his submissions on an e-mail dated November 27, 2001 in which it is said:

> "I am therefore cautious of referring to the need for surveys in the conditions in case we are criticised for not requiring these up front. Perhaps we could just ask for protective schemes to be agreed—or if we really do need to ask for surveys, call them 'further detailed surveys'."

162 It is said that the content of that e-mail was not drawn to the attention of councillors and the fact that a survey in relation to contaminated land was necessary was a great concern to the local residents.

163 Mr McCracken pointed to the conditions in relation to contaminated land, which were amended in relation to Lough Road, where the requirement for surveys which originally had been in the draft conditions had subsequently been deleted so that there was no longer a requirement for surveys, but instead a requirement for a scheme of remedial works.

164 Condition LR61, as originally drafted, said that land contamination investigation should be carried out for each portion of the application site and a scheme of remedial works agreed before commencement of the relevant portion of works. It was amended to delete the reference to investigation and went straight to a requirement for a detailed scheme of remedial works to be approved and implemented at the various relevant stages.

165 Mr McCracken contrasted this with the references in the Environmental Statement expressing uncertainty over the location and type of different heavy metals and hydro-carbons, and to the problems of control over those during site ground preparation.

166 I was referred by Mr Purchas to other parts of the Environmental Statement Technical Annex on land contamination and hydro-geology, which dealt with the low level of risks and the type of measures, removal or "encapsulation" to be undertaken.

167 There was, it was said by Mr McCracken, a pre-occupation with site workers rather than with residents. In the light of the somewhat emotional comments

which accompanied this submission, I point out that workers are more directly involved in the contaminated land while they work because they are closer to it and working on it. They are usually seen as those at greater risk. So if what is done protects them, what is done also protects those who live further away.

168 There are extensive conditions in relation to contaminated land remediation. In relation to Ashburton Grove they are numbered 56 and 95–96, and there are ones in similar terms for Lough Road and Highbury. The scheme for remedial works will show what surveys, if any, are necessary. The problem with this sort of site is that, until the works are started, it is not known, as the Environmental Statement makes clear, where all the problems are. The very fact of carrying out a survey would itself need a scheme of working in order that protective measures be instituted because of the disturbance that is created. It is perfectly sensible to require a scheme. There is no basis for saying that something was concealed because the reference to a survey has been omitted. The scheme would obviously include the necessary site investigation as the detail of the works required to be developed, unfolds with protective and remedial measures. As Mr Harrington in his witness statement dated July 8, 2002 says:

> "30. While the ES variously identifies that further investigations are required prior to remediation (this point being made in the witness statement of John Dunkley), I do not consider that it was necessary for the planning conditions to explicitly require such investigations. Officers were simply concerned with the end result, and not the process necessary to achieve it. This is consistent with UDP Policy ENV16 of the 2000 UDP. . .."

169 It may be regrettable but a certain defensiveness in drafting conditions may be forgivable, and a desire to avoid offering hostages to the fortunes of litigation understandable, when judicial review had already been envisaged by Mr Richard Buxton who is a well known and doughty environmental solicitor. Miss Cluett explains the position in her second witness statement at para.25:

> "In my e-mail of November 27, 2001 I advised of my concern that conditions on contamination should not require surveys, in case such conditions should give the erroneous impression that such surveys ought to have been provided at the Environmental Assessment stage. Following my e-mail, I was advised that all necessary initial assessments had been carried out by AFC in their Environmental Statement to the general satisfaction of the planning officers. (This view was reported to Members at para.28.16 of the Overview Report.) AFC's assessment of Contamination issues together with the Council's own evaluation, was summarised in Appendix A5 of the Overview Report. In the light of that advice from officers, I took the view that the advice in my e-mail had been over cautious, and the 1999 Regulations had been met."

170 There cannot sensibly be said to have been any material consideration omitted. The officer's e-mails do not betray a different view from that which was set out in the officer's report.

171 The sixth point raised in this context related to Drayton Park. Drayton Park Station was of significance because it was thought by Islington to offer potential for additional rail capacity to reduce the demand on the three Piccadilly Line stations, and on Arsenal Station especially. Arsenal FC and LUL were more cautious. The capacity of those stations was linked to crowd control and to the operation of Holloway Road itself. The modal split aimed at a maximum of 20 per cent spectators by car, and preferably less. Again, Mr McCracken for this point relied on an e-mail dated November 5, 2001 disclosed on the public register after the decision, in which it was said:

> "The situation at Holloway Road and other neighbouring underground stations could be somewhat easier if AFC were to accept the need for a major role for Drayton Park with regular services around major events. This station could be very important with respect to relieving pressure on the southbound Piccadilly Line and also provide for Northbound movements beyond Finsbury Park. Negotiations are continuing with the club but as yet there is no agreement with respect to funding for improvements at Drayton Park Station."

172 Mr McCracken also referred to what was said by Gibb's, Islington's transportation consultants, in a memo dated November 14, 2001:

> "SDG have finally accepted that post-match southbound services from Drayton Park have a useful role to play, and can help to reduce the high level of demand for LUL stations.
>
> . . ..
>
> . . .. A full development of Drayton Park would provide as much as 10 per cent additional capacity and provide operational benefits to LUL. LUL could suffer by association if it claims that it can make the SDG demand scenario work. If the SDG demand forecasts prove to be an underestimate and system is seriously overloaded, many will perceive only that LUL said that their station could cope.
>
> SDG argue against Drayton Park that in the northbound direction spectators may not be able/ allowed to get on trains because they would be packed with commuters . . .."

173 Mr McCracken contrasted this with the Overview Report, Appendix 4, p.13 in which it is said:

> "3.22. . . . It is [the] officer's opinion that due to the station's proximity to the proposed stadium, Drayton Park could have a pivotal role in reducing spectator usage of other underground and surface rail stations . . ..
>
> . . ..

> 3.24. . . . Such provision would provide as much as 25 per cent of the required rail/ underground capacity required by the stadium in the post match hour if the club's levels of crowd retention are accepted.''

174 This was a new point and, in the light of Richards J.'s order that consolidated grounds be provided by June 28, I was reluctant to consider it. However, Mr Purchas answered it adequately by pointing out the two different percentages to which Mr McCracken had drawn attention. As they were percentages of different matters, they could be reconciled adequately. The reference to 10 per cent was a reference to capacity. The reference to 25 per cent was a reference to the percentage of demand with which capacity of 10 per cent additionally could cope. 10 per cent was additional available rail/tube transportation capacity; 25 per cent was a percentage of demand for the use of that capacity. Islington's consultant's view was properly reported.

175 The second point made by Mr McCracken in relation to Drayton Park and the omission of what was said to be significantly different views held by the officers from the report, related to para.4.14 of Appendix 4 to the Overview Report. This specifically draws to the Council's attention the fact that Gibb's and SDG (Arsenal FC's transportation consultants) did not agree on whether Arsenal FC can retain 25 per cent of its crowd in the local area after the matches so as to reduce the peak post-match pressure on Holloway Road and the Piccadilly Line. But it was precisely Gibb's concern that Arsenal FC could not do this, which led it to seek more of a role for Drayton Park and finance from Arsenal FC for improvements to Drayton Park Station. This has been obtained. The reference to a requirement for 25 per cent underground and rail capacity was a reference, as I have already identified, to a demand which included the use of Drayton Park. There have also been measures to reduce the demand for travel with a priority scheme for local residents to buy season tickets.

176 Related to that is the assertion that councillors failed to consider as a material consideration the likelihood that an 80:20 non-car to car modal split would be achieved.

177 The assertion that the local authority failed to consider the likelihood of that modal split being achieved is without foundation. The Overview Report in para.26.13.1 and 26.13.2 makes it clear that the main mechanism for the achievement of that modal split would be the event day controlled parking zone, EDCPZ. The prospect of the achievement of that zone was considered. Public transport improvements would assist, but were not the main basis for the achievement of that level of non-car usage.

178 The matter was also considered at length in Appendix 4, at paras 1.7 and 1.8 especially, and indeed in subsequent paragraphs. There is no question of any misconception that the modal split depended on public transport provision. It was dependent upon controlling the use of the car by controlling the availability of parking spaces within reasonable walking distance of the stadium. Public transport was intended to deal with the consequences of success in that respect.

179 I do not consider that Mr McCracken's fourth head of criticism of the Officers' Reports that all these very important matters—which undoubtedly they were—should not have been in an appendix to the report is a sound one. These are detailed matters and can sensibly be placed there without breaching any legal requirements as to fairness or as to the ability on the part of councillors to consider matters. Councillors Leigh and Hitchens obviously disagree about the ease with which the documents could be assimilated. As I have said, her difficulties evidence no point of law.

180 Mr McCracken sought to illustrate his point by comparing Appendix 4, para.3.18, stating that improvements at Holloway Road could not be guaranteed before the opening of the stadium, with para.26.13.9 of the Overview Report. But there is nothing misleading in those paragraphs because the fall-back position of additional buses being required from Arsenal FC is set out in para.3.18. It is also a fall-back obligation in Sch.1 to the s.106 Agreement.

181 He further illustrated his point by contrasting the improvements to Drayton Part and WAGN's attitude, as described in Appendix 4 of the Overview Report, paras 3.19 and 3.20, with the Overview Report, para.26.13.10, emphasising the key role of Drayton Park. But the conditional nature of the improvements has already been referred to. Appendix 4 deals with the assessment of capacity in the passages to which I have already referred.

182 Nor do I see anything misleading in the contrast between para.1.22 of Appendix 4 on the prospects of 75 per cent completion of the EDCPZ delivering 20 per cent modal split to car, and para.26.13.2 of the Overview Report. They are expressed in very similar terms.

183 The complaint that the view of LUL on the potential of Drayton Park had not been put in the report does not give rise to a point of law. Drayton Park is neither its station nor on its lines, and there is no obligation to refer to its view. The view of Gibb's and of London Transport was set out in the report and in Appendix 4.

184 It is convenient also at this stage to pick up as fifth head of criticism the allegation that a material consideration was ignored in relation to the loss of the private waste-handling capacity from the Ashburton Grove site. The North London Waste Authority facility at Ashburton Grove was to be replaced with a more modern WRC at Lough Road. But there were two businesses at Ashburton Grove, Brewsters and McGovern, which provided private waste-handling facilities. The relocation and potential loss of the businesses *as enterprises* was discussed, it was accepted, but not the question of where any shortfall in waste-handling facilities might be met, nor at what environmental cost.

185 Mr McCracken relied on this point although it had been raised not by the first or second claimant, nor indeed by the GLA, nor the NLWA, but by Mr Scott, whose organisation is no longer a claimant, at the 10th December meeting. Mr Scott criticised the response of the developers in relation to the location of other sites within three miles of Ashburton Grove. Mr Hepher, Arsenal FC's planning consultant, had responded at the meeting that the three sites to which he had made previous reference were all licensed and that, as much of the material came from outside the area, it could also be disposed of outside the area. Sites in Tottenham may have been in mind.

186 There was no specific conclusion by the Council as to where the reduced private waste-handling capacity might be made good. The loss of the business was noted in the report on Ashburton Grove at pp.81 and 84 in Brewsters' and McGovern's own representations. Paragraph 13.7.2 of the Overview Report dealt with both the risk of the losses of business if there were no relocations and with the waste handling implications:

> "NLWA intend that the proposed WRC would be licensed to take commercial waste. However, they expect that municipal waste would consume all or nearly all of the expected licensed capacity (1,100 tonnes per day). AFC has yet to identify suitable alternative sites for the private sector waste management and skip hire operations currently based at Ashburton Grove (Brewsters and McGoverns). Officers acknowledge that the loss to the Borough of these facilities would reduce overall waste transfer capacity and disadvantage some small businesses. However, AFC has submitted a plan as part of the November 2001 revisions which demonstrates that there are seven private waste facilities/skip hire businesses within approximately three miles of the Ashburton Grove site. Whilst this would inconvenience some businesses that use the existing facilities and lead in some cases to longer journeys, it would appear that reasonable alternative provision is currently available."

187 The s.106 Agreement, Sch.1, s.3, contains obligations on Arsenal FC in relation to the relocation of businesses which would assist in, but plainly do not and cannot guarantee, relocation.

188 It is clear that the Council could not be sure and knew it could not be sure that there would be a specific convenient relocation of the waste handling facility, or a suitable place found for the lost capacity. It is impossible to say that the Council ignored that point in the light of para.13.7.2.

189 However, the debate continued long after the meeting was closed, in the witness statements before this court. Mr Dunkley, in his first witness statement, at p.171, dealt with the issue with a mixture of fact and argument, seeking to show that there had been a factual misapprehension on the part of the Council. Mr Hepher, in his second witness statement (Vol.1, p.310, para.2.32) disagreed, and he gave further evidence on the source of arisings and the availability of other facilities. Mr Dunkley responded to this in a second witness statement (Vol.1, p.1337), saying that Mr Hepher's evidence to the councillors was misleading and grossly inaccurate, to which Mr Purchas for the Council, and Mr David Elvin Q.C. for Arsenal FC, say that what Mr Hepher said was correct in relation to licensed sites. It is not for me to resolve this factual issue, I am glad to say.

190 There is a potential loss of private waste handling capacity which may cause local businesses a degree of disruption if they have to travel further. London Borough of Islington were aware of that and took it into account with the Overview Report. They may or may not have been assuaged by Mr Hepher, and they may or may not have been more concerned by what Mr Scott had to say. There may have been some councillors on either side of the debate who may have been in their

turn either more or less assuaged and taken a view in relation to that matter when reaching their overall conclusion. But the evidence does not support the conclusion that the Council was unaware that there was a risk of a loss of private waste handling capacity.

191 I note also that Mr Harrington in his second witness statement, at paras 35 and 36, denies that there was any misleading of the members and explains his understanding of the information previously supplied by Mr Hepher in relation to other licensed sites, which is rather more extensive than the short comment made by Mr Hepher at the Council meeting, and was material available to support the comment made in the Overview Report.

192 Finally, the complaint made of an error in relation to physical measures to control crowds can be seen to be false by reference to what the reports actually say. The impact of crowds from the football matches is dealt with very clearly in paras 26.13 and 14 of the Overview Report, and in the appendix dealing with transportation at paras 4.14–4.15. The criticism as to the detail of that in the summary report is quite unfounded.

The Environmental Statement

193 This was a development which required an Environmental Statement. That was never in doubt. Mr McCracken contended that there were such deficiencies in the Environmental Statement that it could not be regarded as an Environmental Statement for the purposes of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293). The relevant provisions are as follows. Regulation 3(2) provides:

> "The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."

194 "Environmental information" by reg.2(1) means the Environmental Statement including any further information and any representations made by anybody required to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development.

Part IV of the Regulations deals with the preparation of Environmental Statements and scoping opinions. A scoping opinion was sought here and was formally given after extensive public consultation. The purpose of it is to enable the planning authority and the developer, with the benefit of public assistance, to identify those issues which it is necessary for an Environmental Statement to address.

195 Regulation 13(1) deals with the procedure for submitting an Environmental Statement to the planning authority. But it is notable for the language which it uses:

"When an applicant making an EIA application submits to the relevant planning authority a statement which he refers to as an Environmental Statement . . .."

196 Similar language can be seen in reg.19(1), which sets out the means whereby further information is to be obtained. Regulation 19(2) is also relevant. They provide:

"19 Further information and evidence respecting Environmental Statements

(1) Where the relevant planning authority, the Secretary of State or an inspector is dealing with an application or appeal in relation to which the applicant or appellant has submitted a statement which he refers to as an Environmental Statement for the purposes of these Regulations, and is of the opinion that the statement should contain additional information in order to be an Environmental Statement, they or he shall notify the applicant or appellant in writing accordingly, and the applicant or appellant shall provide that additional information; and such information provided by the applicant or appellant is referred to in these Regulations as 'further information'.

(2) Paragraphs (3) to (9) shall apply in relation to further information, except in so far as the further information is provided for the purposes of an inquiry held under the Act and the request for that information made pursuant to para.(1) stated that it was to be provided for such purposes."

197 An Environmental Statement is defined in reg.2(1) as follows:

"'Environmental Statement' means a statement—

(a) that includes such of the information referred to in Pt I of Sch.4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but

(b) that includes at least the information referred to in Pt II of Sch.4."

198 Schedule 4 of Pt I deals with the information which is to be included in Environmental Statements. Schedule 4, Pt I, paras 4 and 5 are of most note here. They provide:

"4. A description of the likely significant effects of the development on the environment which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a) the existence of the development;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment."

199 The Environmental Statement, therefore, is not just a document to which the developer refers as an Environmental Statement; it is that document plus the other information which the Local Planning Authority thinks that it should have in order for the document to be an Environmental Statement. Accordingly, it is the Local Planning Authority which judges whether the documents together provide what Sch.4 requires by way of a description or analysis of the likely significant effects: see, for example *R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 406, paras 104–106 (Sullivan J.), and *R. (on the application of Barker) v Bromley LBC* [2001] EWCA Civ 1766, [2002] P.L.C.R. 8, paras 32, 33 and 65.

200 It is quite clear from the material before this court that Islington did conclude that the documents which it received enabled it to say that it had before it an Environmental Statement. The Mayor of London was also satisfied with the Environmental Statement.

201 I have already identified, in short form, the process whereby the Environmental Statement was produced, the IEMA review of the statement and the consultations which took place upon it.

202 Paragraphs 28.15 and 28.16, and Appendix 5, of the Overview Report set out the Council's overall view of the Environmental Statement, the fact of and the nature of the disagreements between the Council and the developer over some of its contents, and in the Appendix detail its views in relation to significant effects.

203 Whilst one should not be over-impressed by the volume or weight of documents—and even very lengthy documents can omit significant factors—I confess to approaching Mr McCracken's submissions with a degree of doubt as to whether the deficiencies to which he drew attention could be such as to mean that Islington could not reasonably regard the material as constituting an Environmental Statement. It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to some minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law on the Local Planning Authority's part in treating the document as an Environmental Statement or that there was a breach of duty in reg.3(2) on the local authority's part in granting planning permission on the basis of that Environmental Statement.

204 The first complaint related to the fact that there was no assessment in the Environmental Statement of the impact of an 80:20 modal split to car. The Environmental Statement approached the impact of traffic, of crowds on Tube and rail, and on the pavements through the areas of concern to local residents,

on the basis that there would be an 88:12 percentage modal split, non-car to car modes. It did not assess it on the basis of 80:20, that is to say a larger number of cars with fewer public transport or walk modes. There is no doubt that the Council did consider transport impact on an 80:20 modal split basis.

205 Mr McCracken says that the Council must always have thought that an 80:20 assessment was required because it was the scenario viewed as likely by the decision maker. An e-mail of October 19, 2001 discussed this issue and the risk that not having an 80:20 Environmental Statement assessment could lead to the quashing of any planning permission. It is convenient here to set out extracts from the e-mails which deal with other points in relation to the 80:20 split upon which Mr McCracken relies. The relevant part of the first, dated October 19, 2001 reads:

> **"Environmental Statement**
>
> Agreed there is a risk that if approval is recommended on the basis that it is likely/ highly likely that 80:20 will be achieved, the ES will be challenged as having failed to assess the impact of 80:20 (it assesses the impact of 88:12).
>
> Agreed that on the basis that the risk is accepted, LBI could accept the current ES and proceed to determine the application using the above formula for assessing traffic modal split issues, without a further supplement to assess the impacts of 80:20.
>
> Agreed that the risk of proceeding without an ES supplement on the 80:20 impacts would be reduced if it was considered by SW that the 88:12 was likely to be achieved albeit not immediately and without prejudicing the CPZ consultation exercise or prejudging committee'sdecision on the CPZ (this is because the ES Regs require the 'likely' env effects be assessed, not the 'worst case' env effects. However, the Regulations also require the 'short, medium and long term effects' to be assessed, and it may be that the effects of 88:12 are only likely to occur in the long term.)
>
> **Timetable**
>
> The upshot is that if AFC are not prepared to provide a supplement to the ES to assess the effects of other likely mode splits, LBI need not insist on this, but this gives rise to a risk of any decision being quashed on the basis of a flawed ES. This is a risk LBI could decide to take."

206 The relevant extracts of the e-mail dated February 18, 2002 read:

> "However, to summarise my concern and assist our thinking about the acceptability of 'reasonable endeavours' in relation to achieving the 80:20 modal split, I have tried to do an audit trail as to how we reached the 'best endeavours' obligation which Graham H and I thought we were recommending to ctee. My recollection is as follows:
>
> We originally prepared the s.106 on the basis that the Stadium would not open until Holloway tube improvements and Match Day Parking Zone were in place. This was based on Leading Counsel's advice, and was the only fire-

proof way of securing the traffic restraint measures we all want and without which the 80:20 cannot be achieved. This is important because any more car use than 20 per cent pushes the traffic impacts to an unacceptable level. This is important because any more car use than 20 per cent pushes the traffic impacts to an unacceptable level. We reluctantly agreed to modify this for commercial reasons to assist AFC funding—and replaced it with the 'best endeavours' clause.

. . ..

At no stage has the possibility that 80:20 cannot be achieved, nor the impacts of failing to achieve this, been assessed. This is why it is so important (in order to defend the planning evaluation) that AFC go beyond the normal 'reasonable endeavours' in relation to achieving the threshold of acceptability in relation to the modal split . . ..''

207 Mr McCracken's point is not answered by showing the reasonableness of the Local Planning Authority's view that an 80:20 split would occur as from the date of opening of the stadium, which I conclude the local authority have considered and assessed. The complaint is not that there was no assessment of a modal split with a yet higher percentage than 20 coming by car. The complaint is about the Environmental Statement.

208 Miss Cluett in her second witness statement referred to the October e-mail. She said:

> ''26. As stated in my first witness statement:
>
> • 'In my e-mail of October 19, 2001 headed ''AFC Traffic Issues'' I summarised the common ground which had been identified between Arsenal Football Club (''AFC'') and the Council following a telephone conference with Leading Counsel. I had concerns, at that stage, whether sufficient information had been made available to evaluate the traffic impacts of the proposals.
>
> • I was particularly concerned that AFC's assessment of traffic impacts had assessed those impacts on the basis that only 12 per cent of visitors to the stadium would travel by car, whereas the Council's traffic consultants were concerned that a higher proportion of visitors to the stadium might travel by car (20 per cent), at least initially, with more travelling by sustainable models in the long term.
>
> • A further evaluation was carried out by both AFC and the Council's traffic engineers and consultants. The Council's Head of Planning and Transportation, Graham Loveland, explains in his witness statement how that evaluation was carried out and what conclusions were reached. Following that Review, the Council's Head of Planning and Transportation took the view (which I considered reasonable) that the environmental assessment carried out was sufficiently robust to satisfy all statutory requirements, and to identify all significant impacts.

- In the light of the analysis carried out by the Council and explained in the witness statement of Graham Loveland, I was satisfied that my concerns had been met.'

27. The e-mail exchange referred to represents a part of the consideration and not the final view reached by officers after proper scrutiny. I would in particular confirm that in the light of the further examination that I supported the view of officers that the environmental impact assessment provided in this respect, was sufficient information to identify the key environmental impacts for their consideration."

209 The thinking was also set out by Mr Loveland in his first witness statement. He says at para.14:

> "Council officers considered whether an assessment based on the 80:20 mode split should also be carried out. However, having considered the matter further with AFC and its consultants I was satisfied that the environmental assessment did in fact identify the likely environmental impacts."

210 He explains in para.15:

> "In reaching this judgment I had regard to the fact that a 20 per cent mode share for car travel to the proposed new stadium would equate to 5000 cars, this being equal to the numbers of vehicles currently driving to the existing stadium. Given that an Event Day Parking Scheme (albeit incomplete) would be operational by the time of Stadium opening, vehicles seeking access to the Stadium would be expected to be more widely dispersed, than with the limited Match Day Parking Scheme currently in operation."

211 Appendix 4 of the Overview Report, in paras 1.6 and 1.24, draws attention to the basis of the Environmental Statement and to the way in which the s.106 Agreement would require Arsenal FC to work towards a modal split of 88:12 compared to 80:20. In effect, Islington argues that SDG have assessed the worst case in terms of non-car modes, *i.e.* 88 per cent. So that aspect has been covered in terms of pedestrian impact and bus and tube travel. The s.106 Agreement, as the EDCPZ is extended and public transport improvements are implemented, will reduce the car split in the longer term to 12 per cent. In effect, therefore, it would be said that a likely effect in the short to medium term, namely the extra 8 per cent car split, has not been assessed. However, the Council was entitled to take the view which, as I understand it, it did, that the anticipated medium term continuance of the same level of traffic in the same area, equivalent to 20 per cent split to car, but with a greater degree of dispersion, could not a "likely significant effect" of the development and that the Environmental Statement did cover therefore the likely significant effects. An absence of significant change is not a significant effect which requires assessment. That in effect is an

aspect which has been assessed as the baseline or existing condition. I cannot regard that as irrational.

212 This stance had been flagged up in the officer's report and was obvious from the Environmental Statement; and I have been shown no complaint by the claimants in relation to it (I emphasise by the claimants) before the resolution to grant permission or the grant itself. It may be of some relevance in judging the significance of Mr McCracken's point that that is what has happened. The comments made by officers in relation to likely significant effects are consistent with Appendix 5 of the Overview Report dealing with comments on pedestrian effects, crowd movements and public transport, which are significant.

213 The second aspect complained of was that there was no assessment in the Environmental Statement of the loss of waste handling capacity through the relocation or demise of Brewsters and McGovern at Ashburton Grove. This argument depends on a view being taken as to the significance of that aspect. A view was taken. It is expressed by Mr Harrington in his second witness statement at para.34:

> "Whilst the potential loss of waste handling capacity in the area was not specifically addressed, I should add here that my main concern, and that of other officers, related to the capacity for waste handling of the public facilities run by the North London Waste Authority and the Council. Further, with respect to the private waste companies (as with all other directly affected private businesses that provide a useful service to other businesses and the public) the Council was concerned to ensure that appropriate relocation arrangements were put in place. In this context, I consider the information that was provided in the ES to be reasonably sufficient to enable the Council and others to come to a view on the loss of these private businesses. It is relevant that neither the North London Waste Authority nor the Greater London Authority raised concerns about the potential loss to the area of the waste management capacity provided by these firms. Similarly, the Islington Chamber of Commerce did not raise concerns on behalf of businesses within the Borough."

214 This demonstrates that this aspect was considered but not considered to be a significant effect; that conclusion cannot be said to be unreasonable.

215 The third aspect complained of related to noise. Mr McCracken relied on Mr Fiumicelli's e-mails, to which I have already made reference, in relation to Sunday, bank holiday and late night operation of the stadium, and also in relation to the air handling equipment noise which Mr McCracken said had the potential to be a continual nuisance to residents [Vol.2, pp.111–112]. There was indeed a further e-mail on November 7, 2001. I have already dealt with this in part in relation to whether a material consideration had been ignored. However, what is apparent from Mr Fiumicelli's witness statements is that the e-mails, as Miss Cluett said in her second witness statement (the extract from which I have already cited), represented no more than internal discussions and not a final view.

216 The final view on the likely significant effects is not in those e-mails but is set out in the Overview Report which led to the range of conditions, including those dealing with air-handling equipment at Lough Road. It is not necessary for me to set those out, but I identify them by number: LR2, 3, 4 and 28.

217 This is reflected in the evidence of Mr Fiumicelli as well as in the evidence of other officers involved. I draw attention specifically to (but it is unnecessary to set them out) paras 8 and 14 of Mr Fiumicelli's first witness statement, and para.8 of his second. These deal with discussions that took place between consultants, and the further information provided, which enabled him, with the advice of expert consultants acting for the Council, to be satisfied that conditions would deal with those issues. The new information is identified in para.28.10 of the Overview Report.

218 The fourth aspect was contaminated land. It is quite clear from the material to which I have already referred, including the Environmental Statement itself, that this was not seen as a likely significant effect and the requirement for a scheme of working, which in reality may include a survey as the work proceeds, was considered sufficient to protect health or amenity.

219 Moreover, I do not consider that it can be said that it was thought surveys were necessary in order to reach that assessment, but that necessity was concealed revealing a view that there was a disguised but likely significant effect. The foundation for Mr McCracken's suspicions is flimsy. The e-mail merely shows a desire to avoid offering an unnecessary hostage to fortune.

220 The fifth aspect concerns dust at Lough Road and methods for dealing with it. This was said to be a significant concern to residents arising from the unknown method of preparation of the site. It is difficult to see the justification for the legal criticism in the light of the coverage of this aspect in the Environmental Statement main report, para.10.14 and 10.15, which deal with construction, and 10.20, which deals with the operation of the WRC.

221 That is but a sample of material which I have seen. It is quite clear from the Council's and Arsenal FC's skeleton arguments that that is not comprehensive. Mitigation is also referred to. I have also seen a part of the Land Contamination and Hydro-Geology Technical Appendix, at para.7.3. Odour in operation is dealt with at paras 10.22 10.23 of the Environmental Statement main report. Mitigation is covered. It cannot rationally be said that this material was so obviously insufficient that the Environmental Statement was no Environmental Statement at all.

222 Conditions are imposed which cover dust in construction (LR9), odour (LR10), construction and contamination, and also relevant to dust is condition LR61(a) and (b).

223 The way in which the significance of dust and noise are described in Appendix 5 to the Overview Report, together with the comments made by Islington in relation to them, also bear noting.

224 The absence of analysis of alternatives beyond the M25 was effectively abandoned as a criticism because Mr McCracken recognised that he had no basis for saying that Islington could not rationally decline to require that to be studied: fans' home addresses dispersed all around the M25 and beyond. In any event,

the Regulations are quite clear. What needs to be covered in the Environmental Statement are the alternatives which the developer has considered. This the Environmental Statement did. The Regulations do not require alternatives which have not been considered by the developer to be covered, even though the Local Planning Authority might consider that they ought to have been considered.

225 It is also said that there that there was a missing document forming part of the Environmental Statement which was never available publicly. Mr Dunkley deals with this in para.67 of his first witness statement. He says that the document entitled, "Further Information Regarding 'Extended Stays' in Stadia Resulting from Post-Match Entertainment" was never received and remained missing in paper copies of the Environmental Statement and on the CD Roms. He said that the error was acknowledged by Mr Hepher.

226 Islington says that this was not part of the Environmental Statement; it was merely additional material which Arsenal FC, through SDG, had passed to Islington in early October 2001 and which Arsenal FC had not treated either as part of the Environmental Statement. Mr Spencer of SDG describes this in para.35 of his affidavit (Vol.1, p.328).

227 I see no reason to doubt Mr Dunkley when he says that it was not with the Environmental Statement documents, but I cannot sensibly resolve what may be a dispute of fact as to its availability on a point arising in that way. I find it difficult to see how its absence could mean that the Environmental Statement was not an Environmental Statement, which was the only way it was put in relation to Mr McCracken's submissions on the Environmental Statement. There is some dispute about it in terms of its availability to the public, but a lack of availability to the public does not alter the fact that if it was available to the Council, as it was, the Environmental Statement was not in that respect deficient. As I say, the only point raised was that the absence of it meant that the Environmental Statement was not an Environmental Statement.

228 It is also clear that the Local Planning Authority had the document and were able to take it into account as a relevant factor.

The section 106 Agreement

229 A range of issues was raised under this head. First, it was said that there was an absence of public consultation on it. It was said that the public had no opportunity to comment on it and that that was unfair. Mr McCracken relied on the decision in *R. (on the application of Lichfield Securities) v Lichfield District Council* [2001] EWCA Civ 303, [2001] P.L.C.R. 519. At para.12 Sedley L.J. said:

> "It is fundamental to s.106 that it must be used only for legitimate planning purposes. A variety of people may have an interest in these—not only a potential financial beneficiary such as LSL but, for example, local people who want to be sure that their community is going to benefit appropriately from a development. It is only in the run-up to the entry into the s.106 Obli-

gation that these interests can have any worthwhile say, for they have no right of appeal if the authority's eventual resolution adopts an unsatisfactory agreement."

230 It is unnecessary to deal with Islington's submission that the decision in *Lichfield* is irrelevant because it concerned fairness as between two developers rather than fairness towards resident objectors, save to observe that the comment of Sedley L.J. appears to be wider than that.

231 The problem with Mr McCracken's submission is that it is factually incorrect. The heads of terms for the s.106 Agreement were set out in Appendix 7 to the Overview Report and could be commented on by the public both at the Council meeting and at any time subsequently. This was a publicly and widely available report. The public consultation in relation to the s.106 Agreement is described by Miss Cluett in her second witness statement at para.22:

> "The Overview Report was made available on request by a Press Notice which appeared in the local paper and which invited interested parties to contact the committee clerk for copies of the Reports. It was available on the Council's web-site, from the Planning Enquiries office, and was sent to all Review Group members including the first claimant. The Report to February 2002 Planning Committee reporting the main settled terms was also available on request. While there is no requirement to consult on the detailed terms, nevertheless on February 14, 2002 the Planning Committee Report was sent under cover of an explanatory letter to Members of the Review Group, including the first claimant. A copy of the covering letter and circulation list is exhibited at 'DC4'. The Report to February 19, Planning Committee was also available on the Council's web-site. Comments on the s.106 Agreement were made by interested parties, including individuals and Members of the Review Group, and Members at the Planning Committee meeting. These were noted and, where appropriate, the final form was amended to reflect them. It is therefore wrong to suggest that there has been no opportunity for the claimants and other interested parties to comment on the s.106 Agreement."

232 The circulation list for the report to Committee in February 2002 included the first claimant. No complaint can justifiably be made of any omission to consult on what for these purposes appear to be the non-controversial changes on April 23, 2002. The claimants had plenty of time to say whatever it was they wanted to say.

Unlawfulness of the Involvement of an Expert

233 The complaint originally raised in the grounds by Mr McCracken was that Sch.1 to the s.106 Agreement contained a number of obligations on Arsenal FC to do things in accord with various plans, but no provision for the production of such plans or for the resolving of disputes. That point was expressly abandoned

by Mr McCracken before me as incorrect. But he developed a new point which does not appear in the grounds. This was that the mechanism for the resolution of the issues involved the use of an independent expert and accordingly the task of resolving issues or approving plans had been passed by Islington to him, something which Islington had no power to do. Clauses 3.5 and 5.1 of the s.106 Agreement impose an obligation on Arsenal FC to carry out the terms of Sch.1 which contain clauses dealing with the Stadium Travel Plan, to take the chief example relied on, in particular cll.9.1–10.1. They read:

> "9.1 All reasonable endeavours shall be used to work with LBI to work towards achieving the modal split target.
>
> 9.2 The stadium shall only be used in accordance with the stadium travel plan and the approved stadium travel plan shall be complied with.
>
> 9.3 The monitoring programme shall be implemented and funded.
>
> 9.4 All reasonable endeavours shall be used to ensure that upon commencement of use of the stadium for a major event no more than 20 per cent of all visitors attending a major event shall travel to the locality of the stadium by private car and measures intended to achieve this figure in the event that this figure is not met shall be secured.
>
> 9.5 Until completion of the proposed Holloway Road underground station improvement works on the occasion of a major event sufficient travel capacity shall be provided to ensure that no more than 20 per cent of all visitors attending a major event shall travel to the Locality of the stadium by private car including for example the provision of an additional sufficient number of coaches and buses.
>
> 10. Retention of visitor measures
>
> 10.1 The retention of visitor measures shall be complied with in accordance with the stadium travel plan."

234 The modal split target, which is referred to in cl.9.1, is the 88:12 split. The stadium travel plan is dealt with in Sch.11 to the s.106 Agreement. It sets out the purpose of the STP and the obligations to take measures to ensure that the purpose is fulfilled. The measures are described. The flavour of the point upon which Mr McCracken relies can be seen from this extract from the stadium travel plan requirement in Sch.11:

> "Purpose: To identify measures to be taken by AFC to achieve the modal split target for major events and to ensure that retention of visitor measures are effective.
>
> Measures: AFC shall liaise with all relevant bodies, including LBI (planning and transportation functions), transport for London, London Underground Ltd, relevant train operating companies, the Metropolitan Police and British Transport Police to ensure that the purposes of the stadium travel plan are achieved and implement such reasonable measures as may be required to achieve those purposes following consultation with the Liaison Committee.

In addition to the funding of an Event Day Parking Scheme (as set out in cl.11), such measures may include:

(a) an approved 'Car Part Management Agreement' for the stadium car park;

. . .."

235 Schedule 12 to the s.106 Agreement deals with monitoring in the same vein. Clause 8.1 of the s.106 Agreement provides for the role of the single expert. It reads:

> "Save for matters of construction (which shall be matters for the Courts) any dispute or disagreement arising under this Agreement including questions of value or any question of reasonableness may be referred at the instance of any party for determination by a single expert whose decision shall be final and binding on the parties PROVIDED THAT nothing in this clause shall fetter LBI in exercising its discretion in carrying out its functions."

236 Thus, submits Mr McCracken, it is the single expert, not Islington, who ultimately would decide whether Arsenal FC were making "all reasonable endeavours" to achieve the 88:12 modal split target contained in cl.9.1 of Sch.12, or the immediate 80:20 requirement in cl.9.4.

237 It is undoubtedly true that the single expert would ultimately have that role; but I cannot see why that provision for dispute resolution is unlawful. There is no doubt but that those matters are capable of giving rise to dispute. It is lawful to postpone the resolution of those issues until after planning permission has been granted and until after dispute has arisen as the process of negotiation subsequently continues. It is unnecessary for all those matters to be resolved in order to decide whether or not to grant planning permission. Some dispute resolution is necessary because if it were merely a matter for Islington to decide, there might be no agreement at all, or less strict restrictions with a less happy outcome. It is for the planning authority to decide if it wants to deal with matters in that way. Once it has decided that it does not want to deal with matters in that way, a dispute resolution provision is necessary. Where a planning authority is in dispute over the reasonableness of requirement, I see nothing unlawful in an expert resolving that matter. This is not a question of the exercise of a statutory discretion being devolved. It is in the exercise of the statutory power of the decision maker to grant or refuse planning permission and in relation to that decision it is a material consideration that there is an agreement in existence with this dispute resolution procedure within it. There has been the exercise rather than the abdication or unlawful delegation of power. It is difficult to see how the decision as to what it is reasonable to require, where there is a dispute, can be regarded as itself the exercise of a specific statutory discretion any more than the position would be with any other arbitration or dispute resolution provision. In any event, the proviso to cl.8.1 recoups any power which it might be said that the Local Plan-

ning Authority has unlawfully devolved or passed away so as to fetter its discretion. That submission by Mr McCracken is untenable.

Reasonable Endeavours

238 Mr McCracken criticised this aspect, particularly in relation to s.9 of Sch.1 dealing with the stadium travel plan, from two related angles. First, he said that the planning officer had altered the terms recommended in February 2002 from those recommended in December 2001, when it was "best endeavours" which were required. Accordingly, the December resolution was passed on a basis which was later falsified.

239 Second, he submitted that the concept of reasonable endeavours was weaker than best endeavours and enabled account to be taken of the financial position of Arsenal FC, which made its financial position, the DTZ Report and the funding gap relevant in planning terms.

240 As to the first point, Mr McCracken relied again on e-mails. There was one dated February 18, 2002 in which this issue was discussed, and which is set out above in this judgment. The Overview Report Appendix A7 at p.6 sets out the heads of terms for the December 2001 meeting. It proposed the use of "best endeavours" to secure the 80:20 modal split and the use of "all reasonable endeavours" to improve on that towards 88:12. In the s.106 Agreement, as approved, "all reasonable endeavours" are required to be used in relation to both aspects. This specific change was highlighted in the Report to committee for February 19, 2002 and the reason given:

> "The heads of terms (No.9) required AFC to use 'best endeavours' to ensure that no more than 20 per cent of all visitors coming to a major event at a new stadium travel to it by car. AFC is not willing to commit to this and the Director of Law and Public Services has advised that it would be unreasonable to insist that the club uses 'best endeavours' and that 'all reasonable endeavours' is acceptable."

241 The basis for the acceptability of this change was spelt out more fully in Miss Cluett's second witness statement at paras 18.2–18.3:

> "18.2 In fact it became apparent that the key mechanism for achieving the 80:20 mode split lay with the Council: that is the Council could implement an event day parking zone. AFC had agreed to fully fund this as a planning obligation. I subsequently took the view that it would be unreasonable for the Council to insist on a 'best endeavours' covenant. This view was reported to members in a report seeking authority for the terms of the s.106 Agreement to Planning Committee of February 19, 2002.

> 18.3 The views expressed during the consideration of the applications by officers referred to by the claimants did not represent the final view of officers. The Report accurately reflected the final view of officers arrived at after careful and proper deliberation, as fully explained in my first witness statement.''

242 In essence this explanation does not alter the basis of the December 2001 resolution because it is quite clear from para.26.13.1 of the Overview Report and Appendix 4, paras 1.7–1.8, to which I have already referred, that the EDCPZ was the main basis for reaching the view that an 80:20 split was probably achievable from the outset of the operation of the new stadium. In any event, even if there had been a change, it is clear that the Local Planning Authority was aware of the fact of change and of its basis. It was a perfectly proper basis upon which to make the change as well.

243 As to the second and related aspect, Mr McCracken referred to the difference between ''best endeavours'' and ''reasonable endeavours'' in terms of the relevance of the financial implications arising from Arsenal FC's financial position. Mr McCracken relied on the decision of the Court of Appeal in *IBM (UK) Limited v Rockware Glass Ltd* [1980] F.S.R. 335. In relation to ''best endeavours'', Buckley L.J. said at p.343:

> ''In my judgment the test must be: what would an owner of the property with which we are concerned in this case, who was anxious to obtain planning permission, do to achieve that end? The formula which has been suggested and which would commend itself to me is that the plaintiffs as convenators are bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take, and I would favour making a declaration in answer to question 2 in those terms.''

244 Mr McCracken contrasted this with the approach to ''reasonable endeavours'' adopted by the Court of Appeal in *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] C.L.C. 329 at pp.339 and 342 in the judgment of Kennedy L.J.:

> ''In *P & O Property Holdings Ltd v Norwich Union* (1994) P. & C.R. 261 a developer and head lessor had each contracted to use 'reasonable endeavours to obtain' lettings of units in a shopping centre. The head lessor contended that in the circumstances the developer should have been prepared to pay to a tenant a reverse premium if a hypothetical reasonable landlord would regard such a premium as good estate management in current conditions, but the House of Lords, upholding the decision of the Court of Appeal, rejected that contention. In the Court of Appeal Steyn L.J. said at p.16A of the transcript:

'The concepts of (a) "reasonable endeavours" obligation placed on both parties, and (b) the judgment of the "reasonable landlord" are inherently in tension. As a matter of ordinary commonsense they convey different ideas. The "reasonable endeavours" obligation necessarily imports the idea that the endeavours of the parties may fail to result in a letting, but neither is necessarily in breach. The judgment and approach of the parties may be at odds, but measured against a yardstick of reasonableness neither may be in breach of the "reasonable endeavours" obligation. The reality is that the position of each party may be reasonably defendable. On the other hand, the standard of the "reasonable landlord" results in a single vindicated position.'

Similarly, in the House of Lords Lord Browne-Wilkinson trenchantly rejected the submission that by agreeing to use reasonable endeavours the parties intended to impose an objective standard as to what terms it would be reasonable to agree to obtain a letting. Mr Kentridge submits that precisely the same line of reasoning can be applied to the case with which we are concerned.

. . ..

When the critical words in art.2.2 are read in their contractual setting, and with regard to the ensuing fall-back provision, I find it impossible to say that they impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligations to use reasonable endeavours to agree to a commissioning date prior to September 25, 1996."

245 I accept that there is a real distinction between "best endeavours" and "reasonable endeavours", but it is not as stark in principle nor as stark in its relation to the provisions of the s.106 Agreement as Mr McCracken suggests. I do not consider that cost is irrelevant to the use of "best endeavours", as set out in the *IBM* case; nor is "all reasonable endeavours" simply an empty phrase. First, it is "*all* reasonable endeavours"; in para.9.4 of Sch.12 the obligation is to "ensure" that 20 per cent car mode, which is the key provision, is met, and this is stronger than the provision in cl.9.1 which is "to work towards" 12 per cent. Second, the fall-back obligation in cl.9.5, which until Holloway Road Station is improved, requires Arsenal FC to provide sufficient public transport travel capability probably by bus or coach in order to achieve the 20 per cent is not qualified. Nor, third, is it irrelevant that Sch.11, which deals with the Stadium Travel Plan, does require the implementation of such reasonable measures as may be required to achieve the purposes of the Stadium Travel Plan. As both *IBM* and *Phillips Petroleum* show, the contractual setting matters. This also has to be read in the context of the monitoring requirements in Sch.10. Fourth, I accept that the financial considerations of Arsenal FC will be a relevant factor in judging reasonableness, but I do not consider that this analysis shows any falling away by Islington from the approach adopted in December 2001 at the

resolution stage so as to negate its then thinking. Nor does it show that financial considerations loom so large in the achievement of the planning aims that the councillors ought to have required more information or that the public ought to have been provided with more as to Arsenal FC's financial position in order to reach a sensible conclusion on such planning issues to which those aspects may relate.

246 There was a specific criticism of cl.7.2 of the s.106 Agreement as constituting an unlawful fetter on the Local Authority's discretion. Clause 7.2 reads:

> "For the avoidance of doubt after the stadium shall have opened nothing shall thereafter prevent the stadium from operating at its full capacity of 60,000 spectators for a major event for football and operating as a stadium permanently providing only that a safety certificate issued pursuant to the Football Licensing Act 1989 (as may be replaced or amended) is in full force and effect."

247 The effect of the agreement by the Council not to use such powers as it might have, other than safety powers to restrict numbers, is said to preclude a restriction on the capacity of the stadium as a means of ensuring that the modal split to car does not exceed 20 per cent or reach 12 per cent. It is difficult to see what other discretion is in reality fettered. The 60,000 seating capacity still requires the operation of the Stadium Travel Plan. The clause is obviously included because at one time Islington officers, with the advice of their then leading counsel, were contemplating using a restriction on seating capacity as a means of enforcing a modal split of 20 per cent—a restriction on capacity naturally feared and resisted by Arsenal FC. This possible restriction ceased to be relevant once Islington realised, as set out in the Overview Report, that the key control was the extension of the EDCPZ. That controls car usage. The aim of the 20 per cent restriction was to restrict the numbers of cars to the number of cars now attending Highbury with its much smaller capacity. Islington accepted that ground capacity was not a useful tool of control in relation to car numbers. The key control for that is controlling car demand and the availability of parking space. That is an entirely reasonable view for the London Borough of Islington to take. There is no fetter on Islington's discretion. The provision is there for the avoidance of doubt lest there be a resurgence of the idea now accepted as mistaken. Mr McCracken said that no lawful basis had been shown for the Council not to act in accordance with the advice given by leading counsel that the restriction on stadium capacity should be retained for that purpose. There is no obligation in law to follow the advice of leading counsel. An ample planning reason was provided as to why that counsel's view did not effectively address the planning issue which the Council and its consultants had to address.

248 A further criticism by Mr McCracken was that the s.106 Agreement did not prevent both new and old stadia being used at the same time. The heads of terms for the s.106 Agreement in the Overview Report, Appendix 7, item 37, said:

"Future Use

- A new stadium at Ashburton Grove shall have opened before commencement of development pursuant to the Highbury consent.
- Once a new stadium at Ashburton Grove opens, (other than for a limited trial period to be agreed) Highbury shall not be used as a sports stadium."

249 In the s.106 Agreement the obligation appears in Sch.1, cl.38.2 as follows:

> "The stadium at the Highbury Site shall not without LBI's prior consent which it may give at its absolute discretion taking all material circumstances into account be used as a sports stadium after the date that the Stadium is open for permanent use of which date AFC and HHL shall give LBI seven days previous notice in writing."

250 This is said by Mr McCracken to be somewhat wider than and again different from what was envisaged in December 2001. This change was not identified in the report to Committee for February 19, 2002. Rather no change was envisaged. In Report D, para.18.1, it was stated that the s.106 Agreement would mean that the use of the existing stadium would cease. It was also said that the implications of both being in use at the same time had not been assessed in the Environmental Statement.

251 The reality is that the heads of terms in the report envisage, and the s.106 Agreement does not preclude, the use of Highbury stadium for sport once the new stadium is open. They are not in conflict. But the language in the actual Agreement reflect the aim which originally was loosely expressed in the Heads of Terms; indeed the language of the actual Agreement gives a greater degree of control to Islington, and does so without providing a role for the intervention of the single expert. It was always envisaged by the heads of terms that there could be teething problems once the new stadium had opened, which might mean that it could not be used; or that if it opened mid-season, perhaps with its opening being triggered by minor community use, Arsenal FC might wish to wait until the end of the season before transferring to it. That thinking is still what is reflected in the s.106 Agreement, but in language which gives the Local Planning Authority greater control. Miss Cluett sets these matters out clearly in her second witness statement at para.17. As she says, it is inconceivable that in reality there would be two stadia operating.

252 The last criticism made by Mr McCracken was that the s.106 Agreement contained no provision for contaminated land to be investigated. There is nothing in this point which I have not already considered in relation to other aspects of contaminated land.

COMMENTARY

C1 See Commentary to *R. (on the application of Adriano) v Surrey County Council* [2002] EWHC 2471 (Admin), below.

R. (ON THE APPLICATION OF BLEWETT) v DERBYSHIRE CC

Queen's Bench Division (Administrative Court)

(Sullivan J.): November 7, 2003[1]

[2003] EWHC 2775 (Admin); [2004] Env. L.R. 29

BPEO; Environmental statements; Groundwater; Landfill sites; Local authorities powers and duties; Planning permission; Planning policy; Waste management; Water pollution

H1 *Waste management—environmental assessment—obligations under Sch.4 Waste Management Licensing Regulations 1994—selection of Best Practicable Environmental Option—application of National Waste Strategy—adequacy of environmental statement*

H2 The claimant ("B") lived in close proximity to a large landfill site which was being filled with waste. The tipping had been phased. The first two phases had been granted planning permission in 1984 and 1995 respectively. The proposed third phase was the subject of a planning application made to the defendant County Council ("DCC") and submitted on March 11, 2002. The application was accompanied by an environmental statement in accordance with the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999. DCC granted planning permission on December 23, 2002. B applied for a judicial review of that decision to grant planning permission arguing:

(1) The environmental statement did not include an assessment of the potential impact of the use of the proposed landfill on groundwater. Instead DCC had left those matters to be assessed after planning permission had been granted by assuming that complex mitigation measures would be successful. This approach had been unlawful.
(2) DCC had failed to give effect to its obligations under Sch.4 of the Waste Management Licensing Regulations 1994 ("the 1994 Regulations") by failing to keep the objectives of avoiding, or at least minimising, nuisance from noise and smells in mind.
(3) DCC failed to comply with its obligations under the Government's Waste Strategy 2000 to carry out an assessment in order to determine whether the proposed landfill was the best practicable environmental option ("BPEO").

[1] Paragraph numbers in this judgment are as assigned by the court.

H3 **Held,** in allowing the appeal:

H4 (1) DCC's approach to the status of the policies relating to BPEO in the Waste Strategy 2000 was erroneous in principle because it effectively relegated BPEO to a material consideration to be taken into account but to be given such weight as DCC thought fit. Such an approach did not accord with the approach taken by the Court of Appeal in *R. v Derbyshire CC Ex p. Murray.* There was no recognition of DCC's duty, post the publication of the Waste Strategy 2000 and the implementation of the Landfill Directive, not to grant planning permission unless the proposed development was "in line with" the policies relating to BPEO in the Strategy. The question of whether the application site would be the BPEO had to be addressed in terms of the three key considerations set out in the Strategy, including the proximity principle. DCC did not address this issue at all beyond two minor references.

H5 (2) The environmental statement did contain a description of the effect of the operation of the proposed landfill upon groundwater. Although the description was relatively brief, it was open to B and others to challenge it as inaccurate and/or inadequate in the consultation process. It was also open to argue that more stringent mitigation measures should be adopted. Although general criticisms were made of the adequacy of the mitigation measures proposed in the environmental statement, no alternative mitigation measure, let alone a more effective mitigation measure, was advanced on behalf of B during the consultation process. It was significant that the Environment Agency raised no objection or concern about the information provided in the environmental statement. Against that background, DCC was fully entitled to leave the detail of the measures to deal with groundwater pollution to be assessed after planning permission had been granted.

H6 (3) It was clear that DCC, when granting planning permission, kept the relevant objectives found in the 1994 Regulations in mind. The objective was not to avoid noise or odours altogether. Such an objective would be wholly unrealistic in the context of a waste disposal operation. The objective was to avoid "causing nuisance through noise or odours". Thus an approach which sought to reduce the impact of noise and smells so that they would not cause a nuisance was in accordance with the objectives.

H7 **Legislation referred to:**

Directive 75/442 Framework Directive on Waste, Arts 4 and 7
Directive 91/689 on Hazardous Waste
Directive 99/31 on Landfilling Waste, Arts 6(3) and 8 and Annex II
Environmental Protection Act 1990, ss.30, 44A and 50
Landfill (England and Wales) Regulations 2002
Pollution Prevention and Control (England and Wales) Regulations 2000
Town and Country Planning Act 1990 ss.54A and 70(2)
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 regs 2, 3(2), 17 and 19
Town and Country Planning (General Development Procedure) Order, Art.8
Waste Management Licensing Regulations 1994, Sch.4,

H8 **Cases referred to:**

Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] 2 A.C. 603; [2001] 2 C.M.L.R. 38; [2001] Env. L.R. 16

Gillespie v First Secretary of State [2003] EWCA Civ 400; [2003] Env. L.R. 30

R. (on the application of Burkett) v Hammersmith and Fulham LBC [2002] UKHL 23; [2002] 1 W.L.R. 1593; [2003] Env. L.R. 6

R. (on the application of Thornby Farms) v Daventry DC [2003] EWCA Civ 31; [2003] Q.B. 503; [2003] Env. L.R. 28

R. v Bolton MBC Ex p. Kirkman [1998] Env. L.R. 719; [1998] J.P.L. 787

R. v Cornwall CC Ex p. Hardy [2001] Env. L.R. 25; [2001] J.P.L. 786

R. v Leicestershire CC Ex p. Blackfordby and Boothcorpe Action Group [2001] Env. L.R. 2

R. v North Yorkshire CC Ex p. Brown [2000] 1 A.C. 397; [1999] Env. L.R. 623

R. v Rochdale MBC Ex p. Milne [2001] Env. L.R. 406

R. v Rochdale MBC Ex p. Milne (No.1) [2000] Env. L.R. 1

Smith v Secretary of State for the Environment, Transport and the Regions [2003] EWCA Civ 262; [2003] Env. L.R. 32

H9 *Mr D. Wolfe*, instructed by Public Law Project, appeared on behalf of the claimant.

Mr A. Evans, instructed by Derbyshire County Council, appeared on behalf of the defendant.

Mr J. Barrett appeared on behalf of Derbyshire Waste Ltd as an interested party.

JUDGMENT

SULLIVAN J.:

1 **Introduction**

2 In this application for judicial review the claimant seeks a quashing order in respect of a grant of planning permission dated December 23, 2002 by the defendant to the interested party for "land reclamation by waste disposal with restoration to agricultural, woodland, grassland and nature conservation uses at Smith's void, Former Glapwell Colliery, Palterton Lane, Sutton Scarsdale".

Factual background

3 Glapwell Colliery closed in the mid-1970s leaving two spoil tips. Planning permission was granted for a reclamation scheme which involved tip washing, opencast mining of shallow seams under the spoil tips and the replacement of the opencast mine spoil and washed deep mine spoil into a landscaped profile. Smith's void was to be reprofiled as part of these operations but the contractor employed to carry out the coal recovery scheme went into receivership, leaving the scheme incomplete. Voids had been created within the reprofiled spoil tips as part of the reclamation works to facilitate landfills.

4 Glapwell 1 was the first of the voids to be filled. Over a five year period between 1983 and 1988 it accommodated some 750,000m^3 of waste. Planning permission was granted in 1984 for the filling of two further voids, Glapwell 2 and 3. Waste disposal in Glapwell 2 commenced in 1988, and finished in November 2002 after planning permission had been granted in 1995 for additional tipping. No tipping took place in Glapwell 3 (Smith's void) pursuant to the 1984 permission, but that planning permission remains valid until December 2003 (operations were limited to a period of 15 years from the start of tipping). The 1984 planning permission envisaged that Glapwell 3 would have a capacity of about 1 million m^3. The present proposal involves tipping around 850,000m^3 of domestic, industrial, commercial and inert waste over a period of four years, with the overall operational programme, including restoration to agriculture et cetera, taking six years.

5 The application site covers about nine hectares and is located within 1km of the villages of Glapwell, Palterton, Bramley Vale and Doe Lea. The claimant lives in Bramley Vale. In his witness statement he states that the nearest site boundary of Glapwell 3 is about 800m from his home, which is about 200m from the nearest site boundary of the existing tipped voids, Glapwell 1 and 2.

6 The claimant is registered disabled and suffers from chronic bronchitis and also from asthma and angina. He contends that these conditions have been exacerbated by dust and smells from the landfilling operations on Glapwell 1 and 2. He also complains of noise from the landfilling operations, that some of his pet pigeons have been killed by rats living in the landfills, and that he is plagued by the noise and droppings of the many seagulls who are attracted to the landfills. The claimant has actively opposed the grant of planning permission for Glapwell 3. He made representations to the defendant both personally and in his capacity as a member of the "Stop the Landfill Group".

7 The defendant County Council is both the waste planning authority, and thus responsible for granting planning permission for landfilling operations, and the waste disposal authority for its area. Derbyshire Waste Ltd (the interested party) was set up by the County Council, pursuant to arrangements made under s.30 of the Environment Protection Act 1990, to dispose of Derbyshire's waste. The company remains 20 per cent owned by the County Council and disposes of the County's waste under a long term contract with the County Council.

8 The development proposed in the application for planning permission was a "Schedule 2" development as defined by the Town and Country Planning (Environmental Impact Assessment) (England and wales) Regulations 1999 ("the Regulations"). An environmental statement was required if the development was likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The application was accompanied by an environmental statement which was submitted to the County Council on February 8, 2001.

9 The defendant's Regulatory Planning and Control Committee first considered the application on March 11, 2002. The defendant's Director of Environmental Services advised members as to the merits of the application in a 55-page report

("the report"). He recommended that planning permission should be granted, subject to no less than 53 conditions.

10 On the morning of the meeting the Secretary of State issued an Art.14 direction preventing the defendant from determining the application. Members resolved that had they been in a position to determine the application they would have granted planning permission, as recommended in the report, subject to a minor amendment to one of the recommended conditions.

11 Application for permission to apply for judicial review of the Committee's resolution was lodged on April 22 on a precautionary basis, since at that time it was unclear whether the three month period prescribed by CPR Pt 54.5(1)(b) ran from the date of the resolution to grant planning permission or from the date of the permission itself. I adjourned consideration of the application pending the outcome of the Secretary of State's Art.14 direction. In the event, the Secretary of State decided not to call in the application, but the judicial review challenge had by then been overtaken by the decision of the House of Lords in *R. (on the application of Burkett) v Hammersmith and Fulham LBC* [2002] 1 W.L.R. 1593. Although the challenge to the resolution to grant planning permission was premature in the light of that decision, the application for permission to apply for judicial review was adjourned to enable the claimant to challenge the grant of planning permission in due course, if so advised. On November 4, 2002 the Committee reconsidered the application for planning permission. In addition to the report, members were provided with a joint report of the County Secretary and Director of Environmental Services. The joint report responded to the contentions which were being advanced in the judicial review proceedings. The officers recommended that planning permission should be granted. Members resolved to grant planning permission and permission was granted on December 23, 2002.

12 Having considered the amended claim form, Collins J. granted permission to apply for judicial review on April 29, 2003.

Submissions

13 On behalf of the claimant, Dr Wolfe submitted that the decision to grant planning permission was unlawful on three grounds:

(1) The environmental statement did not include an assessment of the potential impact of the use of Glapwell 3 for landfill on groundwater and on human health and instead unlawfully left those matters to be assessed after planning permission had been granted. So far as groundwater is concerned, the defendant had impermissibly approached the issue by assuming that contemplated "complex" mitigation measures would be successful ("Environmental Statement").

(2) The defendant failed to give effect to its obligations under Sch.4 to the Waste Management Licensing Regulations 1994 ("the 1994 Regulations") by failing to keep the objectives of avoiding, or at least minimising, nuisance from noise and smell, in mind ("relevant objectives").

(3) The defendant failed to comply with its obligations under the Government's Waste Strategy 2000 to carry out an assessment in order to determine whether the proposed landfill was the Best Practicable Environmental Option ("BPEO") for the waste stream(s) in question.

14 In his submissions before me Dr Wolfe placed ground 3 in the forefront of the claimant's case.

Analysis and conclusions

15 I find it convenient to begin with ground 2, I will then consider ground 1 and finally ground 3.

Ground 2 (Relevant Objectives)

16 Schedule 4 to the 1994 Regulations implements certain provisions of Council Directive 75/442 ("the Waste Framework Directive"). Article 4 of the Directive provides:

> "Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular—
>
> . . .
>
> without causing a nuisance through noise or odours . . ."

Paragraph 2(1) of Sch.4 states that:

> ". . . the competent authority shall discharge their specified functions insofar as they relate to the recovery or disposal of waste with the relevant objectives."

The wording of para.2(1) is, to say the least, inelegant. It appears that a word or words may have been omitted in the process of transposing the requirements of the Directive.

17 In any event, the defendant is a competent authority and when it granted planning permission it was discharging a specific function: see paras 1 and 3 and table 5 in Sch.4.

18 Paragraph 4 in Sch.4 sets out the relevant objectives in relation to the disposal or recovery of waste. They include:

> "ensuring that waste is . . . disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without . . .
>
> (ii) causing nuisance through noise or odours."

19 The nature of the obligation imposed by paras 2 and 4 of Sch.4 was considered by the Court of Appeal in *R. (on the application of Thornby Farms Ltd) v Daventry DC*; *R. (on the application of Murray) v Derbyshire CC* [2002] Q.B. 503

[2002] EWCA Civ 31. Having reviewed the authorities, Pill L.J., with whom the other members of the court agreed, concluded in para.[53] of his judgment:

> "An objective in my judgment is something different from a material consideration. I agree with Richards J that it is an end at which to aim, a goal. The general use of the word appears to be a modern one. In the 1950 edition of the *Concise Oxford Dictionary* the meaning now adopted is given only a military use: 'towards which the advance of troops is directed'. A material consideration is a factor to be taken into account when making a decision, and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept in mind when making a decision even while the decision-maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others. On occasions, the giving of weight to other considerations will mean that little or no progress is made. I accept that there could be decisions affecting waste disposal in which the weight given to other considerations may produce a result which involves so plain and flagrant a disregard for the objective that there is a breach of obligation. However, provided the objective is kept in mind, decisions in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful. I do not in any event favour an attempt to create an hierarchy of material considerations whereby the law would require decision-makers to give different weight to different considerations."

20 Thus, the question is whether the Committee kept the objective, of avoiding causing nuisance through noise or odours, in mind when deciding to grant planning permission. It is common ground that, in the absence of any evidence to the contrary, members approached these issues on the basis set out in the report and joint report.

21 The report said this under "Noise":

> "Existing ambient noise levels have been measured at four sensitive noise locations around the proposed site boundary and a detailed analysis of the potential impacts has been submitted with the application. It shows the predicted noise impact to be within MPG 11 criterion at all properties. In the event of a grant of planning permission the Environmental Health Officer agrees that it would be appropriate to condition noise levels as above and to require ongoing monitoring."

22 Under the heading "Odour" the report said this:

> "There are two principal sources of odour from landfill sites; freshly deposited waste and landfill gas (LFG). Like dust, the generation and dispersal of odours is dependent on the wind speed, temperature and precipitation. The applicant is proposing to adopt a number of good working practices that can substantially reduce the generation and disposal of odour. These are:
> - minimising the extent of the operating area;

- the daily application of cover materials, such as inert soils;
- progressive restoration;
- any waste previously identified with an odour problem should be deposited directly in pre-prepared trenches excavated into dry waste and immediately covered.

In the long-term, the applicant proposes that upon cessation of landfill operations, continued odour mitigation would be provided by the engineered containment liner and cap preventing the escape of odourous gases to the atmosphere and the active abstraction and burning/flaring of landfill gas.

Some objectors have raised odour as an issue and I acknowledge that some individuals may be more sensitive to smells than others. To minimise future odour impact I recommend that a detailed scheme for the control of odour should be submitted for approval if planning permission is granted and that the following are incorporated as agreed by the Environmental Health Officer:

- implementation of a monitoring scheme;
- results of smell monitoring to be submitted to the Council together with details of any remedial action taken and any complaints received by the operator about smell.

I am satisfied that, subject to rigorous adherence to the above practices and conditions that could be imposed as part of a planning permission, long term nuisance impacts associated with odour should not arise.''

23 The joint report responded to the contention in the application for permission to apply for judicial review that the defendant had failed to give effect to the relevant Waste Framework Objectives in these terms:

> ''This ground of the challenge relates to the objectives under the ' Waste Framework Directive' relating to human health and harm to the environment. The claimant refers to an obligation on the part of the County Council to have had in mind the objective of avoiding impacts such as noise and dust, as explained by the Court of Appeal in *Thornby Farms v Daventry District Council*; *Murray v Derbyshire County Council* [2002] EWCA Civ 31 by refusing permission rather than just reducing them to below a threshold.
>
> Your reporting officers consider that the report of 11 March does demonstrate that the Council did keep the relevant objectives in mind.''

24 The officers recommended conditions in relation to noise and odour control which were included in the planning permission, as follows:

> ''(18) All plant and machinery shall be silenced at all times in accordance with the manufacturers' recommendations.
>
> (19) The noise levels arising from the developments, with the exception of temporary operations, shall not exceed 55dB(A)Leq (1hr) at any noise sensitive property.

(20) Noise levels arising from temporary operations shall be minimised as far as is practicable, shall not exceed 70dB(A)Leq (1hr) measured at any noise sensitive property and shall not continue for more than eight weeks in any 12 month period. Any bund or mound constructed under this exemption shall be in accordance with a scheme that shall have received the prior approval of the Waste Planning Authority. The scheme shall provide for the minimum impact on the landscape and upon nearby residential property. The commencement of all temporary operations carried out in accordance with this condition shall be notified to the Waste Planning Authority before such works commence.

(21) No development authorised by this permission shall take place until a scheme for noise monitoring at the site has been submitted to and approved by the Waste Planning Authority. The noise levels from the site shall be monitored in accordance with the approved scheme.''

25 ''Olfactory assessment'' was dealt with in condition 22:

''(22) A scheme for the monitoring of smells generated by the site shall be submitted to the Waste Planning Authority three months before the first deposit of waste. Monitoring and control of smells shall be undertaken in accordance with an approved scheme or as subsequently modified in writing by the Waste Planning Authority.
The scheme shall include: . . .
(vi) what would trigger remedial action;
(vii) details of remedial action that would be taken . . .''

26 In my judgment it is plain from these references that the Committee, when granting planning permission, did keep the relevant objectives in mind. The objective is not to avoid noise or odours altogether. Such an objective would be wholly unrealistic in the context of a waste disposal operation. The objective is to avoid ''causing nuisance through noise or odours''. Thus, an approach which seeks to reduce the impact of noise and smells so that they will not cause a nuisance is in accordance with the objectives. Dr Wolfe drew a distinction between an approach which merely sought to reduce noise below a threshold, and an approach which sought to minimise the impact of noise or smell. Provided the threshold is set with the objective of avoiding the creation of a noise or smell nuisance, I can see no objection to the former approach. That is the objective of the noise limits recommended in MPG11, which was referred to in the report. In effect, conditions 19 and 20 impose the noise limits recommended in MPG11. Dr Wolfe points to the fact that MPG11 explains that the recommended limits are not intended ''to become the norm at which operations work. Operators are asked to take any reasonable steps they can to achieve quieter working wherever this is desirable and technically feasible having regard to the principle of BATNEEK [(Best Available Techniques Not Entailing Excessive Cost)]'' (para.31). He contrasts condition 20, which follows this advice—''noise levels

from temporary operations shall be minimised as far as practicable"—with condition 19 which contains no such requirement, merely an upper limit of 55dB(A)Leq (1hr). The difference between the two conditions is readily explained by the fact that noise levels at the upper limit set by condition 20 would be perceived as very noisy indeed. The purpose of the high upper limit is to enable such operations as the construction of baffle mounds around the perimeter of a landfill site. Temporary inconvenience is the price residents will have to pay for long term benefits (para.61 of MPG11). It is reasonable to expect that an operator will try to minimise such high levels of noise as far as practicable.

27 As explained in para.34 of MPG11, the lower limit in condition 19 "is roughly equivalent to a noise made by a person talking normally, and is generally thought to be a tolerable noise level; above this level, continuous noise could well cause annoyance". Limiting the noise of operations to such a threshold is wholly in accordance with the objective of not causing noise nuisance. Moreover, even if condition 19 was deficient in this respect, because it should have incorporated a requirement to minimise the noise levels arising from operations as far as practicable, the deficiency would not mean that members had not kept the objective in mind when deciding to grant planning permission. The fact that a decision taker has not imposed the most effective condition that might (with the benefit of hindsight) have been devised does not mean that he failed to keep the relevant objective in mind.

28 The original claim form in these proceedings, to which the joint report responded, criticised the report's treatment of noise and odour issues, but did not suggest any amendment to the proposed conditions. Nor is any such criticism made in the replacement claim form challenging the grant of planning permission on December 23, 2002.

29 So far as odour control is concerned, it is difficult to see what more could reasonably have been done by the defendant. It was submitted that the scheme required by condition 22 merely provided for monitoring, but that is clearly wrong. The scheme must cover not merely the monitoring but also the "control of smells", and "shall include . . . what would trigger remedial action" and "details of remedial action that would be taken".

30 In his skeleton argument Dr Wolfe referred to a "proof of the pudding test". Applying such a test, the proof of the pudding under ground 2 is that the claimant has not cast any doubt on the conclusions in relation to noise and smell in the report, and has not suggested any better conditions, save for the addition of a general requirement to reduce noise below the threshold set in condition 19. By no stretch of the imagination could such an omission indicate that there had been a failure to keep the relevant objectives in mind. Accordingly, I reject ground 2 of the challenge.

Ground 1 (Environmental statement)

31 As mentioned above, the application for planning permission was accompanied by an environmental statement. The environmental statement was a lengthy document comprising 15 chapters and 7 technical appendices. It is not

suggested that the environmental statement failed to mention the potential impact of the proposed development on groundwater and human health, rather it is submitted that the manner in which these issues were dealt with was inadequate. In summary, the assessment of likely impact and the description of the necessary mitigation measures were left over for subsequent determination.

32 Where there is a document purporting to be an environmental statement, the starting point must be that it is for the local planning authority to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in reg.2 of the Regulations:

> "'environmental statement' means a statement—
> (a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
> (b) that includes at least the information referred to in Part II of Schedule 4."

33 The local planning authority's decision is, of course, subject to review on normal Wednesbury principles: see *R. v Cornwall CC Ex p. Hardy* [2001] J.P.L. 786, per Harrison J. at para.[65], applying *R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 416 at para.[106].

34 Information cable of meeting the requirements of Sch.4 to the Regulations must be provided: see Hardy (*ibid.*) and *R. v Rochdale MBC Ex p.Tew* [1999] 3 P.L.R. 74 at 95G.

35 Part I of Sch.4 requires the environmental statement to provide "a description of the likely significant effects on the environment . . ." (para.4) and "a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment". Part II of Sch.4 requires:

> "1. A description of the development comprising information on the site, design and size of the development.
> 2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
> 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
> 4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
> 5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

36 Dr Wolfe referred to the speech of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603 at pp.615–616, which, he submitted, "emphasised the absolute nature of the requirement to produce an environmental statement in the correct form and to comply with the procedural requirements". Lord Hoffmann's speech must be considered in its context. *Berkeley* was a case

where there had been no environmental statement. Even in such a case the House of Lords was prepared to accept that "an EIA by any other name will do as well. But it must in substance be an EIA" (see p.617). If an application for planning permission has been accompanied by a document purporting to be an environmental statement, can it be said that that document falls outside the definition of environmental statement in reg.2 (so that the local planning authority is unable to grant planning permission: see reg.3(2)) because it has failed to describe a likely significant effect on the environment subsequently identified by the local planning authority, or a particular mitigation measure thought necessary by the local planning authority? The omission might have been due to an oversight on the part of those preparing the environmental statement, or to a deliberate decision because it was not considered by the author of the environmental statement that a particular environmental effect was likely, or, if likely, that it was likely to be significant, or because the author of the environmental statement was unfamiliar with the particular mitigation technique, or because he considered that mitigation was unnecessary.

37 In my judgment, the fact that the local planning authority's consideration of the application leads it to conclude that there has been such an omission does not mean that the document is not capable of being regarded by the local planning authority as an environmental statement for the purposes of the Regulations.

38 The Regulations envisage that the applicant for planning permission will produce the environmental statement. It follows that the document will contain the applicant's own assessment of the environmental impact of his proposal and the necessary mitigation measures. The Regulations recognise that the applicant's assessment of these issues may well be inaccurate, inadequate or incomplete. Hence the requirements in reg.13 to submit copies of the environmental statement to the Secretary of State and to any body which the local planning authority is required to consult. Members of the public will be informed by site notice and by local advertisement of the existence of the environmental statement and able to obtain or inspect a copy: see reg.17 of the Regulations and Art.8 of the Town and Country Planning (General Development Procedure) Order 1995.

39 This process of publicity and public consultation gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies. Under reg.3(2) the local planning authority must, before granting planning permission, consider not merely the environmental statement, but "the environmental information", which is defined by reg.2 as "the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development".

40 In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does

not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of Sch.4 are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

41 Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Sch.4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R. v North Yorkshire CC Ex p. Brown* [2000] 1 A.C. 397, at p.404, the purpose is "to ensure that planning decisions which may affect the environment are made on the basis of full information". In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (*Tew* was an example of such a case), but they are likely to be few and far between.

42 It would be of no advantage to anyone concerned with the development process—applicants, objectors or local authorities—if environmental statements were drafted on a purely "defensive basis", mentioning every possible scrap of environmental information just in case someone might consider is significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail.

43 Against this background, I turn to the manner in which this environmental statement dealt with the impact of the proposed development on groundwater and human health. Chapter 13 referred to human health in two paragraphs as follows:

> "13.4.36. The potential health effects of landfill sites have been the subject of epidemiological studies, and the presentation of the findings of a recent study has caused some concern in respect of proposed new facilities. How-

ever, the evidence available does not support a causal link between the health effects studied and proximity to landfill sites.

13.4.37. The proposed landfill at Smiths Void would be operated to the highest environmental standards and the operation would be independently regulated by the Environment Agency. The management and regulation of the site would ensure that the potential risk to the site employees, local communities and the wider environment were minimised."

44 It is submitted on behalf of the claimant that the environmental statement did not provide any assessment of the potential health impacts arising out of the proposal. On the contrary, it is plain from para.13.4.36 that the authors of the environmental statement considered that there were not likely to be any significant effects on human health. It was therefore unnecessary for them to describe mitigation measures in any detail. Those who disagreed with this assessment had an opportunity to put their views to the local planning authority in the consultation process. The report summarised the responses of consultees. They included the North Derbyshire Health Authority, which raised no objection:

> "A report subsequently amended to include congenital anomalies data has been produced on the impact of the proposal on the local population. It is held in the Environmental Services Department for Members' inspection and will be available at Committee. The covering response states:
>
> > 'There are concerns in relation to the recent study from the Small Area Health Statistics Unit on health effects in people living adjacent to landfill sites. The results of this study, however, were not conclusive. Landfill sites could potentially be harmful if toxic substances are released into the environment and ingested/absorbed (in toxic doses) by the local population. It is essential therefore that all landfill sites are engineered to a high standard with appropriate control and monitoring of any emissions (landfill gas/leachate).
> >
> > If planning permission were granted, I would expect the applicants to undertake a health risk assessment as part of the Integrated Pollution and Prevention Control (IPPC) application process for a waste management licence. Any application would be scrutinised by our environmental toxicology advisors and us at this stage.
> >
> > I do not feel there is sufficient evidence to object to landfill sites on health grounds. However, I would need to be satisfied by the proposed control measures detailed in a waste management licence application.'
>
> The amended report indicates that '*from our routine data sets, there is no evidence that the local communities have suffered health effects from the existing landfill sites.*'
>
> *The Lancet* has recently reported further findings from the Eurohazcon study relating to selected landfill sites in Europe.
>
> Whilst this study relates to hazardous sites only and is therefore of marginal relevance in this case, I refer to it given the medial interest shown and renewed public concern about landfill sites.

The AHA has commended that the Study fails to demonstrate a statistically significant association between those living near a hazardous landfill site and chromosomal abnormalities and that further work is needed.

I address the question of the perception of risk associated with certain hazardous waste types and a method of providing some comfort to the local community in the Planning Considerations section of this report.''

45 The Director dealt with ''Health, Perception of Risk and the Living Environment Considerations'' as follows:

> ''I accept that in this case fear regarding adverse health effects as expressed by objectors should not be viewed as baseless, since the possibility of risk to health cannot entirely be dismissed. Accordingly, it is appropriate to afford some weight to this genuinely held view. The Area Health Authority's (AHA) amended report and correspondence evaluates recent studies, takes account of specialist advice and examines rates of congenital anomalies in the electoral Wards adjacent to Glapwell compared to the North Derbyshire average. The results over a four year period from 1997 to 2000 illustrate no significant difference. The AHA's conclusions would not, in my view, support a rejection of the application on health related grounds.
>
> I am also mindful of the fact that the ongoing 'health' debate has not led to health issues being accorded significance within national planning policy guidance relating to waste management facilities including landfill.
>
> Notwithstanding the above, the AHA has pointed out that anxiety relating to operations at landfill sites can lead to a variety of health concerns. I would agree with its conclusion that this could largely be avoided if the local population have confidence in the site operator to maintain a clean and safe site. The early establishment of a Liaison Committee for the duration of the operations as agreed by the applicant can also be an effective way of alleviating concerns.
>
> Additionally, I have raised with the applicant the possibility of a condition specifically restricting the deposit of hazardous waste as a means of providing assurance to the public. While I believe that there is general recognition of the meaning and character of municipal domestic waste, there is less public understanding of the terms commercial and industrial waste. There is also widespread concern that this is likely to involve toxic substances as evidenced by the objection notices displayed locally.
>
> I have suggested a condition to the application the wording of which makes reference to the Hazardous Waste Directive 91/689/EEC. As described in Article 6(c) of the Directive, only non-hazardous commercial and industrial waste would be acceptable at the site with the exception of stable, non-hazardous wastes that have for example been solidified or vitrified. I consider that a condition linking the range of waste coming to the site to the Landfill Directive's classification of waste would be appropriate and would be warranted on planning grounds as a means of calming public fear.

The applicant has agreed that such a condition would be acceptable to them."

Condition 7 in the planning permission imposes a restriction on waste types as follows:

"In relation to commercial and industrial waste, the site shall be used for the landfill of only non-hazardous waste, except for stable, non-reactive hazardous wastes as described in article 6(c(iii) and Annexe II of the Landfill Directive 1999/31/EC."

46 This was an eminently reasonable response to fears expressed by objectors which, while they did not raise any *likely significant* effect, nevertheless raised a possibility of risk to human health which "cannot entirely be dismissed".

47 Turning to the effect of the proposed development upon groundwater, the assessment of operational impacts and mitigation in ch.12 of the environmental statement has to be considered against the background of the description of the proposals given in ch.4. Under "Engineering", para.4.5 of the environmental statement said:

"4.5.1 On completion of the initial earthworks, the engineering of the landfill void would be carried out for Cell 1.

4.5.2 The formation below the lining system would be graded to falls of approximately 1 in 50, to ensure positive drainage. The proposed lining system, comprising a minimum of 1.0m of mineral liner, with a maximum permeability of 1 × 10–9 m/s, or equivalent, would then be installed. The installation would be the subject of a rigorous Construction Quality Assurance programme.

4.5.3 The clay would be excavated from the area of Cell 3, above the cell formation levels. During the landfilling of Cell 1, Cell 2 would be constructed, taking further clay from the area of Cell 3.

4.5.4 The construction of Cell 3 would comprise completion of the formation levels. The quantity of clay above the formation levels would be sufficient to construct the clay liner within the cell.

4.5.5 Each cell would be constructed independently, and would be separated from adjacent cells by internal bunds constructed to a similar standard to the basal lining.

4.5.6 The liner would be overlain by a comprehensive leachate collection system, comprising 300 mm of free draining material, within which would be situated a network of slotted pipes to collect leachate. The leachate would be directed via this system to leachate collection points situated at the low point of each cell.

4.5.7 Upon completion of landfilling in each cell, the waste would be capped. The capping system would include a stabilisation layer, overlain by a mineral liner or equivalent geosynthetic material to minimise rainfall infiltration and leachate generation within the waste mass.

4.5.8 Typical details of the proposed engineering systems are indicated on Figure 11; Typical Construction Details."

48 Figure 11 contained diagrams of a typical basal liner, typical capping liner, typical leachate collection point, and typical internal bund.

49 Chapter 12 dealt with the effects of the proposed development under the heading of "Geology, Hydrogeology and Hydrology".

50 Under "Introduction" paras 12.1 and 12.2 said:

> "12.1.1 The landfilling of biodegradable wastes has the potential to cause environmental impact on the local water environment. The source of this potential impact is leachate produced through the percolation of rainwater through the waste mass. Leachate has the potential to pollute any adjacent water bodies it is able to reach.
>
> 12.1.2 In order to assess the potential impact, an examination of the geological, hydrogeological and hydrological conditions at the site has been undertaken."

Against the background of that assessment, para.12.3 described the Construction Impacts and Mitigation. They included:

> "12.3.1 During the construction phase of the landfill, the principal potential impact would be the discharge of polluted surface water run-off to the local watercourses.
>
> 12.3.2 To mitigate the potential impact of polluted discharges, a system of perimeter cut-off ditches would be installed, to intercept polluted run-off and direct it to settlement facilities where suspended solids would be removed prior to discharge.
>
> 12.3.3 Such measures would be designed to ensure that surface water discharges complied with the requirements of a Consent to Discharge issued by the Environment Agency."

Paragraph 12.4 described the Operational Impacts and Mitigation as follows:

> "12.4.1 The potential impacts associated with the operation of the landfill would include those identified during the construction phase, and in additional potential impacts from the uncontrolled discharge of leachate from the site.
>
> . . .
>
> 12.4.9 The uncontrolled discharge of landfill leachate has the potential to pollute any adjacent water it is able to reach. Given the position of the site in relation to surface watercourses, and the groundwater table, it is predicted that potential impacts would be low to medium.
>
> 12.4.10 To minimise the potential for such impacts, the following mitigation measures would be implemented:
>
> - The installation of a full containment system, constructed within a rigorous Construction Quality Assurance regime, to prevent uncontrolled discharge of leachate
> - The provision of a comprehensive leachate collection system
> - Regular monitoring and removal of excess leachate

12.4.11 The design of the above measures would be finalised based upon the results of a quantitative Risk Assessment, in agreement with the Environment Agency.

12.4.12 With the implementation of the above measures, and good working practices, the operation of the site would be in accordance with Environment Agency policy, and the residual impact associated with the operation of the landfill would be low."

51 The Environment Agency was one of the consultees. It raised a number of matters in a letter dated April 24, 2001. The interested party sought to address the Environment Agency's concerns in an addendum report dated July 2001. This gave further information in relation to the geological and hydrogeological setting of the proposal. The proposed development was described in para.2.3:

> "The site will be operated as a containment site with a liner equivalent to or better than a clay composite liner as required by the IPPC Regulations and Landfill Directive. The appropriateness of the lining system and the site design will be assessed as part of the assessment of emissions to groundwater (Regulation 15 Risk Assessment) as part of the PPC Permit application.
>
> . . .
>
> Leachate management systems at the site will result in the leachate levels being maintained at 1m above the base of the site. This is approximately 1 m below the water levels within the made ground and consequently the site will be hydraulically contained with respect to the shallow groundwater."

A conceptual design of the site was presented in a diagram.

52 Chapter 4 described the historical contamination of the site and para.4.2 described the remediation options available:

> "The remediation options currently available which are considered suitable for the site include the interception of potentially contaminated groundwater adjacent to the development area and/or capping the area to reduce the infiltration and the production of contaminated groundwater."

Paragraph 4.3 dealt with the effect of the development on remedial design, and concluded that:

> "In summary by developing the site, the reduction in infiltration will improve the quality of the Stockley Brook by decreasing the impact from contaminated groundwater on the stream from that observed today and will not limit the application of future remediation operations."

53 The addendum report concluded in para.5.0:

> "Based on the conclusion that the contamination is disseminated throughout the colliery spoil the potential remediation options which could be implemented include the interception of groundwater and/or capping of the site to reduce the infiltration. By developing Smith's void as a landfill site, the groundwater quality would be improved by:

● Reducing the infiltration to the made ground and therefore the volume of contaminated groundwater;

● Decreasing the residence times of the groundwater within the made ground therefore potentially decreasing the contaminant loading.

In addition, the development would not impeded the interception of groundwater, should it be required at a later date.

The risks posed by the landfill development to the perched groundwater (and consequently surface water streams) and the groundwater in the Coal Measures will be assessed as part of the PPC application for the assessment of emissions to groundwater."

54 The Environment Agency responded to the addendum report in a letter dated July 3, 2001. That said, in part:

> "Generally speaking the report satisfies the majority of the matters raised.
>
> The issues pertaining to managing existing contamination have been discussed but no final remediation strategy has been proposed.
>
> The other outstanding matters that have not been addressed in this submission will need to be resolved through the IPPC authorisation application process.
>
> The Agency has no objections, in principle, to the proposed development but recommends that if planning permission is granted the following planning conditions are imposed:
>
> CONDITION: No development approved by this permission shall be commenced until:
>
> (a) The application site has been subjected to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Local Planning Authority.
>
> (b) Detailed proposals for the removal, containment or otherwise rendering harmless any contamination (the 'Reclamation Method Statement') have been submitted to and approved in writing by the Local Planning Authority.
>
> REASON: To protect the environment and ensure that the remediated site is reclaimed to an appropriate standard.
>
> . . .
>
> CONDITION: There shall be no discharge of foul or contaminated drainage from the site into either groundwater or surface waters, whether direct or via soakaways.
>
> REASON: To prevent pollution of the water environment.
>
> CONDITION: No soakaway shall be constructed in contaminated ground.
>
> REASON: To prevent pollution of groundwater.
>
> INFORMATION
>
> The waste disposal operations shall be subject to an IPPC permit under the Pollution Prevention and Control Regulations 1999."

55 The addendum report and the Environment Agency's response were part of the environmental information considered in the report. The claimant's solicitors had argued that the environmental statement was deficient in its treatment of the impact of the proposal on human health and hydrology. The Director commented in his report:

> "I have received an 'Addendum Report' from the applicant dealing with ground water issues in response to a request from the Environment Agency. The Agency's observations upon it are referred to below. Additional ecological information to that contained in the Environmental Statement has also been supplied and, subject to conditions that could be required as part of a planning permission, the relevant statutory consultees are content with the development proposal. Further background noise assessment has also been submitted at the request of the District of Bolsover Environmental Health Officer. I am satisfied that, with the inclusion of the additional material referred to above, these issues have been thoroughly covered. My assessment of these issues is addressed with the Planning Considerations section of this report. The submission of additional information on these issues does not in any event detract from the adequacy of the Environmental Statement which I am satisfied meets relevant legal requirements.

The claimant's solicitors had complained:

> "• The application does not deal adequately with ground water issues and this matter should be properly addressed as part of the planning process rather than being left to the Integrated Pollution Prevention Control Authorisation application.
>
> Comment: The Environment Agency has confirmed that its Hydrology Section has examined the planning application and the Addendum Report requested by the Agency and has reiterated that it has no objections in principle to landfilling at this location. The Agency indicates that further detailed work will be required through the IPPC process to ensure that the requirements of the relevant legislation can be met. A ground water risk assessment will be required as part of this process, to address ground water protection issues in greater detail. Planning Policy Guidance (PPG) Note 23 gives advice to planning authorities on whether or not concerns about potential releases can be left for the pollution control authority or, in the case of wider impact of potential releases, may appropriately be considered unacceptable on planning grounds. PPG 23 also advises that planning authorities should work on the assumption that pollution control regimes will be properly applied and enforced. In this case I am satisfied that it would be appropriate for this issue to be addressed within any IPPC Authorisation application that would have to follow a grant of planning permission. Of course, planning permission would not pre-empt the Agency's proper consideration of an IPPC Authorisation application. If matters could not be resolved to the Agency's satisfaction then Authorisation would not be granted and the development could not proceed."

56 The claimant's concerns in relation to groundwater and human health were also addressed in the joint report. Under the heading "Groundwaters" the joint report said this:

> "Chapter 12 of the Environmental Statement provides information relation to Geology, Hydrogeology and Hydrology. It identifies groundwater levels including those from 'perched' groundwater within the colliery spoil deposits at the site. It identifies the potential for impacts on local water resources. The proposed mitigation measures include a full containment system for the landfill cells.
>
> Apart from the ES itself, the 'Addendum Report' that the applicant subsequently submitted to the Council gives further technical details in relation to, amongst other things, hydrogeology, groundwaters and mitigation measures. This report was not produced at the Council's request, but was submitted following discussions between the applicant and the Environment Agency. The report made it quite clear that the leachate management system that was proposed would be designed to maintain leachate levels within the site below the groundwater levels in the colliery spoil. The proposals included a free draining groundwater drain and the hydraulic containment of the landfill by means of an impermeable liner system
>
> The Council is always particularly mindful of the responses made by the Environment Agency (EA), which is a statutory consultee, on such matters. The Agency, after careful consideration of the geological and hydrogeological details, raised no objections to the application in principle and recommended a number of conditions to be included if planning permission was granted. The EA letter in response to this application confirmed that other outstanding matters which it had discussed with the application would be resolved through its Pollution Prevention and Control (PPC) authorisation application process. These matters would include a 'groundwater risk assessment'. Your reporting officers understand this to be a reference to an assessment that would be carried out under the PPC process in order to ensure that the final detailed technical specifications for the liner system of the landfill cells would be adequate to fully contain the leachate as proposed in the planning application.
>
> There is a specific allegation within this ground of the challenge that the ES did not provide any estimate of emissions to soil and water including, in particular, of leachate to groundwater, nor of the likely effect of the landfill on soil or groundwater of such emissions.
>
> The ES did identify potential impacts of the proposed landfill on groundwaters. Measures are included in the proposals in order to ensure that any negative impacts are prevented from happening. Your officers have no reason to doubt that this will be achieved through the detailed PPC process referred to above. The ES's estimate of the emissions to groundwater and soils is that there would not be any because the landfill cells would be fully contained.

The ES also identified potential benefits in reducing the impact on groundwaters of the site compared to that which would be expected to continue into the future if the site were to be left in its existing undeveloped state. The proposals include the continued monitoring of groundwater quality which is considered to be a sensible precautionary approach.

In our opinion the ES should not be regarded as deficient."

The report continued:

> "Regulation 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 requires a planning authority, if it considers that a submitted Environmental Statement should contain additional information in order to be an Environmental Statement, to so notify the applicant in writing . . .
>
> These circumstances did not apply in this case, the Council never has taken such a view on the ES and the submission of the Addendum Report was not in response to a notification by the Council. The Council nevertheless considered the contents of the Addendum Report once it was received, and duly forwarded it to consultees for their comments and it was placed on the planning register."

57 So far as conditions are concerned, the defendant accepted the Environment Agency's suggestions. Under "Water Resources and Pollution Prevention" condition 29 provided:

> "No part of the development shall be commenced until:
>
> (a) The application site has been subject to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Waste Planning Authority.
>
> (b) Detailed proposals for the removal, containment or otherwise rendering harmless of any contamination (the 'Reclamation Method Statement') have been submitted to and approved in writing by the Waste Planning Authority."

Condition 32 provided:

> "There shall be no discharge of foul or contaminated drainage from the site into either ground water or surface waters, whether direct or via soakaways."

58 It is against this background that the claimant submits that the assessment of the impact of the proposed development on groundwater was impermissibly left over to another decision maker (the Environment Agency) after the grant of planning permission, and that the environmental statement did not adequately describe the mitigation measures, because it left significant matters over for subsequent determination and proceeded on an assumption that remedial measures, whatever they might be, would work.

59 In advancing these submissions Dr Wolfe relied on two decisions of the Court of Appeal: *Smith v Secretary of State for the Environment* [2003] EWCA Civ 262 and *Gillespie v Secretary of State for the Environment* [2003] EWCA Civ 400. In *Smith*, Waller L.J. distilled a number of principles from the authorities which he set out in para.[24] of his judgment. The first and second principles in para.[24] relate to the grant of outline planning permission. The planning permission in the present case, for engineering operations, is a detailed permission. The third and fourth principles are as follows:

> "Third, the planning authority or the Inspector will have failed to comply with article 4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given . . .
>
> Fourth, (and here it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the final details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case."

Waller L.J. continued in para.[33] of his judgment:

> "In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision-maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision-maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision-maker will act competently. Constraints must be placed on the Planning Permission within which future details can be worked out, and the decision-maker must form a view about the likely details and their impact on the environment."

60 In *Gillespie* there was no environmental statement and Richards J. quashed a planning permission granted by the Secretary of State on the basis that he had erred in concluding that no environmental statement was required. Part of the site was a former gas works, which was extensively contaminated. The Secretary of State had relied upon the imposition of a condition (condition (VI)) which required a detailed site investigation to be carried out. That investigation would have proposed a remediation scheme. Pill L.J. rejected a submission that the Secretary of State, in deciding whether an environmental statement was required, was obliged to shut his eyes to the remediation scheme. In para.[37] he said this:

> "The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration."

He continued in paras [40] and [41]:

> "40. In my judgment the Secretary of State erred in the test he has expressed in paragraph 19 of his final decision letter. I read the second part of paragraph 19 as including an assumption that Condition VI provides a complete answer to the question whether significant effects on the environment are likely. That is too narrow an approach. In the circumstances, it was necessary to consider the stage which the site investigation had reached (Condition VI requires a further site investigation in detail to be undertaken), the nature and extent of the scheme for remediation, including its uncertainties, the effects on the environment during the remediation and the likely final result. The condition is properly drafted but itself demonstrates the contingencies and uncertainties involved in the development proposal, as does the evidence of Mr Simmons already quoted.
>
> 41. When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in Condition VI could be treated, at the time of the screening decision, as having had a successful outcome."

Laws L.J. agreed, saying in para.[46]:

> "Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably

cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA."

Arden L.J.'s judgment in para.[49] is to a similar effect.

61 The facts of the present case are very different. Here there was an environmental statement which did contain a description of the effect of the operation of the landfill upon groundwater: the potential impacts of uncontrolled discharge of landfill leachate were described as "low to medium". With the implementation of the mitigation measures described in the environmental statement the residual impact was described as "low".

62 The description was relatively brief, but it was open to the claimant and others to challenge it as inaccurate and/or inadequate in the consultation process. It is significant that having received the addendum report, the Environment Agency raised no objection. The environmental statement did describe the proposed mitigation measures. The claimant complains that the description was brief, and that the proposals are in effect purely standard, providing for no more in terms, for example of the permeability of the proposed lining system in the cell, than would be required by the Landfill (England and Wales) Regulations 2002 in any event.

63 That may well be so, but it was open to the claimant to argue that more stringent mitigation measures should be adopted. Although criticisms have been made in general terms of the adequacy of the mitigation measures proposed in the environmental statement, no alternative mitigation measure, let alone a more effective mitigation measure, was advanced on behalf of the claimant during the consultation process.

64 The measures were described in sufficient detail to enable informed criticism of them to be made. Dr Wolfe placed reliance on the words "The appropriateness of the lining system and the site design will be assessed . . . as part of the PPC permit application" in support of his submission that the defendant had left over questions relating to the effectiveness of mitigation. That submission takes the words out of context. Reading the environmental statement and the addendum report as a whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process. This case falls squarely within Waller L.J.'s fourth principle (above). The defendant had placed constraints upon the planning permission within which future details had to be worked out. Condition 6 provided:

"Except as may otherwise be required by conditions of this permission, the development shall be implemented in accordance with the submitted details and accompanying Environmental Statement dated 8 February 2001 as amended by letters dated 18 June 2001, 17 July 2001 and 29 August 2001 with enclosures and Addendum Report, provided that nothing otherwise required or prohibited by this condition shall prevent the making of any alterations to any detailed technical specifications and operations of waste management processes that the Environment Agency might require in accordance with the Landfill Regulations 2002.''

65 The claim form did not criticise condition 29 (above). In his skeleton argument and submissions Dr Wolfe contended that the condition (which is concerned with the existing contamination on this former site) left over a significant environmental impact for future assessment and was, in this respect, similar to condition (VI) relied upon by the Secretary of State in the *Gillespie* case. It is clear from the letter dated July 3, 2001 that the Environment Agency was initially concerned that existing contamination had not been adequately addressed in the environmental statement. The addendum report was the response to this concern. Having considered the addendum report the Environment Agency acknowledged that the issue had been discussed but said that ''no *final* remediation strategy had been proposed'' (my emphasis).

66 If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the addendum report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29.

67 I therefore reject ground 1 of the challenge.

68 I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Sch.4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of ''full information'', but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the ''environmental information'' of which the environmental statement will be but a part.

Ground 3 (BPEO)

69 Under the heading ''Planning Considerations'' the report explained that planning policies were developed at national, regional and local levels. Having reminded members of the obligations imposed by ss.70(2) and 54A of the Town and Country Planning Act 1990 identifying the plans comprising the Statutory Development Plan, the report stated that ''It is also necessary to have regard

to Government Policy on waste issues, planning guidance at national and regional level and objectives and requirements obtained in relevant EC directives. The report mentions Council Directive 1999/31 on the landfill of waste (The Landfill Directive) and refers to Waste Strategy 2000:

> "Waste Strategy 2000, which is the current national waste strategy sets out the changes considered necessary to deliver more sustainable waste management. It sets a series of challenging targets to increase the value that is recovered from municipal waste and to reduce the amount of biodegradable municipal waste that is sent to landfill.
>
> Waste Strategy 2000 expects planning decisions on suitable sites for treatment and disposal to be based on a local assessment of the 'Best Practicable Environmental Option' (BPEO) for each waste stream. However, the courts have held that, whilst BPEO is material to land use planning, it is for local planning authorities to decide how much weight to attach to it. The BPEO process was defined in the 12th Report of the Royal Commission on Environmental Pollution as:
>
>> 'The outcome of a systematic and consultative decision-making procedure which emphasises the protection of the environment across land, sea and water. The BPEO establishes for a given set of objectives, the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term.'
>
> In determining the BPEO, decision-makers are expected to take account of three key considerations."

Those three considerations are the Waste Hierarchy, the Proximity Principle and Self-sufficiency.

70 Under "National Planning Policy Guidance" reference is made to PPG10:

> "The document advises that Waste Planning Authorities should consider the provision of waste management facilities within the context of the following . . .
>
> the best practicable environmental option for each waste stream including consideration of the 'Waste Hierarchy' and 'Proximity Principle'."

71 Under the heading "Regional Policy" reference is made to RPG8, which advises that waste planning authorities should adopt the targets for waste recycling and reduction set out in Waste Strategy 2000. Under "Local Policy" the report states that the Derby and Derbyshire Joint Structure Plan:

> ". . . reflects national policies. In particular Chapter 10: Waste Management Policies, acknowledges the strategic principles set out in Waste Strategy 2000 and confirms that its policies accord with the framework established in national, regional and local waste strategies.
>
> The principle policies that are relevant to consideration of this application are as follows:

Waste Management Policy 1: Waste Management Sites and Facilities states:

> 'Provision will be made for sufficient sites and facilities to cater for the waste management needs of Derbyshire, having regard to the national, regional and local strategies for waste management. Particular account will be taken of:
>
> (1) The need to pursue objectives which further the aim of achieving sustainable waste management, such as to find the Best Practicable Environmental Option for individual waste streams.'

Waste Management Policy 2: Waste as a Positive Resource states that:

> 'Where waste disposal activities are justified, preference will be given to proposals that assist the reclamation of derelict or despoiled land or mineral sites, subject to the environmental acceptability.'

Waste Management Policy 3: Environmental Criteria states that:

> 'Waste management sites and facilities will be permitted only where their impact on the environment is acceptable, in particular where:
>
> (1) in accordance with the proximity principle, they are well located to serve the main sources of waste, are well related to the transport network . . .'"

72 The report also refers to a non-statutory policy document, Derbyshire Waste Management Strategy (DWMS). That in turn refers to BPEO and the report states that:

> "The Strategy recognises that movement up the waste hierarchy will take time to achieve and, secondly, despite being at the bottom of the waste hierarchy, indicates that landfill will continue to be the best environmental option for some waste types. This is particularly likely to be so for municipal waste."

73 Having identified the relevant policies, the Director then set out his own Policy Assessment. He considered that the issues to be addressed included the relationship of the application to the policies in the Structure Plan, in PPG10 and in Waste Strategy 2000 for England and Wales.

74 The applicant for planning permission had claimed that there was a shortfall in final disposal capacity in Derbyshire for non-inert wastes of approximately 4.1 million m^3 for the remainder of the plan period in the DWMS to 2011. Perhaps as a consequence, the environmental statement did not address BPEO in terms. Under the heading "Need for the Development", it was said in para.3.2.1 that:

> "The need for the development is two-fold; to deliver the comprehensive reclamation of the current despoiled site and to facilitate the disposal of wastes arising in the area."

Having referred to the shortfall in the county as a whole, paras 3.2.11 and 12 of the environmental statement said:

> "3.2.11 The proposed development of a landfill site at Smiths Void is intended to address at least part of this shortfall and to provide continuity of waste disposal capacity at the locality. The proposed waste void has a capacity of approximately 850,000m^3, which represents 4 to 5 years life at an input rate of approximately 200,000 tonnes per annum. The capacity generated would be available during the plan period.
>
> 3.2.12 The development of the landfill would also enable Derbyshire Waste Ltd to fulfil its obligations under the long term contract with Derbyshire County Council in the surrounding area, ensuring that MSW [Municipal Solid Waste] arising continues to be disposed of locally, thus complying with the 'proximity principle'."

Having examined the figures provided by the interested party and the Environment Agency, the Director did not accept that there was a shortfall of capacity:

> "Work that I am currently undertaking in connection with the production of a waste local plan, does not assume an increase in waste due to economic growth contrary to the DWMS. My calculations suggest that there may be a sufficiency of landfill within the county as a whole up to 2010 provided that there is no growth in waste and the Government's recovery targets are achieved. However, further work and refinement of figures is ongoing and as yet there is no published information. At that stage the methodology would be open to public scrutiny.
>
> . . .
>
> . . . given my preparatory local plan work and having regard to the degree of uncertainty on this issue, I can only conclude that the case in relation to need is, in my view, not proven although seems not to be in conflict with Waste Management Policy 1."

The only passage in the report that deals directly with the question whether the proposed development would be the BPEO for the waste stream in question is in the following terms:

> "Glapwell 2 has, until its recent closure, taken waste including a large proportion of municipal solid waste, from Chesterfield, North-East Derbyshire and the Bolsover area. The applicant indicates that municipal waste from this area is currently deposited at the Hall Lane, Steveley landfill site and at Sutton Landfill in Nottinghamshire. As an extension of an existing disposal facility, this site would make an effective, albeit small, contribution to the facilities available. Notwithstanding the Sub-Area supply position, I am satisfied that the proposal is not large enough that it would transform the local supply situation and, of itself, create substantial excess capacity. Whilst the application site is particularly accessible from the north-east of the County, the site also has good connections to the M1 Motorway and A38 trunk route to serve the wider needs of Derbyshire and I am mindful of the imminent shortage of landfill space in the south-east of the county. Thus, I consider that landfilling at this site would be in accordance with the key considerations—Proximity Principle and Regional Self-sufficiency

> and technically suitable for landfilling as proposed thereby providing a Best Practicable Environmental Option for the disposal of waste in accordance with criteria 1 of this policy.''

75 The Director's planning conclusions were:

> ''The case for additional landfill space within the County for the period specified in the Derbyshire Waste Management Strategy to 2011 is not proven although I am satisfied that the proposal is not of a sufficient size that it would transform the local supply situation and, of itself, create substantial excess capacity. Further, preparatory waste local plan works suggests that a shortage of landfill space in the county as a whole will arise by 2010 and in the south-east of Derbyshire, a shortage is imminent. This site could help meet that shortage.
>
> Notwithstanding the availability of alternative sites both currently, and which may become available in the north-east of the County within the Waste Management Plan period referred to this report, I consider that there are compelling reasons to accept the infilling/land raising/restoration of the site as submitted to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. I consider that there is no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed.''

76 The minutes of the meeting of the Planning and Control Committee on March 11, 2002 state that:

> ''The Director of Environmental Services written report referred to there being no shortage of landfill space within the County as a whole to 2010, provided that reduced waste production and landfill targets were achieved. If waste arisings increased due to economic growth as forecast by the applicant then a shortfall of landfill space would arise. There was some uncertainty on this issue but he was satisfied that the proposal was not large enough that it would transform the local supply situation and create substantial excess capacity. He was mindful that preparatory waste local plan work showed that a shortfall of landfill space was about to arise in the south east of the County and given its good accessibility, this site could assist in meeting the waste disposal needs of that area.
>
> The officer also reported verbally that ongoing work in connection with the production of the waste local plan for Derby and Derbyshire now indicated that there was likely to be sufficient landfill space both in the North East Derbyshire Sub-Area and the plan area as a whole up to the end of the current Structure Plan period in 2011, but that an overall shortage was currently predicted to develop in the subsequent period up to 2015 (the year to which that plan would run).
>
> In his report the Director of Environmental Services considered that there were compelling reasons to accept the infilling/landraising/restoration of the site as submitted, to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. He considered

that there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed.

. . .

Members of the Committee commented on the proposal, and asked for clarification from officers on a number of issues raised, to which officers responded. Members, having considered the report and heard the comments made and explanations provided by officers, generally considered that there were not any substantial planning grounds for refusal of the application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own. An officer explained that satisfactory restoration without use of waste was a technical possibility but was not feasible except at great expense and that no such alternative scheme was likely to be being promoted."

77 In the original claim form in the judicial review proceedings one of the grounds of challenge was that there was no proper BPEO assessment. The joint report responded as follows:

"Lack of a Compliant Best Practicable Environmental Option (BPEO) Assessment

The report to Committee of 11 March explained the concept of BPEO (*i.e.* the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term), and analysed it in the context of this proposal.

The challenge essentially alleges that the Council's treatment of BPEO, as referred to in the Government's published Waste Strategy 2000, was insufficient. In particular, the level of detail that should be taken into account in determining a planning application, including the lack of identification of the specific BPEO for particular waste streams.

The Courts have held that in appropriate cases BPEO is an objective to which planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it. In this case the waste hierarchy and the proximity principle were considered and reference was made to the relevant Planning Policy Guidance, Waste Strategy 2000, Regional Planning Guidance and the Derbyshire Waste Management Strategy. The ES made reference to the applicant's own waste management strategy and proposed recycling rates. In particular, the report identified the waste hierarchy, the proximity principle and self sufficiency as considerations. It addressed the issues of the targets for reducing, re-using and recovering value from waste and the requirements for landfill capacity for the residual wastes. In the context of Structure Plan policies it identified the use of waste as a positive resource to reclaim this site.

Although extensive reference has been made under this ground of challenge to Chapter 3 in Part 2 of Waste Strategy 2000 ('the decision making framework'), this Part of the Strategy appears to be concerned with waste management decisions by local authorities in general rather than with waste planning authority decision-making on particular planning applications.

Your reporting officers remain of the view that the relevant factors relating to the planning application in terms of BPEO were properly taken into account."

78 It would appear from the defendant's summary grounds of opposition to the claim and from Mr Evans' skeleton argument on its behalf that the words "the Courts have held" were a reference to the dicta of Carnwath J. (as he then was) in *R. v Bolton MBC Ex p. Kirkman* [1998] J.P.L. 787 at p.799, which were followed by Richards J. in *R. v Leicestershire CC Ex p. Blackfordby & Boothorpe Action Group* [2001] Env. L.R. 2, see paras [46] to [49], whose dicta were in turn followed by Maurice Kay J. in *R. v Derbyshire CC Ex p. Murray* [2001] Env. L.R. 26, see paras [13] to [15].

79 Since *Murray* went to appeal, it is curious that reference was not made in this context to the conclusions of Pill L.J. in para.[53] of his judgment given on January 22, 2002 (see above).

80 It is submitted on behalf of the claimant that the approach to be BPEO in the report and the joint report—"BPEO is an objective to which local planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it"—does not accord with Pill L.J.'s conclusion that an objective is more than a factor to be taken into account, since it is an objective which is obligatory it must always be kept in mind when making a decision.

81 It is further submitted that the weight to be given to BPEO has increased since the government implemented the 1999 Landfill Directive by making the Landfill (England and Wales) Regulations 2002, which came into force on June 15, 2002. It should be noted that *Thornby Farms* was an incinerator, not a landfill, case and that the decision in *Murray* predated the implementation of the Directive, and did not consider Waste Strategy 2000 which had been published in May 2000. The pre- Landfill Directive position, which was that considered by the Court of Appeal in *Murray*, was as follows. The relevant objectives in para.4 of Sch.4 to the 1994 Regulations included: "(b) implementing so far as material any plan made under the plan making provisions." Paragraph 1, as amended, defines the plan making provisions as follows:

"'plan making provisions' means paragraph 5 below, section 50 of the 1990 Act . . . Part II of the Town and Country Planning Act 1990 . . . and section 44A of the Environmental Protection Act 1990 . . ."

Section 44A, which was inserted by the Environment Act 1995 makes provision for a national waste strategy:

"(1) The Secretary of State shall as soon as possible prepare a statement ('the strategy') containing his policies in relation to the recovery and disposal of waste in England and Wales.

(2) The strategy shall consist of or include—

(a) a statement which relates to the whole of England and Wales; or.

(b) two or more statements which between them relate to the whole of England and Wales.

(3) The Secretary of State may from time to time modify the strategy.

(4) Without prejudice to the generality of what may be included in the strategy, the strategy must include—

(a) a statement of the Secretary of State's policies for attaining the objectives specified in Schedule 2A to this Act . . ."

The objectives in paras 1 and 2 of Sch.2A are, in substance, the objectives in Arts 4 and 5 of the Waste Framework Directive.

82 Waste Strategy 2000 for England and Wales is the national waste strategy prepared for the purposes of s.44A (see para.5.1 of the document). Thus, the defendant in the present case was obliged to keep in mind the objective of implementing, so far as material, the provisions of the strategy. BPEO is dealt with in the strategy as follows. Under the heading "Delivering Change" the second bullet point in the introduction to Ch.4 states:

> "Decisions on waste management, including decisions on suitable sites and installations for treatment and disposal, should be based on a local assessment of the Best Practicable Environmental Option."

Under the heading "Making Good Decisions", para.4.4 says:

> "The right way to treat particular waste streams cannot be determined simply. The objective is to choose the Best Practicable Environmental Option, (BPEO) in each case. BPEO varies from product to product, from area to area and from time to time. It requires waste managers to take decisions which minimise damage to the environment as a whole, at acceptable cost in both the long and short term. A more detailed description of how decision makers can identify the BPEO is at Chapter 3 section starting 3.3 in Part 2 of this strategy."

83 The three "key considerations", namely the waste hierarchy, the proximity principle, and self-sufficiency are set out in para.4.5. Paragraph 4.13 is concerned with the obligations of waste planning authorities. It says:

> "Waste Planning Authorities are responsible for identifying suitable sites for waste treatment or disposal installations. The Government and the National Assembly look to Waste Planning Authorities to:
> - take full account of the policies described in this strategy, in particular:
> - the importance of establishing the BPEO . . ."

Part 2 of the strategy complements Pt 1 and should be read in conjunction with it (see para.1.2).

84 Having referred to the fact that the strategy is a waste management plan for the purposes of the Framework Directive and s.44A of the 1990 Act, para.1.8 says:

> "Furthermore, this waste strategy is an advisory document. The 1990 Town and Country Planning Act requires local planning authorities in England and Wales to have regard to national policies in drawing up their development plans, and therefore this document will be an important source of guidance. These development plans will then provide a framework for individual planning decisions . . ."

85 Chapter 3 describes the decision-making framework in considerable detail. I do not propose to extend this already lengthy judgment by extensive citations from the chapter. Suffice it to say that para.3.2 states in part:

> "When taking waste management decisions on suitable treatment options, sites and installations, local authorities must follow the framework set out below. This framework should act as a guide for other decision makers, including business waste managers."

The framework is set out under the heading "Determining the Best Practicable Environmental Option". Paragraph 3.4 states:

> "The process that should be used for considering the relative merits of various waste management options in a particular situation is the Best Practicable Environmental Option (BPEO). This was defined in the 12th Royal Commission on Environmental Pollution as . . ."

The definition is then set out.

86 The proximity principle—which suggests that waste should generally be disposed of as near to its place of origin as possible—is then amplified. A step by step approach is suggested:

> "Identifying the most sustainable mix of waste management options, environmentally, economically and socially, can be a daunting task. However, the process can be simplified by breaking it down into smaller, more manageable tasks:
>
> Step 1: set the overall goals for making the waste management decision, subsidiary objectives and the criteria against which the performance of different options will be measured.
> Step 2: identify all the viable options.
> Step 3: assess the performance of these options against the criteria.
> Step 4: value performance.
> Step 5: balance the different objectives or criteria against one another.
> Step 6: evaluate the rank the different options.
> Step 7: analyse how sensitive the results are to variations in the assumptions made or the data used."

87 Annex A deals with "Major Waste Facilities in England and Wales" and includes the following advice in para.A3:

> "Under the Town and Country Planning legislation, planning authorities must have regard to national and regional policies, including policies on waste management, in drawing up their waste development plans. This

waste strategy will be a material consideration for planning authorities in drawing up their development plans and for determining individual planning applications.''

88 It is submitted on behalf of the claimant that while the report mentions BPEO on a number of occasions, and indeed sets out the Royal Commission on Environmental Pollutions definition, it does no more, in effect, than pay lip service to the principle when it comes to applying it to the particular circumstances of this application for planning permission. BPEO could not have been kept in mind by the Committee because there was nothing recommending a step-by-step analysis of the kind recommended in Waste Strategy 2000.

89 Having concluded that there was sufficient landfill space in the North-East Derbyshire Sub-Area and the plan area as a whole up to the end of the structure plan period in 2011, the Committee should have been invited to consider whether landfill at the application site was the best option to meet the objectives which this particular application was intending to meet.

90 The objectives were not identified in any systematic way, but once it was acknowledged that there was sufficient capacity in the county as a whole and in the north-east of the county, they clearly included the objective of meeting an imminent shortage of landfill space in the south-east of the county. Whether landfill was the best option for such a waste stream, having regard to the waste hierarchy, and if it was whether landfill in the north-east of the county would be in accordance with the proximity principle, were not examined. The defendant was obliged to adopt *the*, not *a, BPEO. There is considerable force in these criticisms of the way in which the report and the joint report dealt with BPEO.*

91 I turn to consider the status of Waste Strategy 2000 post the Government's implementation of the Landfill Directive.

92 The background to the making of the Directive is set out in the recitals. Recital 18 explains:

> ''Whereas, because of the particular features of the landfill method of waste disposal, it is necessary to introduce a specific permit procedure for all classes of landfill in accordance with the general licensing requirements already set down in Directive 75/442/EEC and the general requirements of Directive 96/61/EC . . .''

Article 8 provides, so far as material:

> ''Member states shall take measures in order that:
> (a) the competent authority does not issue a landfill permit unless it is satisfied that . . .
> (b) the landfill project is in line with the relevant waste management plan or plans referred to in Article 7 of Directive 75/442/EEC.''

Article 7 of the Waste Framework Directive required the competent authorities to draw up as soon as possible one or more waste management plans. Waste Strategy 2000 is that plan for England and Wales. Who is to ensure that a landfill permit is not issued unless it is ''in line with'' the Strategy? As mentioned above, the Landfill Directive was implemented by the Landfill (England and Wales) Regulations 2002, under which the Environment Agency is responsible for issuing landfill permits.

93 DEFRA has published a note explaining how the main requirements of the Landfill Directive have been transposed in the 2002 Regulations. Under the heading "Conditions of the permit" the note explains that the requirement in Art.8B of the Landfill Directive "has already been transposed in the PPC Regulations 2000 through the duty placed on the Environment Agency not to issue a permit to any waste management activity unless it has already obtained planning permission". Thus, it is clearly intended, at least by DEFRA, that local planning authorities will not grant planning permission for a landfill project unless they are satisfied that it is "in line" with Waste Strategy 2000.

94 On behalf of the defendant, Mr Evans, whose submissions were adopted by Mr Barrett on behalf of the interested party, submitted that the combined effect of the Landfill Directive and Waste Strategy 2000 did not alter the approach to BPEO that was required to be taken by the local planning authority. It had to keep BPEO in mind as an objective. Both Mr Evans and Mr Barrett submitted that the strategy was merely advisory, no more than a material consideration to which the defendant was required to have regard as members were advised in the joint report. It was for the local planning authority to decide what weight to give to the Strategy, both in general and insofar as it gave advice in relation to BPEO in particular.

95 So far as Art.8 of the Landfill Directive is concerned, Mr Evans submitted that the duties relating to issuing landfill permits were imposed by the 2002 Regulations upon the Environment Agency, not the local planning authority. Thus, the local planning authority was not under any duty to ensure that a planning permission was "in line" with the Strategy.

96 He fairly accepted that this approach had two consequences. Firstly, if the local planning authority was not under any obligation to ensure that a grant of planning permission was in line with the Strategy, it might well be too late to recover the position when the Environment Agency came to consider the issue of a permit under the 2002 Regulations. That might cause the United Kingdom to be in breach of the Landfill Directive. Secondly, whatever may be the respective roles of the local planning authority and the Environment Agency, the practical effect of the submissions of the defendant and the interested party is that no greater weight need be placed by the decision taker upon the relevant waste management plan that has been drawn up pursuant to Art.7 of the Waste Framework Directive as implemented by s.44A.

97 I am unable to accept Mr Evans' and Mr Barrett's submissions in this respect. In 1975 the Waste Framework Directive addressed all forms of waste management, including reduction, re-use, recycling, energy recovery and disposal (see Arts 3 and 4). Since it required member states to prepare waste management plans it could reasonably be expected that, once those plans had been prepared, arrangements would be made for them to be given additional weight in the decision-making processes of member states.

98 The 1999 Landfill Directive is concerned with a particular method of waste disposal, landfill, which is at the bottom of the waste hierarchy (that is to say,

all other things being equal, it is the least preferred option). The purposes of the Landfill Directive included encouraging the prevention, recycling and recovery of waste and obviating the wasteful use of land (Recital 3), and ensuring that, in future, only safe and controlled landfill operations should be carried out (Recital 2). In short, it sought to discourage the unnecessary use of landfill as a method of waste disposal.

99 To this end, Art.8 of the Landfill Directive is more prescriptive than the Framework Directive as implemented by paras 2 and 4(1)(b) of the 1994 Regulations. In ordinary language an obligation to be satisfied that a proposed development is "in line with" a waste management plan, is more stringent than an obligation to keep the objective of implementing the plan, so far as material, in mind. The difference in wording between the two directives, requiring greater weight to be placed upon the waste management plan, is deliberate, having regard to the purposes of the later directive. The words "in line with" admit of some flexibility. They are perhaps less prescriptive than "in accordance with". Moreover, given the complexity of the subject matter and the many factors that may have to be taken into account when taking individual waste disposal decisions, the waste management plan itself may well allow for a further degree of flexibility. Mr Evans submitted that, in this respect, the Strategy was no different from earlier policy guidance, which also referred to BPEO such as that contained in PPG10. He referred to para.1.8 in Pt 2 (above) and to the advice in para.A3 in Annex A to the Strategy.

100 This is to take these paragraphs out of context. Both Pts 1 and 2 of the Strategy must be read as a whole. It is true that it is an important source of guidance which must be taken into account by local planning authorities. But on its face it professes to be more than that: it "implements . . . the requirement within the Waste Framework Directive . . . as incorporated into law by section 44A of the Environmental Protection Act 1990" (see paras 1.4 and 1.5).

101 Fairly read, as a whole, the policies relating to BPEO in Waste 2000 are, and are intended to be, more prescriptive than earlier policy guidance. To give but a few examples from the extracts cited above: "Decisions on waste management, including decisions on suitable sites . . . for disposal should be based on a local assessment of the BPEO"; "The right way to treat particular waste streams cannot be determined simply. The objective is to choose the BPEO in each case"; "The Government . . . look(s) to Waste Planning Authorities to take full account of the policies described in this Strategy, in particular . . . the importance of establishing the BPEO"; "When taking waste management decisions on suitable . . . sites . . . local authorities must follow the framework set out below". As mentioned above, the framework describes how to determine the BPEO: "The process that should be used for considering the relative merits of the various waste management options in a particular situation is the BPEO".

102 On a fair reading, the Strategy does not simply maintain the status quo in policy terms, leaving local planning authorities free to give such weight as they choose to BPEO. One of the main objectives of the Strategy is to "deliver change" by placing greater emphasis on the need to choose the BPEO when making waste management decisions.

103 It is true that Ch.3 in Pt 2 of the Strategy applies to waste management decisions by local authorities generally, but contrary to the advice given to members in the joint report (above) it applies with no less force to waste planning authorities when they are taking decisions on planning applications for waste disposal. Under the 2002 Regulations the Environment Agency is concerned at the landfill permit stage with the detailed regulation of landfilling operations that will already have been granted planning permission. It is for waste planning authorities when deciding whether or not to grant planning permission for landfill proposals to ensure that they are "in line" with Pts 1 and 2 of the Strategy.

104 Mr Evans submitted that such an obligation might conflict with the waste planning authority's duty under s.54A: to determine an application for planning permission in accordance with the development plan unless material considerations indicate otherwise. Policies in the development plan might conflict with those in the Strategy. Since the Strategy will be a material consideration for local planning authorities when reviewing their development plans, the scope for conflict should reduce as policies in development plans "catch up" with those in the Strategy. Any conflicts in the short term should not present a practical difficulty because the policies in the Strategy will, at the very least, be material considerations for the purposes of s.54A which may indicate that an application for planning permission should be determined otherwise than in accordance with the (conflicting) policies in the development plan.

105 Mr Barrett conceded that the Government might well have wished local planning authorities to give greater weight to the policies in the Strategy including BPEO, but he submitted that its intention was that this should be achieved through the incorporation of those policies into statutory development plans, thus giving them the added force of s.54A. He relied upon para.A3 of Annex A to the Strategy, but his submission ignores the concluding words of the para.A3 which make it clear that the Strategy is to be taken into account in both plan making and development control.

106 For these reasons, I conclude that the defendant's approach to the status of the policies relating to BPEO in Waste Strategy 2000 was erroneous in principle because the joint report effectively relegated BPEO to a material consideration to be taken into account but to be given such weight as the defendant thought fit. Such an approach did not accord with Pill L.J.'s pre- Landfill Directive and Waste Strategy 2000 *dicta* in *Murray*. There was no recognition of the defendant's duty, post the publication of the Strategy and the implementation of the Landfill Directive, not to grant planning permission unless the proposed development was "in line with" the policies relating to BPEO in Waste Management 2000.

107 But the defendant's consideration of BPEO was seriously flawed, regardless of the weight that should have been attributed to the policies in the Strategy. Mr Evans and Mr Barrett pointed to the number of places in the report where BPEO was mentioned. I accept that there are frequent references to BPEO in the report, but merely repeating the acronym, however frequently, and whether or not accompanied by the Royal Commission's definition, is not an adequate consideration of the issues raised by BPEO. If a material consideration is to be

taken into account it must first be properly understood. What matters is not the letters BPEO, but the analysis of the issues raised by the concept: the application of the three key elements—the waste hierarchy, the proximity principle and self-sufficiency to the particular waste stream(s) which the development is intended to serve. So long as there was both a local (in the North-East Derbyshire Sub-Area) and county-wide shortage of capacity, it was relatively easy to see how the proximity principle might be met. It would appear that this must have been the assumption underlying the environmental statement, since it contained no discussion of BPEO whatsoever. However, once it had been concluded that there was capacity both locally and county-wide up to 2011, the question whether this particular application site would be the BPEO for meeting a shortage of landfill space in the south-east of the county had to be addressed in terms of the three key considerations, including the proximity principle. Beyond referring to the application site's good road connections, and stating that the Director was "mindful of the imminent shortage of landfill space" in the south-east of the county, the report did not address this issue at all. It may well be that this is why the Director did not feel able to conclude that the site was the BPEO in accordance with criterion 1 in Waste Management Policy 1 in the structure plan, merely that it was "a BPEO for the disposal of waste".

108 I accept that officers' reports should not be read in a legalistic or pedantic manner. If there had been a reasonable attempt to grapple with the issues raised by BPEO in the light of local spare landfill capacity and capacity county-wide for the structure plan period, the use of the indefinite rather than the definite article might well have been of little consequence, and reference to it dismissed as mere pedantry. Its use in this report is, in my judgment, a reflection of the defendant's muddled approach to the BPEO issue. Unfortunately, the muddle was compounded, rather than clarified, by the advice given to members in the joint report as to the weight that they ought to give to BPEO. Given the importance attached to choosing the BPEO for a particular waste stream in Waste Strategy 2000, this was a significant flaw in the decision-making process.

109 The defendant's failure to deal adequately with BPEO, whether it is regarded as a breach of its obligation to ensure that the grant of planning permission was in line with Waste Strategy 2000, or whether it is viewed more simply as a failure to have regard to a material consideration, does not mean that the planning permission must be quashed. The court has a discretion and I have anxiously considered whether it would be right in all the circumstances to exercise that discretion, given the two-fold justification for the development in the environmental statement: to reclaim a despoiled site and to facilitate the disposal of wastes arising in the area. It is clear from the report and from the minutes of meeting on March 11, 2002 that the Director placed considerable weight upon the first justification: "there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed". However, it was for members to determine the application. The minutes record that they "generally considered that there were not any substantial planning grounds for refusal of the application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own."

110 Given the manner in which BPEO was addressed in the report and joint report it is not surprising that members concluded that there were no substantial planning grounds for refusing planning permission. Since there had been no proper BPEO analysis it is not possible to say whether there would or would not have been a substantial planning objection on this ground, for example because of failure to comply with the proximity principle. Thus it is simply not possible to tell what members' attitudes might have been if there had been a proper analysis of the BPEO issue, including both the weight to be given to, and the content of, the policies relating to BPEO in Waste Strategy 2000. In particular, Waste Management Policy 2 in the structure plan gives preference to waste disposal proposals that assist in the reclamation of derelict or despoiled land, "where waste disposal activities are justified" (see above). In deciding whether waste disposal activities are justified a BPEO assessment is, for the reasons set out above, a most material consideration.

111 For these reasons, the application succeeds on ground 3 and the planning permission dated December 23, 2002 must be quashed.

Supreme Court

*Regina (Morge) *v* Hampshire County Council

[2011] UKSC 2

2010 Nov 8; 2011 Jan 19 — Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Kerr of Tonaghmore JJSC

European Union — Environment — Natural habitats — Local planning authority granting permission for development affecting species or habitat of European protected species — Whether effects of development constituting "deliberate disturbance" of protected species — Whether planning decision made in breach of requirements of Council Directive — Council Directive 92/43/EEC, art 12(1)(b)

Planning — Development — Natural habitats — European protected species — Application for planning permission for development affecting species or habitats of bats — Planning authority granting planning permission in reliance, inter alia, on withdrawal by Natural England of opposition to planning application — Whether effects of development constituting "deliberate disturbance" of protected species — Whether planning decision made in breach of requirements of Council Directive — Conservation (Natural Habitats, etc) Regulations 1994 (SI 1994/2716) (as amended by Conservation (Natural Habitats, etc) (Amendment) Regulations 2007 (SI 2007/1843), reg 5 and Conservation (Natural Habitats, etc) (Amendment) (England and Wales) Regulations 2009 (SI 2009/6), reg 7), regs 3(4), 39(1) — Council Directive 92/43/EEC, art 12(1)(b)

The defendant local authority, which was also the planning authority for the area, applied for planning permission for a development whereby a bus route would run alongside a disused railway track. The track was overgrown with vegetation and bats, a European protected species within Annex IV of Council Directive 92/43/EEC ("the Habitats Directive")[1], lived and/or foraged there. Natural England, the Government's adviser on nature conservation and the body responsible for enforcing the Directive, initially objected to the planning application on the grounds, inter alia, of the impact of the proposed development on bats. The defendant then commissioned an updated bat survey and, as a result of the findings of the survey, Natural England withdrew its objections to the planning application. Thereafter the defendant's planning committee, having also considered the reports of the defendant's planning officers, granted planning permission for the development. The claimant, a local resident, sought judicial review of that decision, claiming that the defendant had acted unlawfully in failing to have regard to the strict protection afforded to bat species by article 12(1) of the Habitats Directive, and in breach of regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994[2] by failing to "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of [the defendant's] functions". In dismissing the claim the judge held, inter alia, that article 12(1)(b) of the Habitats Directive was not concerned with any indirect effect of the development upon the "deterioration or destruction of breeding sites or resting places" and that in the circumstances the proposals did not lead, either directly or indirectly, to the "deliberate disturbance" of the bats within the meaning of article 12(1)(b). The Court of Appeal dismissed the claimant's appeal on the grounds, inter alia, that article 12(1)(b) was concerned with the protection of the species, and

[1] Council Directive 92/43/EEC, art 12(1)(b): see post, para 2.
[2] Conservation (Natural Habitats, etc) Regulations 1994, reg 3(4): see post, para 3.
Reg 39(1), as amended: see post, para 26.

the loss of habitats or disturbance to one or more bats did not necessarily constitute disturbance of the species.

On the claimant's appeal—

Held, (1) that in determining the level of disturbance required to fall within the prohibition in article 12(1)(b) of the Habitats Directive consideration had to be given to the fact that it was an article affording protection specifically to species and not to specimens of the species, nor to habitats, although the disturbance of habitats could indirectly impact on species; that article 12(1)(b) did not preclude an assessment of the nature and extent of the negative impact of the defendant's activities upon the species and whether it was sufficient to constitute a "disturbance" of the species; that it was implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration was more likely to have a negative impact on the species so as to constitute the prohibited "disturbance" than activity at other times; that consideration had to be given to the rarity and conservation status of the species and the impact of the disturbance on the local population of a protected species; that individuals of a rare protected species were more important to a local population than individuals of a more abundant protected species, and disturbance of species which were declining in number were likely to be more harmful than disturbance to species which were increasing in numbers; and that, therefore, a case by case approach with careful reflection on the characteristics and survival chances of the species concerned was required when determining whether there was a level of "disturbance" which fell within the prohibition in article 12(1)(b) (post, paras 19–25, 33, 34, 48, 77–79).

(2) Dismissing the appeal (Lord Kerr of Tonaghmore JSC dissenting), that the planning committee's only obligation under regulation 3(4) of the 1994 Regulations was to have regard to the requirements of the Habitats Directive when deciding whether to grant planning permission; that the United Kingdom had chosen to implement the Directive by making a breach of the article 12 prohibition a criminal offence under regulation 39(1) of the 1994 Regulations and it was the function of Natural England, and not of the planning authority, to enforce compliance with the Directive by prosecuting those who had committed offences; that the grant of planning permission did not provide a defence to the offence, so that even if planning permission was given there were criminal sanctions available for any offending activity, and it was wrong in principle when Natural England had the primary responsibility for ensuring compliance with the Directive also to place a substantial burden on the planning authority, in effect, to police the fulfilment of Natural England's own duty; that since Natural England had expressed itself satisfied that the proposed development would be compliant with article 12 of the Directive and had withdrawn its objections to the development, the planning committee was entitled to presume that Natural England was correct; that it could not be said that Natural England had misunderstood the ambit of article 12(1)(b) or that the planning committee had been materially misled or left insufficiently informed; that regulation 3(4) did not require members of the planning committee to consider and decide for themselves whether the development would occasion such disturbance to bats as in fact and law would constitute a violation of article 12(1)(b) of the Directive; that the planning committee also knew that the necessary measures had been planned to compensate for the loss of foraging; and that, accordingly, in reaching its decision to grant planning permission the defendant authority had had regard to the requirements of the Directive to the extent necessary to fulfil its obligation under regulation 3(4) of the Regulations (post, paras 26–32, 33, 34, 44–47, 48, 50, 54–56).

Decision of the Court of Appeal [2010] EWCA Civ 608; [2010] PTSR 1882 affirmed on partly different grounds.

The following case is referred to in the judgment of Baroness Hale of Richmond:

R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] WLR 1389; [2001] 2 All ER 929, HL(E)

The following additional cases were cited in argument:

Berkeley v Secretary of State for the Environment [2001] 2 AC 603; [2000] 3 WLR 420; [2000] 3 All ER 897, HL(E)
Commission of the European Communities v Kingdom of Spain (Case C-221/04) [2006] ECR I-4515, ECJ
R (Hulme) v Secretary of State for Communities and Local Government [2010] EWHC 2386 (Admin)
R (Newsum) v Welsh Assembly Government [2004] EWCA Civ 1565; [2005] PLR 107, CA
R (Woolley) v Cheshire East Borough Council [2009] EWHC 1227 (Admin); [2010] Env LR 57

APPEAL from the Court of Appeal

By permission of the Supreme Court (Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance JJSC) granted on 27 July 2010, the claimant, Vivienne Morge, appealed from a decision of the Court of Appeal (Ward, Hughes and Patten LJJ) on 10 June 2010, dismissing the claimant's appeal from the judgment of Judge Bidder QC sitting as a judge of the Queen's Bench Division in the Administrative Court on 17 November 2009, refusing the claimant's claim for judicial review of a decision of the defendant planning authority, Hampshire County Council, on 29 July 2009, to grant planning permission for a development providing a bus route between Fareham and Gosport in South East Hampshire to run alongside a disused railway track.

The facts are stated in the judgments of Lord Brown of Eaton-under-Heywood, Baroness Hale of Richmond and Lord Kerr of Tonaghmore JJSC.

Charles George QC, Gregory Jones and *Sarah Sackman* (instructed by *Edwin Coe LLP*, London agents for *Swain & Co, Havant*) for the claimant.

Neil Cameron QC and *Sasha White* (instructed by *Sharpe Pritchard* for *Head of Legal Services, Hampshire County Council, Winchester*) for the local planning authority.

The court took time for consideration.

19 January 2011. The following judgments were handed down.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

1 This appeal concerns a planning permission granted on 29 July 2009 for a proposed three-mile (4·7km) stretch of roadway to provide a rapid bus service between Fareham and Gosport in South East Hampshire. The permission was challenged on environmental grounds including not least its likely impact on several species of European protected bats inhabiting the general area around the proposed busway. The challenge having failed before Judge Bidder QC (sitting as a High Court judge) on 17 November 2009; [2009] EWHC 2940 (Admin)—and before the Court of Appeal (Ward, Hughes and Patten LJJ) on 10 June 2010; [2010] PTSR 1882—this court on 27 July 2010 gave the appellant limited permission to appeal so as to raise two issues of some general importance.

2 Issue one concerns the proper interpretation of article 12(1)(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural

habitats and of wild fauna and flora ("the Habitats Directive"), which provides that:

> "Member states shall take the requisite measures to establish a system of strict protection for the animal species listed [the protected species] in their natural range, prohibiting . . . (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration . . ."

3 Issue two concerns the proper application of regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994 (SI 1994/2716) (as amended first by the Conservation (Natural Habitats, etc) (Amendment) Regulations 2007 and then by the Conservation (Natural Habitats, etc) (Amendment) (England and Wales) Regulations 2009), by which domestic effect is given to the Directive:

> ". . . every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they [the requirements] may be affected by the exercise of those functions."

With that briefest of introductions let me turn to the essential factual context in which these issues now arise, noting as I do so that altogether fuller descriptions of the facts can be found in the judgments below.

4 The proposed new rapid busway—the first and larger phase of which is already substantially under way, applications for interlocutory relief to stay its continuance having been refused by the Court of Appeal and refused by this court on granting leave to appeal—runs along the path of an old railway line, last used in 1991. The scheme provides for buses to be able to join existing roads at various points along the route. It will create a new and efficient form of public transport to the benefit of many residents, workers and visitors to the region. Central Government has committed £20m to it.

5 Although most of the scheme lies within a built-up area, there are a number of designated nature conservation sites nearby and, unsurprisingly, once the railway line ceased to be used, the surrounding area became thickly overgrown with vegetation and an ecological corridor for various flora and fauna. Although, therefore, the scheme was widely supported, it also attracted a substantial number of objectors one of whom is Mrs Morge, the appellant, who lives close by.

6 The respondent authority is both the local planning authority for the relevant area and also the applicant for planning permission through its agent, Transport for South Hampshire, who submitted a planning application on 31 March 2009. Taking it very shortly, on 30 April 2009 Natural England (the Government's adviser on nature conservation) objected to the planning application in part because of their concerns about the impact of the development on bats (an objection reiterated on 29 June 2009). As a result the respondent authority commissioned an updated bat survey ("UBS") which was submitted on 9 July 2009. On 17 July 2009, largely as a result of the UBS, Natural England withdrew their objections. There then followed a decision report prepared by the respondent's planning officers, a further letter from Natural England dated 23 July 2009, an addendum decision report from the officers, and on 29 July 2009 a three hour meeting of the respondent's regulatory committee which concluded with the grant of planning permission for the scheme by a majority of six to five with two abstentions.

7 The UBS is a document of some 70 pages. For present purposes, however, its main findings can be summarised as follows. No roosts were found on the site. The removal of trees and vegetation, however, would result in a loss of good quality bat foraging habitats. This would have a moderate adverse impact at local level on foraging bats for some nine years, the impact thereafter reducing, because of mitigating measures, to slight adverse/neutral. In addition the busway would sever a particular flight path followed by common pipistrelle bats, increasing their risk of collision with buses (without, however, given the proposed mitigation of this risk, a significant impact on bats at a local level).

8 The officers' decision report (again a lengthy document) included these passages with regard to the bats:

> "3.7 Detailed ecological surveys have been undertaken across the site over the last 18 months . . . A number of bat species roost and forage along the corridor . . . Accordingly, a strategy to mitigate the impact on these species has been developed. The main principles of the strategy [include] enhancement of the habitat of the retained embankment to provide continued habitat for displaced species. Bat surveys have also been carried out to enable appropriate measures to be implemented . . ."
>
> "5.6 Natural England initially raised objections on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats . . . which are [a] legally protected species. Further survey work was undertaken in response to this objection and provided to Natural England. Following receipt of this information Natural England are now satisfied that the necessary information has been provided and have withdrawn their objection. They recommend that if the council is minded to grant permission for this scheme conditions be attached requiring implementation of the mitigation and compensation measures set out in the reports . . ."
>
> "*Nature conservation impact*
>
> "8.17 The requirements of the Habitats Regulations need to be considered . . ."
>
> "8.19 The surveys also identified the presence of a diversity of bat species, which are protected, using the trees alongside the track for foraging. An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them from these proposals . . ."
>
> "*Conclusion*
>
> "8.24 Suitable mitigation measures are proposed for . . . protected species . . ."

The addendum report dealt specifically with the Habitats Regulations and repeated that Natural England, having initially objected to the application and required further survey information regarding protected species, were now satisfied and had withdrawn their objection.

9 Against this essential factual background I turn now to the two main issues arising.

Issue 1—the proper interpretation of article 12(1)(b) of the Habitats Directive

Article 12(1)(b) must, of course, be interpreted in the light of the Directive as a whole. Included amongst the recitals in its preamble is this:

> "Whereas, in the European territory of the member states, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at community level in order to conserve them".

10 Article 1 is the definition article and defines "species of Community interest" in four categories, respectively "endangered", "vulnerable", "rare", and "endemic and requiring particular attention [for various specified reasons]". The six species of protected bats affected by the proposed busway fall variously into the second, third and fourth of those categories. Article 1(i) defines "conservation status of a species" to mean "the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations". It further provides:

> "The conservation status will be taken as 'favourable' when: population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis".

Article 2(2) provides that "Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of community interest."

11 There then follow articles 3 to 11 under the head "Conservation of natural habitats and habitats of species". Within these provisions one should note article 6(2):

> "Member states shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive."

12 Articles 12 to 16 inclusive then follow under the head "Protection of species". I have already set out article 12(1)(b). Article 16 provides for derogation and so far as material provides:

> "1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, member states may derogate from the provisions of articles 12 . . . (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment."

13 Besides the issues now before us the Court of Appeal had to deal in addition with challenges based upon article 12(1)(d) of the Directive and upon the respondent's decision not to treat the proposal as an EIA development (matters upon which this court refused leave to appeal). Ward LJ gave the only reasoned judgment, one of infinite care and thoughtfulness and, I may add, one of enormous assistance to this court in its consideration of this further appeal.

14 As a background to deciding the meaning of article 12(1)(b), Ward LJ necessarily had regard to the European Commission's views upon the scope of the Directive, as set out in a guidance document issued in February 2007 which include the following:

> "(37) Disturbance (e g by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (e g by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods of its life cycle e g (breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of 'disturbance'.
>
> "(38) The disturbance under article 12(1)(b) must be deliberate . . . and not accidental. On the other hand, while 'disturbance' under article 6(2) must be significant, this is not the case in article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.
>
> " (39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a member state . . . For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a 'disturbance' in terms of article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under article 12. Once again, it has to be stressed that the case by case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

No problem arises as to what is meant by "deliberate" in article 12(1)(b). As stated by the commission in para 33 of their guidance:

> " 'Deliberate' actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against the species, but intends this offence or, if not, consciously accepts the foreseeable results of his action."

Put more simply, a deliberate disturbance is an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant protected species. The critical, and altogether more difficult, question is what precisely in this context is meant by "disturbance".

15 Having, as I too have sought to do, thus cleared the ground and recognised that the central difficulty in the case lies in determining the level of disturbance required to fall within the prohibition, Ward LJ rejected the appellant's contention that any disturbing activity save only that properly to be characterised as de minimis—too negligible for the law to be concerned with—constitutes disturbance within the article. As Ward LJ pointed out [2010] PTSR 1882, the example given in para 38 of the commission's guidance (scaring away a wolf from the sheep fold) "must be an a fortiori, rather than a typical one". The judgment then continues (and I make no apology for quoting it at some length):

> "35. . . . the disturbance does not have to be significant but, as para 38 of the guidance explains, there must be some room for manoeuvre which suggests the threshold is somewhere between de minimis and significant. It must be certain, that is to say, identifiable. It must be real, not fanciful. Something above a discernible disturbance, not necessarily a significant one, is required. Given that there is a spectrum of activity, the decision-maker must exercise his or her judgment consistently with the aim to be achieved. Given the broad policy objective which I explored . . . above ['to ensure that the population of the species is maintained at a level which will ensure the species' conservation so as to protect the distribution and abundance of the species in the long term'], disturbing one bat, or even two or three, may or may not amount to disturbance of the species in the long term. It is a matter of fact and degree in each case.
>
> "36. [Counsel for the claimant] seizes on the words in para 38 . . . of the guidance, 'a certain negative impact likely to be detrimental must be involved' and he elevates this statement into a test for establishing a disturbance. His difficulty is that that does not answer the critical question: when does the negative impact become detrimental? Para 39 seems to me to spell out the proper approach, namely to give consideration to the 'effect on the conservation status of the species at population level and biogeographic level'. This in my judgment is an important refinement. The impact must be certain or real, it must be negative or adverse to the bats and it will be likely to be detrimental when it negatively or adversely effects the conservation status of the species. 'Conservation status of a species' is a term of art [which] . . . means the sum of the influences acting on the species concerned that may affect the

long-term distribution and abundance of its population. That is why the guidance at para 39 makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species'. Furthermore, 'the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation', to quote the concluding sentence of para 39. The summary in the guidance . . . has the same emphasis: 'Disturbance is detrimental for a protected species e g by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.'

"37. Having regard to the aim and purpose of the Directive and of article 16 and having due consideration of the guidance, I am driven to conclude that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level . . ."

"39. In my judgment whether the disturbance will have a certain negative impact which is likely to be detrimental must be judged in the light of and having regard to the effect of the disturbance on the conservation status of the species, i e, how the disturbance affects the long-term distribution and abundance of the population of bats. I remind myself that according to the [commission's] guidance . . . 'favourable conservation status could be described as a situation where a . . . species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in the future'. Whether there is a disturbance of the species must be judged in that light."

16 Finally, in a passage in the judgment headed "Overall conclusions", Ward LJ, expressing himself satisfied that the respondent's planning committee had due regard to the requirements of the Directive, said:

"73. I have been troubled by the fact that the conclusion of the bat survey upon which such reliance was placed is to the effect that no *significant* impacts to bats are anticipated. The disturbance does not have to be significant and this is a misdirection or misunderstanding of . . . [article] 12(1)(b) . . . of the Habitats Directive. The question for me is, therefore, whether the conclusions can be upheld. I am satisfied that the decision of the planning committee should not be quashed.

"74. I reach that conclusion for these reasons. I am satisfied that the loss of foraging habitat occasioned by cutting a swathe through the vegetation does not offend article 12(1)(b) which is concerned with protection of the species not with conservation of the species' natural habitats. I am satisfied that that bald statement that the bats have to travel further and expend more energy in foraging does not justify a conclusion that the conservation status of the bats is imperilled or at risk. There is no evidence which would allow the planning committee to conclude that the long-term distribution and abundance of the bat population is at risk. There is no evidence that they will lose so much energy (as they might when disturbed during hibernation) that the habitat will not still provide enough sustenance for their survival, or their survival would be in jeopardy. There is no evidence that the population of the species will not maintain itself on a long-term basis. There is therefore no

A evidence of any activity which would as a matter of law constitute a disturbance as the word has to [be] understood.

"75. As I have already concluded, the risk of collision cannot amount to a disturbance and article 12(1)(b) is not engaged in that respect."

17 Mr George QC submits that the Court of Appeal were wrong to hold that article 12(1)(b) is breached only when the activity in question goes so B far as to imperil the conservation status of the species at population level, i e, that only then does the activity amount to a "disturbance" of the species. This, he points out (and, indeed, Ward LJ himself recognised), puts the threshold for engaging the article higher than Mr Cameron QC for the respondent put it, Mr Cameron's main concern being that such a construction would sit uneasily with article 16(1) (a provision which itself C necessarily implies that article 12(1)(b) may need to be, and be capable of being, derogated from notwithstanding that this is only permissible where it is "not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status"). The Court of Appeal's construction is also, submits Mr George, inconsistent with an additional reasoned opinion addressed to the UK by the commission dated 18 September 2008 with regard, inter alia, to what was then the new D regulation 39(1), inserted by the 2007 Amendment Regulations, providing for an offence where someone

"(b) deliberately disturbs wild animals of any species in such a way as to be likely significantly to affect— (i) the ability of any significant group of animals of that species to survive, breed or rear or nurture their young . . ."

E The prohibition in the Directive, the commission pointed out in their opinion, "is not limited to *significant* disturbances of *significant groups* of animals". Article 12(1)(b) of the Directive, the opinion later suggested, "covers all disturbance of protected species."

18 Whilst not actually conceding that the Court of Appeal approach is wrong, Mr Cameron contends now that the proper approach is to ask F whether the activity in question produces "a certain negative impact likely to be detrimental to the species having regard to its effect on the conservation status of the species".

19 In my judgment certain broad considerations must clearly govern the approach to article 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, G disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b), in contrast to that in article 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species". Thirdly, whilst it is true that the word "significant" is omitted from article 12(1)(b)—in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having "a significant negative impact on the [protected] species"— H that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species. Fourthly, it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have

a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times.

20 Beyond noting these broad considerations it seems to me difficult to take the question of the proper interpretation and application of article 12(1)(b) much further than it is taken in the commission's own guidance document. (The commission's suggestion in their September 2008 Additional Reasoned Opinion that article 12(1)(b) "covers all disturbance of protected species" in truth begs rather than answers the question as to what activity in fact constitutes such "disturbance" and cannot sensibly be thought to involve a departure from their 2007 guidance.) Clearly the illustrations given in para 39 of the guidance—on the one hand "any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area", on the other hand "scaring away a wolf from entering a sheep enclosure"—represent no more than the ends of the spectrum within which the question arises as to whether any given activity constitutes a disturbance. Equally clearly, to my mind, the suggestion in para 39 that "consideration must be given to its effect [the effect of the activity in question] on the conservation status of the species at population level and biogeographic level" does not carry with it the implication that only activity which *does* have an effect on the conservation status of the species (i e which imperils its favourable conservation status) is sufficient to constitute "disturbance".

21 I find myself, therefore, in respectful disagreement with Ward LJ's conclusion [2010] PTSR 1882, para 37 "that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level". Nor can I accept his view, at para 36, that "the guidance, at para 39, makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species' ". On the contrary, as I have already indicated, para 39 of the guidance uses disturbing activity of that sort merely to illustrate one end of the spectrum. Rather the guidance explains that, within the spectrum, every case has to be judged on its own merits. A "species-by-species approach is needed" and, indeed, even with regard to a single species, the position "might be different depending on the season or on certain periods of its life cycle": see para 37 of the guidance. As para 39 of the guidance concludes:

> "it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

22 Two further considerations can, I think, usefully be identified to be borne in mind by the competent authorities deciding these cases (considerations which seem to me in any event implicit in the commission's guidance). First (and this I take from a letter recently written to the respondent by Mr Huw Thomas, Head of the Protected and Non-Native Species Policy at DEFRA, the department responsible for policy with regard to the Directive):

"Consideration should . . . be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species. Individuals of a rare species are more important to a local population than individuals of more abundant species. Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers."

23 Second (and this is now enshrined in regulation 41(2) of the Conservation of Habitats and Species Regulations 2010 (SI 2010/490)):

"disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong."

Note, however, that disturbing activity likely to have these identified consequences is included "in particular" in the prohibition; it does not follow that other activity having an adverse impact on the species may not also offend the prohibition.

24 In summary, therefore, whilst I prefer Mr Cameron's suggested approach to this article (see para 18 above) than that adopted by the court below or that contended for by Mr George, it seems to me in the last analysis somewhat simplistic. To say that regard must be had to the effect of the activity on the conservation status of the species is not to say that it is prohibited only if it *does* affect that status. And the rest of the formulation is hardly illuminating.

25 Tempting although in one sense it is to refer the whole question as to the proper interpretation and application of article 12(1)(b) to the Court of Justice of the European Union pursuant to article 267 of the Lisbon Treaty, I would not for my part do so. It seems to me unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance than we have here sought to give.

Issue two—The proper application of regulation 3(4) of the 1994 Regulations (as amended)

26 I can deal with this issue altogether more briefly. Article 12(1) requires member states to "take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range". Wisely or otherwise, the UK chose to implement the Directive by making a breach of the article 12 prohibition a criminal offence. Regulation 39 of the 1994 Regulations (as amended) provides that "(1) A person commits an offence if he . . . (b) deliberately disturbs wild animals of any such species [i e a European protected species]". It is Natural England, we are told, who bear the primary responsibility for policing this provision.

27 It used to be the position that the implementation of a planning permission was a defence to a regulation 39 offence. That, however, is no longer so and to my mind this is an important consideration when it comes to determining the nature and extent of the regulation 3(4) duty on a planning authority deliberating whether or not to grant a particular planning permission.

28 Ward LJ dealt with this question in para 61 of his judgment:

> "The planning committee must grant or refuse planning permission in such a way that will 'establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range . . .' If in this case the committee is satisfied that the development will not offend article 12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status; and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission."

29 In my judgment this goes too far and puts too great a responsibility on the planning committee whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the planning committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.

30 Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The planning committee here plainly had regard to the requirements of the Directive: they knew from the officers' decision report and addendum report (see para 8 above and the first paragraph of the addendum report as set out in para 72 of

A Lord Kerr of Tonaghmore JSC's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that "no *significant* impacts to bats are anticipated"—and, indeed, about the decision report's
B reference to "measures to ensure there is no significant adverse impact to [protected bats]". It is certainly not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. Having regard to the considerations outlined in para 29 above, I cannot agree with Lord Kerr JSC's view, implicit in paras 75 and 76 of his judgment, that regulation 3(4) required the committee
C members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive.

31 Even, moreover, had the planning committee thought it necessary or appropriate to decide the question for themselves and applied to article 12(1)(b) the less exacting test described above rather than Ward LJ's
D test of imperilling the bats' conservation status, there is no good reason to suppose that they would not have reached the same overall conclusion as expressed in paras 74 and 75 of Ward LJ's judgment: see para 16 above.

32 I would in the result dismiss this appeal.

LORD WALKER OF GESTINGTHORPE JSC

33 For the reasons given in the judgment of Lord Brown of Eaton-
E under-Heywood JSC, with which I agree, and for the further reasons given by Baroness Hale of Richmond and Lord Mance JJSC, I would dismiss this appeal.

BARONESS HALE OF RICHMOND JSC

34 On the first issue, I have nothing to add to the judgment of Lord Brown of Eaton-under-Heywood JSC, with which I agree. I also agree with
F him on the second issue, but add a few observations of my own because we are not all of the same mind.

35 The issue is whether the regulatory committee of Hampshire County Council (the planning authority for this purpose) complied with their duty to "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise" of their planning functions: the Conservation
G (Natural Habitats, etc) Regulations 1994, regulation 3(4) ("the Habitats Regulations"); see also the Conservation of Habitats and Species Regulations 2010, regulation 9(5). It is, of course, always important that the legal requirements are properly complied with, perhaps the more so in cases such as this, where the county council is both the applicant for planning permission and the planning authority deciding whether it should be granted.

H 36 Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd) v Secretary of State for the Environment,* *Transport and the Regions* [2003] 2 AC 295, para 69: "In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them." Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.

37 It is important to understand the chronology in this case. The planning application was dated 31 March 2009. Natural England was consulted. Their first reply is dated 30 April. In it they objected to the application on the ground that "the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". Specifically, they were concerned about the impact upon bats and great crested newts. Reference was made to "the impacts of the development and mitigation upon European protected species" and the council were reminded of, among other things, their duty under regulation 3(4). This objection was maintained in a letter dated 29 June 2009.

38 Further information on great crested newts and the updated bat survey were submitted in early July in response to this. Based on this information, Natural England wrote on 17 July 2009 withdrawing their objection, subject to recommendations about the conditions to be imposed if planning permission were granted. This letter also contained comments about common widespread reptiles and asking that these too be addressed although Natural England were not lodging an objection in relation to them.

39 Natural England wrote again on 23 July with their "final response" to the proposal. This dealt, first, with the fact that the site was close to the Portsmouth Harbour Site of Special Scientific Interest, itself part of the Portsmouth Harbour Special Protection Area and Ramsar site and gave their advice on the requirements of regulation 48(1)(a) of the Habitats Regulations. Regulation 48(1)(a) imposes a specific obligation on planning authorities, among others, to make an "appropriate assessment" of the implications for a European protected site before granting permission for a proposal which is likely to have a significant effect upon the site. The letter advised that, provided that specified avoidance measures were fully implemented, the proposal would not be likely to have a significant effect upon the protected sites. Thus they had no objection on this score and permission could be granted. The letter went on to deal with "Protected species and biodiversity" under a separate heading, repeated that they had withdrawn their objection subject to the implementation of all the recommended mitigation, but reminded the council that "whilst we have withdrawn our objection to the scheme in relation to European protected species, we have ongoing concerns regarding other legally protected species on site . . ." A separate paragraph went on to deal with biodiversity.

40 The officer's report was prepared for the committee meeting, which was due to take place on 29 July 2009, before receipt of the letter of 23 July. It is 31 pages long. The executive summary lists "the main issues raised", including "concern at the procedure because this is a county council scheme" and "nature conservation impact" (para 1.4). The account of the "Proposals" refers to the detailed ecological surveys undertaken, including the bat surveys "carried out to enable appropriate measures to be implemented"; but states that the impact on the designated sites would be negligible (para 3.7). The section on "Consultations" includes a paragraph explaining that Natural England had initially objected "on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats and great crested newts which are legally protected species" but that they had withdrawn their objection after further survey work was undertaken (para 5.6).

41 The section on "Nature conservation impact" deals first with the proximity to the protected sites and points out that the requirements of the Habitats Regulations needed to be considered (para 8.17). This is a reference to the specific obligation in regulation 48(1)(a). It went on to explain why it was thought that an "appropriate assessment" was not needed, noting that Natural England had raised no concerns about any impact on these sites (para 8.18). The report then turns to the corridor itself, referring to the environmental report submitted with the application, which dealt with badgers, bats, great crested newts, and reptiles; on bats, it states that "An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them for these proposals" (para 8.19).

42 The report concludes by recommending that no appropriate assessment is required under the Habitats Regulations (para 9.2); that planning permission be granted (para 9.3); and that the proposed development accords with the development plan and the relevant policies, because, among other things "suitable mitigation measures are proposed for badgers and protected species" (para 9.4). There is a cross reference to the annexed policy C18 on protected species, which states that

> "Development which would adversely affect species, or their habitats, protected by the Habitats Regulations 1994, the Wildlife and Countryside Act 1981 or other legislation will not be permitted unless measures can be undertaken which prevent harm to the species or damage to the habitats. Where appropriate, a permission will be conditioned or a legal agreement sought to secure the protection of the species or their [habitat]."

43 After receiving the letter from Natural England dated 23 July, an addendum to the report was prepared, dealing with three issues which had arisen since the report was finalised. Under the heading "Habitats Regulations" it deals first with the objections raised by Natural England "requiring additional survey information concerning potential for the presence of great crested newts and bats, which are protected species". It points out that the survey work was undertaken and Natural England had withdrawn their objection. In two separate paragraphs, it goes on to explain that Natural England had now given specific advice on the requirements of regulation 48(1)(a) (thus reinforcing the recommendation made in para 9.2 of the main report).

44 It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the Habitats Regulations, and that the applicable policy on protected species, which also refers to the Habitats Regulations 1994, was being applied. It is true that the report does not expressly mention either regulation 3(4) or article 12 of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an "appropriate assessment" if a proposal is likely to have a significant effect upon a European site. It is not surprising, therefore, that the report deals more specifically with that obligation than it does with the more general obligation in regulation 3(4).

45 Furthermore, the United Kingdom has chosen to implement article 12 of the Directive by creating criminal offences. It is not the function of a planning authority to police those offences. Matters would, as Lord Brown JSC points out, have been different if the grant of planning permission were an automatic defence. But it is so no longer. And it is the function of Natural England to enforce the Directive by prosecuting for these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the Regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people with the expertise to assess the meaning of the updated bat survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment.

46 But if I am wrong about this, and the planning authority did have to make an independent assessment in terms of article 12(1)(b), there is absolutely no reason to think that they would have reached a different conclusion and refused planning permission on this account. They may have reached their decision by a majority of six votes to five. But the minutes make it clear that there were a great many other problems to worry about with this scheme. While the "impact on nature" was among the many matters upon which members questioned officers, this was not one of their listed concerns. If this scheme was not going to get planning permission, it would be because of the local residents' concerns about the impact upon them rather than because of the members' concerns about the impact upon the bats.

47 I would therefore dismiss this appeal on both issues.

LORD MANCE JSC

48 I agree with the reasoning and conclusions of Lord Brown of Eaton-under-Heywood and Baroness Hale of Richmond JJSC on each of the issues. I add only a few words because the court is divided on the second.

49 Lord Kerr of Tonaghmore JSC's dissent on this issue is, I understand, based on the premise that (a) Natural England had not expressed a view that the proposal would not involve any breach of the Habitats Directive, and (b) if it had, the planning committee was not informed of this: see his paras 73 and 74.

50 For the reasons given in Lord Brown JSC's and Baroness Hale JSC's judgments, I cannot agree with either aspect of this premise.

51 I add the following in relation to the suggestion that Natural England was, in its letter of 17 July 2009, "preoccupied with matters that were quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive" or that the letter was "principally taken up with the question of possible impact on common widespread reptiles": see para 69 below.

52 It is true that the longer part of the text of the letter of 17 July related to the latter topic, in relation to which Natural England at the end of the letter made clear it was not lodging an objection, but was only asking that further attention be given and comments supplied. But the first, and in the circumstances obviously more significant, aspect of the letter consisted in its first three paragraphs. These withdrew Natural England's previous objection made on 30 April and reiterated on 29 June in relation to great crested newts and bats. The withdrawal was in the light of the information, including the updated bat survey, which the council had earlier in July supplied. In withdrawing their objection, Natural England emphasised the importance of the mitigation procedures outlined in section 10 of the survey, and added the further recommendation that the council look closely at the requirement for night working and keep any periods of such working "to an absolute minimum". This confirms the attention it gave to the information supplied.

53 When making its objection in its letter dated 30 April, Natural England had said:

> "Our concerns relate specifically to the likely impact upon bats and great crested newts. The protection afforded these species is explained in Part IV and Annex A of Circular 06/2005 *Biodiversity and Geological Conservation—Statutory Obligations and their Impact within the Planning System*".

Part IV of Circular 06/2005 stated that the Conservation (Natural Habitats, etc) Regulations 1994 implemented the requirements of the Habitats Directive and that it was unlawful under regulation 39 deliberately to disturb a wild animal of a European protected species. Annex A identified all species of bats as wild animals of European protected species.

54 It is therefore clear that Natural England was, from the outset, focusing on the protected status of all species of bats under the Directive and domestic law; and that its withdrawal of its objection on 17 July was directly relevant to the planning committee's performance of its role under regulation 3(4) to "have regard to the requirements of" that Directive in the exercise of its functions. The planning officer's first report dated 29 July summarised the position for the planning committee in accurate terms. Thereafter, as Lord Brown and Baroness Hale JJSC record, Natural England's further letter dated 23 July arrived, reiterating Natural England's as the position stated in its letter dated 17 July. This too was again accurately summarised to the committee by the planning officer in his addendum dated 29 July to his previous report.

55 With regard to the updated bat survey, there is no reason to believe that Natural England did not, when evaluating this, understand both the legal requirements and their general role and responsibilities at the stage at which they were approached by the council. The survey repays study as a whole, and I merely make clear that I do not share the scepticism which Lord Kerr JSC feels about some of its statements or agree in all respects with his detailed account of its terms and their effect. The important point is, however, that Natural England was well placed to evaluate this survey, and, having done so, gave the advice they did. This was, in substance, accurately communicated to the planning committee, in a manner to which the committee was entitled to have, and must be assumed to have had, regard.

56 In addition to my agreement with the other parts of Lord Brown JSC's and Baroness Hale JSC's judgments, I confirm my specific agreement with Baroness Hale JSC's penultimate paragraph.

LORD KERR OF TONAGHMORE JSC

57 As legislative provisions go, regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994 ("the Habitats Regulations") is relatively straightforward. Its terms are uncomplicated and direct. It provides:

> "every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

58 In plain language this means that if you are an authority contemplating a decision that might have an impact on what the Directive requires, you must take its requirements into account before you reach that decision. Of course, if you know that another agency has examined the question and has concluded that none of those requirements will be affected, and if you are confident that such agency is qualified to make that judgment, this may be sufficient to meet your obligation under the regulation. What lies at the heart of this appeal is whether the regulatory committee of Hampshire County Council, when it came to make the decision whether to grant the planning permission involved in this case, either had regard itself to the requirements of the Habitats Directive or had sufficient information to allow it to conclude that some other agency, in whose judgment it could repose trust, had done so and had concluded that no violation arose.

59 An old and currently disused railway line runs between Gosport and Fareham in South Hampshire. A section of this, between Redlands Lane, Fareham and Military Road, Gosport is some 4·7 km in length. On 31 March 2009 Hampshire County Council, acting on behalf of Transport for South Hampshire, applied for planning permission to develop this section in order to create what is described as a "busway". Transport for South Hampshire is a name used to describe three local authorities,

Hampshire County Council, Gosport Borough Council and Fareham Borough Council. Planning permission was granted on 29 July 2009.

60 At present there is serious congestion on the main road between Gosport and Fareham. It is planned that the busway should operate by allowing buses to join existing roads at various points along the route and that a fast, efficient and reliable public transport service will ensue. It will also be possible to cycle on the route. Local residents will be encouraged to use buses and bicycles in preference to their private vehicles and it is hoped that the congestion will thereby be relieved. The busway is to be constructed in two phases, 1A and 1B. Clearance work for the first of these is already underway and funding is available to complete this phase. The second phase does not yet have funding. Its future development is not assured.

61 The railway line along which the busway is to be developed was closed as a result of recommendations made in the Beeching report of 1963. It appears that closure did not finally take effect until June 1991, however. In that month the last train ran along the line. Since then the area has become overgrown. It is now regarded as "an ecological corridor for various flora and fauna". Several species of bats fly through and forage in the area but no bat roosts have been found on the planning application site itself. There are two bat roosts in proximity to the route: one in Savernake Close, near the southern section of phase 1A, the other at Orange Grove which is close to the northern section of phase 1B.

62 All bats are European protected species, falling within Annex IV (a) of Council Directive 92/43/EEC ("the Habitats Directive"). Article 12 of this Directive requires member states to "take the requisite measures to establish a system of strict protection for the animal species" listed in the annex. The Conservation (Natural Habitats, etc) Regulations 1994 were made for the purpose of implementing the Habitats Directive. The Regulations prescribe a number of measures (most notably in relation to this case, regulation 39) which seek to achieve this level of protection. Derogation from these measures is permitted to those who obtain a licence from the appropriate authority. Natural England is the nature conservation body specified in the Regulations as the licensing authority in relation to European protected species.

63 Although the issue of a licence is quite separate from the grant of planning permission, Natural England is regularly consulted on applications for development where the Habitats Directive and the Regulations are likely to be in play and so it was that in April 2009 a letter was sent by the Environment department of the council seeking Natural England's views about the proposal. On 30 April 2009, Natural England replied, objecting to the scheme and recommending that planning permission be refused.

64 Bat surveys had been undertaken in 2008. These considered the suitability of the habitat for bats; they also examined how bats used the site and which species of bats were present. Clearly, however, the detail of the information yielded by these surveys was insufficient to satisfy Natural England's requirements for it stated that the application contained "insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". The letter also recommended that the local planning authority should consider all the points made in an annex that was attached to the letter.

This provided guidance on survey requirements and on how the authority should fulfil its duties on

> "biodiversity issues under [among others] . . . regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994 . . . to ensure that the potential impact of the development on species and habitats of principal importance is addressed."

65 Amendments to the scheme were undertaken but these did not allay Natural England's concerns and their objection to the planning application was repeated in a letter of 29 June 2009.

66 An updated bat survey (leading to the publication of a report entitled "Survey Method Statement and Mitigation Strategy") was carried out on behalf of the council. The survey identified two species of bat which had not been detected in the 2008 survey. Greater levels of foraging and commuting were also recorded along the disused railway. No roost sites were found but the presence of a common pipistrelle roost was confirmed approximately 40 metres from planned works. The report concluded that the works would result in the loss of a number of trees with low to moderate "roost potential" and approximately seven trees with moderate to high roost potential. Although no known roosts would be lost, because of the difficulty in identifying tree roosts, the Bat Conservation Trust recommends that it should be assumed that trees with high potential as roosts are *in fact* used as roosts. On this basis a number of roosts will be lost as a result of the works. Impact on commuting of bats between foraging habitats was also anticipated. It was felt that this could be restored in the longer term but, until restoration was complete, at least four species of bats that had been detected in the area would be affected. It was concluded that the removal of trees and vegetation would result in the loss of good quality habitats for foraging. Loss of foraging habitats would have an inevitable adverse impact on three species of local bats with one of these (Myotis sp) being more severely affected. This was characterised as a moderate impact at local level during the time that the vegetation was being re-established, a period estimated in the survey to be at least seven years. On the issue of the long term impact of the loss of foraging habitats the report was somewhat ambivalent. At one point it suggested that there would be a long term "slight adverse to neutral" impact. Later, it suggested that it was "probable" that the re-creation of good foraging habitats would result in an eventual neutral impact. The introduction of artificial lighting would affect the quality of foraging habitat by attracting insects from unlit areas. Although this would favour some species, it would adversely affect others. Moreover, increased lighting can delay the emergence of bats from roosts and so reduce foraging opportunities. Lighting also constitutes a barrier to bats gaining access to foraging areas. Although the report is silent on the duration of these effects, it must be presumed that they will be permanent. In a somewhat bland claim, however, the authors assert that "with mitigation to reduce light spill and the selection of lights with a low UV output, the impact of lighting on bats is not anticipated to be significant". Increased noise levels would also have an adverse impact on some species of bats, the brown long-eared in particular. The report concludes at this point that it is probable that there would be a slight adverse impact on foraging habitats from operational noise. Again, the report does not expressly state how long this would last

A but, since the noise source is the operation of the busway, it must be presumed to be permanent.

67 The overall conclusion of the report was that it was probable that there would be a short term moderate adverse impact on bats. (As Lord Brown of Eaton-under Heywood JSC has pointed out, this "short term" impact is likely to continue for some nine years.) If planned mitigation measures are successful, the long-term impact of the works was anticipated
B to be "slight adverse". On this basis the authors of the report concluded that no "significant impacts" to bats were anticipated. This general conclusion requires to be treated with some caution, in my opinion. There can be no doubt that effects which could not be described as insignificant *will* occur for some seven to nine years at least. Thereafter, while the long term impact may not be quantitatively substantial, it will be permanent.

C 68 The bat survey, together with further information, was sent to Natural England in July 2009. In consequence, the objection to the application was withdrawn. Natural England considered that planning permission could now be granted, albeit subject to certain conditions. The letter relaying the withdrawal of the objection contained the following:

> "Natural England has reviewed the further information submitted
> D (Great Crested Newt Survey Method Statement and Mitigation Strategy, June 2009 and Updated Bat Survey Method Statement and Mitigation Strategy, July 2009) and can now confirm that we are able to withdraw our objection of 30 April 2009, subject to the following comments: We recommend that should the council be minded to grant permission for this scheme, conditions be attached requiring implementation of all the mitigation/compensation detailed within these reports. Particularly at
> E section 10 of the Bat Report and section 6 of the Great Crested Newt Report. We would also recommend that the council look closely at the requirement for night time working and associated flood lighting. Natural England would not advocate night time working for reasons of disturbance/disruption to the lifecycle of nocturnal wildlife and the council should ensure these periods are kept to an absolute minimum."

F

69 The head of planning and development made a report (referred to as "the officer's decision report") to the regulatory committee of the council which was to take the planning decision on 29 July 2009. The impact on nature conservation was one of the issues of concern identified in the report. Lord Brown JSC has quoted in para 8 of his judgment many of the material parts of the report that touch on this issue and I will not repeat all of those
G here. It is important, however, I believe, to understand the context of the statement in para 8.17 (quoted in part by Lord Brown JSC) that the Habitats Regulations needed to be considered. The full paragraph reads as follows:

> "The site is not within any designated sites of importance for nature conservation. However the site is within 30 metres, at its closest, to the Portsmouth Harbour Special Protection Area (SPA) and Portsmouth
> H Harbour RAMSAR site. *Therefore* the requirements of the Habitats Regulations need to be considered." (My emphasis.)

70 As Lord Brown JSC has pointed out, the report in para 8.19 stated that the updated bat survey report contained "measures *to ensure* [emphasis added] there is no significant adverse impact" to bats from the proposals.

This appears to me to be a gloss on what had in fact been said in the report. A The actual claim made (itself, in my opinion, not free from controversy) was that it was *anticipated* that there would be no significant impacts on bats *if* the mitigation measures succeeded.

71 Two points about the decision officer's report should be noted, therefore. Firstly, the enjoinder to consider the Habitats Regulations was made because of the proximity of the works to sites requiring special protection rather than in relation to the need to avoid disturbance of bats in B the ecological corridor itself. Secondly, it conveyed to the members of the regulatory committee the clear message that the updated bat survey report provided assurance that there would be no significant impact on bats. No reference was made to the moderate adverse impact that would occur over the seven to nine year period that regeneration of the forage areas would take nor to the permanent, albeit slight, impact that those measures C could not eliminate.

72 Lord Brown JSC has said that the addendum to the officer's report dealt specifically with the Habitats Regulations. It did, but the context again requires to be carefully noted. In order to do this, I believe that the entire section dealing with the Regulations must be set out. It is in these terms:

> "*Habitats Regulations* D
>
> "As stated in the report Natural England initially raised a holding objection to the application, requiring additional survey information concerning potential for the presence of great crested newts and bats, which are protected species. This survey work was undertaken and sent to Natural England, who are now satisfied and subsequently withdrew their objection. As also stated in the report the application site lies close to habitats which form part of the Portsmouth Harbour Site of Special E Scientific Interest (SSSI). This SSSI is part of the Portsmouth Harbour Special Protection Area (SPA) and Ramsar Site. Under the Conservation (Natural Habitats, etc) Regulations 1994, as amended ('the Habitats Regulations') the county council is the competent authority and has to make an assessment of the impacts of the proposal on this European site, therefore the second recommendation for the committee is to agree that F the proposal is unlikely to have a significant impact on the European site. It was implied that by withdrawing their objection Natural England did not consider there would be any significant impact, but they did not specifically give their advice. Since the report was finalised Natural England have now given specific advice on the requirements of regulation 48(1)(a) of the "Habitats Regulations". They raise no objection subject to the avoidance measures included in the application G being fully implemented and advise that their view is that either alone or in combination with other plans or projects, this proposal would not be likely to have a significant effect on the European site and the permission may be granted under the terms of the Habitats Regulations."

73 Regulation 48(1)(a) requires a competent authority, before deciding H to undertake, or give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on a European site in Great Britain to make an appropriate assessment of the implications for the site in view of that site's conservation objectives. It has nothing to do with the need to ensure that there is no disturbance of species of bats.

The addendum to the decision officer's report, therefore, offered no information whatever to the regulatory committee on the vital question whether the proposal would comply with article 12 of the Habitats Directive. Indeed, it is clear from an examination of the letter from Natural England of 17 July 2009 that it was preoccupied with matters that were quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive. The letter was principally taken up with the question of possible impact on common widespread reptiles. In so far as the letter dealt with the question of the impact on bats, its tone certainly did not convey a view that the planning committee need not consider that matter further. On the contrary, on a fair reading of the letter, Natural England was making it clear that this issue required to be addressed by the committee, not only in terms of the conditions to be applied but also as to whether night time working would be unacceptable because of disturbance to wildlife.

74 The committee considered the report of the decision officer and the addendum to it and received an oral presentation from officers of the council. The minutes of their meeting record the following in relation to the oral presentation:

> "In introducing the report, officers informed members that the proposal formed part of the strategy to improve the reliability and quality of public transport in South Hampshire and the access to Gosport and Fareham. A Traffic Regulation Order would be imposed on the bus way to allow only cycles, buses and emergency vehicles to use it. Members were advised that an environmental impact assessment (EIA) was not required as the proposal was a freestanding project that did not give rise to 'significant environmental effects'. Notwithstanding that, the county council considered that important nature conservation, amenity and traffic issues had to be properly addressed and reports on these matters had been taken into account. The addendum to the report provided reassurance that Natural England had no objection to the proposals and confirmed their view that an appropriate assessment under the Habitat Regulations was not required and provided further clarification about the application and the issue of 'screening' under the EIA Regulations."

75 At best, this had the potential to mislead. A committee member might well think that Natural England had concluded that there would be no violation of article 39(1)(b) of the 1994 Regulations (which forbids the deliberate disturbance of wild animals of a European protected species) or, more particularly, article 12 of the Habitats Directive. Of course the true position was that Natural England had expressed no explicit opinion whatever on that question. At most, it might be presumed that this was its view. Even if that presumption could be made, however, it does not affect the clear indication in the letter of 17 July 2009 that this matter was still one which required the committee's attention. I can find nothing in the letter which suggests that Natural England regarded this matter as closed. Nor do I believe that the letter could have been properly interpreted by the committee as relieving it of the need to consider the issue.

76 The critical issue on this appeal, therefore, is whether there is any evidence that the regulatory committee considered at all the duty that it was required to fulfil under regulation 3(4) of the 1994 Regulations.

77 In addressing this question I should immediately say that I agree with Lord Brown JSC on his analysis of the nature of the requirement in article 12(1)(b) of the Habitats Directive. As he has observed, a number of broad considerations underlie the application of the article. It is designed to protect species (not specimens of species) and its focus is on the protection of species rather than habitats, although, naturally, if major intrusion on habitats is involved, that may have an impact on the protection of the species. Not every disturbance will constitute a breach of the article. The nature and extent of the disturbance must be assessed on a case by case basis.

78 The European Commission's guidance document of February 2007 contains a number of wise observations as to how the application of the article should be approached. While the word "significant" has not been employed in article 12(1)(b), a "certain negative impact likely to be detrimental must be involved". In making any evaluation of the level of disturbance, the impact on survival chances, breeding success or reproductive ability of the affected species are all obviously relevant factors. Like Lord Brown JSC, I am sanguine about Mr Cameron's formulation of the test as one involving the question whether there has been "a certain negative impact likely to have been detrimental to the species, having regard to its effect on the conservation status of the species". And also like Lord Brown JSC, I consider that the Court of Appeal pitched the test too high in saying that disturbance must have "a detrimental impact on the conservation status of the species at population level" or constitute a threat to the survival of the protected species.

79 Trying to refine the test beyond the broad considerations identified by Lord Brown JSC and those contained in the commission's guidance document is not only difficult, it is, in my view, pointless. In particular, I do not believe that the necessary examination is assisted by recourse to such expressions as de minimis. A careful investigation of the factors outlined in Lord Brown JSC's judgment (as well as others that might bear on the question in a particular case) is required. The answer is not supplied by a pat conclusion as to whether the disturbance is more than trifling.

80 Ultimately, however, and with regret, where I must depart from Lord Brown JSC is on his conclusion that the regulatory committee had regard to the requirements of the Habitats Directive. True it is, as Lord Brown JSC says, that they knew that Natural England had withdrawn its objection. But that cannot substitute, in my opinion, for a consideration of the requirements of the Habitats Directive. Regulation 3(4) requires every competent authority to have regard to the Habitats Directive in the exercise of its functions. The regulatory committee was unquestionably a competent authority. It need scarcely be said that, in deciding whether to grant planning permission, it was performing a function. Moreover the discharge of that function clearly carried potential implications for an animal species for which the Habitats Directive requires strict protection.

81 Neither the written material submitted to the committee nor the oral presentation made by officers of the council referred to the Habitats Directive. The reference to Natural England's consideration of the Habitats Regulations, if it was properly understood, could only have conveyed to the committee that that consideration had been for a purpose wholly different from the need to protect bats. It could in no sense, therefore, substitute for a consideration of the Habitats Directive by the committee members whose

decision might well directly contravene one of the Directive's central requirements. It is for that reason that I have concluded that those requirements had to be considered by the committee members themselves.

82 It may well be that, if Natural England had unambiguously expressed the view that the proposal would not involve any breach of the Habitats Directive and the committee had been informed of that, it would not have been necessary for the committee members to go behind that view. But that had not happened. It was simply not possible for the committee to properly conclude that Natural England had said that the proposal would not be in breach of the Habitats Directive in relation to bats. Absent such a statement, they were bound to make that judgment for themselves and to consider whether, on the available evidence the exercise of their functions would have an effect on the requirements of the Directive. I am afraid that I am driven to the conclusion that they plainly did not do so.

83 As I have said, Natural England (at the time that it was considering the Habitats Regulations in July 2009) had not explicitly addressed the question whether the disturbance of bats that the proposal would unquestionably entail would give rise to a violation of the Directive. The main focus of the letter of 19 July was on an entirely different question. Lord Brown JSC may well be correct when he says that it is not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b), but the unalterable fact is that it did not say that it had concluded that no violation would be involved, much less that the planning committee did not need to consider the question.

84 It is, of course, tempting to reach one's own conclusion as to whether the undoubted impact on the various species of bats that will be occasioned by this development is sufficient—or not—to meet the requirement of disturbance within the meaning of article 12. But this is not the function of a reviewing court. Unless satisfied that, on the material evidence, the deciding authority could have reached no conclusion other than that there would not be such a disturbance, it is no part of a court's duty to speculate on what the regulatory committee would have decided if it had received the necessary information about the requirements of the Habitats Directive, much less to reach its own view as to whether those requirements had been met. Since the planning permission was granted on a vote of six in favour and five against, with two abstentions, it is, in my view, quite impossible to say what the committee would have decided if it had been armed with the necessary knowledge to allow it to fulfil its statutory obligation. Other members of the court have expressed the view that this is what the committee would have decided. Had I felt it possible to do so, I would have been glad to be able to reach that conclusion. As it is, I simply cannot.

85 I would therefore allow the appeal and quash the planning permission.

Appeal dismissed.

SHIRANIKHA HERBERT, Barrister

Case No: C1/2010/1779

Neutral Citation Number: [2011] EWCA Civ 775
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
Sir Michael Harrison
CO/12710/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE ETHERTON
and
MR JUSTICE HEDLEY

- -

Between :

Georgiou	**Appellant**
- and -	
(1) The Secretary of State for Communities and Local Government and Anor	**Respondent**
(2) Lambeth Borough Council	

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Kevin Leigh and Mr Phillip Williams (instructed by **Messrs Hall & Co**) for the **Appellant**
Ms Justine Thornton (instructed by **Treasury Solicitor**) for the **Respondent**
The 2nd Respondent did not appear and were not represented

Hearing dates : 24th June 2011

- -

Judgment
As Approved by the Court

Lord Justice Etherton :

Introduction

1. This is an appeal in a planning matter from the order of 2 July 2010 of Sir Michael Harrison, sitting as a Deputy High Court Judge in the Administrative Court. The Deputy Judge dismissed the application of the appellant, Theodoros Georgiou, for an order quashing the decision of a planning inspector ("the Inspector") appointed by the first respondent ("the SoS"), who dismissed the appellant's appeal in relation to one of the conditions imposed by the second respondent, the London Borough of Lambeth ("Lambeth"), when granting planning permission in respect of development at 68-70 Clapham High Street, London SW4 7UL ("the Property").

2. The appellant's complaints about the Inspector's decision are that the Inspector did not explain why he rejected the report of the appellant's acoustics expert which had been put forward in support of the appellant's claim that the condition in question was not justified and, further, the Inspector's decision was irrational.

3. Lambeth has not been represented and has made no submissions on this appeal. The effective opposition to the appeal has been by the SoS.

Background facts

4. The Property comprises a restaurant and bar called "Aquum". The appellant and his business partners, having purchased the Property, carried out substantial renovation works, before opening it in March 2009. Retrospective planning permission was granted by Lambeth on 26 March 2009. The approved alterations included bi-folding doors that open onto Clapham High Street. With all of the doors in the open position, the Property is, at the bar and restaurant level, in effect open-fronted. Condition 4 of the planning permission ("Condition 4") stated:

> "The existing shopfront which comprises of bi-folding doors shall remain fixed shut throughout the duration of the use of the bar/restaurant."

5. The reason given for the imposition of the condition was:

> "To protect the amenities of adjoining occupiers (Policies 7, 29, 33 and 36 of the Unitary Development Plan)."

6. The appellant appealed pursuant to section 78 of the Town and Country Planning Act 1990 ("the 1990 Act"). The appeal was conducted by the written representations procedure. The principal issue was whether or not Condition 4 should be retained in order to mitigate actual and potential nuisance arising from the bar and restaurant use.

7. The appellant submitted as part of his written representations a report dated 7 May 2009 ("the Report") by Richard Vivian, the principal acoustic consultant at Big Sky Acoustics, an independent acoustic consultancy providing advice on environmental noise matters. In paragraph 2.3 of the Report Mr Vivian stated that it was understood that Condition 4 existed for the purposes of preventing noise egress from the Property; and the purpose of the Report was "to establish typical external noise levels in the area and consider if open doors to the building frontage may contribute to

increased noise levels outside the premises". In paragraph 4.4 he said that the objective of the assessment was to establish "if operating Aquum with the doors open during the day will cause any nuisance to local residents."

8. Having explained his measurement methodology in section 5 of the Report, Mr Vivian recorded in section 6 the measurement data that had been obtained, and made the following observation:

> "6.3 The data shown illustrates typical noise levels in the area in excess of 71dB at all times. I can confidently predict this continuous noise level in the area is due to traffic on Clapham High Street, and at locations where the level is significantly higher than 71dB this is due to increased patron noise associated with queuing and gathering outside premises at night."

9. Mr Vivian then set out his assessment, recommendations and conclusions as follows:

> "7.0 Assessment
>
> 7.1 Low-level background sound in a restaurant would typically be in the range of 55-65dB. Indeed at levels greater than this voices would need to be raised for conversation so effectively it stops being background music. Therefore it is realistic to assume a maximum sound system level of around 65dBA in the central bar area during the daytime.
>
> 7.2 Assuming simplified propagation; a point source of 65dBA would be attenuated by 14dB at a distance of 5m. Therefore at 5m from the bar area music noise levels would be 54dBA and totally masked by any traffic noise.
>
> 7.3 With a continuous "masking noise" of 71dBA in the area due to traffic any other low level noise will not lead to a change in average ambient noise level."
>
> 8.0 Recommendations
>
> 8.1 Based on the measurement data above and my assessment of these premises and other premises in the area, there is no reason with regard to noise, why the frontage of 68-70 Clapham High Street may not be open during the day.
>
> 8.2 However any music systems in the premises must be limited to a level so as to not cause disturbance to local residents. This effectively means that it should not be possible to hear music from Aquum at the facade of any noise sensitive premises in the area. In

order to achieve this consistently and effectively the internal sound equipment should be configured to have a “doors open” setting which must be used at all times when the doors are open. It is recommended that at this operating level measurements are taken from within the bar and these measurements provided to the Environmental Protection Team at Lambeth for their records.

8.3 Additionally loudspeakers should be positioned within the premises so as not to point at the open frontage area and no loudspeakers should be placed outside.

9.0 Conclusions

9.1 An assessment of the ambient noise levels in the area around Aquum has been carried out and an assessment made of the potential noise impact from the premises operating with the doors open.

9.2 Measurement data indicates that the average noise levels on Clapham High Street are high due to continuous heavy traffic flow. Therefore lower level noise will effectively be masked by traffic noise.

9.3 It is recommended that if the premises are allowed to operate with doors open then the sound system should be configured with a present “doors open” mode to limit the system to low-level operation.

9.4 The ultimate “safety net” with any sound system is that the system should be controlled to not exceed the level where there is no disturbance at nearby noise sensitive properties.

9.5 Establishing good noise management policies and periodically verifying the sound system operating levels will ensure there is no loss of amenity to local residents by reason of music noise breakout from Aquum.”

10. The Inspector carried out a site visit on the afternoon of 8 September 2009 when the doors were open.

11. In his decision letter dated 17 September 2009 the Inspector described the Property and its surrounding area, the works carried out to the Property, Lambeth’s concerns, and the appellant’s case. He referred to the Report and some of its conclusions and recommendations, and then said the following, so far as relevant, as his reasons for dismissing the appeal:

> “8 … Although it [viz. Aquum] was open and had several customers, both inside and outside, my visit occurred at a relatively quiet time in its operation. From the Council’s representations, I have little doubt that at other times, particularly in the late evenings and at weekends, and extending into the small hours of the morning, it would frequently be far more busy. This is borne out by representations from interested persons, objecting to the application. Noise sources would include both the customers themselves, and the internal music system.
>
> 9. It is a legitimate and commonplace objective of planning policies, including the UDP policies cited by the Council in this case, to attempt to mitigate noise nuisance coming from commercial and entertainment uses, including bar/restaurant premises. This in order to protect the residential amenity of persons living in the vicinity, including in the upper floors of the nearby buildings along Clapham High Street.
>
> 10. In my judgement, on the balance of probability there would be likely to be occasions – perhaps many occasions – when with the doors open the noise from Aquum, whether generated by the customers themselves or by the internal sound system, would not be adequately contained within the premises, but would be heard in the immediately surrounding locality, sufficient to constitute a noise nuisance. In my opinion, the doors are needed effectively to screen the interior of the premises from the exterior, and thereby to contain any noise, and that can only occur if they are kept closed. That is why I do not propose to delete condition 4.
>
> 11. …
>
> 12. I have considered all the other matters raised by the appellant, but they do not alter or outweigh my conclusions on the main planning issue. These are that, in order to mitigate actual and potential noise nuisance arising from the bar/restaurant use, and to comply with the relevant UDP policies, condition 4 should be retained. Accordingly, I dismiss the appeal.”

The appeal to the High Court

12. The appellant applied to the High Court under section 288 of the 1990 Act to quash the Inspector’s decision on the ground that the decision was not within the powers of the 1990 Act, or alternatively the requirements of the 1990 Act had not been complied with and the appellant’s interests had been substantially prejudiced thereby.

13. In his judgment the Deputy Judge summarised ([16]) the main submission of Mr Kevin Leigh, counsel for the appellant, as being that the Inspector failed to grapple with the Report and failed to give any reasons why he disagreed with it; accordingly,

the claimant did not know whether the Inspector misunderstood it or what parts he did not accept, and why; and so the appellant was substantially prejudiced. The Deputy Judge said that Mr Leigh alternatively submitted that the Inspector's conclusion was *Wednesbury* unreasonable because it flew in the face of the Report, which was not contradicted by Lambeth and was not explained away by the Inspector.

14. The Deputy Judge acknowledged ([20]) that the Inspector did not expressly address the conclusions in the Report. He nevertheless rejected the appellant's case because he considered that the Inspector was not bound to do so. He said ([21]) that, having considered the report and having visited the Property, the Inspector exercised his own subjective planning judgement for the reasons expressed in paragraphs 10 and 12 of the decision letter, and he was entitled to do so. The Deputy Judge referred ([22]) to *Kentucky Fried Chicken (GB) Ltd v Secretary of State for the Environment* [1978] 1 EGLR 139 and *Mason v Secretary of State for the Environment and Bromsgrove District Council* (1984) JPL 332 as authority that an inspector is not bound to accept an expert's report even if it is unchallenged. He said, at [23]:

> "In this case, the inspector was entitled to rely on his own experience, expertise and common sense in exercising his subjective planning judgment, taking into account all the evidence, including the noise report, the residents' objections, the fact that the premises could be open until as late as 04.00 hours, and his site visit where he saw the doors being operated. In my view, the reasons that he gave in paragraphs 10 and 12 of the decision letter were adequate and sufficient and there was no need for him, in the circumstances of this case, to embark on a critique of the noise report"

15. The Deputy Judge then said ([24]) that the decision could not be *Wednesbury* unreasonable because all relevant considerations were taken into account and reasons were given for the decision which was an exercise of planning judgement; it could not be said that the decision was one which no reasonable decision taker could have reached.

This appeal

16. The appellant says that the Report was new evidence on the appeal to the Inspector, which was effectively unchallenged by Lambeth and which demonstrated that the perceived harm that might result from noise break-out onto the High Street would not occur as a matter of proper analysis, and, in any event, noise break-out could be avoided by a condition that would prevent the source of the noise from increasing in the event that noise levels at the position of the doors rose to a specified level. The appellant says the evidence in the Report is based upon well-known and uncontroversial acoustic principles, but the Inspector wrongly failed to explain why he did not accept the reasoning of the expert evidence or why the Inspector's own judgement was preferable.

17. As part of its case, the appellant has placed weight on the fact that there is permission from Lambeth to have tables and chairs for customers on an area in front of the Property surrounded by a railing; and that the pavement is sufficiently wide at that

point to accommodate them. He seeks to adduce in this court new evidence relating to that permission.

18. So far as the legal principles are concerned, Mr Leigh submitted, on behalf of the appellant, that, while an inspector does not have to mention expressly in the decision letter every argument and each submission advanced, he or she must deal with the principal important issues in dispute between the parties. He cited in support of that proposition the speech of Lord Lloyd in *Bolton Metropolitan Borough Council v. SSETR* (1995) 71 P&CR 309 at pages 313-315. He said that, in the present case, the Inspector expressed his opinion but gave no reasons at all for rejecting the Report.

19. Mr Leigh also referred to *South Bucks District Council v Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953. In that case, Lord Brown, with whom all the other members of the Appellate Committee agreed, having reviewed several earlier cases in which the adequacy of reasons requirement in a planning context had been considered, gave the following broad summary of the relevant principles, at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon such future applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision. "

20. The appellant says that the Deputy Judge was plainly wrong to accept the SoS's argument that the Inspector did not need to do deal expressly in the decision letter with the analysis in the Report since he was entitled simply to ignore the expert evidence and form his own planning judgement. The appellant says the point of principle is directly covered by that summary of the relevant principles by Lord Brown in *South Bucks* because he cannot tell from the decision letter what view the Inspector took of the analysis in the Report or whether the Inspector exercised his

planning judgement correctly or whether the Inspector erred in his approach to the evidence, including his understanding of the evidence placed before him.

21. The appellant criticises the reliance of the Deputy Judge on *Kentucky Fried Chicken* and *Mason*. He says that those cases are about the ability of Inspectors to form their own judgement, whereas the issue here is about the need for adequate reasons where there is a single issue and sound scientific evidence one way. The appellant distinguishes *Kentucky Fried Chicken* and *Mason* on their facts, and also submits that they do not represent the modern approach to considering planning decisions as exemplified in cases such as *Bolton Metropolitan Borough Council v SSETR* (1995) 71 P&CR *309* and *R v SSETR ex p. Alconbury Developments Ltd* [2003] 2 AC 295.

22. Those submissions were initially advanced on the basis that the Report expressly or implicitly addressed the issue of potential noise nuisance from the Property at all times, that is to say both in the daytime and at night. Mr Leigh further submitted, however, that even if, as the SoS contends, the Report is dealing only with daytime use of the Property, so that the Inspector was entitled on any footing to form his own judgement about the potential for noise nuisance at other times, the Inspector's decision should still be quashed on the basis of absence of adequate reasons. Mr Leigh submitted that the Inspector had both the powers and, in view of the unchallenged evidence in the Report, the duty to limit Condition 4 to daytime use, and, if he did not do so, to explain why he was not doing so.

23. The appellant does not abandon his argument, which he unsuccessfully ran before the Deputy Judge, that the Inspector's decision was *Wednesbury* unreasonable. Mr Leigh submitted that the Inspector's decision simply cannot stand in the light of the clear evidence of the noise consultant; and that, in any event, noise could have been conditioned with a sound-limited device being required to cut any noise registered above a pre-set level at the threshold of the Property. Mr Leigh said that the Inspector's decision was therefore irrational on the further ground that it infringed the principle of planning law and practice that, where a condition can save a permission that would otherwise be refused, it should be imposed and consent granted.

Discussion

24. In one sense, it is perfectly clear from the decision letter why the Inspector rejected the appeal. He concluded ([10]) that, notwithstanding the Report, to which he expressly referred, there would probably be occasions when, with the doors open, the noise from the Property would not be adequately contained within the Property but would be heard in the immediately surrounding locality, sufficient to constitute a noise nuisance; and, therefore, Condition 4 is required to ensure the doors are kept closed. The issue is the extent to which, if at all, he was required as a matter of law to descend into further detail as to the grounds for rejecting what was said in the Report.

25. As is apparent from Lord Brown's summary in *South Buck*s, the required degree of particularity as to reasons depends entirely on the nature of the issues falling for decision. In the present case, the Report gave specific data measurements in support of the conclusion that there was a continuous noise level in the region of 71dB due to traffic on Clapham High Street. The Report also stated that low-level background sound in a restaurant would typically be in the range of 55-65dB; there would be a maximum sound music sound system level of around 65dBA in the central bar area

during the daytime; and so, with a continuous "masking noise" from the traffic of 71dBA in the area due to traffic, any other low level noise would not lead to a change in the average ambient noise level. The recommendation in paragraph 8.1 of the Report was that, in those circumstances, there was no reason, with regard to noise, why the frontage of the Property should not be open during the day.

26. Mr Leigh submitted that the Report's analysis and recommendations were not limited to potential noise through daytime use of the Property, with the doors open. He said that, even if not expressly stated, at least implicitly the Report recommended and concluded that use of the Property at any time of the day or night would not cause noise nuisance if the doors were open at the front. I have no hesitation in rejecting that submission. Paragraph 4.4 of the Report expressly stated that the objective of the assessment was to establish "if operating Aquum with the doors open during the day will cause any nuisance to local residents". Paragraphs 5.1, 7.1 and the recommendation in paragraph 8.1 were expressly directed to daytime use. The point is further highlighted by the fact that section 6 of the Report set out noise levels at night for premises nearby but not for the Property itself. It is clear from that fact and paragraph 6.3 of the Report that those measurements were taken purely for the purpose of establishing the continuous noise level due to traffic and not with a view to establishing potential noise levels from the Property itself at night.

27. On that basis there can be no doubt that the Inspector was entitled to reject the appellant's case that Condition 4 should be discharged in its entirety. The Report did not preclude or undermine any conclusion by the Inspector, exercising his own planning judgement, that noise would be generated at other times than the daytime.

28. As I have said, Mr Leigh submitted that is not, however, the end of the matter. The appellant's argument is that the Inspector had power, by virtue of sections 73, 78 and 79 of the 1990 Act, to modify Condition 4 by, for example, limiting it to daytime use, and, in view of the unchallenged evidence in the Report, that was his duty. In support of the existence of that duty, Mr Leigh cited *Dyason v SSETR and Chiltern District Counsel* [1998] JPL 778 and submitted (by analogy with what Pill LJ said in that case at p.784 in relation to hearings before an inspector in lieu of public local enquiries) that the absence of an accusatorial procedure, on an appeal dealt with by written submissions, places an inquisitorial burden on an inspector to ensure that the proper approach to the issues is adopted in reaching his or her determination, whether that approach is expressly dealt with by either of the parties or not.

29. Ms Justine Thornton, counsel for the SoS submitted that there was no obligation on the Inspector to consider anything other than the complete discharge of Condition 4, for which the appellant was contending on the appeal to the SoS. She invoked in support of that submission the approach of the court in *R (on the application of Ayres) v SSETR* [2002] EWHC 295 (Admin), in which there was an appeal under section 288 of the 1990 Act against the SoS's dismissal of an appeal against a refusal of planning permission for use of a site for two mobile homes for gypsies. The claimant's appeal to the SoS was based on the need for gypsy site provisions in the area as well as being founded on personal and humanitarian factors relating to the claimant and his immediate family, who lived with him on the appeal site. The main ground of complaint by the claimant on the appeal to the High Court was that the inspector appointed by the SoS should have considered a proposal for a 5 year temporary condition in the light of all the relevant circumstances and of the European

Convention on Human Rights. No such proposal had been put to the inspector on behalf of the claimant, who made it clear to the inspector that he wanted a permission for his life and the lives of his mother, wife and children. The appeal was dismissed by Silber J.

30. In the course of his judgment Silber J referred ([35]) to the following statement of Lord Woolf MR in *Brightwell –v- SSETR* (1997) 73P & CR 418 at 426 in respect of the contention that the inspector had failed to say anything about the possibility of granting permission with a limited time condition:

> "So far as that is concerned, I fully accept that this has been made clear in the case of *Top Deck Holdings Limited –v- Secretary of State for the Environment* that there is no obligation on an inspector, in the absence of any reference to an appropriate condition, to search for a condition which might be used to assist an applicant who is appealing against the decision of a planning authority."

31. Silber J also referred ([39]) to the statement in *Top Deck* at [1991] JPL 961, 965 of Mann LJ (with whom Dillon and Beldam LJJ agreed) that "an Inspector should not have imposed upon him an obligation to cast about for the conditions not suggested before him", and quoted the following comment of Forbes J in the earlier case of *Marie Finlay v Secretary of State for the Environment* [1983] JPL 802 at 803:

> "If a party to an appeal wanted the appeal to be considered on the basis that some condition could cure the planning objection put forward, then it was incumbent on [the applicant for the permission] to deal with that condition at the inquiry. Unless such condition has been canvassed the Secretary of State was not at fault in not imposing such a condition".

32. Although *Ayres* was an appeal against the refusal of planning permission, Ms Thornton submitted that in principle the same approach should govern an appeal against the imposition of a condition on the grant of planning permission. She emphasised that modification of the condition, which had not been requested, could complicate what was intended to be a speedy and relatively informal appeal procedure by written representations if the inspector was required to ask for further representations and perhaps to consult locally. Ms Thornton accepted that there might be exceptional occasions when it would be appropriate for an inspector to modify a planning condition even though not expressly requested, but the present case was not one of them.

33. I agree with Ms Thornton that, on the facts of this case, the Inspector was not under any duty to allow the appeal to the extent of modifying Condition 4 by restricting it to certain hours or days. The appeal to the Inspector, conducted by professionals on behalf of the appellant was on the basis that Condition 4 should be discharged in its entirety. The Inspector was entitled to find in his planning judgement that Condition 4 fulfilled an important planning function. He was never asked to consider the modification of Condition 4 by restricting it to daytime use. Nor, in my view, did he have the material to make such a modification, at least not without requesting for further representations. The Report did not focus on the precise time when, for the

purpose of the analysis in the Report, daytime began and ended. That would have been a very material consideration for any limitation by reference to the time of day. It was not the Inspector's duty to require further representations in order to place himself in a position in which he could modify Condition 4 in a way which had never been requested.

34. That does not, however, exonerate the Inspector for failing to give any reasons for rejecting the analysis and conclusions in the Report. His failure to do so left the appellant in doubt as to the potential for a future application by the appellant under section 73 of the 1990 Act for planning permission with a condition similar to Condition 4 but restricted, for example, to certain hours at night. If the Inspector had made clear that he was rejecting the Report in its entirety, that would probably have made such an application a practical impossibility. If, however, the Inspector had made clear that he was not rejecting the Report insofar as it dealt with daytime use in the week-days, but considered that Condition 4 still served a useful purpose in respect of other times and days and should for that reason not be entirely discharged, it would have left open the possibility of an application under section 73 for a fresh planning permission with a more restricted condition than Condition 4. In the event, it is quite unclear whether the Inspector was rejecting the Report because he did not agree with either the facts or the analysis it contains. It is particularly unclear because his summary in paragraph 7 of his decision letter indicates that he may have misunderstood that the Report dealt only with the daytime. Further, in paragraph 8 of the decision letter, having said that his site visit was at a relatively quiet time in the afternoon, the Inspector then said that he had little doubt that at other times it would have been far more busy, but then only referred specifically to the late evening, the early mornings and weekends.

35. Ms Thornton submitted that the Inspector's use of the word "particularly" in the sentence - "I have little doubt that at other times, particularly in the late evenings and at weekends, and extending into the small hours of the morning, it would frequently be more busy" – showed that he was exercising his planning judgement, and implicitly rejecting the Report, as regards weekday daytime use. That seems to me to be very far from clear, and I am doubtful the submission is correct. Accordingly, contrary to the principles summarised by Lord Brown in *South Bucks*, the decision letter left the appellant materially in the dark about its impact on obtaining some alternative planning permission in relation to the noise issue addressed in Condition 4.

36. For that reason, while I have some considerable sympathy for the situation in which the Inspector found himself, bearing in mind particularly that he was conducting the appeal on the basis of written representations only, I consider that the decision letter was inadequately reasoned, and accordingly this appeal should be allowed.

37. It follows from what I have already said that the challenge to the Inspector's decision on the ground of irrationality must fail. The Report only dealt with daytime use. The appeal to the Inspector was on the ground that Condition 4 should be removed in its entirety. The Inspector was fully entitled to take the view that Condition 4 had value, particularly at night.

38. The outcome of this appeal does not rest in any way on the use of space by customers at the front of the Property. In any event, it is perfectly clear from decision letter that the Inspector was aware of that use since he expressly referred to some of the

restaurants on Clapham High Street, including the Property, having small open seating areas at the front, with tables and chairs alongside the pavement. I would therefore refuse permission to adduce the new evidence about outside use.

Conclusion

39. For those reasons, I would allow this appeal, quash the Inspector’s decision and order that the matter be remitted to the Inspector.

Mr Justice Hedley

40. I agree.

Lord Justice Mummery

41. I also agree.

Neutral Citation Number: [2013] EWHC 3 (Admin)

Case No: CO/6931/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2013

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

(1) MALCOLM ALEXANDER MACARTHUR
(2) REGINALD THOMPSON
(as officers and on behalf of AGAINST TURBINES AT CHIPLOW (ATAC))

(3) ANTHONY JONATHAN WEIR POWELL
(4) RICHARD CHALK
(as officers and on behalf of CREAKES ACTION FOR PROTECTING THE ENVIRONMENT (CAPE))

Claimants

- and -

(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) KING'S LYNN AND WEST NORFOLK BOROUGH COUNCIL
(3) E.ON CLIMATE & RENEWABLES UK DEVELOPMENTS LIMITED
(4) RES UK AND IRELAND LIMITED

Defendants

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

D. Hart QC and A. Ranatunga (instructed by **Butcher Andrews**) for the **Claimants**
J. Moffett (instructed by **The Treasury Solicitor**) for the **First Defendant**
J. Pike (instructed by **Cobbetts LLP**) for the **Third Defendant**
G. Nardell QC (instructed by **Eversheds LLP**) for the **Fourth Defendant**
The Second Defendant did not appear and was not represented

Hearing dates: 18th & 19th December 2012

- -

Judgment
As Approved by the Court

....

THE HONOURABLE MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. The Claimants applied under section 288(1)(b) of the Town and Country Planning Act 1990 ("TCPA 1990") for an order quashing the decisions of R.P.E. Mellor, an Inspector appointed by the First Defendant, dated 3 July 2012, allowing the appeals against the decisions of King's Lynn and West Norfolk Borough Council and granting planning permission:

   i) for a wind farm development at Bagthorpe, King's Lynn, Norfolk (the 'Chiplow' site); and

   ii) for a wind farm development at Barwick Hall Farm, Barwick Road, Stanhoe, King's Lynn, Norfolk (the 'Jack's Lane' site).

<u>The Parties</u>

2. The Claimants commenced their claim under Part 8 CPR. Initially the First Claimant was 'Against Turbines at Chiplow' (ATAC), an action group campaigning against the wind farm development at Chiplow. However, ATAC is not a legal entity and so the claim was amended to add Mr Malcolm Macarthur and Mr Reginald Thompson as officers of, and on behalf of, ATAC. Similarly the Second Claimant was initially 'Creakes Action for Protecting the Environment' (CAPE), an action group campaigning against the wind farm development at the Jack's Lane site. It is not a legal entity either and so the claim was amended to add Mr Anthony Powell and Mr Richard Chalk as officers of, and on behalf of, CAPE. I have amended the title of the claim so that the individual claimants are named as the First to Fourth Claimants.

3. The Second, Third and Fourth Defendants were initially named as 'interested parties'. By consent, I have amended the title of the claim so that they are named as Defendants, in accordance with the published guidance of the Administrative Court[1], as there is no provision for interested parties under Part 8.

4. Shortly before the hearing, the First and Second Defendants signed a consent order, agreeing that the decisions should be quashed. All parties agreed that the Third and Fourth Defendants were entitled to be heard in opposition to the proposed quashing, before the court made any decision. In those circumstances, I could not approve the consent order. I directed the First Defendant to attend the hearing to assist the court.

<u>Planning History</u>

5. The Third Defendant, E.ON, applied for planning permission to construct a wind farm at the Chiplow site on 26 May 2010. Following consultation, the application was refused by the Second Defendant Council on 27 April 2011. The grounds of refusal were, inter alia, (1) that the proposed development would have a significantly harmful impact upon the landscape character and visual amenity of the local area; and (2) that it would have a harmful impact upon the setting of Bloodgate Hill fort, a Scheduled Ancient Monument, and Houghton Hall Park, a Grade 1 Historic Park, which was not outweighed by the modest contribution it would make to climate change. The cumulative effect of this development, when combined with others proposed in the

[1] 'Applications under Section 288 of the Town and Country Planning Act 1990 Notes for Guidance for Court Users'

area, was also considered to be significantly harmful. The Third Defendant appealed against the refusal of planning permission.

6. The Fourth Defendant, RES, applied for planning permission to construct a wind farm at the Jack's Lane site, on 17 August 2010. Following consultation, the application was refused by the Second Defendant Council on 2 August 2011. The grounds of refusal were, inter alia, (1) that the proposed development would have a significantly harmful impact upon the landscape character and visual amenity of the local area; and (2) that it would have an adverse effect on the setting of Bloodgate Hillfort, Barmer Church, a Grade II listed building, and Houghton Park, which was not outweighed by the modest contribution it would make to climate change. The cumulative effect of this development, when combined with others proposed in the area, was also considered to be significantly harmful. The Fourth Defendant appealed against the refusal of planning permission.

7. The Planning Inspectorate decided that the appeals should be heard together, since the two sites were approximately 2.5 km from one another, involved the same form of development and involved similar and overlapping issues, including their cumulative impact.

8. An Inquiry was held on 31 January and 1 to 22 February 2012. A site visit was made on 20-21 February 2012. Both ATAC and CAPE were formal parties to the inquiry process pursuant to Rule 6, Town and Country Planning Appeals (Determination by Inspectors)(Inquiries Procedure)(England) Rules 2000. All parties were represented by counsel, and relied on expert evidence.

9. The Inspector issued Appeal Decisions on 24 May 2012, but these were superseded by the final Appeal Decisions, containing certain minor corrections issued on 3 July 2012.

10. The Inspector allowed both appeals, giving planning permission for both wind farms. His conclusions were at paragraphs 194 to 199:

> "194. The relevant local development plan policies that are most relevant to these proposals pull in different directions. However, the recently adopted CS Policy CS08 clearly and explicitly sets out the need to balance the identified harm and the benefit as, in part, does CS Policy CS12. These local policies have been recently adopted by Kings Lynn and West Norfolk Council since the subject planning applications were refused. They continue to merit full weight as advised by the Framework. There is no material conflict between these local polices and the Framework. Thus whether the appeal proposals are in overall conformity with the adopted local development plan depends upon the outcome of balancing the identified harm with the benefits.
>
> 195. The identified harm that weighs against the proposals is:
>
> i. For each scheme, the adverse landscape and visual effects that are significant close to each windfarm but

which diminish with distance. If both windfarms are developed there are limited additional cumulative effects. This harm attracts moderate weight overall.

ii. For the Appeal A Chiplow scheme the minor harm to the setting and heritage significance of Houghton Park, Syderstone Church, Bloodgate Hillfort, and the group of listed buildings at Bagthorpe. This minor harm is of limited weight.

iii. For the Appeal B Jack's Lane scheme there is moderate harm to the setting and heritage of Bloodgate Hillfort and Barmer Church. This moderate harm is less than substantial in terms of national policy and therefore attracts only moderate weight (the cumulative effects on the heritage assets of developing both windfarms would not be materially greater than the impact of the scheme with the greatest individual impact).

iv. For the Appeal B Jack's Lane scheme there are minor residual impacts on nature conservation after mitigation that do not amount to likely significant effects. This is of limited weight.

v. In respect of both schemes, at low wind speeds there would be minor harm in respect of increased noise above current very low background levels but these would not breach local or national policies and guidance. This is of limited weight.

196. The matters which weigh in favour of the proposals are:

i. For each scheme the local, regional and national policy encouragement for the provision of renewable energy, especially to address climate change. This carries substantial weight.

ii. The contribution that each scheme, and the greater contribution of both schemes together, would make towards addressing the identified shortfall against regional targets for onshore renewable energy and towards the relevant national targets for renewable energy. This also merits substantial weight.

iii. The economic benefits of each scheme, and the greater contribution of both schemes together, in terms of energy security and economic activity. This attracts some weight.

197. Although the Appeal B Jack's Lane scheme is identified as having slightly greater impact on landscape, heritage and

> nature conservation than the Chiplow scheme, that is offset by the greater amount of installed capacity and likely increased energy production at the Jack's Lane site.
>
> …
>
> 199. I conclude here on the evidence before me that the benefits of both appeal schemes clearly outweigh the individual and cumulative identified harm. In the terms of the local Core Strategy Policy CS08 the locational and other impacts are thus not unacceptable as they are here outweighed by wider environmental and economic benefits. Similarly the public benefits here outweigh the modest loss of interest or significance of environmental assets in the terms of local Core Strategy Policy CS12 and the National Planning Policy Framework (as carried forward from the previous PPS5 Policy HE.10). Both appeal proposals are therefore in overall accord with the local development plan and with regional and national policy. The Framework urges at paragraph 14 that, for decision-taking, the Framework's presumption in favour of sustainable development means that development proposals that accord with the development plan should be approved without delay. For all these reasons both appeals should therefore be allowed and planning permission granted subject to planning conditions."

Statutory framework

11. The Third and Fourth Defendants appealed by notice to the First Defendant, the Secretary of State, under section 78 TCPA 1990. In determining the appeal, the Inspector was required to have regard to the provisions of the development plan, and to any other material considerations (ss.79(4) by reference to section 70(2) TCPA 1990). The reference to the development plan engaged the duty in section 38(6) of the Planning and Compulsory Purchase Act 2004, namely that the determination must be made in accordance with the plan unless material considerations indicate otherwise.

12. The protection of ancient monuments is provided for in the Ancient Monuments and Archaeological Areas Act 1979. Part I of that Act, inter alia, requires the Secretary of State to compile and maintain a schedule of monuments and provides for the regulation and control of works affecting such scheduled monuments through a system of limited consent and, where necessary, compensation.

13. The Claimants applied to the High Court under section 288(1) TCPA, the material parts of which provide:

> "(1) If any person –
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action, on the grounds –

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section."

….

"(5) On any application under this section the High Court –

(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

14. The general principles of judicial review apply to applications under s. 288: *Seddon Properties Ltd v. Secretary of State for the Environment and Macclesfield BC* (1981) 42 P & CR 26.

Grounds of challenge

15. The Claimants submitted that both decisions were unlawful on two grounds:

i) they were vitiated by a material error of fact; and

ii) the reasons were inadequate.

16. Both grounds were founded upon the allegation that the Inspector failed to record or remember that at the Inquiry Dr Edis, the expert witness for the Third Defendant, had conceded in oral evidence that his written evidence had under-assessed the impact of the proposed developments upon Bloodgate Hillfort. The Claimants submitted that the Inspector had therefore made a material mistake of fact about Dr Edis' evidence and, if he had correctly directed himself on the facts, he might have reached a different conclusion.

17. The Claimants also submitted that the Inspector failed to give adequate reasons because when he concluded, in paragraph 85 of his Appeal Decisions, that he agreed with Dr Edis' evidence, he was under an obligation to address the difference between Dr Edis' written and oral evidence, and explain what conclusion he had reached. His reasons were silent on this issue. The Claimants were prejudiced, they submit because they were unable to understand how their submissions had been dealt with by the Inspector and to ascertain whether or not he had made a material error of fact about Dr Edis' evidence.

Mistake of fact

Dr Edis' written evidence

18. An Environmental Impact Assessment (EIA) for the Chiplow scheme was produced to assess the likelihood of significant environmental effects arising from that scheme. A document entitled ‘Supplementary Environmental Information’ (SEI) was produced by Dr. Edis in November 2011, in order to assess further the effects of the development on the historic environment following the issue of revised policy in ‘Planning Policy Statement 5 (Planning for the Historic Environment)’ (PPS5) and having regard to English Heritage’s guidance on ‘The Setting of Heritage Assets’. Dr Edis amplified his evidence in his proof of evidence submitted to the Inquiry.

19. Dr Edis’ assessment methodology was based upon the Design Manual for Roads and Bridges, adapted to take account of the policy in PPS5. The methodology assessed in stages (1) the significance (value/sensitivity) of the heritage assets; (2) sources of impacts; (3) factors in the assessment of magnitude of impacts; (4) the significance of the effects.

20. Under stage (1), Bloodgate Hill fort was assessed being of a “High” significance (value/sensitivity) because as a Scheduled Ancient Monument, it was a ‘Designated Heritage Asset’ as defined in Annex 2 of PPS5.

21. Under stage (2), the effect of the proposed development was assessed as ‘indirect’, in the sense that it affected the setting of the heritage asset, defined in PPS5 as “the surroundings in which the asset is experienced”.

22. Under stage (3), Dr Edis had to classify the magnitude of impact of the development within his Table 2. There were four categories: major, moderate, minor and negligible. He concluded that the Chiplow development was “negligible”, assessing it as:

> “Slight change within the setting of the heritage asset, which does not affect the significance of the asset or its character, value or interest, but which could nevertheless be considered within HE10 of PPS5.”

23. Under stage (4), Dr Edis assessed the magnitude of the impact in relation to the significance (value/sensitivity) of the heritage asset. This was done by reference to a matrix. In the case of Chiplow, the “negligible” impact on a “high” sensitivity asset produced a significance of effects which was “minor”. It was not significant in EIA terms.

24. Dr Edis also assessed the Jack’s Lane development. Stages (1) and (2) were the same as for Chiplow. Under stage (3), he concluded that the Jack’s Lane development was “minor”, coming within the criterion of :

> “A noticeable change amounting to a difference to a key characteristic, normally falling within HE10 of PPS5.”

Under stage (4), he concluded that the “minor” impact on a “high” sensitivity asset produced a significance of effects which was “moderate”.

25. In assessing the cumulative impact of both developments, he concluded that they "would have at least a moderate impact, which is significant in EIA terms, but the Jack's Lane scheme would contribute by far the greater proportion of the effect."

26. It was acknowledged by the Claimants that the 'significance of effects' matrix was simply a tool in the analysis. Slavish adherence to the matrix methodology was not conclusive and the assessment of whether (1) there would be likely significant environmental effects (the primary purpose of the SEI) and (2) whether there would be harm under the terms of national planning policy required the exercise of professional judgment in each case, as Dr Edis made clear. These were the "two strands" referred to by Dr Edis in his proof of evidence.

27. Consistently with his assessment in the SEI, Dr. Edis concluded in his witness statement that the Chiplow development would have a minor impact on the setting of the fort, whereas the Jack's Lane development would have a moderate impact. Taken together, the two wind farms would have a moderate impact, which would be significant in EIA terms.

Dr Edis's oral evidence

28. Regrettably, there was no recording of Dr Edis' oral evidence and no reliable note. I do not know whether or not the Inspector had a reliable note because the Treasury Solicitor had not investigated the 'mistake of fact' ground, having decided that the reasons were inadequate. Counsel for the First Defendant declined to make any submissions on this ground.

29. Mr Powell, the Third Claimant, said in his witness statement that when Dr Edis was cross-examined by Mr Booth for the Council, he was shown a photomontage identified as viewpoint 11B in the SEI and asked his opinion of the impact of the Chiplow scheme on Bloodgate Hill fort. According to Mr Powell, he "described the impact on the setting as 'noticeable'".

30. Mr Powell went on to describe the cross-examination of Dr Edis by counsel for the Claimants, Mr Ranatunga, in these terms:

> "I understand that Mr Ranatunga reminded him of that oral evidence given just before lunch and confirmed that that was how he described the impact of the Chiplow scheme. It was put to him that he had chosen his words carefully in giving his evidence. It was noted that when that 'noticeable' change was applied to Dr Edis's assessment methodology (and in particular the assessment of magnitude of effect) in his SEI the resulting significance of effect was 'moderate', not 'minor' as he had previously concluded in his written evidence. It is my understanding that Dr Edis conceded the point and accepted what followed from that concession, that such an impact would therefore be significant in EIA terms. In response to these questions, he also volunteered that if his assessment of the impact on the setting of Bloodgate Hillfort had to be revised upwards for the Chiplow proposal, there would be a

> consequential revision upwards of his assessment of the impact on the setting caused by the Jack's Lane proposal."

31. Mr Powell admitted in his witness statement that he did not recall this evidence in detail; it was merely a summary of what he had been told after speaking to his counsel, Mr Ranatunga and Mr Grover, the Claimants' expert witness. Neither Mr Ranatunga nor Mr Grover made witness statements or produced notes.

32. The Claimants rely upon the fact that these changes in Dr Edis' evidence were recorded and relied upon in the Claimants' and the Council's written closing statements which were finalised on 22 February, a week after Dr. Edis gave evidence on 15 February. The Claimants submitted that the effect of Dr Edis' oral evidence was that his written assessment of the impact of (1) Chiplow, (2) Jack's Lane and (3) the cumulative effect of both wind farms, had to be "revised upwards". The Council went further, submitting that, following Dr Edis' revised assessment of the impact of the Chiplow development as "minor", Dr Edis then went on to revise his assessment of the impact of Jack's Lane as "major".

33. Mr Marcus Trinick QC referred to this issue in the course of his closing submissions. There is no record of what he said. Mr Powell, in his witness statement, at paragraph 14 said that Mr Trinick:

> "disagreed with the Council that the effect of Dr Edis's revised assessment was that the impact of the Jack's Lane proposal on the setting must now be 'major'. He acknowledged that Dr Edis had stated that his revised view of the impact of the Chiplow proposal would mean a consequential revision upwards for the impact of the Jack's Lane proposal, but only that this 'upped it a bit'. I believe he thereby implicitly accepted that there had to be a revision upwards, but disagreed with the extent of that uplift."

34. Mr Trinick made a witness statement in response, stating:

> "Mr Powell is broadly correct in recording what I said in closing submissions at paragraph 14 of his witness statement, except that I do not accept the belief which he expresses in the final sentence of paragraph 14 to the effect that I implicitly accepted "that there had to be a revision upwards, but disagreed with the extent of that uplift"…. I noted that the statement contained in … the Council's closing submissions that Dr Edis had "revised his assessment of Jack's Lane to one of 'major' impact … was incorrect. I made it clear that nothing specific could be implied for the impacts of Jack's Lane from the evidence of Dr Edis, noting that RES relied on the evidence of Dr Collcutt, who had not been invited to comment on the cross examination of Dr Edis."

35. Dr Edis made a witness statement for these proceedings in which he accepted that, during the course of cross examination on behalf of the Council, he volunteered "that the Chiplow turbines would be noticeable from the hillfort".

36. Dr Edis said that, when cross-examined by Mr Ranatunga:

> "11. I accepted that the word "noticeable" appeared in Table 2, and it was put to me that if the effect was minor rather than negligible then the impact in Table 3 would be moderate. Contrary to what was later stated in paragraph 17 of the ATAC closing submissions, and paragraph 81 of the Council's closing submissions, I did not then revise or concede my position as has been suggested"

> "13. During the exchanges with Mr Ranatunga I observed that if the Chiplow impacts were to be upgraded, then it would follow that the assessment of the Jack's Lane impacts would also be upgraded. This was a hypothetical application of the mechanical effects of the SEI tables, not a concession that the Chiplow scheme had a moderate impact, or that the Jack's Lane scheme had a major impact. I distinctly recall my answer being predicated with the words "if that were the case…" and I intended my answer to imply that a major impact would clearly be overstating the effect of Jack's Lane."

37. There was no application to cross-examine any of these witnesses on their statements. On the basis of this conflicting and sometimes ambiguous evidence, and in the absence of any reliable contemporaneous record, I am unable to reach any conclusion as to whether Dr Edis revised upwards the assessment of impact he had previously made in his written evidence.

38. The Claimants submitted that Dr. Edis' acceptance that the Chiplow turbines would give rise to a noticeable change by reference to Viewpoint 11b can only have meant that there would be a difference to a key characteristic of Bloodgate Hill fort. When considering the effect on heritage assets it was the impact on the heritage significance of the asset which was in issue, as the Inspector recognised. This photomontage provided a view out west from the fort. The strategic or guarding function of the fort looking out into the landscape was accepted by Dr. Edis in his proof of evidence, and the functional suitability for use for defensive purposes was also acknowledged by the Inspector.

39. The evidence is insufficient to enable me to accept the Claimants' submission. Although Dr Edis accepted that he said that the Chiplow turbines would be "noticeable" from the fort, this is not the same as accepting that the turbines amounted to "a noticeable change amounting to a difference to a key characteristic" within the meaning of the 'minor' category in Table 2. Indeed, Dr Edis expressly addressed this distinction in meaning in his written evidence when he noted that the turbines would be 'visible' from the fort but went on to conclude that that "while the change will be noticeable, it will not be so great as to amount to a difference to a key characteristic". In the SEI, in a section headed "Bloodgate Hill Hillfort – Assessment of Impacts" he said:

> "While there is no doubt that the moving blades of the Chiplow turbines will be <u>visible</u> from the hillfort, they will not be a distraction to visitors and they will not diminish the experience

> of seeing and appreciating the monument. The surroundings of the SAM are capable of absorbing a degree of change without loss of significance, and the setting of the monument will remain so that the significance of the monument will be adequately preserved. <u>While the change will be noticeable, it will not be so great as to amount to a difference to a key characteristic because it will only occupy some 13 degrees of arc, at a considerable distance</u>." (emphasis added)

Even if the Claimants were correct in their recollection that Dr Edis did not make this distinction during his cross-examination, the fact that he made it so clearly in his written evidence indicates to me that the mere use of the word 'noticeable' by him is not a sufficient basis upon which to conclude that he meant 'a noticeable change amounting to a difference to a key characteristic'.

40. Dr Edis' written evidence included other passages confirming in unequivocal terms his assessment of the Chiplow turbines, for example, paragraph 28 of the SEI:

> "The effects of the proposed development on this Iron Age hillfort, at a distance of 4.2 km to 5k from the turbines, are assessed as negligible, and so the impact is assessed as minor, and not significant in EIA terms. There is a very weak impact on the setting of the SAM to be considered under Policy HE10.1 of PPS5 and to be carried forward into the planning balance, but this effect is minor. The turbines are located so far away from the SAM as to be beyond what would normally be described as its setting, and it is questionable whether Policy HE9 of PPS5 applies at all. If it is applied, then the level of harm is certainly minor and falls to be considered within Policy HE9.4, which is similar in wording to the test in HE10.1"

41. Whilst I accept that an expert might well revise his assessment at an Inquiry, particularly after hearing other experts give evidence, the revision for which the Claimants contend would be a very significant change from his written evidence. The evidence before me is insufficient for me to conclude that he made such a significant change to his evidence.

The Inspector's decision

42. The Inspector's conclusions on this part of the evidence are at paragraphs 84 and 85:

> "84. Like the hedges and farm-buildings that can be seen in various views out from the hillfort, and the site's own car park, the windfarm would be one more feature of the modern landscape that it would be necessary to disregard in order to appreciate the heritage significance of the site, a task already made difficult by previous alterations to the site's form and appearance. It is not agreed with the RES expert witness that there would be no harm. It is rather concluded that there would be a moderate but less than substantial adverse effect on the setting of the monument and hence on the significance of the

> heritage asset. In the Heritage Mitigation Measures Unilateral Undertaking submitted by RES in respect of the Jack's Lane proposal, there is an offer to fund off-site signage for the hillfort to encourage more people to visit and experience the asset. That would be of public benefit but it would not directly mitigate the identified harm.
>
> 85. Because of their lower height and greater separation distance, the Chiplow turbines, whilst still noticeable, particularly when in motion, would have a much reduced impact on the hillfort compared to the Jack's Lane turbines and would be less distracting. They too would be seen against the skyline and they would not conceal any significant elements of the present landscape. In conclusion it is agreed with the E.ON expert witness that there would be only a minor adverse effect from the Chiplow turbines on the setting and heritage significance of the SAM either as an individual development or as an additional cumulative effect if constructed in addition to the Jack's Lane turbines."

43. The Claimants submit that the Inspector made a material mistake of fact when he said, in paragraph 85, that the evidence of the E.ON expert witness was that there would only be a 'minor' adverse effect from the Chiplow turbines on the setting and heritage significance of the SAM. The Claimants submit that the Inspector based this statement upon Dr Edis' written evidence and the Inspector had either forgotten or failed to appreciate that Dr Edis, during his oral evidence, had revised his assessment of the impact of the Chiplow turbines upwards.

44. I am unable to accept this submission since I am not satisfied that Dr Edis did revise his assessment in the course of his oral evidence, for the reasons I have given above.

'Mistake of fact' as an error of law

45. In order to succeed in establishing an error of law based upon a mistake of fact, the onus is on the Claimants to show that there has indeed been a mistake in respect of a fact which is 'established', 'uncontentious' and 'objectively verifiable'.

46. In *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330, the Board made its decision in ignorance of a medical report by a police doctor who reported findings consistent with the claimant's allegations of rape and buggery by a burglar. Lord Slynn said at 344G:

> "Your Lordships have been asked to say that there is jurisdiction to quash the board's decision because that decision was reached on a material error of fact. Reference has been made to *Wade & Forsyth, Administrative Law*, 7th ed. (1994), pp. 316-318 in which it is said:
>
> > 'Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact,' [*Secretary of State for*

> *Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1030], or acting 'upon an incorrect basis of fact' . . . This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law.'

De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 288:

> 'The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.'

For my part, I would accept that there is jurisdiction to quash on that ground in this case, but I prefer to decide the matter on the alternative basis argued, namely that what happened in these proceedings was a breach of the rules of natural justice and constituted unfairness. It does not seem to me to be necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness."

47. In *R v Secretary of State for the Environment ex p Alconbury* [2003] 2 AC 295, Lord Slynn referred (at [53]) to the jurisdiction to quash for "misunderstanding or ignorance of an established and relevant fact", in the context of a judicial review of the Secretary of State's decision on a called in application or a recovered appeal under the planning legislation.

48. In *E v Secretary of State for the Home Department* [2004] QB 1044, Carnwath LJ reviewed the authorities and concluded at [63] – [66]:

> "63. In our view, the CICB case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:

i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);

ii) The fact was “established”, in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;

iii) The claimant could not fairly be held responsible for the error;

iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;

v) The mistaken impression played a material part in the reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. Similarly, in *Tameside*, the Council and the Secretary of State, notwithstanding their policy differences, had a shared interest in decisions being made on correct information as to practicalities…

65. The apparent unfairness in CICB was accentuated because the police had in their possession the relevant information and failed to produce it. But, as we read the speeches, “fault” on their part was not essential to the reasoning of the House. What mattered was that, because of their failure, and through no fault of her own, the claimant had not had “a fair crack of the whip”. (See *Fairmount Investments v Secretary of State* [1976] 1 WLR 1255 , 1266A, per Lord Russell of Killowen.) If it is said that this is taking “fairness” beyond its traditional role as an aspect of procedural irregularity, it is no further than its use in cases such as *HTV Ltd v Price Commission* [1976] ICR 170 , approved by the House of Lords in R v IRC ex p Preston [1985] AC 835 , 865–6.)

66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the

> above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

49. In my judgment, the Claimants cannot fulfil the requirements set out in these authorities for establishing an error of law based on mistake of fact, because they have failed to establish that there was a mistake in respect of a fact which was established, uncontentious and objectively verifiable. Although I accept that the requirements in *E* were not intended by Carnwath LJ to be a 'precise code' (at [66]), and that unfairness is the touchstone of the 'mistake of fact' ground, I consider that establishing the existence of a mistake of fact on the evidence is a fundamental requirement which a claimant must meet in order to succeed. The Claimants have failed to do so in this case.

50. Although the point is now academic, I do accept that a decision-maker's failure to correctly record or understand the evidence before it can amount to a material mistake of fact: see *Railtrack plc v Guinness Ltd* [2003] RVR 280, cited in *E* at [38], in which the issue was whether the tribunal had misunderstood the expert evidence given to it. The Court of Appeal accepted that was a proper ground of challenge on an appeal limited to questions of law, but held that it was not made out on the facts.

Inadequate reasons

51. The Claimants submitted that the Inspector was required to address the difference between Dr Edis' written and oral evidence and explain what conclusions he had reached upon this issue.

52. The Inspector was under a statutory duty to give reasons under Rule 19 of the Town and Country Planning Appeals (Determination by Inspectors)(Inquiries Procedures)(England) Rules 2000/1625.

53. The relevant principles in relation to the adequacy of reasons were summarised by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR. 1953:

> "36 The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision

> on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

54. The Inspector, in paragraph 4, identified as one of the 'main issues' the effect of the proposed developments on heritage assets and whether any identified harm was outweighed by the wider economic or environmental benefits of the wind farm developments. Bloodgate Hill fort was one of the main heritage assets under consideration. There was a dispute between the parties, reflected in the evidence of their respective expert witnesses, as to the effect the proposed developments would have on the setting of Bloodgate Hill fort. In my judgment, these were all 'principal important controversial issues' (per Lord Brown in *Porter* at [36]).

55. The Inspector, in paragraphs 79 to 85, set out his findings of fact and his conclusions in relation to the effect of the proposed developments on Bloodgate Hill fort. They were skilfully drafted, synthesising a large amount of material in a concise yet clear way. The Inspector did not identify which factual matters were in dispute and why. He made minimal reference to the evidence of the experts. He clearly set out his conclusions on the issues which the experts addressed, but he did not explain why he rejected the evidence of one expert or preferred another.

56. I found it significant that all counsel, including counsel for the Claimants, submitted that the Inspector's general approach (leaving aside the specific criticism in relation to Dr Edis' evidence) was in accordance with accepted practice and did not demonstrate inadequate reasoning.

57. Generally, decision makers are required to explain, at least in summary form, why they prefer the evidence of one expert over another. The authorities were helpfully summarised by Beatson J. in *RWE Npower Renwables Ltd v The Welsh Ministers* [2011] EWHC 1778 (Admin), at [37(6)].

> "Where the decision-maker has to choose between competing expert opinions, as opposed to competing accounts of primary fact, there will generally be a greater need for particularity. In the context of civil litigation Bingham LJ stated in *Eckersley v Binney* (1988) 18 Con LR 1 at 77 – 78 that "a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons…", and Henry LJ in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373

> that "where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other". The reasoning in Flannery's case was deployed in a planning context in *Dunster Properties v FSS* [2007] EWCA Civ 236. That case was concerned with the position where an Inspector dealing with a site departs from the views of another Inspector who previously dealt with the same site. Lloyd LJ stated (at [21]) that "although not much by way of reasons may have been called for" on the part of the second Inspector, "it was not sufficient for him, having expressed the exact opposite view from [the first Inspector] on the question of principle, to decline to comment on the inconsistency". Referring to Flannery's case and Save Britain's Heritage v No. 1 Poultry Ltd , he stated (at [22]) that if the reader cannot tell why the second Inspector disagreed with the first Inspector "the salutary safeguard has not performed its intended function". "

58. However, the balance of the authorities suggest that Inspectors are not required to give reasons for accepting or rejecting expert evidence. Although Beatson J quashed the Inspector's decision on the basis that his reasons did not enable the reader to understand why he had rejected the evidence of the experts, the Court of Appeal reversed Beatson J. at [2012] EWCA Civ 311. Pill LJ said, at [22] – [28], that the reasoning of the Inspector "was sufficient and elaboration was not required". The unsuccessful parties were well aware of the issues and the relevant evidence and they knew that the reason why they had lost was that the Inspector "found that, in his planning judgment, the harmful effect of the precise locations of turbines … on the peat bog habitat was significant". It was not suggested that this conclusion was irrational, on the evidence, and "the care with which he approached the issues and … the coherence of his general reasoning, can leave no doubt that his mind was concentrated on the issues before him".

59. The Court of Appeal took a similar approach in *Tegni Cymru Cyf v The Welsh Ministers* [2010] EWCA Civ 1635 when it overturned the decision of Wyn Williams J., [2010] EWHC 1106 (Admin), who found that the Inspector had given no or insufficient explanation of how the evidence from local residents might be sufficiently compelling to displace the case presented by the developer, given the compliance with the relevant standards on noise and the fact that the existing wind farm operated within its noise provision. Pitchford LJ concluded that the lack of detail did not affect the cogency or lawfulness of the decision and stated (at [27]) that "read as a whole the relevant paragraphs reveal an acceptable line of reasoning towards the Inspector's conclusion" and that "none of the parties could really be in any doubt what was the basis for his planning judgment".

60. I was informed by counsel that the rationale for the generous approach taken to Inspectors' reasons is that the Inspector has a unique role, in which he exercises his own planning judgment on site, and he is not confined to evaluating the evidence placed before him, like a judge. In *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 Sullivan J. explained at [7] – [8]:

> "…..the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection."

61. In *Kentucky Fried Chicken (GB) Ltd v Secretary of State for the Environment and Anor* [1978] 1 EGLR 139, Lord Widgery CJ said:

> "the Inspector (who is a man of experience, and above all, specialised qualifications, who is sent to assess a problem of this kind) is supposed to use his own knowledge and, if I may say so, commonsense as well … he is not bound to accept the evidence of experts. It is exactly the same situation that justices and juries find themselves in when experts of great distinction go into the witness box before them. The inspector is no more bound to accept the evidence of the experts than are they."

62. Although some might argue that the duty to give reasons has evolved in recent times (as described by Beatson J. in the extract from *RWE NPower* quoted above), the general principle that an Inspector is not obliged to give reasons for accepting or rejecting the evidence of expert witnesses is not under challenge in this claim, and so I accept and apply it. In my judgment, the consequence is that an unsuccessful party will usually not know, in any detail, why the evidence of an expert has been accepted or rejected by the Inspector and therefore will not be able to discern whether the Inspector has correctly understood and applied the evidence of the expert. Lord Brown in *Porter*, at [36], established a high threshold for challenging reasons on the ground that it was not possible to detect whether the inspector had made an error of law:

> "The reasoning must not give rise to <u>a substantial doubt</u> as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. <u>But such adverse inference will not readily be drawn</u>." (emphasis added)

63. Applying these legal principles to the facts of this case, my conclusions are as follows.

64. The Inspector's reasoning made it clear to the Claimants why they had lost on the principal important controversial issues which were (1) the extent of the adverse

effect of the proposed developments on the setting and heritage significance of Bloodgate Hill fort, when considered individually and cumulatively, and (2) whether the identified harm was outweighed by the wider economic or environmental benefits of the wind farm developments.

65. In particular, it is clear from the Inspector's reasons why he concluded, on the evidence, that the Chiplow turbines would only have a 'minor adverse effect' on the setting and heritage significance of the fort. This was an exercise of the Inspector's planning judgment, which he reached independently, having had regard to all the evidence.

66. The evidence of Dr Edis, and whether or not there was a change between the oral and the written evidence, was not a 'principal important controversial issue' or a 'main issue'. It was merely part of the evidence relating to 'a principal important controversial issue' or 'main issue'.

67. The authorities indicate that the Inspector was not required to summarise the evidence of the experts in his decision, nor the submissions of the parties' legal representatives. It follows that he was not required to record that the Claimants and the Council contended that Dr Edis had, under cross-examination, departed from the conclusions on impact contained in his written evidence. Nor was he required to record what Dr Edis said in his written evidence or his oral evidence.

68. In paragraph 85 of the decision the Inspector set out his findings in relation to the Chiplow turbines, and concluded that there was only a minor adverse effect on the setting and heritage significance of the fort. On the authorities I have cited, this was sufficient to discharge his duty. Indeed, if he had not referred to Dr Edis at this stage, the Claimants would not have had any basis for bringing their challenge to this court. The Inspector added that he was in agreement with Dr Edis on this issue. In my judgment, his reference to Dr Edis did not trigger any additional legal requirement to record or analyse Dr Edis' evidence. He was not then required to indicate the detailed reasons why he accepted Dr Edis' expert evidence on this issue. Nor was he required to state which parts of Dr Edis' evidence he accepted and why. Thus, he was not required to state whether he accepted the matrix analysis in the SEI, on which the cross-examination had focussed, or whether he had relied on the other parts of Dr Edis' evidence. Nor was he required to state his conclusions on the submissions that, during cross-examination, Dr Edis had revised his assessment upwards from the position set out in his written evidence.

69. The Claimants submitted that the Inspector's failure to explain his conclusions about Dr Edis' evidence under cross-examination made it impossible for them discern whether or not the Inspector had made a mistake of fact, either forgetting the oral evidence of Dr Edis or misunderstanding it.

70. Applying Lord Brown's test in *Porter*, the Inspector's decision does not leave me with 'a substantial doubt' as to whether he made a mistake of fact in respect of Dr Edis' evidence. My reading of the reasons is that the Inspector agreed with the conclusions in Dr Edis' written evidence. It is therefore reasonable to draw the inference that he did not accept that Dr Edis had resiled from the conclusions in his written evidence, when he was cross-examined by the Claimants' counsel. In this context, it is significant that the Inspector finds that the Chiplow turbines would be

‘noticeable’ but goes on to conclude that there would only be a minor adverse effect, which is the position adopted by Dr Edis and challenged by the Claimants.

71. I am unable to conclude that the Inspector simply forgot about the cross-examination when he wrote the decision some months after the hearing. First, because the Inspector would have been reminded of the issue about Dr Edis’ oral evidence by the written closing submissions from the Claimants and the Council. Second, because it would have been very careless on the part of the Inspector to forget Dr Edis’ oral evidence. The decision when read as a whole, is detailed, careful and thorough, and therefore I consider that the court should be slow to draw the inference that the Inspector made a very careless mistake.

72. The First Defendant conceded that the reasons were inadequate, and that the decision should be quashed, but was reluctant to make any submissions to the court as to the reasons why. When pressed, counsel said that the First Defendant simply relied upon the grounds presented by the Claimants, without more. The First Defendant did not provide the court with any information about the Inspector’s comments on the Claimants’ claim, if indeed there were any such comments. Therefore I do not consider it is safe to assume that the Inspector conceded that he had made an error.

73. I have given considerable weight to the First Defendant’s decision to concede the claim, but ultimately I have come to the conclusion that the concession was wrongly made. Of course, I have had the benefit of much more detailed argument than the First Defendant and his legal advisers.

74. I have found the guidance given in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P&CR 263 by Sir Thomas Bingham MR of assistance in this case, when he said at 271-2:

> “I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication.”

75. In my judgment, on a straightforward reading of the decision letter, there is no genuine doubt as to what the Inspector decided and why, and therefore the reasons challenge must fail.

76. The Claimants’ claim is dismissed.

Neutral Citation Number: [2014] EWHC 508 (Admin)

Case No: CO/1371/2013

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

Manchester Civil Justice Centre
1 Bridge Street West, Manchester M60 9DJ

Date: Friday 28th February 2014

Before:

MR JUSTICE STEWART

- -

Between :

Andrew Bagshaw & Shirley Carroll	**Claimants**
- and -	
Wyre Borough Council	**Defendant**
- and -	
Mrs E Nickson	
Regenda Group	**Interested Parties**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr G Cannock, Counsel (instructed by **Nabarro LLP**) for the **Claimants**
Mr J Barrett, Counsel (instructed by **Wyre Borough Council**) for the **Defendant**

Judgment
As Approved by the Court

Mr Justice Stewart:

Introduction

1. On 26 June 2013 Judge Pelling QC granted permission to the Claimants to bring judicial review in respect of the grant by Wyre Borough Council ("the Council") of planning permission on 13 November 2012.

2. The applicant for the planning permission was Mrs E A Nickson, the First Interested Party. The Second Interested Party is the intended RSL for the development.

3. The site is land at Hall Lane, Great Eccleston, Preston. The Claimants are residents in the village. They objected to the application for planning permission. There is no issue about their standing in the case.

4. The permission is for the "the erection of 18 dwellings (comprising 4 two bed apartments, 9 two bed houses and 5 three bed houses) together with associated infrastructure…"

5. The Council had previously granted planning permission for the development in a decision that was issued on 25 April 2012. The Claimants made a claim for judicial review of that decision and it was revoked by the Council. The present application was made on 11 May 2012. On 3 October 2012 there was a resolution to grant planning permission which was then the subject of the decision notice on 13 November 2012.

6. The ground which I have to determine relates to protected species, namely bats, and is based on the Claimants' contention:

   (a) That there has been a breach of the Council's statutory duty.

   (b) That the LPA failed to take into account a material consideration, namely nature conservation interests.

   (c) The reasoning of the Council was inadequate in its treatment of the protected species issue and consultation responses.

Relevant Legislation and Policy

7. This is set out in full in the Appendix to this judgment. It comprises:

   - Section 70 of the Town and Country Planning Act 1990 ("the 1990 Act").
   - Section 38 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").
   - Article 31 of the Town and Country Planning (Development Management) Procedure (England) Order 2010 ("the DMPO").
   - Regulation 9(3) of the Conservation of Habitat and Species Regulations 2010 ("the 2010 Regulations").

- Articles 12 and 16 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive").[1]

- Paragraphs 98, 99 and 116 of the Biodiversity and Geological Conservation: Circular 06/205 ("the Circular").

<u>Basic Legal Principles from Case Law</u>

8. Applications for planning permission and appeals require the Local Planning Authority to "have regard to …the provisions of the Development Plan, so far as material to the application…(and)…any other material considerations" (the 1990 Act, sections 70 and 79).

9. By section 38(6) of the 2004 Act "the determination must be made in accordance with the plan unless material considerations indicate otherwise".

10. As to Policy[2]:

    (i) Policy statements should be interpreted objectively in accordance with the language read in its proper context and according to what is actually written, rather than what may have been intended.

    (ii) Policy statements should not be construed as if they were statutory or contractual provisions.

11. Matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State. The weight to be attributed to various material considerations in exercising his statutory power is a matter for the discretion of the decision maker.[3] In the *Newsmith* case Sullivan J said:

> "6. An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is *Wednesbury* perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits. …."

12. The Court can interfere if the decision maker has taken into account a consideration which is immaterial or failed to take account of a consideration which is material (per Lord Denning MR *Ashbridge v Minister of Housing* [1965] 1 WLR 1320 at 1326);

13. The decision-maker ought to take into account a matter which "might" cause him to reach a different conclusion on the matter i.e. where there is a real possibility that he

---

[1] Article 12 of the 1992 Directive requires Member States to take requisite measures to establish a system of strict protection for animal species listed (including pipistrelle bats) prohibiting "(b) deliberate disturbance of these species…." Article 12 is also a material consideration under section 70(2)(c) of the 1990 Act. (The Circular paragraph 98).

[2] See *Tesco Stores Limited v Dundee* CC [2012] UKSC 13; [2012] 2P and CR162 para 17, 18 and 19.

[3] Tesco v Secretary of State [1995] 1WLR 759, 770; *Newsmith Stainless Limited v Secretary of State for the Environment and Regions* ETR [2001] EWHC Admin 74.

would reach a different conclusion if he did take that consideration into account (per Glidewell LJ in *Bolton MBC v SOSE* (1990) 61 P&CR 343;

14. In *Oxton Farms v Selby District Council* [1997] EWCA Civ 4004, Judge LJ held:

> "In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

15. As to the reasons for a decision Lord Brown of Eaton-under-Heywood said[4]:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

The Survey and Assessment of the Roadside Hedgerow (May 2010)

16. This document was submitted by Regenda Group (IP2). The following paragraphs are of importance:

    (i) 4.2.18 "No other woody vegetation (ie. trees) within the hedgerow is suitable for roosting bats."

    (ii) 5.1.6 "It is assessed that there is potential for the ivy cover on the associated mature trees to provide suitable habitat for night roosting/perching of bats

[4] *South Bucks DC v Porter (No 2)* [2004] 1WLR 1953

(whilst feeding) or for daytime roosting bats in the summer months. In addition, three of the five mature ash trees display moderate/high potential habitat value for daytime roosting bats. Further surveys are required to ascertain whether or not such trees support roosting bats and consideration of bat species will be necessary as indicated in section 6 of this report."

(iii) 6.1.1. "It is identified that there is moderate/high potential for recurrence of roosting bats at trees FE2, FE3 and FE4. On this basis, to comply with current best practice as set out in the "Bat Surveys – Good Practice Guidelines" (Bat Conservation Trust 2007) it is recommended that a further survey is undertaken in the form of :

- A nocturnal survey (dawn or dusk, as determined by the licensed bat worker responsible for the daylight inspection);

and

- An "off the ground" inspection of the roost holes in the tree that this is proposed to be felled (FE3) undertaken by a licensed bat worker with ladders and/or climbing gear."

and

(iv) Paragraph 6.1.4 "The outcome of the survey would then enable an ecologist to provide advice on any implications and/or mitigation and/or compensation requirements. If a bat roost is found in a location where it would be at risk of disturbance of loss then this will need to be covered under the auspices of a European Protected Species licence."

(v) Paragraph 6.1.5 "Even if further bat survey work does not reveal evidence of a roost there will remain potential for temporary use of potential roost features associated with tree FE3."

(vi) Required actions:…"Further bat survey work is required to conclusively determine whether or not the trees support any roosting bats and whether or not mitigation and compensation measures are required. (notably, under the proposal only one mature ash tree will need to be felled). Notwithstanding the result of further bat survey(s), best – practice measures should be applied for the protection of bats so the tree to be felled should only be removed in winter months (after the first hard frost) and in sections…

Replacement planting of a native species broad leaved hedgerow is strongly recommended. A possible location is along the southern boundary of the site, which (in the long term) would actually result in a greater length of hedgerow and potentially greater plant species diversity within it (provided a recommended ratio of native wood species is planted).

It is assessed that provided such measures are implemented (including further survey and guidance in respect of bats) the proposed work, which entails removal of the hedgerow and the one mature tree, can be achieved in full accord with the applicable wildlife legislation and planning policies."

(vii) It must be noted that Drawing Figure 1 appended to the report showed a 65m section of 3 foot high hedgerow was to be removed.

Dawn Bat Survey and Assessment (June 2010) "The Bat Report"

17.1 The Bat Report is dated 26 June 2010 and was submitted by IP2. It contained the following relevant paragraphs in its Conclusions and Guidance section:-

- "4.1.1 The surveyed area is currently used by at least one species of bat for foraging and commuting, with the possibility of roosting in the large ash tree labelled FE2."[5]

- 4.2.4 "If planning permission is granted then the hedgerow, shrubs and tree FE3 will be removed. Although there is no confirmed bat roost, thus no requirement for EPS licensing, it will still be important to apply timing constraints and tree felling precautions to ensure compliance with the wildlife legislation."

17.2 The Bat Report strongly recommended that the actions described in paragraphs 4.25 to 4.27 of the report were applied. In summary, these actions were:

(i) protect breeding birds by restricting the timing of the shrub and tree removal to outside the breeding season;

(ii) protect roots and canopies of retained matured trees in accordance with BS5837;

(iii) protect bats by implementing several actions in relation to the felling of tree FE3 (not least because of the high potential or roosting occurrence in the adjacent tree FE2);

(iv) restrict the time of the year for FE3 felling to September or early October, or alternatively early April;

(v) hand remove ivy cover from FE3 prior to felling and in the presence of a suitable licensed bat worker;

(vi) get a tree felling survey of FE3 carried out by a suitably licensed bat worker and take professional advice on whether any further precautions are required based on the results of that survey."

The County Council Ecologist's Report 3 June 2011

18 Dr Sarah Manchester is the Lancashire County Council ecologist. Her report was provided under cover of letter of 3 June 2011. I shall refer to it as the "Ecologist's Report". Dr Manchester had received the Roadside Hedgerow Survey and the Bat Report. Lancashire County Council is a consultee on ecological matters.

19 The following passages are of importance:

(a) "Recommendations:

---

[5] (a tree that was not proposed to be felled).

Prior to the determination of the application, further information should be submitted:

- To clarify potential impacts from protected and/or priority amphibians. If the proposals would result in impacts on amphibians or their habitat, proposals for mitigation and compensation should also be submitted for approval;

- To demonstrate that adequate mitigation and compensation for the loss of Habitat of Principal Importance (hedgerow), and which is of medium to high value for foraging and commuting bats and nesting birds can be delivered as part of the proposals. <u>Ideally this would include the retention of a significant length of the existing roadside hedge in addition to the creation of a new hedgerow elsewhere in the development.”</u> (my underlining)

(b) “Legislation and Planning Policy

…………………..

Further information is required in order to demonstrate that the proposed development would comply with the above policies and guidance

……………….

In order to meet the requirements the applicant would need to demonstrate that development would be located and designed in such a way that would avoid ecological impacts and that mitigation/compensation measures were sufficient to fully offset all unavoidable ecological impacts and maintain and enhance biodiversity. It should also be demonstrated that habitat connectivity would be maintained and enhanced. In addition to mitigating and compensating for unavoidable ecological impacts, the above policies and guidance require enhancement of the quantity and quality of biodiversity and habitat; …………..

Although the applicant has submitted some information regarding the current biodiversity value of the application area (hedgerows, trees, bats), this does not include a thorough assessment of the ecological interest on the site. Further survey/information is necessary in order to inform the need for mitigation/compesation”

(c) “<u>European Protected Species: Bats</u>

It appears that the proposal would result in the loss of the entire roadside hedgerow and a mature ash tree. Although no bat roosts were identified, trees do have potential to be used by roosting bats and the hedgerow has been valued as of medium to high importance for bat populations locally. The loss of this hedgerow could thus result in detrimental impacts on bats in this area.

> Planning policy requires that impacts on biodiversity are avoided or, if unavoidable, that impacts are adequately mitigated and compensated. It is not clear that this development has been designed to avoid biodiversity impacts, nor is it clear that mitigation and compensation for impacts on a bat foraging and commuting habitat would be delivered as part of the development proposals. Further information is therefore necessary to demonstrate the high value bat habitat would be maintained and/or adequately compensated.
>
> Precautionary measures to ensure that the hedgerow and tree removal do not result in impacts on nesting birds or bats/bat roosts are included in paragraphs 4.25 – 4.27 of the report of "Hall Road, Great Eccleston. Report of Dawn Bat Survey and Assessment" (ERAP, June 2010). If Wyre Borough Council is minded to approve this application, it will be appropriate to ensure that these recommendations are implemented by planning condition."

Analysis of the Roadside Hedgerow Report, Bat Report and Ecologist's Report

20 It is sensible to pause there in the chronology and to carry out some summary analysis of the import of these three reports.

21 The ecologist's report recommendation[6] requested further information in relation to amphibians. In relation to bats (and nesting birds) it requested further information as to adequate mitigation and compensation for loss of hedgerow for "foraging and commuting bats…"

22 Reading the relevant sections of the report as a whole and in particular the recommendation, Dr Manchester was concerned about:

(i) Amphibians.

(ii) What she perceived to be the removal of the entire roadside hedgerow which was of medium to high value for foraging and commuting bats and birds, ideally including retention of the significant length of the hedgerow and the creation of a new hedgerow. That is the only matter on which her recommendation required further information. In addition, <u>if</u> the Defendant was minded to approve the application, she recommended conditions.

23 It is common ground that thereafter IP2 submitted a report on amphibians (August 2011). It is also common ground that no further report was provided in respect of bats. Dr Manchester responded to the amphibian report in an undated second consultation response in which she declared herself satisfied as to the proposals.

Subsequent Chronology

24 The first committee report went before members of the planning committee on 7 September 2011. They resolved to grant the first planning permission. The committee report states:

[6] Paragraph 19(a) above.

Wildlife Issues

> "9.16 A Bat Survey and a Hedgerows Survey/Report have been submitted to support the application. A further report/information was request by LCC Ecology and has been commented upon by the County Ecologist. A survey of the hedgerow indicated that they are species poor and are not classified as important under the Hedgerow Regulations. However, ideally they should be retained and protected. Where removal is unavoidable (i.e. to facilitate the access point), removal should be timed to avoid nesting season and new linear planting using native stock can enhance the landscape and biodiversity (especially on the Southern boundary where a new hedge is to be planted).
>
> 9.17 No objections have been raised by the LCC Ecologist, subject to conditions (see Consultee Response section above). To ensure adequate protection of the TPO'd trees there would be a condition regarding safety/protection fencing around the retained trees. In order to enhance biodiversity of the site and to ensure no net loss of hedgerows and trees, adequate native species planting is required in any replacement hedgerow and trees. Any felling and clearance works are to be avoided between March and July to protect nesting birds."

25 The reference in paragraph 9.17 to the "Consultee Response section above" is a reference to paragraph 6.5 which reads:

> "LCC ECOLOGY – Request conditions regarding no tree felling in nesting bird season, protection of bats measures identified in ecology report to be implemented, no site clearance until a landscape scheme has been submitted and approved (in consultation with specialist advisors), and protection of trees and hedgerows in accordance with BS5837. Further to my earlier consultation response, I have now received additional information to address the potential presence of amphibians and particularly great crested newts…I can confirm that I am satisfied that the proposals are unlikely to result in impacts upon great crested newts or their habitat and, provided the recommendations of section 4.0 of the report are implemented by an appropriately worded planning condition, impacts on common toads should also be avoided."

26 By resolution of 7 September 2011 delegated authority was granted to the Head of the Planning Services of the Council (Mr David Thow). His first decision was then dated 25 April 2012. This was a decision which was the subject of the first judicial review made by a claim form dated 22 June 2012. It was based on 6 grounds for which permission was granted. The first grant was then revoked by the council.

27 As regards the renewed application, the second committee report dated 3 October 2012 is in identical terms as the first report as to paragraph 6.5. The following paragraphs are also important:[7]

> "Impact of development on character in the area
>
> 9.24…the existing hedge along the boundary of Hall Lane would be retained except for the gap to be created for the access road (approximately 14 metres). One tree would be removed for the same reasons. The hedge would be reduced in height to one metre high for the rest of the frontage on to Hall Lane. A new southern boundary hedge would be secured via a condition should approval be given. This is also part mitigation for the length of hedge to be removed at the access point. Other hedges along the boundary surrounding the site would be retained. Any new hedgerow would be of native species…other hedge boundaries would be retained, although the frontage one to Hall Lane would be reduced in height. The proposal will clearly have an effect on the area, but the impact is minimised by retention of hedges and the new hedge to be planted to the south of the site.
>
> Wildlife Issues
>
> 9.25 A Bat Survey and a Hedgerow Survey/Report have been submitted to support the application. Along with further details regarding the impact on owls. A survey of the hedgerow indicated that they are species poor and are not classified as important under the Hedgerow Regulations. However, ideally they should be retained and protected. Where removal is unavoidable (i.e. to facilitate the access point), removal should be timed to avoid nesting season and new linear planting using native stock can enhance the landscape and biodiversity (especially on the Southern boundary where a new hedge is to be planted).[8]
>
> 9.26 No objections have been have been raised by the LCC Ecologist, subject to conditions (see Consultee Response section above). To ensure adequate protection of the TPO'd trees there would be a condition regarding safety/protection fencing around the retained trees. In order to enhance biodiversity of the site and to ensure no net loss of hedgerows and trees, adequate native species planting is required in any replacement hedgerow and trees. Any felling and clearance works are to be avoided between March and July to protect

[7] Paragraphs 9.25 and 9.26 are very similar, but not identical, to paragraphs 9.16 and 9.17 of the first committee report: see paragraph 24 of this judgment.

[8] A planning committee update sheet added to para 9.25 "the duty imposed upon the Council in respect of protected species will be met through compliance with the conditions proposed to be imposed in this case that have been formulated following consideration of the application and supporting information by the County Ecologist."

> nesting birds. The proposal is not detrimental to the ecology of the area and complies with requirements of the National Planning Policy Framework and Habitat Regulations."

28 There had been a third LCC consultation response from Dr Manchester dated 5 September 2012 which stated:

> "I commented on the planning application 11/00353/FULMAJ on 03/06/11 (requesting further information) and 19/08/11 (indicating that sufficient information had been submitted, and mitigation and compensation for impacts on biodiversity could be addressed by a planning condition). "
>
> The applicant has not submitted any additional ecological information in support of the current application, and I am not aware of any significant changes in the biodiversity value of the application area. Therefore my comments in respect of impacts on biodiversity remain largely unchanged from those made previously in respect of the previous application (and this response should be read in conjunction with my response to application 11/00353/FULMAJ)."[9]

Discussion:

29 The central submission of the Claimants is that Dr Manchester requested further information on bats before a judgment could be reached in compliance with the relevant legal tests. No further information having been provided, and Dr Manchester not having changed her opinion regarding bats in either the second or third consultation response, the committee report is said significantly to mislead the planning committee in respect of the actual position of Dr Manchester i.e. that further information on the impact on bats was required to be submitted prior to determination. It is further said that the Head of Planning failed to explain why Dr Manchester was incorrect and that in fact adequate information had been submitted, in particular as to the amount of hedgerow which was actually required to be removed and the impact of such a removal on bats.

30 Did the planning committee report misrepresent Dr Manchester's consultation responses? It is correct that in her first response second recommendation, she said that further information should be submitted about hedgerows "prior to the determination of the application".[10] She does not say that further information should be submitted to her. At that time the proposal would have resulted in the loss of the entire roadside hedgerow.[11] Her recommendation was that the further information had an ideal resolution, namely including the retention of a significant length of existing roadside hedge in addition to the creation of a new hedgerow elsewhere in the development.

---

[9] This response included some further conditions if the Defendant was minded to approve the application. They concerned protection of retained hedgerows during and after construction and highly associated with the development to be designed to avoid impacts on bats and their habitat. These were adopted as conditions for the permission.

[10] See paragraph 19 above.

[11] See paragraph 19(c) above.

31 How does the Defendant respond to the Claimants' criticism? In summary its case is this:

(i) The second planning application was not the same as the first. Part of the document submitted in support of the second application was:

(a) A report from Envirotech dated 26 March 2012. This concerned the hedge in respect of its possible use for nesting birds. It says "the area inspected included approximately 6m of hedge to be removed along with a length of at least 5m either side of this."

(b) A landscape report dated February 2012 which in paragraph 2.5 dealt with retention of hedges and trees and offsetting the loss of existing hedgerows and compensating for the loss of mature trees on the east boundary etc.[12]

(ii) Paragraph 9.24 of the Officer's report[13] also refers to a much reduced removal of hedgerow on the eastern boundary i.e. on the road. This paragraph refers to the removal of "approximately 14 metres". It also says "the hedge will also be reduced in height to 1 metre high for the rest of the frontage onto Hall Lane."

(iii) Therefore the planning authority were told how much hedge would be removed and, when they considered the Officer's report, that report synthesised the Ecologist's responses and the new information in support of the second planning application.

(iv) The Planning Officer was therefore justified in saying at paragraph 9.26 of his report "the proposal is not detrimental to the ecology of the area and complies with the requirement of the National Planning Policy Framework and Habitat Regulation." This was because the Ecologist had in her first response set out an ideal situation which was now the reality.[14]

32 It is unfortunate that there is some discrepancy between the 6 metres referred to in the Envirotech report and the 14 metres referred to in paragraph 9.24 of the Officer's report. Also it is not clear why in the Officer's report the hedge was to be reduced to 1 metre in height or for what reason. Putting those matters on one side, I do not accept that what went before the planning committee was, in ecological terms, "the retention of a significant length of the existing roadside hedge". The reduction was not merely in the length but also ⅔ of the height. The significance of the hedge was foraging and commuting (this is common ground), but there is nothing from which I can infer that the height of the hedge is not relevant. Whilst it might have been possible, if the height had been unaffected, to say that "a significant length of the existing roadside hedge" was to be retained, the combination of the reduction in height and length means that the planning committee and the court simply do not know the impact in ecological terms of the reduction in hedgerow.

[12] See also paragraphs 2.13 and 2.14 of that landscape report.
[13] See paragraph 27 above.
[14] i.e. "the retention of a significant length of the existing roadside hedge in addition to the creation of a new hedgerow elsewhere in the development."

33 This in my judgment is the critical point and it undermines the Defendant's central plank of its resistance to the claim. Putting the matter in its legal context the position is as follows:

(i) The Defendant has a statutory duty under regulation 9(3) of the 2010 Regulations to have regard to the requirements of the Habitats Directive. Paragraph 99 of the Circular states:-

> "It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before planning permission is granted…"

I accept that the Defendant established the presence or otherwise of protected species, namely the bats. However I do not accept that they established "the extent that they may be affected by the proposed development." As Lord Brown said in *R (Morge) v Hampshire County Council*[15] at paragraph 19 "whilst it is true that the word "significant" is omitted from article 12(1)(b)….that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species." I bear in mind fully what Baroness Hale said at paragraph 36, namely that the court should not impose too demanding a standard upon officers' reports, but she also said that the reports "obviously have to be clear and full enough to enable them (i.e. the planning authority) to understand the issues and make up their minds within the limits that the law allows them." The Defendant, in my judgment, did not do that here.

(ii) Mr Barratt, Counsel for the Defendant, was at pains to point out the importance of the conditions attached to the planning permission. He submitted that the Defendant was entitled to take a layered approach i.e. compliance with the Circular and the 2010 Regulations and then conditions. I accept that they were entitled to take a layered approach. The problem is they did not comply with the Circular and the Regulations. If that is the case then conditions do not assist because:

(a) Paragraph 99 of the Circular makes this clear.

(b) With specific reference to the height of the hedge, although condition 20 is very wide ranging,[16] this cannot be a sufficient answer to the lack of a proper assessment of the nature and extent of the negative impact upon the protected species.

---

[15] [2011] UKSC to [2011] 1WLR 268.

[16] It prevents any site clearance, site preparation or development work before a landscaping scheme has been submitted and approved in writing by the LPA in consultation with specialist advisers. It also requires the scheme to demonstrate that existing hedgerows shall be substantially retained and managed to maintain their biodiversity value.

(c) The second recommendation of the Ecologist's report has not been complied with.[17]

34 In the *Morge* case the Supreme Court made it clear that it is the function of Natural England to enforce compliance with the Habitats Directive by prosecuting those who commit offences contrary to its provision. It is not the function of the planning authority to police offences under Article 12 of the Habitats Directive. Where Natural England express themselves satisfied that a proposed development will be compliant with Article 12, the planning authority are entitled to presume that it is so.[18] In the present case Natural England did report. Their report is dated 31 August 2012. They said:

> "Bats
>
> …working through the flowchart we reached box (xvi) which advises the authority that permission may be granted subject to appropriate conditions including a detailed mitigation and monitoring strategy for bats.
>
> We advise that the recommendations made by the Ecologist at section 4.2 of the Bats Survey Report are carried out as part of the development and recommend that a sympathetic lighting scheme to be secured as part of the development.
>
> …
>
> On the basis of the information available to us with the planning application, Natural England is broadly satisfied that the mitigation proposals, if implemented, are sufficient to avoid adverse impacts on the local population of bats…It is for the local planning authority to establish whether the proposed development is likely to offend against Article 12(1) of the Habitats Directive. If this is the case then the planning authority should consider whether the proposal would be likely to be granted a licence."

35 In my judgment the report from Natural England does not provide an answer to the Defendant's failures because

(i) There was no mention of the Natural England response in section 6 of the committee report or in the committee report at all. There is therefore no evidence that the planning committee was aware of the position of Natural England. The matter however goes further. Mr Thow, the Head of Planning Services, provided a witness statement dated 9 July 2013. Of course this witness statement is after the event. Nevertheless, if he had taken into account the Natural England report, then one would have expected him to make reference to it in his witness statement, which is a detailed justification of his report and the planning committee's decision. Finally there was no reference to the Natural England report even in the Defendants defence to these proceedings. It is not enough for

[17] To the extent that Dr Manchester's letter of 5 September 2012 states that "sufficient information had been submitted", this is erroneous and goes only to the amphibians and not to the bats.
[18] See paragraphs 29 and 30 of *Morge*.

the Defendant to say that Natural England did not object and that the Planning Officer must have had the Natural England report in mind.

(ii) In any event Natural England required not only mitigation but a "monitoring strategy for bats." I do not accept that condition 20, wide ranging though it is, complies with this.

36 The Defendant submits that even if they are in breach, the content of the Natural England report is a factor which the court should take into account in deciding whether, in its discretion, to quash the decision. I have weighed this very carefully. I have come to the conclusion that I should nevertheless quash the decision. Not only is there no "monitoring strategy for bats", the lack of basic compliance with the regulations and the Circular do not enable me to be satisfied that the failure has not affected the outcome and the decision would have been the same in any event.[19]

Conclusion

37 I therefore determine that the Defendants' decision in the Decision Notice dated 30 November 2012 should be quashed as:

(a) The Officer's report significantly misled the planning committee on the position of the County Ecologist.

(b) The Defendant did not engage with the requirements of the Regulations, the Habitats Directive and the Circular.

Appendix

Town and Country Planning Act 1990 c. 8

Part III CONTROL OVER DEVELOPMENT

Determination of applications

70.— Determination of applications: general considerations.

(1) Where an application is made to a local planning authority for planning permission—

(a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or

(b) they may refuse planning permission.

(2) In dealing with such an application the authority shall have regard [to—]

[19] See *Gransden (E.C.) & Co Limited v Secretary of State for the Environment* [1986] JPL 519.

[

(a) the provisions of the development plan, so far as material to the application,

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations.

……………

Planning and Compulsory Purchase Act 2004 c. 5

Part 3 DEVELOPMENT

Development plan

38 Development plan

(1) A reference to the development plan in any enactment mentioned in subsection (7) must be construed in accordance with subsections (2) to (5).

………………..

(3) For the purposes of any other area in England the development plan is–

(a) the regional strategy for the region in which the area is situated ………. and

(b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area and

(c) the neighbourhood development plans which have been made in relation to that area.

……………..

(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.

………………………..

Chapter 2 The Town and Country Planning (Development Management Procedure) (England) Order 2010

Chapter 3
Written notice of decision or determination relating to a planning application

31. (1) When the local planning authority give notice of a decision or determination on an application for planning permission ……………….—

(a)where planning permission is granted, the notice shall—

(i)include a summary of their reasons for the grant of permission;

(ii)include a summary of the policies and proposals in the development plan which are relevant to the decision to grant permission; and

(iii)where the permission is granted subject to conditions, state clearly and precisely their full reasons for each condition imposed, specifying all policies and proposals in the development plan which are relevant to the decision;

(b)where planning permission is refused, the notice shall state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision;

Chapter 4

Chapter 5 The Conservation of Habitats and Species Regulations 2010

Exercise of functions in accordance with the Habitats Directive

9. (3) Without prejudice to the preceding provisions, a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.

……………….

COUNCIL DIRECTIVE 92/43/EEC

of 21 May 1992

on the conservation of natural habitats and of wild fauna and flora

………………………………

Protection of species

Article 12

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

………………………….

Article 16

1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

…………………..

Chapter 6 Biodiversity and geological conservation: circular 06/2005

……………..

PART IV Conservation of Species Protected by Law

………………

98. The presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat……….

For European protected species (i.e. those species protected under the Habitats Regulations) further strict provisions apply, as explained below, to which planning authorities must have regard.

99. It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decisions. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted…

116. When dealing with cases where a European protected species may be affected, a planning authority …has a statutory duty under regulation 3(4)[now Reg 9(3)] to have regard to the requirements of the Habitats Directive in the exercise of its functions. So the Directive's provisions are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account. The Directive's requirements include a strict system of protection for European protected species prohibiting deliberate killing catching or disturbing of species and damage to or destruction of their breeding sites or resting places. Derogations from this strict protection are only allowed in certain limited circumstances and subject to certain tests being met. Planning authorities should give due weight to the presence of a European protected species on a development site to reflect these requirements, in reaching planning decisions and this may potentially justify a refusal of planning permission.

Neutral Citation Number: [2014] EWCA Civ 567

Case Nos: C1/2013/2619, 2622, 3551 and 3781

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Haddon-Cave
[2013] EWHC 2582 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 7th May 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE UNDERHILL
and
LORD JUSTICE FLOYD

- -

Between :

The Queen on the application of Cherkley Campaign Limited	**Claimant/ Respondent**
- and -	
Mole Valley District Council	**Defendant/ Appellant**
and	
Longshot Cherkley Court Limited	**Interested Party/ Appellant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

James Findlay QC (instructed by **Sharpe Pritchard**) for the **Appellant**
Douglas Edwards QC and Sarah Sackman (instructed by **Richard Buxton Solicitors**) for the **Respondent**
Christopher Katkowski QC and Robert Walton (instructed by **Berwin Leighton Paisner LLP**) for the **Interested Party**

Hearing dates : 11-12 March 2014

Judgment

Lord Justice Richards :

1. This appeal concerns the grant of planning permission for the development of Cherkley Court and land on the Cherkley Estate near Leatherhead, Surrey, into a hotel and spa complex and an exclusive 18 hole golf course. The whole estate is within the Surrey Hills Area of Great Landscape Value ("the AGLV") and part of the proposed golf course is within the Surrey Hills Area of Outstanding Natural Beauty ("the AONB"). The planning permission was granted on 21 September 2012 by the local planning authority, Mole Valley District Council ("the Council"), to Longshot Cherkley Court Limited ("Longshot"). Cherkley Campaign Limited ("Cherkley Campaign") brought a claim for judicial review to challenge the grant of planning permission. The claim succeeded before Haddon-Cave J who by order dated 22 August 2013 quashed the planning permission. The Council and Longshot both bring appeals against that order, with permission granted by Sullivan LJ. They also appeal against Haddon-Cave J's costs order dated 15 November 2013, but the costs appeals are contingent on the outcome of the main appeals.

2. The facts are set out at paras 5 to 27 of the judgment of Haddon-Cave J. Rather than repeat them here, I will refer to salient features as necessary when considering the issues on the appeal. It is, however, relevant to note at this stage that the decision to grant permission was made by the Council's Development Control Committee ("the Committee") by a bare majority of 10 to 9 after a prolonged decision-making process and that it was contrary to the recommendation in the officers' reports. The grant of permission was accompanied by a lengthy summary of reasons, drafted by the officers, which is quoted in full at para 27 of the judgment below.

3. The issues in the appeal can be considered under the headings of (1) development plan policy, (2) landscape impact, (3) Green Belt policy and (4) reasons.

4. I should say at once that Haddon-Cave J examined the case with great thoroughness and style. He was not at all impressed by the arguments in favour of a golf course development in this area of outstanding natural beauty and/or great landscape value and he expressed himself in strong terms in concluding that the decision of the majority of the Committee suffered from error of law, irrationality and inadequacy of reasons. After initial reading of his judgment I approached the appeals with a disinclination to interfere with it. In the end, however, I have been persuaded by the submissions on behalf of the appellants that he was wrong on each of the issues on which he found against them. In those circumstances I have concluded that his orders cannot stand. My reasons for that conclusion are set out below.

Development plan policy

The relevant policy

5. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") required the Council to determine the planning application in accordance with the development plan unless material considerations indicated otherwise. By section 54(1), the development plan included "the provisions of the local plan … for the time being in operation in the area".

6. The Mole Valley Local Plan ("the Local Plan"), adopted in October 2000 under the predecessor legislation, contained a section on golf courses. The section comprised "Policy REC12 – Development of Golf Courses" and supporting text (paragraphs 12.70 to 12.81), as follows:

"**GOLF COURSES**

12.70 There are seven established golf courses in the District concentrated principally around Dorking and Leatherhead. In the Newdigate area a new course has been opened in recent years and another permitted. More generally this part of Surrey is very well served with golf courses. According to the recognised standards of provision there is no overriding need to accommodate further golf courses in the District.

12.71 In considering proposals for new courses, the protection of the District's Green Belt and countryside will be of paramount importance. In this regard it will be important to ensure that a proposal is compatible with retaining and where possible enhancing the openness of the Green Belt and rural character of the countryside. Applicants proposing new courses will be required to demonstrate that there is a need for further facilities.

12.72 New courses are likely to have an impact on the District's landscape because of their extensive size, formal appearance, considerable earth works and new buildings. The Council will seek to ensure that proposals for golf courses do not reduce the distinctiveness and diversity of the District's landscape. The Council is particularly concerned about the effect on the special landscape qualities of the Surrey Hills Area of Outstanding Natural Beauty and the Area of Great Landscape Value and future golf course proposals will be directed away from these areas of high landscape quality.

POLICY REC12 – DEVELOPMENT OF GOLF COURSES

Proposals for new golf courses and extensions to existing courses will be considered against the following criteria:

1. the impact of the course on the landscape, archaeological remains and historic gardens, sites which are important for nature conservation and identified in Policies ENV9, ENV10, ENV11, ENV12 and ENV13, and the extent to which the proposal makes a positive contribution to these interests;

2. the extent of any built development and facilities and their impact on the character and appearance of

the countryside;

3. courses will not be permitted on Grade 1, Grade 2 or Grade 3a agricultural land;

4. the course should have safe and convenient vehicular access to an appropriate classified road. Proposals generating levels of traffic that would prejudice highway safety or cause significant harm to the environmental character of country roads will not be permitted;

5. the extent to which public rights of way are affected and whether any provision is proposed for new permissive rights of way;

6. the provision of adequate car parking which should be discreetly located or screened so as not to have an adverse impact on the character and appearance on the countryside.

In considering proposals for new golf courses, the Council will require evidence that the proposed development is a sustainable project without the need for significant additional development in the future, such as hotels or conference facilities.

Proposals for new golf courses should be designed to respect the local landscape character. New golf courses in the Surrey Hills Area of Outstanding Natural Beauty and the Area of Great Landscape Value will only be permitted if they are consistent with the primary aim of conserving and enhancing the existing landscape.

12.73 In determining proposals for golf courses and ancillary development, the Council will have regard to the Surrey County Council's guidelines for the development of new golf facilities in Surrey. Account will also be taken of the existing and proposed provision of courses in the area …."

7. Part of Cherkley Campaign's case before the judge was that the Committee majority (i) failed to apply correctly the requirement in paragraph 12.71 for "need" to be demonstrated and (ii) failed to consider whether the golf course could be "directed away" from the AONB and AGLV in accordance with paragraph 12.72. The judge accepted both arguments: he dealt with need at paras 51-123 of his judgment and with directing away at paras 124-130. In considering the appellants' challenge to those findings I will follow the pattern of the submissions by concentrating primarily on need and coming back at a later stage to deal briefly with directing away.

Whether there was a requirement to demonstrate need

8. The first issue in relation to need is the status and effect of the statement in paragraph 12.71 of the Local Plan that "Applicants proposing new courses will be required to demonstrate that there is a need for further facilities". That issue turns on (i) the relationship between Policy REC12 and the supporting text and (ii) the effect of the 2004 Act and a "saving direction" made under it in respect of Policy REC12.

9. It is helpful to consider first the relevant statutory provisions and guidance at the time when the Local Plan was adopted. Section 36 of the Town and Country Planning Act 1990, in the version in force at the time, provided:

> "36 … (2) A local plan shall contain a written statement formulating the authority's detailed policies for the development and use of land in their area.
>
> …
>
> (6) A local plan shall also contain –
>
> (a) a map illustrating each of the detailed policies; and
>
> (b) such diagrams, illustrations or other descriptive or explanatory matter in respect of the policies as may be prescribed,
>
> and may contain such descriptive or explanatory matter as the authority think appropriate."

10. More specific requirements were laid down by the Town and Country (Development Plan) (England) Regulations 1999. In particular, regulation 7 provided:

> "**7. Reasoned justification**
>
> (1) A local plan … shall contain a reasoned justification of the policies formulated in the plan.
>
> (2) The reasoned justification shall be set out so as to be readily distinguishable from the other contents of the plan."

11. Annex A to Planning Policy Guidance 12 ("PPG12") contained guidance on content and layout:

> "23. **The local plan and UDP Part II** consists of a written statement and a map ('the proposals map'). The written statement should include the authority's policies and proposals for the development and use of land and, in particular, those which will form the basis for deciding planning applications and determining the conditions attached to planning permissions. As with structure plans, policies and proposals should be clearly and unambiguously expressed, with sufficient

> precision to enable them readily to be implemented and performance measured.
>
> 24. The written statement should also include a reasoned justification of the plan's policies and proposals. A brief and clearly presented explanation and justification of such policies and proposals will be appreciated by local residents, developers and all those concerned with development issues. The reasoned justification should only contain an explanation behind the policies and proposals in the plan. It should not contain policies and proposals which will be used in themselves for taking decisions on planning applications. To avoid any confusion, the policies and proposals in the plan should be readily distinguished form the reasoned justification (for example, by the use of a different typeface)."

12. The approach adopted within the Local Plan itself is consistent with that guidance. Paragraph 1.10 of the Local Plan states:

> "1.10 The Plan's policies are printed in bold type and boxed within a shaded background to distinguish them from the supporting text which provides a reasoned justification for each policy and indicates how it will be implemented by the Council. To interpret the policies fully, it is necessary to read the supporting text."

Policy REC12 is one of the policies there referred to: it is boxed, with a heading in bold text, to distinguish it from the supporting text.

13. The material to which I have referred indicates the relationship between Policy REC12 and the supporting text at the time when the Local Plan was adopted. But it is also necessary to take account of a subsequent change in the statutory regime. The 2004 Act introduced a new development plan making process under which local plans were to be replaced. Paragraph 1 of schedule 8 provided for a three year transitional period from 28 September 2004 after which existing local plans *ceased to have effect*, subject to a power in the Secretary of State to direct "for the purposes of such *policies* as are specified in the direction" (emphasis added) that the old policies should remain in effect until replaced by new policies. The Secretary of State made such a saving direction in respect of certain policies in the Local Plan, including "Policy REC12".

14. In the light of the above, the appellants submit that:

i) Even leaving aside the saving direction, the Local Plan contained no requirement to demonstrate need. The relevant policy was Policy REC12 and on its proper construction it contained no such requirement. Although paragraph 12.71 referred to such a requirement, the paragraph was not part of the policy and its wording was not carried through into the policy.

ii) In any event the saving direction saved only Policy REC12, not paragraph 12.71 or the rest of the supporting text; and the only relevant part of the Local

Plan that continued in force on the expiry of the three year transitional period was Policy REC12.

15. I agree with the first submission and also, subject to a qualification, with the second.

16. Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed *policies* for the development and use of land in the area. The supporting text consists of *descriptive and explanatory matter* in respect of the policies and/or a *reasoned justification* of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the polices will be implemented.

17. In this case, therefore, the correct focus is on the terms of Policy REC12. That policy contains no requirement to demonstrate need. It sets out six criteria against which proposals for new golf courses will be considered, none of which relate to need. It provides in addition that the Council will require evidence that the proposed development is a *sustainable* project without the need for significant additional development in the future. It also provides that new golf courses in the AONB and the AGLV will only be permitted if they are consistent with the primary aim of *conserving and enhancing* the existing landscape. None of those matters can be equated with or involves a requirement to demonstrate need and in my view no such requirement can be read into them. The policy must of course be read in the light of the supporting text, given the statutory role of that text as descriptive and explanatory matter and/or reasoned justification for the policy, and also bearing in mind the statement in paragraph 1.10 of the Local Plan that the text indicates how the policy will be implemented by the Council. But making all due allowance for the role thereby performed by paragraph 12.71, I do not see how the paragraph can provide a basis for reading a need requirement into the policy. For whatever reason, the reference to a requirement to demonstrate need was not carried over into the terms of the policy. Nor can paragraph 12.71 operate independently to impose a policy requirement that Policy REC12 does not contain.

18. The relevant provisions of the 2004 Act and the saving direction made under it serve to underline rather than to alter the position as I see it. Subject to the saving direction, the Local Plan ceased to have effect at the end of the transitional period; and the effect of the direction was to save only the *policies* referred to in it, specifically including Policy REC12. It follows that the relevant question when considering the conformity of the proposed development with the Local Plan after the expiry of the transitional period must be whether the development is in accordance with saved Policy REC12. I do not accept, however, the appellants' submissions that the effect of the statute was to blue-pencil the supporting text on the expiry of the transitional period, leaving in place only the text of the policy, so that the policy fell to be interpreted thereafter without regard to the supporting text. To blue-pencil the supporting text would risk altering the meaning of the policy, which cannot have been the legislative intention. It seems to me that the true effect of the statutory provisions was to save not just the

bare words of the policy but also any supporting text relevant to the interpretation of the policy, so that the policy would continue with unchanged meaning and effect until replaced by a new policy. The resulting position in terms of relationship between the saved policy and its supporting text is therefore the same as it was prior to the 2004 Act and the saving direction.

19. The judge took a different view of the effect of paragraph 12.71. He referred at paras 79-81 of his judgment to various competing constructions of what was saved pursuant to a direction under the 2004 Act that specified "policies" should remain in effect on the expiry of the transitional period. The first, which he rejected, was that "policies" referred only to the wording in the policy box. The second was that "policies" included any illustrative map or reasoned justification and any other descriptive or explanatory matter. The third was that "policies" had a narrow meaning, referring to the wording in the policy box, but on the basis that regard could be had to any map or reasoned justification or other descriptive or explanatory matter when interpreting or implementing the policy. He said that it probably did not matter which of the second or third constructions was correct but the third was probably to be preferred. He concluded at para 87 that the saving direction had the effect in law of preserving all the supporting text to Policy REC12, so that appropriate resort could be had to it when interpreting and applying the policy. I would reject the second construction but would accept the third construction. To that limited extent I agree with the judge. I do not agree, however, with the way in which he went on to use the supporting text in the interpretation of the policy.

20. The judge picked this point up later in his judgment, in a passage at paras 104-106 on the "efficacy of supporting text". He said there that if the second construction of the "policies" saved was correct, the supporting text would presumably stand *pari passu* with the wording in the policy box and be of equal efficacy: it was all to be treated as "policy". If the third construction was correct, so that the "policy" was the wording in the box but resort could be had to the supporting text in order to interpret the policy, the effect in law of paragraph 12.71 was in his view as follows:

> "105. In my judgment, it matters not that the wording '… *applicants will be required to demonstrate that there is a need for further [golf] facilities*" appears outside the policy box rather than inside the box. Paragraph 1.10 [of the Local Plan] provides a perfectly rational explanation for the role of the "*supporting text*" outside the box, namely to provide a "*reasoned justification*" for the policies and indicate "*how*" policies will be implemented by the Council, and further states that it is necessary to read the "*supporting text*" in order "*to interpret the policies fully*". It matters not that the requirement to demonstrate "*need*" could equally well have featured in the box and that given the strictures of paragraph 24 of Annex A of PPG12 (that "*the reasoned justification … should not contain policies and proposals that will be used in themselves for taking decisions on planning applications*") it might have been preferable if it had. It also matters not that Policy REC12 might have been more conventionally drafted …. Reading the wording inside and outside the box as a whole, the intention of

> the framers of the policy is clear: given (a) the apparent sufficiency of golf courses in this part of Surrey and (b) the need to protect the special landscape of the Surrey Hills *etc.*, applicants will have to demonstrate a "*need*" for further such facilities and proposals for new golf courses will be considered against certain listed criteria. As stated above, in the light of (a) and (b), it might reasonably be said that the requirement to demonstrate the "*need*" for further such facilities is simply making explicit what is implicit."

21. It should already be clear why I disagree with that reasoning. The policy is what is contained in the box. The supporting text is an aid to the interpretation of the policy but is not itself policy. To treat as part of the policy what is said in the supporting text about a requirement to demonstrate need is to read too much into the policy. I do not accept that such a requirement is implicit in the policy or, therefore, that paragraph 12.71 makes explicit what is implicit. In my judgment paragraph 12.71 goes further than the policy and has no independent force when considering whether a development conforms with the Local Plan. There is no requirement to demonstrate need in order to conform with the Local Plan either in its original form or as saved.

22. It is true that the Council proceeded in practice on the basis that there was a policy requirement to demonstrate need. That was because the officers' report, by reference to the supporting text in paragraph 12.71, treated Policy REC12 as imposing such a requirement. As regards the application of the test, the officers' view was that there was no proven need for additional golf facilities. The majority of the Committee, however, took a different view on that issue. Their summary of reasons for the grant of planning permission included the statement that "the terms of Mole Valley Local Plan policy REC12 and its supporting text were considered to have been met in that a need for the facilities had been demonstrated …". I will come back to this later. For present purposes it suffices to say that if on the proper interpretation of Policy REC12 there was no requirement to demonstrate need, nothing turns on the fact that the Council proceeded on the basis that there was such a requirement but concluded that it was satisfied.

23. The judge records at para 53 of his judgment that it was initially accepted by all parties at the permission hearing and on the first day of the substantive hearing before him that Longshot had to demonstrate a need for further golf facilities in the particular location pursuant to Policy REC12 and that the issue was simply whether the Council had properly interpreted the requirement of need in this context and whether such a need had reasonably been identified. But Mr Katkowski QC, counsel for Longshot, "pulled a couple of surprise clubs out of his bag" on the second day of the substantive hearing and sought to argue that (1) the requirement in paragraph 12.71 to demonstrate need amounted to "policy" rather than "reasoned justification" and accordingly fell foul of paragraph 24 of Annex A to PPG 12 (see para 10 above) and was unlawful and of no effect, and (2) paragraph 12.71 had not been, and was not capable of being, saved by the Secretary of State's direction and therefore no longer existed in law. Mr Findlay QC, for the Council, adopted both of Mr Katkowski's new submissions. They were strongly resisted by Mr Edwards QC on behalf of Cherkley Campaign. In the event neither submission commended itself to the judge. The first submission has not been renewed before us. The second has been renewed, in part at

least, and has been considered above. It seems to me, however, that the way in which the case was argued before the judge distracted attention from the fundamental question whether Policy REC12, properly interpreted with due regard to the supporting text, required need to be demonstrated. That question was central to the argument before us; and for the reasons I have given I would answer it in the negative.

24. I should mention that the judge took the view that even if a requirement to demonstrate need was not part of the policy matrix under the Local Plan, "the requirement to demonstrate '*need'* in paragraph 12.71 is, at the very least, a material consideration" (para 81 of his judgment; the same point seems to be reflected in part of para 88). I respectfully disagree with that view. I accept of course that need can in principle arise as a material consideration, in particular where it is relied on in support of a departure from policy; but to the extent that the issue of need was canvassed in this case, it was in the context of a particular (and in my view mistaken) understanding of the policy rather than as a justification for a departure from policy. There is no overriding test of need; and if the relevant policy of the Local Plan did not require an applicant for a new golf course to demonstrate a need for further facilities, I do not think that the circumstances were such as to give rise to such a requirement through the route of material considerations.

The meaning of "need"

25. If my analysis so far is correct, it is unnecessary to go on to consider the judge's further findings as to the meaning of "need" and whether the majority of the Committee could rationally have concluded that a need had been demonstrated. I think it helpful to deal with those issues, however, since the points were fully argued and my conclusions in relation to them provide an alternative basis for my overall conclusion that the judge was wrong to accept the case advanced by Cherkley Campaign on the issue of need.

26. At paras 89-106 of his judgment the judge engaged in an elaborate examination of the meaning of "need" in paragraph 12.71 of the Local Plan, looking at dictionary definitions and at the general and specific context, and identifying both a geographical and a qualitative component. He referred to a submission for the Council that it was sufficient to show a need for the golf course in the sense that it would be sustainable and not require non-golfing activities to subsidise it; and a submission for Longshot that it was sufficient that an applicant could demonstrate a demand for a new golf course in the sense of requisite financial backing and membership for it. He concluded:

> "102. I reject Mr Findlay QC and Mr Katkowski QC's constructions of the word '*need*'. They are inimical to the philosophy of planning law. They run counter to the specific context in which the word appears in the Mole Valley Local Plan. They do not accord with common sense. Their approach would be recipe for a planning free-for-all.
>
> 103. In my judgment, the word '*need'* in paragraph 12.71 means '*required*' in the interests of the public and the community as a whole, i.e. '*necessary*' in the public interest

> sense. ‘*Need*’ does not simply mean ‘*demand*’ or ‘*desire*’ by private interests. Nor is mere proof of ‘*viability*’ of such demand enough. The fact that Longshot could sell membership debentures to 400 millionaires in UK and abroad who might want to play golf at their own exclusive, ‘world class’, luxury golf club in Surrey does not equate to a ‘*need*’ for such facilities in the proper public interest sense. Paragraph 12.71 in the Local Plan requires applicants proposing new golf course in the Mole Valley to demonstrate that further golf facilities are ‘*necessary*’ in this part of Surrey in the interests of the public and community as a whole.”

27. It is common ground that in relation to the construction and application of planning policy statements the court should be guided by the principles summarised by Lord Reed in *Tesco Stores v Dundee City Council* [2012] UKSC 13, at paras 18-21. Lord Reed referred to considerations suggesting that in principle such policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context. But he said that they should not be construed as if they were statutory or contractual provisions. Development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their judgments can only be challenged on the ground that it is irrational or perverse. Nevertheless planning authorities cannot make the development plan mean whatever they would like it to mean. The distinction that Lord Reed drew between interpretation and application is illustrated by the way he described the particular issue in that case:

> “21. A provision in the development plan which requires an assessment of whether a site is ‘suitable’ for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word ‘suitable’, in the policies in question, means ‘suitable for development proposed by the applicant’, or ‘suitable for meeting identified deficiencies in retail provision in the area’, is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.”

28. I am satisfied that, contrary to a submission by Mr Findlay, the exercise engaged in by the judge in the present case was one of interpretation, not application, of the statement in paragraph 12.71 that applicants proposing new golf courses “will be required to demonstrate that there is a need for further facilities”. It seems to me, however, that in holding that it required applicants to demonstrate that further golf facilities were “‘*necessary*’ in this part of Surrey in the interests of the public and the

community as a whole" he adopted an unduly exacting and narrow interpretation of that statement. The word "need" has a protean or chameleon-like character, as Mr Findlay and Mr Katkowski respectively submitted, and is capable of encompassing necessity at one end of the spectrum and demand or desire at the other. The particular meaning to be attached to it in paragraph 12.71 depends on context. The first and most obvious point to make about context is that Policy REC12 itself contains nothing to support the judge's exacting interpretation. The policy's requirement of evidence that the proposed development is a "sustainable" project without the need for significant additional development in the future is more consistent with a meaning at the other end of the spectrum, i.e. that there is sufficient demand for the project to be sustainable. The policy's reference to a primary aim of conserving and enhancing the existing landscape does not take this point any further. As to the immediate context provided by paragraphs 12.70 to 12.72, the most relevant consideration is the statement in paragraph 12.70 that "According to the recognised standards of provision there is no overriding need to accommodate further golf courses in the District". The point there being made appears to be that there is no necessity for further golf courses. But the very fact that, against that background, paragraph 12.71 leaves it open to applicants to demonstrate a need for further facilities suggests that "need" is being used in a different and less exacting sense in paragraph 12.71. Overall I take the view that if any need requirement is to be read into the policy by reference to paragraph 12.71, "need" is to be understood in a broad sense so that the requirement is capable of being met by establishing the existence of a demand for the proposed type of facility which is not being met by existing facilities.

29. In making his finding as to meaning the judge placed emphasis on the general context, namely "the broad horizon of planning law itself" and the fact that "the *raison d'etre* of planning law is the regulation of the private use of land in the public interest" (para 96 of his judgment). He referred back to para 2, where he said this:

> "… The developer argued that proof of private '*demand*' for exclusive golf facilities equated to '*need*'. This proposition is fallacious. The golden thread of public interest is woven through the lexicon of planning law, including into the word '*need*'. Pure private '*demand*' is antithetical to public '*need*', particularly very exclusive private demand. Once this is understood, the case answers itself …."

Thus his reasoning appears to have been that because planning control is exercised in the public interest, "need" must relate to the interests of the public and/or the community as a whole. I respectfully disagree with that reasoning. I see no reason in principle why a planning policy should not lay down a requirement of need which is capable of being met by a private demand for the facility in question, including a demand that arises outside the local community or area, as in the case of an elite facility catering for a national or even global market. It is not inimical to the philosophy of planning law to lay down such a requirement.

30. Accordingly, I accept the case for the appellants that if, contrary to my primary finding, Policy REC12 is to be read as containing a need requirement, it was an unexacting requirement and was capable in principle of being met by demonstrating an unmet demand for an elite facility of the type proposed.

Whether the Council's conclusion on need was rational

31. The officers' report informed members of the Committee that there was sufficient capacity in existing golf courses to provide for new members wishing to play the sport locally. It went on to explain that the proposed development was targeting the very highest end of the golf market, with exclusive membership sold at a cost that reflected the 5 star facilities. The applicant did not see it as competing for membership with surrounding 2, 3 and 4 star courses. Its financial model included a significant proportion of membership coming from overseas customers who would also use the hotel, and there was already a waiting list of prospective members. The report continued:

> "The applicant argues that need is not an issue and that they are operating within a very specific range of the golf market. Policy REC12 does not draw a distinction between different categories of golf provision. It was written to protect the countryside, particularly sensitive landscapes such as Cherkley, from a proliferation of golf courses. The issue of need is therefore relevant whatever the golf model and market being targeted.
>
> There is no proven need for additional golf facilities from the information available to the Council and the applicant has not indicated otherwise, other than to state that they can sell their product to a targeted market. It might, in any case, be reasonable to judge that the 'high end' market could be catered for in a less sensitive location or where there is an existing ailing course that can be reinvigorated to provide the sort of facilities and course that the membership would be seeking but in a less sensitive location."

32. That passage is far from clear. Whilst saying that there is no proven need for additional golf facilities, it appears to acknowledge that the applicant had put forward a case of need in the sense that the development would cater for a "high end" market; a case which the report meets by making the *different* point that such a market could be catered for in a less sensitive location.

33. The majority of the Committee dealt with the issue in the following paragraph of their summary of reasons for the grant of planning permission:

> "The development was considered to provide opportunities to meet a need for recreation facilities in the countryside and the applicant had been able to demonstrate in the supporting documents, such as the 'Report on Viability of Golf at Cherkley' and the 'Hotel Viability Study', that they would be able to secure enough interest in the facilities to make it viable in the short and long term. Therefore, the terms of Mole Valley Local Plan policy REC12 and its supporting text were considered to have been met in that a need for the facilities had been demonstrated and the character of the countryside could

> be safeguarded even within and adjacent to the Area of Outstanding Natural Beauty ….”

34. At paras 118-121 of his judgment the judge found that in that passage the majority of the Committee had failed properly to interpret or understand the true meaning of the word “need” and had misdirected themselves in law in various respects. At para 122 he found that in any event the majority’s decision to grant planning permission for further golf facilities at Cherkley was perverse; it simply “*does not add up*”; there was no evidence upon which the majority could properly base a conclusion that there was a need “in the public interest sense” for further golf facilities in this part of Surrey.

35. Those findings were all based on a view as to the meaning of “need” with which, as indicated above, I disagree. If in this context “need” has the broader meaning that I favour, so that it can in principle be demonstrated by evidence of an unmet demand for the type of facility proposed, then in my view the summary of reasons given by the majority of the Committee for finding that need had been demonstrated discloses no error of law and the finding itself was reasonably open on the material available to members. I do not accept submissions by Mr Edwards that the reasons simply fail to address the question of need for a further facility or that they wrongly equate need with viability or sustainability. I also reject his submission that the material before the Committee, which included Longshot’s planning statement and briefing note, provided insufficient evidence of unmet demand to enable the majority rationally to conclude that need had been demonstrated. I concentrate on the material before the Committee because that is clearly the basis on which the rationality of the majority’s conclusion must be assessed. A further, though minor, concern about the judge’s analysis is that he had regard to material that was not before the Committee (see para 111 of his judgment).

The issue of “directing away”

36. A separate issue arising in relation to the Local Plan concerns the statement in paragraph 12.72 that future golf course proposals “will be directed away” from the AONB and AGLV. The judge stated at para 126 of his judgment that this was expressed in “unequivocal mandatory terms” and was a requirement and, moreover, a material consideration. He went on to say that there was little evidence that the majority of the Committee properly addressed their mind to the requirement, and it appeared that they failed to heed the officers’ advice that “it is reasonable to conclude that the golf course and its associated facilities could be provided in another location where the landscape is less sensitive and important”. It was false to assume that it was necessary to locate a hotel and spa at Cherkley or that Cherkley was the only place where such combined facilities should be located in England. The reasons of the majority entirely failed to address the question of whether the golf course should be directed away from the designated areas. Accordingly he found that “the Council majority further erred in law in that they failed, properly or at all, to consider the policy requirement or material consideration in paragraph 12.72 that the golf course and its associated facilities could be provided in another location where the landscape was less sensitive and important”.

37. The appellants’ arguments on this issue track certain of the points already considered in relation to the issue of need. It is submitted that the judge was wrong to treat the supporting text in paragraph 12.72 as a mandatory policy requirement that golf

courses be directed away from the AONB and AGLV. Policy REC12 includes no such requirement, and no such requirement can be read into it by reference to the supporting text: on the contrary, Policy REC12 contemplates that new golf courses can be permitted in those areas "if they are consistent with the primary aim of conserving and enhancing the existing landscape". Paragraph 12.72 had no independent policy status even in the Local Plan as originally drafted, and in any event only Policy REC12 itself was saved by the saving direction under the 2004 Act.

38. I accept those submissions, for essentially the same reasons as I have accepted the appellants' submissions to the effect that there was no requirement to demonstrate need. I take the view that "directing away" was not a policy requirement of the Local Plan and that in the absence of a policy requirement the reference to it in paragraph 12.72 did not convert it into a material consideration. Policy REC12 contained provisions aimed specifically at the protection of the landscape. In my view those provisions were taken properly into account by the majority of the Committee, as will be explained when I move to the main landscape issues. No error of law is disclosed by the absence of reference to "directing away" in the summary of reasons.

Landscape impact

39. I turn to consider further issues that arise in relation to landscape impact.

40. The summary of the majority's reasons for granting planning permission stated that the development had been assessed against, *inter alia*, Policy REC12 and the National Planning Policy Framework ("NPPF") and was considered to conform to those policies. In relation to landscape impact it was stated:

> "In coming to its decision and in judging the impact on the Area of Great Landscape Value and Area of Outstanding Natural Beauty, the Development Control Committee were mindful of the Environmental Statement undertaken by the applicant under the EIA Regulations, the Council's assessment of the EA, the details contained in the application, the concerns of officers set out in their report and the requirement under a legal agreement to undertake a Landscape and Ecology Management Plan for the Cherkley Estate. It was judged that the landscaping and mitigation measures contained in the application were sufficient to ensure that the overall landscape character would not be compromised …. It was considered that the design of the proposals met the terms of planning policies designed to protect the biodiversity of the estate and the character of the countryside …. It was noted that the development included suitable measures to protect and enhance the majority of the open countryside of the estate alongside formal playing spaces, whilst introducing management of neglected woodland, retaining hedgerows, managing trees and including new planting that is appropriate to a chalk grassland location. There would also be suitable protection during the construction phase.

> The Committee was mindful that a management plan will be prepared to integrate all the management provisions, from construction through to the maturity of the golf course. Therefore, the development could meet commitments to safeguard and enhance the natural environment within the NPPF … and REC12 …. The development was considered to provide an opportunity for stable long term management of the estate and investment to safeguard its ecology and landscape."

41. The judge held that (1) the majority failed to apply the tests in paragraph 116 of the NPPF, (2) could not rationally have concluded that the overall landscape character "would not be compromised", (3) failed to have proper regard to the provision in Policy REC12 that new golf courses would only be permitted if they were consistent with the primary aim of conserving and enhancing the existing landscape, and (4) did not have regard to what he described as the requirement in paragraph 12.72 that new golf courses should be "directed away" from the AONB and AGLV. I have already dealt sufficiently with the issue of "directing away". The other three landscape issues on which the judge found that the majority fell into legal error are considered below.

Whether paragraph 116 of the NPPF applied

42. Section 11 of the NPPF is concerned with the conservation and enhancement of the natural environment. Of specific relevance within it are paragraphs 115 and 116 which provide as follows:

> "115. Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty ….
>
> 116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated that they are in the public interest. Consideration of such applications should include an assessment of:
>
> - the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> - the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and
>
> - any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

43. As regards the proposed development, the judge found at para 139 of his judgment that only the 15th fairway and 16th tee would be physically located within the AONB; the remainder would be located within the AGLV adjacent to the AONB. He

nevertheless took the view that the golf course as a whole was a "major development" to which paragraph 116 of the NPPF applied and that it was therefore subject to the tests of exceptional circumstances and public interest contained in that paragraph. His reasons were these:

> "147. … Paragraph 116 of the NPPF is plainly intended to include '*major developments'* which physically overlap with designated areas or visually encroach upon them. In the present case, it would be artificial, and frankly myopic, to focus simply on the one tee and hole physically within the curtilage of the AONB and ignore the other 17 tees and holes course along the border of the AONB. It would also be contrary to the spirit of Section 11 of the NPPF since the policy is pre-eminently concerned with visual perspectives. In my view, the visual impact of the *whole* proposed golf course on the AONB was clearly relevant and a material consideration. It was also relevant that the adjoining AGLV was considered of AONB quality (and might be redesignated in the near future). There is no evidence or indication that the Council majority considered this issue at all …."

44. The *relevance* of the golf course as a whole for the AONB, including such matters as its impact on visual perspectives, is not in doubt. It forms an aspect of the landscape issues covered *inter alia* by paragraph 115 of the NPPF and Policy REC12 of the Local Plan. The question here, however, is whether the golf course as a whole can properly be regarded as a development to which paragraph 116 of the NPPF applies, so as to be subject to the specific, stringent conditions in that paragraph. On that question I respectfully disagree with the judge. I see no good reason for departing from the language of paragraph 116 itself. The paragraph provides that permission should be refused for major developments "*in*" an AONB or other designated area except where the stated conditions are met: the specific concern of the paragraph is with major developments in a designated area, not with developments outside a designated area, however proximate to the designated area they may be. In this case the only part of the development *in* the AONB would be the 15th fairway and 16th tee. I do not think that the creation of one fairway and one tee of a golf course could reasonably be regarded as a major development *in* the AONB, even when account is taken of the fact that they form part of a larger golf course development the rest of which is immediately adjacent to the AONB.

45. The reasons of the majority of the Committee, whilst stating that the proposed development was considered to conform with the NPPF, did not deal specifically with paragraph 116. The issue had in fact been touched on only briefly in the officers' reports. The first report, written before the publication of the NPPF but at a time when materially the same provision was to be found in PPS7, contained no suggestion that the tests of exceptional circumstances and public interest in paragraph 116 applied. The second report, which took account of the publication of the NPPF, did refer to the terms of paragraph 116. It went on to state that "it is not considered that there are exceptional circumstances for allowing the proposal in such a valued landscape and there is little to suggest that the proposal is in the public interest", and that the proposal was therefore considered to be contrary to the advice contained

within the NPPF. It was therefore implicit that the officers considered the proposal to involve a major development in the AONB. In those circumstances it would have been helpful if the summary of the majority's reasons had indicated the basis on which the views of officers on this issue were rejected, but it was in my judgment legally sufficient to state the majority's conclusion that the development was in conformity with the NPPF. In any event nothing can turn on the omission to refer specifically to paragraph 116 if, as I consider to be the case, that paragraph was not reasonably capable of applying.

Whether the conclusion in relation to landscape character was rational

46. The judge held at para 155 of his judgment that the conclusion of the majority of the Committee that the overall landscape character "would not be compromised" was irrational. He said that it flew in the face of "the unanimous and trenchant views" expressed by the landscape experts that the effects would be "major … adverse, long-term and permanent" and the changes were "of such magnitude" that the landscape character would be "fundamentally, and probably irreversibly, altered"; and that the planning officers also advised unequivocally that the proposals would be "seriously detrimental" to the visual amenity.

47. It is common ground that the threshold of irrationality is a high one: counsel referred in this respect to *R v Secretary of State for the Home Department, ex parte Hindley* [1998] QB 751, 777A, to which the judge also referred at para 42 of his judgment.

48. The court will be particularly slow to make a finding of irrationality in relation to a planning judgment of this kind, especially when the members who made the judgment had the benefit of a site visit whereas the court has to work on the written material alone. In this case, moreover, the importance of the site visit is emphasised by the fact that temporary scaffolding had been erected to outline the position of the proposed clubhouse, so that members could assess the impact of the building in the wider landscape. It is also worth noting that in addition to a well attended Committee site visit some members had visited the site individually.

49. The judge evidently felt able to form the view he did on the basis of the written material because he considered that the expert evidence and officers' advice were unequivocally to the effect that the development would be harmful to the landscape. The members were of course not bound by the opinions of experts or officers. In any event, however, in the light of passages drawn to our attention by Mr Findlay and Mr Katkowski I do not accept that the expert evidence and officers' advice all pointed in the one direction. There was certainly a body of evidence that the development would be harmful to the landscape, but there was also evidence the other way and it was recognised in the officers' advice that there was a balance to be struck.

50. Thus, the environmental statement in support of the application for planning permission included a chapter addressing the landscape and visual impacts of the new clubhouse and golf course, comprising a baseline study and an assessment of the potential impacts without mitigation and following mitigation. The assessment had been carried out by two experienced chartered landscape architects on the basis of desktop research and site visits. The chapter's conclusions included the following (with original emphasis):

> "6.65 Views to the application site from publicly accessible places are very limited restricted by topography, intervening woodlands and mature hedgerows. There are a limited number of properties in Tyrrell's Wood and Yarm Way which have direct views of the application site. Of the eleven representative viewpoints, the residual visual impacts are **Long-term local Minor Beneficial.**
>
> 6.66 The application site lies with[in] the Green Belt, the Surrey Hills AONB and Area of Great Landscape Value. The proposed golf course will enhance the landscape character of the area with opportunities for woodland management and the creation of extensive areas of species rich grassland as well as the opening of distant views out of the application site from public rights of way and improved access. The residual landscape impacts are considered to be **Long-term, Local Minor Beneficial.**
>
> 6.67 The proposed golf course and club house will not result in any significant adverse landscape and visual impacts during the day or from light spill during the night, and complies with the overarching aim of the AONB policy to conserve and enhance …."

51. A briefing note for members, dated April 2012, asserted that "Overall, the impact of the formal golf features will not be sufficiently dominant to cause a material change to the landscape character in any of the distant views to the site"; the course would be of natural appearance "enhancing the visual appearance of the landscape"; "The overall landscape character of this private estate will improve with the present open areas of agricultural uniformity enclosed by neglected woodlands, becoming a richer and subtly varied grassland mosaic"; and in relation to the area outside the AONB "the resulting landscape character will be closer in appearance to that of the adjacent AONB".

52. It is right to say that the views expressed in the environmental statement and the briefing note were challenged by others, including the Council's own independent landscape consultant (and the fact that the Council was not prepared to accept the views in the environmental statement but took external professional advice of its own was a factor stressed by Mr Edwards in argument). These matters were discussed at length in a section of the officers' first report on "Landscape implications of the proposed development". But the officers' analysis did not present the evidence as all pointing in one direction. It stated, for example, that "*on balance* the proposals do not enhance the landscape" (emphasis added). The existence of a balance, but at the same time a firm indication that the balance is considered to come down against the proposed development, is also apparent from the summary at the end of the section:

> "There are undoubtedly landscape benefits to be achieved from the proposed development and there is a commitment to manage the components of that landscape in appropriate ways. However, the price to be paid is the imposition of a golf course on over 40% of the open parkland, with all the artificial

> elements associated with this form of development such as greens, tees, bunkers and fairways. However well designed, in a highly exposed location such as this, conspicuous from public highways and rights of way, it is very difficult to disguise these features. In such circumstances, the proposal would be contrary to a number of established planning policies and the landscape impacts must be given considerable weight when determining the application.
>
> … The quality of the Northern Parkland is underlined by its status as an AGLV and one independent landscape study suggests that it has characteristics that are the same as the adjacent AONB. The independent landscape assessment commissioned by the Council endorsed this view. This is a landscape of special quality, natural beauty and character that would not be enhanced and conserved by overlaying upon it the features of a golf course.
>
> The impact on the AONB is disputed. The applicant argues that the visual impact on the AONB would be limited and the area of intensively managed turf within and immediately adjacent to the AONB would be confined to 25% of the land. However, both Natural England and the AONB Planning Adviser disagree and they consider that adverse impact on the AONB can be caused by development on the Northern Parkland as well as changes to 40 Acre Field. The independent landscape assessment also raised concerns about the impact within and adjacent to the AONB and the wider landscape and views from other parts of the AONB ….
>
> The policy basis for considering the application is explicit in stating that development proposals should respect or enhance the landscape character and there is considerable evidence to suggest that it does not …. The conclusion is that the proposal would be harmful to the landscape character of the AGLV and AONB ….”

53. The officers were therefore giving strong, evidence-based advice that the development would have a detrimental impact on the landscape, but they did not go so far as to suggest that the expert evidence pointed unanimously and unequivocally in that direction or that the contrary view was not reasonably open to members. Mr Findlay took us to a passage in a witness statement of Mr Gary Rhoades-Brown, the Council’s Development Control Manager, in which he made clear that he disagreed with the decision of the majority of the Committee but did not consider that their view on this issue or overall was perverse: he said that officers took the view that “whilst the planning balance clearly favoured refusal there were factors on both sides of the balance and it was open to members to take a different view”. Mr Rhoades-Brown’s opinion on the issue of perversity is of course legally irrelevant but what he says about factors on both sides of the balance seems to me to be a fair reflection of the position in relation to landscape impact; and whilst in the light of the evidence I see considerable force in the officers’ advice, I am not persuaded that the weight of the

evidence and advice was such as to leave no room for members rationally to conclude as a matter of planning judgment, in the light of all the written material and what they had seen on their site visit or visits, that the overall landscape character would not be compromised.

54. In my view, therefore, the judge was wrong to find that the conclusion reached by the majority of the Committee was perverse.

Consistency with the aim of conserving and enhancing the landscape

55. The judge held at paras 156-157 of his judgment that the majority of the Committee failed to have proper regard to the provision in Policy REC12 that new golf courses in the AONB and AGLV would only be permitted if they were consistent with the primary aim of conserving and enhancing the existing landscape. He said that the majority's conclusions that the proposed development would involve change and mitigation was inconsistent with "conserving and enhancing", and that in the light of the "unanimous evidence" from the landscape experts it was difficult to see how the majority could have concluded that the development was consistent with the aim of conserving *and* enhancing (he emphasised the "and"). In his judgment the majority of the Committee "simply failed to understand this policy requirement".

56. Again I take a different view. It seems to me that the majority of the Committee understood the requirements of Policy REC12 and had them properly in mind. They made more than one reference to the policy in their reasons and stated expressly that the development had been assessed against it and was considered to conform to it. They also made clear that they had taken account of the concerns in the officers' report, where the terms of the policy were spelled out. The summary of their reasons uses the language of enhancement as well as protection of the countryside, supporting the view that they had in mind both limbs of the aim set out in the policy (and it is therefore unnecessary to consider a submission by Mr Findlay that on the proper interpretation of the policy the aim is that the landscape should be *either* conserved *or* enhanced). I see no inconsistency between, on the one hand, an acceptance that the development would involve change and mitigation measures and, on the other hand, an assessment that the development would be consistent overall with the aim of conserving and enhancing the landscape; and it is the overall assessment that matters in the application of a policy of this kind. If and in so far as the judge's conclusion was based on his view as to the irrationality of the finding that the overall landscape character would not be compromised, I have already explained above why I do not share that view. Taking everything together, I am persuaded that the majority's decision did not involve any error of law in relation to the "conserving and enhancing" aspect of Policy REC12.

Green Belt policy

57. The whole of the Cherkley Estate is within the Metropolitan Green Belt. The relevant provisions concerning development in the Green Belt are paragraphs 87 to 89 of the NPPF:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by way of inappropriateness, and any other harm, is clearly outweighed by other considerations.
>
> 89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
>
> - ...
> - provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
> - the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
> - …."

58. At the time of the officers' first report the relevant provisions were contained in Planning Policy Guidance 2 ("PPG2") in materially the same form, save that PPG2 referred to "essential" facilities for sport and recreation rather than to "appropriate" facilities, the term used in paragraph 89 of the NPPF.

59. Section 11.2 of the first report contained a lengthy discussion of the Green Belt issues. It explained that the proposed golf course was *not* considered inappropriate development as it preserved the openness of the Green Belt. The focus was therefore on the buildings. The clubhouse was considered to be acceptable because it provided essential facilities ancillary to the golf course. Certain of the other elements of new build, in particular those involving extensions to existing buildings or the re-use of the floorspace and volume of buildings for which there were extant permissions, were considered to be acceptable either because they were appropriate development which did not have a detrimental impact on the Green Belt or because there were sufficient very special circumstances to justify what was otherwise inappropriate development in the Green Belt. In relation to certain other elements of new build, however, the officers' view was that they would represent inappropriate development and that there were insufficient very special circumstances to justify them. The flavour of that part of the advice is apparent from the following extracts from the report:

> "The other buildings including the partly underground swimming pool, the underground spa and the partly underground maintenance/service hub buildings are also new development in the Green Belt which is, by definition, harmful to the Green Belt.

> … Whilst the spa would be underground and would therefore have a limited impact on the Green Belt in terms of its built form, it is of a considerable size and would generate a significant amount of activity. The application details that the spa would be available for use by members of the health club, the Golf Club, hotel guests and members of the public by appointment so there would be a considerable amount of use of the spa that would not be associated with the hotel. As such, it is considered that its size and use mean that it would not be ancillary to the hotel.
>
> With regard to the maintenance facility and service hub building, again, this is not a small building and is not solely related to the golf course use. It would have a dual use of servicing all of the uses on site – the hotel, the spa/health club and the cookery school, in addition to the golf course. It is therefore necessary to see if any very special circumstances have been advanced to offset the harm caused to the Green Belt.
>
> …
>
> Despite the spa's position underground, it is considered that the activity associated with the spa and swimming pool in the Green Belt would be harmful to openness, especially in an area that is isolated and where people would have to rely on the private car rather than public transport to access the site. The new build elements are inappropriate development that is harmful to openness. It is considered that there are insufficient very special circumstances to justify these elements of new development in the Green Belt and as such they fail Green Belt policy tests in PPG2. The golf course maintenance facility and service hub building will have a dual use, and whilst accepting that the service hub element will help to minimise the movement of vehicles around the site, it is considered that this element of the proposal is not genuinely ancillary to the golf course and therefore fails the PPG2 policy test with regard to essential facilities."

All this was reflected in the third reason given for the officers' recommendation that permission be refused:

> "The proposal involves new buildings in the Green Belt including a partly underground indoor swimming pool, an underground spa and a partly underground maintenance facility. These buildings, together with the activity generated by the proposed uses, would represent inappropriate development in the Green Belt, in conflict with the aims of PPG2. There are considered to be no very special circumstances advanced that clearly outweigh the harm caused

> by reason of inappropriateness and the level of activity generated by the proposed development ….”

60. The officers’ second report drew attention to the publication of the NPPF and to the provisions in it concerning the Green Belt but indicated that it did not alter the advice given in the first report.

61. The summary of reasons given by the majority of the Committee for granting the planning permission included the following passage in relation to the Green Belt policies:

> “The development was considered not to compromise significantly the Green Belt policies contained in the NPPF and the Council’s Core Strategy by: re-using existing buildings, utilising floorspace granted under previous, extant permissions and locating additional floorspace underground. The design of the development in terms of siting, scale and detailing was considered to retain substantially the openness of the site sufficiently to overcome concerns set out in the officers’ report, having regard to the other benefits that would be achieved.”

The concluding paragraph of the reasons is also relevant:

> “Having considered all of the material considerations and objection to the development and the officers’ concerns as expressed in their reports, the Committee concluded that, when balancing all of the issues, the development would achieve sufficient economic benefits and contained adequate environmental safeguards, having regard also to the conditions set out in the decision notice and to the Section 106 Agreement, to outweigh any concerns.”

62. The judge dealt with this issue at paras 170-195 of his judgment, including his analysis at paras 185-195. He thought it clear that the majority of the Committee had failed to apply the “very special circumstances” test when deciding that the Green Belt policy had not been breached. He said that the test did not feature either expressly or inferentially in the reasons and that it was not clear that the majority had grappled with or addressed the main “concerns” addressed in the report. He considered that the reference to “other benefits” was a far cry from the very special circumstances that need to be demonstrated to justify inappropriate development in the Green Belt, and that it was clear that the majority “simply did not consider whether any ‘*very special considerations*’ existed, let alone whether such considerations ‘*clearly outweighed*’ the harm caused to the Green Belt by the ‘*inappropriate development*’”; the reference to other benefits represented at best a “‘fig-leaf attempt to justify an ‘overall planning decision’”. He identified what he considered to be other flaws in the majority’s decision and reasoning in relation to Green Belt policy. He also observed that applicants had to be able to demonstrate a *need* for the *golf course* in order to show that it was not inappropriate development, and that such need had not been demonstrated. He concluded:

> "In my judgment, the Council majority failed conscientiously to consider the three questions set out above, in particular whether '*very special circumstances*' existed which '*clearly outweighed*' the harm. The Reasons were inadequate. The Council majority at best paid lip-service to the Green Belt policy but did not apply it. The Council majority failed to take a proper policy-compliant approach to Green Belt considerations …."

63. The judge's observations about the application of the Green Belt policy to the golf course itself were misplaced. It was the agreed position of all parties that the golf course was itself appropriate development, and there is nothing in the policy that required a need to be demonstrated in order to show that it was not inappropriate development.

64. The main thrust of the judge's criticisms of the majority's decision and reasons, however, concerned the applicability of the Green Belt policy to the buildings. As to that, it seems to me that the judge's criticisms are unfair to the majority. Their starting-point will have been the officers' reports which set out fully and clearly the approach to be followed pursuant to the Green Belt policies (referring originally to PPG2, but then to the NPPF following its publication). The reports identified the extent to which the buildings would represent inappropriate development in the Green Belt and the extent to which the officers considered that there did not exist very special circumstances clearly outweighing the harm caused by reason of the inappropriateness and the level of activity generated by the proposed development. The summary of reasons of the majority shows that in finding that the proposed development conformed with the Green Belt policies contained in the NPPF they had addressed themselves to the officers' reports and had considered the concerns expressed in them but they had concluded that those concerns were overcome by the matters referred to. Although the reasons do not use the language of the policies, it seems to me that the proper inference to be drawn is that the majority had concluded that, to the extent that there would be inappropriate development, there existed very special circumstances that clearly outweighed the harm. I do not think that the failure to use the language of the policy can justify the adverse finding made by the judge. There is nothing to show that the majority were applying a different test from that correctly set out in the officers' reports that they were considering. To deal specifically with a point made by Mr Edwards, the fact that the majority referred in the final paragraph of the summary to a general balancing exercise does not mean that when concluding that there was sufficient to "overcome" the officers' concerns in relation to the Green Belt policies they were applying a simple balancing test rather than asking themselves whether there were very special circumstances that *clearly* outweighed the harm.

65. If I am right so far, a further question is whether the majority fell into legal error in concluding that there existed very special circumstances that clearly outweighed the harm. That conclusion depended in part on their assessment that the design of the development would retain substantially the openness of the site (a matter that appears to me to be relevant primarily to the extent of harm) and in part on their assessment of the "other benefits" that would be achieved by the development. Other passages in the summary of reasons identify a number of benefits arising out of the proposed

development, including economic benefits in the form of jobs for local people and accommodation and facilities for visitors to the district. It was open to the members to place weight on such benefits when deciding whether there existed very special circumstances sufficient to justify approval of the inappropriate development. To describe the reference to other benefits as at best a fig-leaf attempt to justify an overall planning decision is unfair. I can see no legal error in the majority's approach to these matters, and the conclusion they reached cannot in my judgment be said to have been irrational.

Reasons

66. As the judge explained at paras 204-206 of his judgment, failure to give adequate reasons was not pursued as a separate ground of challenge before him but was an aspect of the case advanced by Cherkley Campaign under each of the other grounds of challenge. The judge found that the reasons for granting permission were inadequate in respect of the three grounds considered above (need, landscape impact and Green Belt policy) "individually and when read as a whole". He said that they did not comply with the principle in para 15 of the judgment of Sullivan LJ in *R (Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286 that a fuller summary of the reasons may be necessary where the members have granted planning permission contrary to an officer's recommendation. He noted that the officers tasked with drafting the reasons were faced with a very difficult drafting exercise: they had to seek to justify a decision by a bare majority of members which was contrary to their recommendation and their own personal views. In the judge's view, they were tasked with defending the indefensible.

67. *Siraj* was considered and applied in *R (Telford Trustee No.1 Limited and Telford Trustee No.2 Limited) v Telford and Wrekin Council* [2011] EWCA Civ 896. That was a case in which the members of the planning committee followed the recommendation in the officers' report, so that on any view a relatively brief summary of reasons sufficed. If the judgment in the *Telford* case adds anything material to *Siraj*, it is by way of underlining that the requirement is to give a summary of reasons for the grant of permission, not a summary of reasons for rejecting objectors' representations or a summary of reasons for reasons.

68. In *Scottish Widows Plc & Others v Cherwell District Council* [2013] EWHC 3968 (Admin), at paras 34-39, Burnett J rightly emphasised the cautious formulation of Sullivan LJ's observation in *Siraj* that a fuller summary of the reasons may be necessary where members have granted planning permission contrary to their officers' recommendation. He pointed out that the purpose of summary reasons is to enable those concerned about the application to understand why it has been granted in the context of the surrounding circumstances; and on the facts of the case, in the context of a very detailed exposition of conflicting views in the officers' report for one meeting and the clear reasons given in the report for a further meeting, he held that a simple reference in the summary of reasons to compliance with the NPPF was more than enough to enable all concerned to understand why the permission had been granted.

69. It was pointed out to us that the requirement to give a summary of the reasons for the grant of permission was repealed with effect from 25 June 2013 by article 7 of the Town and Country Planning (Development Management Procedure) (England)

(Amendment) Order 2013. But the requirement was in force at the time of the decision here in issue and nothing turns on its subsequent repeal. Both *Telford* and *Scottish Widows* serve to illustrate, however, the limited nature of the requirement while it was in force.

70. Mr Edwards also drew attention to the requirement under regulation 24(1)(c)(ii) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 that where an EIA application is determined by a local planning authority the authority shall make available for public inspection a statement containing *inter alia* "the main reasons and considerations on which the decision is based". He did not contend, however, that this imposed a higher duty than the duty to give a summary of reasons under the general planning legislation, and he made clear that his primary case in relation to reasons was not based on the EIA Regulations. Moreover the judge's decision was based on the general duty under planning law, not on the specific duty under the EIA Regulations.

71. The summary of reasons for the grant in this case was exceptionally lengthy, far fuller than would have been necessary if the majority of the Committee had accepted the recommendation in the officers' reports. No doubt the drafting exercise was a difficult one, given the extent to which the majority disagreed with the views expressed in the reports. The end result, however, seems to me to have been an adequate summary. In discussing the issues of need, landscape impact and Green Belt policy I have referred as appropriate to the majority's reasons when reaching my conclusions. The reasons make clear that the proposed development was considered to conform with all relevant policies; they show that consideration was given to the officers' reports as a whole, including the points on which officers had taken a different view; and they provide enough to justify the conclusion that the majority neither erred in law nor acted irrationally in departing from the officers' views and reaching a decision contrary to that recommended. I do not agree with the judge that there was an unlawful deficiency of reasons, whether in relation to the issues individually or when read as a whole.

The costs appeals

72. If my Lords agree with my conclusions on the main appeals, it will lead to the setting aside of the judge's quashing order and his related costs order, with the result that the separate appeals against the costs order will fall away. The parties will have the opportunity to make written submissions as to the costs consequences of the main appeals if they are unable to reach agreement on the issue. Nothing further needs therefore to be said on the subject of costs at this stage.

Overall conclusion

73. I would allow the main appeals by the Council and Longshot and would set aside the judge's quashing order and costs order.

Lord Justice Underhill :

74. I agree.

Lord Justice Floyd :

75. I also agree.

A Court of Appeal

*East Northamptonshire District Council and others *v* Secretary of State for Communities and Local Government and another

B [2014] EWCA Civ 137

2014 Jan 23; Feb 18

Maurice Kay, Sullivan, Rafferty LJJ

Planning — Planning permission — Development affecting listed building — Application for planning permission for wind farm development close to Grade I listed buildings — Requirement on decision-maker to "have special regard to the C *desirability of preserving" setting of listed buildings — Inspector finding benefit of proposed development outweighing harm to buildings and granting permission — Whether statutory duty requiring inspector to give considerable importance and weight to desirability of preserving setting of listed buildings when carrying out balancing exercise — Whether applying with particular force where setting Grade I listed building affected — Relevance of finding that harm to setting less than substantial — Relevance of perception of any reasonable* D *observer — Whether inspector's decision flawed — Whether rightly quashed — Planning (Listed Buildings and Conservation Areas) Act 1990 (c 9), s 66(1)*

The local planning authority refused the developer's application for planning permission to build a four-turbine wind farm on land in a conservation area which contained a number of listed buildings including a collection of Grade I listed buildings and gardens. The developer appealed to the Secretary of State for E Communities and Local Government, who appointed a planning inspector to determine the appeal. By section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990[1] the inspector was under a duty when considering whether to grant planning permission to "have special regard to the desirability of preserving" a listed building or its setting. Listed buildings came within the definition of "designated heritage assets" in the Government's Planning Policy Statement 5[2] and practice guide. The inspector concluded that while the wind farm would fall within F and affect the settings of a wide range of heritage assets, on balance the significant benefits of the proposed development in terms of the renewable energy which it would produce outweighed the less than substantial harm which it would cause to the setting of such designated heritage assets and the wider landscape, and accordingly granted planning permission. One of the reasons given for the inspector's conclusion that the harm would be less than substantial was that "any reasonable observer" would know that the development was a modern addition to the landscape, separate G from the planned historic landscape or building he was within or considering or interpreting. The judge granted an application by, among others, the local planning authority under section 288 of the Town and County Planning Act 1990 to quash the inspector's decision on the ground that it was flawed because, among other things, he had failed to give effect to the duty under section 66(1) by not giving sufficient weight to the desirability of preserving the setting of the listed buildings.

On the developer's appeal—

H *Held*, dismissing the appeal, (1) that section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 required the decision-maker to give "the desirability of preserving the building or its setting" not merely careful consideration

[1] Planning (Listed Buildings and Conservation Areas) Act 1990, s 66(1): see post, para 2.
[2] Planning Policy Statement 5, policies HE9.1, HE9.4, HE10.1: see post, para 3.

A for the purpose of deciding whether there would be some harm, but considerable importance and weight when balancing the advantages of the proposed development against any such harm; that that general duty applied with particular force if harm would be caused to the setting of a Grade I listed building, which was a designated heritage asset of the highest significance; that, if the harm to the setting of the Grade I listed building would be less than substantial, the strength of the presumption against the grant of planning permission would be lessened but it would not be entirely removed; that, since the planning inspector had not given considerable importance B and weight to the desirability of preserving the setting of the listed buildings when carrying out the balancing exercise, he had not given proper effect to the section 66(1) duty; and that, accordingly, the judge had been right to conclude that the inspector's decision was flawed on that basis (post, paras 22, 23, 24, 26, 28, 29, 45, 46, 47).

The Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303, CA and *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, HL(E) applied.

C (2) That, to the extent that the application of the "reasonable observer" test had been the decisive factor in the inspector's reasoning for his conclusion that harm to the setting of the listed buildings was less than substantial, he had not properly applied the relevant Government policy guidance; that if it had not been the decisive factor he had not given adequate reasons for that conclusion; and that, accordingly, the judge had been right to conclude that the inspector's decision was flawed on that basis also (post, paras 43–44, 45, 46, 47).

D Decision of Lang J [2013] EWHC 473 (Admin); [2013] 2 P & CR 94 affirmed.

The following cases are referred to in the judgment of Sullivan LJ:

Bath Society, The v Secretary of State for the Environment [1991] 1 WLR 1303; [1992] 1 All ER 28; 89 LGR 834, CA

Heatherington (UK) Ltd v Secretary of State for the Environment (1994) 69 P & CR 374

E *R (Garner) v Elmbridge Borough Council* [2011] EWHC 86 (Admin); [2011] PTSR D25; [2011] EWCA Civ 891; [2012] PTSR D7, CA

South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403, HL(E)

F No additional cases were cited in argument.

APPEAL from Lang J

By an application under section 288 of the Town and Country Planning Act 1990 the applicants, East Northamptonshire District Council (the local planning authority), English Heritage and the National Trust, applied for an G order to quash the decision of a planning inspector appointed by the Secretary of State for Communities and Local Government, by a decision letter dated 12 March 2012, allowing an appeal by the developer, Barnwell Manor Wind Energy Ltd, against the decision of the local planning authority dated 24 January 2011 to refuse its application for planning permission for a four-turbine wind farm in a conservation area. The Secretary of State conceded that the inspector's decision should be quashed and took no H further part in proceedings. By order dated 11 March 2013 following judgment on 8 March 2013 Lang J [2013] EWHC 473 (Admin); [2013] 2 P & CR 94 granted the application on the basis grounds that the inspector (1) had failed under the duty in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to and give considerable weight to the desirability of preserving the settings of listed buildings, including Lyveden New Bield; (2) had failed correctly to interpret and apply the policies in Planning Policy Statement 5; and (3) had failed to give adequate reasons for his decision.

By an appellant's notice dated 28 March 2013, the developer appealed, with permission of the judge, on the grounds that the judge (1) had erred in concluding that section 66(1) of the 1990 Act required the inspector to give considerable weight to the desirability of preserving the settings of the many listed buildings in the area; (2) had taken an over-rigid approach to the policy statement and practice guide which were not intended to be prescriptive; and (3) had erred in finding that the inspector had failed to give adequate reasons for his conclusion that the harm would in all cases be less than substantial.

The facts are stated in the judgment of Sullivan LJ.

Gordon Nardell QC and *Justine Thornton* (instructed by *Eversheds LLP*) for the developer.

Morag Ellis QC and *Robin Green* (instructed by *Sharpe Pritchard*) for the applicants.

The Secretary of State did not appear and was not represented.

The court took time for consideration.

18 February 2014. The following judgments were handed down.

SULLIVAN LJ

Introduction

1 This is an appeal against the order dated 11 March 2013 of Lang J quashing the decision dated 12 March 2012 of a planning inspector appointed by the Secretary of State granting planning permission for a four-turbine wind farm on land north of Catshead Woods, Sudborough, Northamptonshire. The background to the appeal is set out in Lang J's judgment [2013] 2 P & CR 94 of 8 March 2013.

Section 66

2 Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") imposes a "General duty as respects listed buildings in exercise of planning functions". Subsection (1) provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

Planning policy

3 When the permission was granted the Government's planning policies on the conservation of the historic environment were contained in Planning Policy Statement 5 ("PPS5"). In PPS5 those parts of the historic environment that have significance because of their historic, archaeological, architectural

or artistic interest are called heritage assets. Listed buildings, scheduled ancient monuments and registered parks and gardens are called "designated heritage assets". Guidance to help practitioners implement the policies in PPS5 was contained in "PPS5: planning for the historic environment: historic environment planning practice guide". For present purposes, policies HE9 and HE10 in PPS5 are of particular relevance. Policy HE9.1 advised that:

> "There should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be . . . Substantial harm to or loss of a Grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, including scheduled monuments . . . Grade I and II* listed buildings and Grade I and II* registered parks and gardens . . . should be wholly exceptional."

Policy HE9.4 advised that:

> "Where a proposal has a harmful impact on the significance of a designated heritage asset which is less than substantial harm, in all cases local planning authorities should: (i) weigh the public benefit of the proposal (for example, that it helps to secure the optimum viable use of the heritage asset in the interests of its long term conservation) against the harm; and (ii) recognise that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss."

Policy HE10.1 advised decision-makers that when considering applications for development that do not preserve those elements of the setting of a heritage asset, they:

> "should weigh any such harm against the wider benefits of the application. The greater the negative impact on the significance of the heritage asset, the greater the benefits that will be needed to justify approval."

The inspector's decision

4 The inspector concluded, at para 22, that the wind farm would fall within and affect the setting of a wide range of heritage assets. For the purposes of this appeal the parties' submissions largely focused on one of the most significant of those assets: a site owned by the National Trust, Lyveden New Bield. Lyveden New Bield is covered by a range of heritage designations: Grade I listed building, inclusion in the register of parks and gardens of special historic interest at Grade I, and scheduled ancient monument.

5 It was common ground between the parties at the inquiry that the group of designated heritage assets at Lyveden New Bield was probably the finest surviving example of an Elizabethan garden, and that as a group the heritage asset at Lyveden New Bield had a cultural value of national, if not international significance. The inspector agreed, and found, at para 45: "this group of designated heritage assets has archaeological, architectural, artistic and historic significance of the highest magnitude."

6 The closest turbine in the wind farm site (following the deletion of one turbine) to Lyveden New Bield was around 1·3 km from the boundary of the registered park and 1·7 km from the New Bield itself. The inspector found, at para 46:

> "The wind turbines proposed would be visible from all around the site, to varying degrees, because of the presence of trees. Their visible presence would have a clear influence on the surroundings in which the heritage assets are experienced and as such they would fall within, and affect, the setting of the group."

This conclusion led the inspector to identify the central question, at para 46:

> "Bearing in mind PPS5 policy HE7, the central question is the extent to which that visible presence would affect the significance of the heritage assets concerned."

7 The inspector answered that question in relation to Lyveden New Bield in paras 47–51 of his decision letter.

> "47. While records of Sir Thomas Tresham's intentions for the site are relatively, and unusually, copious, it is not altogether clear to what extent the gardens and the garden lodge were completed and whether the designer considered views out of the garden to be of any particular significance. As a consequence, notwithstanding planting programmes that the National Trust have undertaken in recent times, the experience of Lyveden New Bield as a place, and as a planned landscape, with earthworks, moats and buildings within it, today, requires imagination and interpretation.
>
> "48. At the times of my visits, there were limited numbers of visitors and few vehicles entering and leaving the site. I can imagine that at busy times, the situation might be somewhat different but the relative absence of man-made features in views across and out of the gardens compartments, from the prospect mounds especially, and from within the garden lodge, give the place a sense of isolation that makes the use of one's imagination to interpret Sir Thomas Tresham's design intentions somewhat easier.
>
> "49. The visible, and sometimes moving, presence of the proposed wind turbine array would introduce a man-made feature, of significant scale, into the experience of the place. The array would act as a distraction that would make it more difficult to understand the place, and the intentions underpinning its design. That would cause harm to the setting of the group of designated heritage assets within it.
>
> "50. However, while the array would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the moated orchard, and various other places around the site, at a separation distance of between one and two kilometres, the turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site. Moreover, the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter). Any reasonable observer would know that the turbine array was a

modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting. A

"51. On that basis, the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield and Lyveden Old Bield, or their relationship to each other. As a consequence, the effect on the setting of these designated heritage assets, while clearly detrimental, would not reach the level of substantial harm." B

8 The inspector carried out "the balancing exercise" in paras 85–86 of his decision letter.

"85. The proposal would harm the setting of a number of designated heritage assets. However, the harm would in all cases be less than substantial and reduced by its temporary nature and reversibility. The proposal would also cause harm to the landscape but this would be ameliorated by a number of factors. Read in isolation though, all this means that the proposal would fail to accord with [conservation policies in the East Midlands regional plan ("EMRP")]. On the other hand, having regard to advice in PPS22, the benefits that would accrue from the wind farm in the 25-year period of its operation attract significant weight in favour of the proposal. The 10 MW that it could provide would contribute towards the 2020 regional target for renewable energy, as required by EMRP policy 40 and Appendix 5, and the wider UK national requirement. C D

"86. PPS5 policies HE9.4 and HE10.1 require the identified harm to the setting of designated heritage assets to be balanced against the benefits that the proposal would provide. Application of the development plan as a whole would also require that harm, and the harm to the landscape, to be weighed against the benefits. Key principle (i) of PPS22 says that renewable energy developments should be capable of being accommodated throughout England in locations where the technology is viable and environmental, economic, and social impacts can be addressed satisfactorily. I take that as a clear expression that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided. In my view, the significant benefits of the proposal in terms of the energy it would produce from a renewable source outweigh the less than substantial harm it would cause to the setting of designated heritage assets and the wider landscape." E F G

Lang J's judgment

9 Before Lang J the first, second and third applicants challenged the inspector's decision on three grounds. In summary, they submitted that the inspector had failed (1) to have special regard to the desirability of preserving the settings of listed buildings, including Lyveden New Bield; (2) correctly to interpret and apply the policies in PPS5; and (3) to give adequate reasons for his decision. The Secretary of State had conceded prior to the hearing that the inspector's decision should be quashed on ground (3), and took no part in the proceedings before Lang J and in this court. H

10 Lang J concluded [2013] 2 P & CR 94, para 72 that all three grounds of challenge were made out. In respect of ground (1) she concluded, at para 39:

> "in order to give effect to the statutory duty under section 66(1), a decision-maker should accord considerable importance and weight to the 'desirability of preserving . . . the setting' of listed buildings when weighing this factor in the balance with other 'material considerations' which have not been given this special statutory status. Thus, where the section 66(1) duty is in play, it is necessary to qualify Lord Hoffmann's statement in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780F–H that the weight to be given to a material consideration was a question of planning judgment for the planning authority."

Applying that interpretation of section 66(1) she concluded, at para 46:

> "the inspector did not at any stage in the balancing exercise accord 'special weight', or considerable importance to 'the desirability of preserving the setting'. He treated the 'harm' to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. Indeed, he downplayed 'the desirability of preserving the setting' by adopting key principle (i) of PPS22, as a 'clear indication that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided' (para 86). In so doing, he applied the policy without giving effect to the section 66(1) duty, which applies to all listed buildings, whether the 'harm' has been assessed as substantial or less than substantial."

11 In respect of ground (2) Lang J concluded that the policy guidance in PPS5 and the practice guide required the inspector to assess the contribution that the setting made to the significance of the heritage assets, including Lyveden New Bield, and the effect of the proposed wind turbines on both the significance of the heritage asset *and* the ability to appreciate that significance. Having analysed the inspector's decision, she found, at paras 55–65, that the inspector's assessment had been too narrow. He had failed to assess the contribution that the setting of Lyveden New Bield made to its significance as a heritage asset and the extent to which the wind turbines would enhance or detract from that significance, and had wrongly limited his assessment to one factor: the ability of the public to understand the asset based on the ability of "the reasonable observer" to distinguish between the "modern addition" to the landscape and the "historic landscape."

12 In respect of ground (3) Lang J found, at para 68, that the question whether Sir Thomas Tresham intended that the views from the garden and the garden lodge should be of significance was a controversial and important issue at the inquiry which the inspector should have resolved before proceeding to assess the level of harm. However, the inspector's reasoning on this issue was unclear. Having said in para 47 of his decision that it was "not altogether clear . . . whether the designer considered views out of the garden to be of any significance", he had concluded, in para 50, that "the turbine array would not intrude on any obviously intended, planned view

out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter)." It was not clear from paras 70–71 whether this was a conclusion that there were no planned views (as submitted by the second defendant) or a conclusion that there were such views but the turbine array would not intrude into them.

The grounds of appeal

13 On behalf of the second defendant, Mr Nardell QC challenged Lang J's conclusions in respect of all three grounds. At the forefront of his appeal was the submission that Lang J had erred in concluding that section 66(1) required the inspector, when carrying out the balancing exercise, to give "considerable weight" to the desirability of preserving the settings of the many listed buildings, including Lyveden New Bield. He submitted that section 66(1) did not require the decision-maker to give any particular weight to that factor. It required the decision-maker to ask the right question—would there be some harm to the setting of the listed building—and if the answer to that question was "yes"—to refuse planning permission unless that harm was outweighed by the advantages of the proposed development. When carrying out that balancing exercise the weight to be given to the harm to the setting of the listed building on the one hand and the advantages of the proposal on the other was entirely a matter of planning judgment for the decision-maker.

14 Turning to the policy ground, he submitted that Lang J had erred by taking an over-rigid approach to PPS5 and the practice guide which were not intended to be prescriptive. Given the way in which those objecting to the proposed wind farm had put their case at the inquiry, the inspector had been entitled to focus on the extent to which the presence of the turbines in views to and from the listed buildings, including Lyveden New Bield, would affect the ability of the public to appreciate the heritage assets.

15 In response to the reasons ground, he submitted that the question whether any significant view from the lodge or garden at Lyveden New Bield was planned or intended was a subsidiary, and not a "principal important controversial", issue. In any event, he submitted that on a natural reading of para 50 of the decision letter the inspector had simply found that the turbines would not intrude into such significant views, *if any*, as were obviously planned or intended, so it had been unnecessary for him to resolve the issue that he had left open in para 47 of the decision.

Discussion

Ground 1

16 What was Parliament's intention in imposing both the section 66 duty and the parallel duty under section 72(1) of the Listed Buildings Act to pay "special attention . . . to the desirability of preserving or enhancing the character or appearance" of conservation areas? It is common ground that, despite the slight difference in wording, the nature of the duty is the same under both enactments. It is also common ground that "preserving" in both enactments means doing no harm: see *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141,150, per Lord Bridge of Harwich.

17 Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?

18 Lang J analysed the authorities in paras 34–39 of her judgment. In chronological order they are: *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303; the *South Lakeland* case (see para 16 above); *Heatherington (UK) Ltd v Secretary of State for the Environment* (1994) 69 P & CR 374; and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. The *Bath Society* case and the *South Lakeland* case were concerned with (what is now) the duty under section 72. The *Heatherington* case is the only case in which the section 66 duty was considered. The *Tesco* case was not a section 66 or section 72 case, it was concerned with the duty to have regard to "other material considerations" under section 70(2) of the Town and Country Planning Act 1990 ("the Planning Act").

19 When summarising his conclusions in the *Bath Society* case [1991] 1 WLR 1303, 1318F–H about the proper approach which should be adopted to an application for planning permission in a conservation area, Glidewell LJ distinguished between the general duty under (what is now) section 70(2) of the Planning Act, and the duty under (what is now) section 72(1) of the Listed Buildings Act. Within a conservation area the decision-maker has two statutory duties to perform, but the requirement in section 72(1) to pay "special attention" should be the first consideration for the decision-maker . Glidewell LJ continued, at p 1319:

> "Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight . . . As I have said, the conclusion that the development will neither enhance nor preserve will be a consideration of considerable importance and weight. This does not necessarily mean that the application for permission must be refused, but it does in my view mean that the development should only be permitted if the decision-maker concludes that it carries some advantage or benefit which outweighs the failure to satisfy the section [72(1)] test and such detriment as may inevitably follow from that."

20 In the *South Lakeland* case [1992] 2 AC 141 the issue was whether the concept of "preserving" in what is now section 72(1) meant "positively preserving" or merely doing no harm. The House of Lords concluded that the latter interpretation was correct, but in his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms, at p 146E–G:

> "There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out

in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria."

21 In the *Heatherington* case 69 P & CR 374, the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of the Planning Act (since repealed and replaced by the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004). However, Mr David Keene QC, at p 383, when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the *Bath Society* case (see para 19 above), and said that the statutory objective "remains one to which considerable weight should be attached".

22 Mr Nardell submitted, correctly, that the inspector's error in the *Bath Society* case [1991] 1 WLR 1303 was that he had failed to carry out the necessary balancing exercise. In the present case the inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. Mr Nardell submitted that there was nothing in Glidewell LJ's judgment which supported the proposition that the court could go behind the inspector's conclusion. I accept that (subject to grounds 2 and 3, see para 29 et seq below) the inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell LJ's judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight."

23 That conclusion is reinforced by the passage in the speech of Lord Bridge in the *South Lakeland* case [1992] 2 AC 141 to which I have referred: see para 20 above. It is true, as Mr Nardell submits, that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in the *Bath Society* case. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight."

24 While I would accept Mr Nardell's submission that the *Heatherington* case 69 P & CR 374 does not take the matter any further, it does not cast any doubt on the proposition that emerges from the *Bath*

A *Society* case [1991] 1 WLR 1303 and the *South Lakeland* case [1992] 2 AC 141: that Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise.

B **25** In support of his submission that, provided he asked the right question—was the harm to the settings of the listed buildings outweighed by the advantages of the proposed development—the inspector was free to give what weight he chose to that harm, Mr Nardell relied on the statement in the speech of Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 780H that the weight to be given to a material consideration is C entirely a matter for the local planning authority (or in this case, the inspector): "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

26 As a general proposition, the principle is not in doubt, but the case D was concerned with the application of section 70(2) of the Planning Act. It was not a case under section 66(1) or 72(1) of the Listed Buildings Act. The proposition that decision-makers may be required by either statute or planning policy to give particular weight to certain material considerations was not disputed by Mr Nardell. There are many examples of planning policies, both national and local, which require decision-makers when exercising their planning judgment to give particular weight to certain E material considerations. No such policies were in issue in the *Tesco* case, but an example can be seen in this case. In para 16 of his decision letter the inspector referred to planning policy statement 22: Renewable Energy (PPS22) which says that the wider environmental and economic benefits of all proposals for renewable energy, whatever their scale, are material considerations which should be given "significant weight". In this case, the F requirement to give "considerable importance and weight" to the policy objective of preserving the setting of listed buildings has been imposed by Parliament. Section 70(3) of the Planning Act provides that section 70(1), which confers the power to grant planning permission, has effect subject to, inter alia, sections 66 and 72 of the Listed Buildings Act. Section 70(2) of the Planning Act, as substituted by section 143(2) of the Localism Act 2011, G requires the decision-maker to have regard to "material considerations" when granting planning permission, but Parliament has made the power to grant permission having regard to material considerations expressly subject to the section 66(1) duty.

27 Mr Nardell also referred us to the decisions of Ouseley J and this court in *R (Garner) v Elmbridge Borough Council* [2011] EWHC 86 (Admin); [2011] PTSR D25; [2011] EWCA Civ 891; [2012] PTSR D7, but H the issue in that case was whether the local planning authority had been entitled to conclude that no harm would be caused to the setting of another heritage asset of the highest significance, Hampton Court Palace. Such was the weight given to the desirability of preserving the setting of the palace that it was common ground that it would not be acceptable to grant planning permission for a redevelopment scheme which would have harmed the setting of the palace on the basis that such harm would be outweighed by some other planning advantage [2011] EWCA Civ 891 at [14]. Far from assisting Mr Nardell's case, the *Garner* case is an example of the practical application of the advice in policy HE9.1: that substantial harm to designated heritage assets of the highest significance should not merely be exceptional, but "wholly exceptional".

28 It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE9.4 and HE10.1 should ignore the overarching statutory duty imposed by section 66(1), which properly understood (see the *Bath Society* case [1991] 1 WLR 1303, the *South Lakeland* case [1992] 2 AC 141 and the *Heatherington* case 69 P & CR 374) requires considerable weight to be given by decision-makers to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings. That general duty applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance. If the harm to the setting of a Grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed.

29 For these reasons, I agree with Lang J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission. The second defendant's skeleton argument effectively conceded as much in contending that the weight to be given to this factor was, subject only to irrationality, entirely a matter for the inspector's planning judgment. In his oral submissions Mr Nardell contended that the inspector had given considerable weight to this factor, but he was unable to point to any particular passage in the decision letter which supported this contention, and there is a marked contrast between the "significant weight" which the inspector expressly gave in para 85 of the decision letter to the renewable energy considerations in favour of the proposal having regard to the policy advice in PPS22, and the manner in which he approached the section 66(1) duty. It is true that the inspector set out the duty in para 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings. This is a fatal flaw in the decision even if grounds 2 and 3 are not made out.

Ground 2

30 Grounds 2 and 3 are interlinked. The applicants contend that the inspector either misapplied the relevant policy guidance, or if he correctly applied it, failed to give adequate reasons for his conclusion that the harm to the setting of the listed buildings, including Lyveden New Bield, would in all cases be less than substantial. I begin with the policy challenge in ground 2. Lang J set out the policy guidance relating to setting in PPS5 and the practice guide in [2013] 2 P & CR 94, paras 62–64. The contribution made by the setting of Lyveden New Bield to its significance as a heritage asset was undoubtedly a "principal controversial" issue at the inquiry. In his proof of evidence on behalf of the local planning authority Mr Mills, its senior conservation officer, said, at para 4.5.1:

> "To make an assessment of the indirect impact of development or change on an asset it is first necessary to make a judgment about the contribution made by its setting."

Having carried out a detailed assessment of that contribution he concluded, at para 4.5.17:

> "In summary, what Tresham created at the site was a designed experience that was intimately linked to the surrounding landscape. The presence of the four prospect mounts along with the raised terrace provide a clear indication of the relationship of the site with the surrounding landscape."

Only then did he assess the impact of the proposed development on the setting by way of "a discussion as to the impact of the proposal on how the site is accessed and experienced by visitors".

31 In its written representations to the inquiry English Heritage said of the significance and setting of Lyveden New Bield:

> "The aesthetic value of the Lyveden heritage assets partly derives from the extraordinary symbolism and quality of the New Bield and the theatrical design of the park and garden. However, it also derives from their visual association with each other and with their setting. The New Bield is a striking presence when viewed on the skyline from a distance. The New Bield and Lyveden park and garden are wonderfully complemented by their undeveloped setting of woodland, pasture and arable land."

In para 8.23, English Heritage said:

> "The New Bield and Lyveden park and garden were designed to be prominent and admired in their rural setting, isolated from competing structures. The character and setting of the Lyveden heritage assets makes a crucial contribution to their significance individually and as a group."

32 In its written representations to the inquiry the National Trust said, at para 11, that each arm of the cruciform New Bield "was intended to offer extensive views in *all directions* over the surrounding parks and the Tresham estate beyond". The National Trust's evidence, at para 12, was that "one if not *the principal designed view from* within the lodge was from the

withdrawing rooms which linked to the important Great Chamber and Great Hall on the upper two levels of the west arm of the lodge". The Trust contended that this vista survived today, and was directly aligned with the proposed wind farm site. (Emphasis in both paragraphs as in the original.)

33 In his proof of evidence, the planning witness for the Stop Barnwell Manor Wind Farm Group said that:

> "the views of Lyveden New Bield from the east, south-east and south, both as an individual structure and as a group with its adjoining historic garden and listed cottage, are views of a very high order. The proposed turbines, by virtue of their monumental scale, modern mechanical appearance, and motion of the blades, would be wholly alien in this scene and would draw the eye away from the New Bield, destroying its dominating presence in the landscape."

34 This evidence was disputed by the second defendant's conservation witness, and the second defendant rightly contends that a section 288 appeal is not an opportunity to re-argue the planning merits. I have set out these extracts from the objectors' evidence at the inquiry because they demonstrate that the objectors were contending that the undeveloped setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset; that the New Bield (the lodge) had been designed to be a striking and dominant presence when viewed in its rural setting; and that the lodge had been designed so as to afford extensive views in all directions over that rural setting. Did the inspector resolve these issues in his decision, and if so, how?

35 I endorse Lang J's conclusion that the inspector did not assess the contribution made by the setting of Lyveden New Bield, by virtue of its being undeveloped, to the significance of Lyveden New Bield as a heritage asset. The inspector did not grapple with (or if he did consider it, gave no reasons for rejecting) the objectors' case that the setting of Lyveden New Bield was of crucial importance to its significance as a heritage asset because Lyveden New Bield was designed to have a dominating presence in the surrounding rural landscape, and to afford extensive views in all directions over that landscape; and that these qualities would be seriously harmed by the visual impact of a modern man-made feature of significant scale in that setting.

36 The inspector's reason for concluding in para 51 of the decision that the presence of the wind turbine array, while clearly having a detrimental effect on the setting of Lyveden New Bield, would not reach the level of substantial harm, was that it would not be so distracting that it would not prevent, or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield or Lyveden Old Bield or their relationship to each other.

37 That is, at best, only a partial answer to the objectors' case. As the practice guide makes clear, the ability of the public to appreciate a heritage asset is one, but by no means the only, factor to be considered when assessing the contribution that setting makes to the significance of a heritage asset. The contribution that setting makes does not depend on there being an ability to access or experience the setting: see in particular paras 117 and 122 of the practice guide, cited in Lang J's judgment [2013] 2 P & CR 94, para 64.

Ground 3

38 The inspector said that his conclusion in para 51 of the decision letter that the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield had been reached on the basis of his conclusions in para 50. In that paragraph, having said that the wind turbine array

> "would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the . . . orchard, and various other places around the site, at a separation distance of between one and two kilometres",

the inspector gave three reasons which formed the basis of his conclusion in para 51.

39 Those three reasons were: (a) The turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site. (b) The turbine array would not intrude on any obviously intended, planned view out of the garden or the garden lodge (which has windows all around its cruciform perimeter). (c) Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.

40 Taking those reasons in turn, reason (a) does not engage with the objectors' contention that the setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset because Lyveden New Bield was designed to be the dominant feature in the surrounding rural landscape. A finding that the "readily visible" turbine array would not dominate the outlook from the site puts the boot on the wrong foot. If this aspect of the objectors' case was not rejected (and there is no reasoned conclusion to that effect) the question was not whether the turbine array would dominate the outlook from Lyveden New Bield, but whether Lyveden New Bield would continue to be dominant within its rural setting.

41 Mr Nardell's submission to this court was not that the inspector had found that there were no planned views (cf the submission recorded in para 70 of Lang J's judgment), but that the inspector had concluded that the turbine array would not intrude into obviously intended or planned views *if any*. That submission is difficult to understand given the inspector's conclusion that the turbine array would be "readily visible" from the garden lodge, from the prospect mounds, and from various other places around the site. Unless the inspector had concluded that there were *no* intended or planned views from the garden or the garden lodge, and he did not reach that conclusion (see para 47 of the decision letter), it is difficult to see how he could have reached the conclusion that the "readily visible" turbine array would not "intrude" on any obviously intended or planned views from the garden lodge. I am inclined to agree with Mr Nardell's alternative submission that the inspector's conclusion that while "readily visible" from the garden lodge, the turbine array would not "intrude" on any obviously intended or planned view from it, is best understood by reference to his third conclusion in para 50. While visible in A views from the garden lodge the turbine array would not intrude upon, in the sense of doing substantial harm to, those views, for the reasons given in the last sentence of para 50.

42 I confess that, notwithstanding Mr Nardell's assistance, I found some difficulty, not in understanding the final sentence of para 50—plainly any reasonable observer would know that the turbine array was a modern B addition to the landscape and was separate from the planned historic landscape at Lyveden New Bield—but in understanding how it could rationally justify the conclusion that the detrimental effect of the turbine array on the setting of Lyveden New Bield would not reach the level of substantial harm. The inspector's application of the "reasonable observer" test was not confined to the effect of the turbine array on the setting of Lyveden New Bield. As Lang J pointed out in para 57 of her judgment, in C other paragraphs of his decision letter the inspector emphasised one particular factor, namely the ability of members of the public to understand and distinguish between a modern wind turbine array and a heritage asset, as his reason for concluding either that the proposed wind turbines would have no impact on the settings of other heritage assets of national significance (paras 28–31); or a harmful impact that was "much less than D substantial" on the setting of a Grade I listed church in a conservation area: para 36.

43 Matters of planning judgment are, of course, for the inspector. No one would quarrel with his conclusion that "any reasonable observer" would understand the differing functions of a wind turbine and a church and a country house or a settlement (para 30); would not be confused about the origins or purpose of a settlement and a church and a wind turbine array E (para 36); and would know that a wind turbine array was a modern addition to the landscape (para 50); but no matter how non-prescriptive the approach to the policy guidance in PPS5 and the practice guide, that guidance nowhere suggests that the question whether the harm to the setting of a designated heritage asset is substantial can be answered simply by applying the "reasonable observer" test adopted by the inspector in this F decision.

44 If that test was to be the principal basis for deciding whether harm to the setting of a designated heritage asset was substantial, it is difficult to envisage any circumstances, other than those cases where the proposed turbine array would be in the immediate vicinity of the heritage asset, in which it could be said that any harm to the setting of a heritage asset would G be substantial: the reasonable observer would always be able to understand the differing functions of the heritage asset and the turbine array, and would always know that the latter was a modern addition to the landscape. Indeed, applying the inspector's approach, the more obviously modern, large scale and functional the imposition on the landscape forming part of the setting of a heritage asset, the less harm there would be to that setting because the "reasonable observer" would be less likely to be confused about H the origins and purpose of the new and the old. If the "reasonable observer" test was the decisive factor in the inspector's reasoning, as it appears to have been, he was not properly applying the policy approach set out in PPS5 and the practice guide. If it was not the decisive factor in the inspector's reasoning, then he did not give adequate reasons for his conclusion that the harm to the setting of Lyveden New Bield would not be substantial. Since his conclusion that the harm to the setting of the designated heritage assets would in all cases be less than substantial was fed into the balancing exercise in paras 85 and 86, the decision letter would have been fatally flawed on grounds 2 and 3 even if the inspector had given proper effect to the section 66(1) duty.

Conclusion

45 For the reasons set out above, which largely echo those given by Lang J in her judgment, I would dismiss this appeal.

RAFFERTY LJ

46 I agree.

MAURICE KAY LJ

47 I also agree.

Appeal dismissed.

ALISON SYLVESTER, Barrister

Michaelmas Term
[2020] UKSC 52
On appeal from: [2020] EWCA Civ 214

JUDGMENT

R (on the application of Friends of the Earth Ltd and others) (Respondents) *v* Heathrow Airport Ltd (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lady Black
Lord Sales
Lord Leggatt

JUDGMENT GIVEN ON

16 December 2020

Heard on 7 and 8 October 2020

Appellant	*Respondent (1)*
Lord Anderson of Ipswich KBE QC Michael Humphries QC Richard Turney Malcolm Birdling (Instructed by Bryan Cave Leighton Paisner LLP)	David Wolfe QC Peter Lockley Andrew Parkinson (Instructed by Leigh Day (London))
	Respondent (2) Tim Crosland, Director, Plan B Earth

Respondents:

(1) Friends of the Earth

(2) Plan B Earth

LORD HODGE AND LORD SALES: (with whom Lord Reed, Lady Black and Lord Leggatt agree)

Introduction

1. This case concerns the framework which will govern an application for the grant of development consent for the construction of a third runway at Heathrow Airport. This is a development scheme promoted by the appellant, Heathrow Airport Ltd ("HAL"), the owner of the airport.

2. As a result of consideration over a long period, successive governments have come to the conclusion that there is a need for increased airport capacity in the South East of England to foster the development of the national economy.

3. An independent commission called the Airports Commission was established in 2012 under the chairmanship of Sir Howard Davies to consider the options. In its interim report dated 17 December 2013 the Airports Commission reached the conclusion that there was a clear case for building one new runway in the South East, to come into operation by 2030. In that report the Airports Commission set out scenarios, including a carbon-traded scenario under which overall carbon dioxide (CO_2) emissions were set at a cap consistent with a goal to limit global warming to 2ºC. The Commission reduced the field of proposals to three main candidates. Two of these involved building additional runway capacity at Heathrow Airport, either to the north west of the existing two runways ("the NWR Scheme") or by extending the existing northern runway ("the ENR Scheme"). The third involved building a second runway at Gatwick airport ("the G2R Scheme").

4. The Airports Commission carried out an extensive consultation on which scheme should be chosen. In its final report dated 1 July 2015 ("the Airports Commission Final Report") the Commission confirmed that there was a need for additional runway capacity in the South East by 2030 and concluded that, while all three options could be regarded as credible, the NWR Scheme was the best way to meet that need, if combined with a significant package of measures which addressed environmental and community impacts.

5. The Government carried out reviews of the Airports Commission's analysis and conclusions. It assessed the Airports Commission Final Report to be sound and robust. On 14 December 2015 the Secretary of State for Transport ("the Secretary of State") announced that the Government accepted the case for airport expansion;

agreed with, and would consider further, the Airports Commission's short-list of options; and would use the mechanism of a national policy statement ("NPS") issued under the Planning Act 2008 ("the PA 2008") to establish the policy framework within which to consider an application by a developer for a development consent order ("DCO"). The announcement also stated that further work had to be done in relation to environmental impacts, including those arising from carbon emissions.

6. In parallel with the development of national airports policy, national and international policy to combat climate change has also been in a state of development. The Climate Change Act 2008 ("the CCA 2008") was enacted on the same day as the PA 2008. It sets a national carbon target (section 1) and requires the Government to establish carbon budgets for the UK (section 4). There are mechanisms in the CCA 2008 to adjust the national target and carbon budgets (in sections 2 and 5, respectively) as circumstances change, including as scientific understanding of global warming develops.

7. In 1992, the United Nations adopted the United Nations Framework Convention on Climate Change. 197 states are now parties to the Convention. Following the 21st Conference of the parties to the Convention, on 12 December 2015 the text of the Paris Agreement on climate change was agreed and adopted. The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases, in particular CO_2, with the object of seeking to reduce the rate of increase in global warming and to contain such increase to well below 2°C above, and if possible to 1.5°C, above pre-industrial levels. On 22 April 2016 the United Kingdom signed the Paris Agreement and on 17 November 2016 the United Kingdom ratified the Agreement.

8. An expansion of airport capacity in the South East would involve a substantial increase in CO_2 emissions from the increased number of flights which would take place as a result. The proposals for such expansion have therefore given rise to a considerable degree of concern as to the environmental impact it would be likely to have on global warming and climate change. This is one aspect of the proposals for expansion of airport capacity, among many others, which have made the decision whether to proceed with such expansion a matter of controversy.

9. On 25 October 2016, the Secretary of State announced that the NWR Scheme was the Government's preferred option. In February 2017 the Government commenced consultation on a draft of an Airports NPS which it proposed should be promulgated pursuant to the PA 2008 to provide the national policy framework for consideration of an application for a DCO in respect of the NWR Scheme. A further round of consultation on a draft of this NPS was launched in October 2017. There were many thousands of responses to both consultations. In June 2018 the Government published its response to the consultations. It also published a response

to a report on the proposed scheme dated 1 November 2017 by the Transport Committee (a Select Committee of the House of Commons).

10. On 5 June 2018 the Secretary of State laid before Parliament the final version of the Airports NPS ("the ANPS"), together with supporting documents. As is common ground on this appeal, the policy framework set out in the ANPS makes it clear that issues regarding the compatibility of the building of a third runway at Heathrow with the UK's obligations to contain carbon emissions and emissions of other greenhouse gases could and should be addressed at the stage of the assessment of an application by HAL for a DCO to allow it to proceed with the development. As is also common ground, the ANPS makes it clear that the emissions obligations to be taken into account at the DCO stage will be those which are applicable at that time, assessed in the light of circumstances and the detailed proposals of HAL at that time.

11. On 25 June 2018 there was a debate on the proposed ANPS in the House of Commons, followed by a vote approving the ANPS by 415 votes to 119, a majority of 296 with support from across the House.

12. On 26 June 2018 the Secretary of State designated the ANPS under section 5(1) of the PA 2008 as national policy. It is the Secretary of State's decision to designate the ANPS which is the subject of legal challenge in these proceedings.

13. Objectors to the NWR Scheme commenced a number of claims against the Secretary of State to challenge the lawfulness of the designation of the ANPS on a wide variety of grounds. For the most part, those claims have been dismissed in the courts below in two judgments of the Divisional Court (Hickinbottom LJ and Holgate J) in the present proceedings, [2019] EWHC 1070 (Admin); [2020] PTSR 240, and an associated action ([2019] EWHC 1069 (Admin)) and in the judgment of the Court of Appeal in the present proceedings: [2020] EWCA Civ 214; [2020] PTSR 1446.

14. The Divisional Court dismissed all the claims brought by objectors, including those brought by the respondents to this appeal (Friends of the Earth - "FoE" - and Plan B Earth). FoE is a non-governmental organisation concerned with climate change. Plan B Earth is a charity concerned with climate change.

15. However, the Court of Appeal allowed appeals by FoE and Plan B Earth and granted declaratory relief stating that the ANPS is of no legal effect and that the Secretary of State had acted unlawfully in failing to take into account the Paris

Agreement in making his decision to designate the ANPS. The Court of Appeal set out four grounds for its decision:

(i) The Secretary of State breached his duty under section 5(8) of the PA 2008 to give an explanation of how the policy set out in the ANPS took account of Government policy, which was committed to implementing the emissions reductions targets in the Paris Agreement ("the section 5(8) ground");

(ii) The Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, to have regard to the desirability of mitigating and adapting to climate change, in that he failed to have proper regard to the Paris Agreement ("the section 10 ground");

(iii) The Secretary of State breached his duty under article 5 of the Strategic Environmental Assessment Directive ("the SEA Directive", Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment) to issue a suitable environmental report for the purposes of public consultation on the proposed ANPS, in that he failed to refer to the Paris Agreement ("the SEA Directive ground"); and

(iv) The Secretary of State breached his duty under section 10 of the PA 2008, when promulgating the ANPS, in that he failed to have proper regard to (a) the desirability of mitigating climate change in the period after 2050 ("the post 2050 ground") and (b) the desirability of mitigating climate change by restricting emissions of non-CO_2 impacts of aviation, in particular nitrous oxide ("the non-CO_2 emissions ground").

16. The Court of Appeal also rejected a submission by HAL, relying on section 31 of the Senior Courts Act 1981, that it should exercise its discretion as to remedy to refuse any relief, on the grounds that (HAL argued) it was highly likely that even if there had been no breach of duty by the Secretary of State the decision whether to issue the ANPS would have been the same.

17. HAL appeals to this court with permission granted by the court. HAL is joined in the proceedings as an interested party. It has already invested large sums of money in promoting the NWR Scheme and wishes to carry it through by applying for a DCO in due course and then building the proposed new runway. The Secretary of State has chosen not to appeal and has made no submissions to us. However, HAL

is entitled to advance all the legal arguments which may be available in order to defend the validity of the ANPS.

18. Prior to the Covid-19 pandemic, Heathrow was the busiest two-runway airport in the world. The pandemic has had a major impact in reducing aviation and the demand for flights. However, there will be a lead time of many years before any third runway at Heathrow is completed and HAL's expectation is that the surplus of demand for aviation services over airport capacity will have been restored before a third runway would be operational. Lord Anderson QC for HAL informed the court that HAL intends to proceed with the NWR Scheme despite the pandemic.

The Planning Act 2008

19. We are grateful to the Divisional Court for their careful account of the PA 2008, on which we draw for this section. The PA 2008 established a new unified "development consent" procedure for "nationally significant infrastructure projects" defined to include certain "airport-related development" including the construction or alteration of an airport that is expected to be capable of providing air passenger services for at least 10m passengers per year (sections 14 and 23). Originally, many of the primary functions under the Act were to be exercised by the Infrastructure Planning Commission, established under section 1. However, those functions were transferred to the Secretary of State by the Localism Act 2011.

20. The mischiefs that the Act was intended to address were identified in the White Paper published in May 2007, Planning for a Sustainable Future (Cm 7120) ("the 2007 White Paper"). Prior to the PA 2008, a proposal for the construction of a new airport or extension to an airport would have required planning permission under the Town and Country Planning Act 1990. An application for permission would undoubtedly have resulted in a public inquiry, whether as an appeal against refusal of consent or a decision by the Secretary of State to "call in" the matter for his own determination. As paragraph 3.1 of the 2007 White Paper said:

> "A key problem with the current system of planning for major infrastructure is that national policy and, in particular, the national need for infrastructure, is not in all cases clearly set out. This can cause significant delays at the public inquiry stage, because national policy has to be clarified and the need for the infrastructure has to be established through the inquiry process and for each individual application. For instance, the absence of a clear policy framework for airports development was identified by the inquiry secretary in his report on the planning inquiry as one of the key factors in the very long

> process for securing planning approval for Heathrow Terminal 5. Considerable time had to be taken at the inquiry debating whether there was a need for additional capacity. The Government has since responded by publishing the Air Transport White Paper to provide a framework for airport development. This identifies airport development which the Government considers to be in the national interest, for reference at future planning inquiries. But for many other infrastructure sectors, national policy is still not explicitly set out, or is still in the process of being developed."

21. Paragraph 3.2 identified a number of particular problems caused by the absence of a clear national policy framework. For example, inspectors at public inquiries might be required to make assumptions about national policy and national need, often without clear guidance and on the basis of incomplete evidence. Decisions by Ministers in individual cases might become the means by which government policy would be expressed, rather than such decisions being framed by clear policy objectives beforehand. In the absence of a clear forum for consultation at the national level, it could be more difficult for the public and other interested parties to have their say in the formulation of national policy on infrastructure. The ability of developers to make long-term investment decisions is influenced by the availability of clear statements of government policy and objectives, and might be adversely affected by the absence of such statements.

22. The 2007 White Paper proposed that national policy statements would set the policy framework for decisions on the development of national infrastructure.

> "They would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development."

The role of Ministers would be to set policy, in particular the national need for infrastructure development (para 3.4).

23. Paragraph 3.11 envisaged that any public inquiry dealing with individual applications for development consent would not have to consider issues such as whether there is a case for infrastructure development, or the types of development most likely to meet the need for additional capacity, since such matters would already have been addressed in the NPS. It was said that NPSs should have more weight than other statements of policy, whether at a national or local level: they

should be the primary consideration in the determination of an application for a DCO (para 3.12), although other relevant considerations should also be taken into account (para 3.13). To provide democratic accountability, it was said that NPSs should be subject to Parliamentary scrutiny before being adopted (para 3.27).

24. In line with the 2007 White Paper recommendation, Part 2 of the PA 2008 provides for NPSs which give a policy framework within which any application for development consent, in the form of a DCO, is to be determined. Section 5(1) gives the Secretary of State the power to designate an NPS for development falling within the scope of the Act; and section 6(1) provides that "[t]he Secretary of State must review each [NPS] whenever the Secretary of State thinks it appropriate to do so".

25. The content of an NPS is governed by section 5(5)-(8) which provide that:

> "(5) The policy set out in [an NPS] may in particular -
>
> (a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;
>
> (b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;
>
> (c) set out the relative weight to be given to specified criteria;
>
> (d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;
>
> (e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development;
>
> (f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.

> (6) If [an NPS] sets out policy in relation to a particular description of development, the statement must set out criteria to be taken into account in the design of that description of development.
>
> (7) [An NPS] must give reasons for the policy set out in the statement.
>
> (8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

As is made clear, the NPS may (but is not required to) identify a particular location for the relevant development.

26. In addition, under the heading "Sustainable development", section 10 provides (so far as relevant to these claims):

> "(1) This section applies to the Secretary of State's functions under sections 5 and 6.
>
> (2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.
>
> (3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of -
>
> > (a) mitigating, and adapting to, climate change; …"

27. The process for designation of an NPS is also set out in the Act. The PA 2008 imposed for the first time a transparent procedure for the public and other consultees to be involved in the formulation of national infrastructure policy in advance of any consideration of an application for a DCO.

28. The Secretary of State produces a draft NPS, which is subject to (i) an appraisal of sustainability ("AoS") (section 5(3)), (ii) public consultation and

publicity (section 7), and (iii) Parliamentary scrutiny (sections 5(4) and 9). In addition, there is a requirement to carry out a strategic environmental assessment under the SEA Directive as transposed by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("the SEA Regulations") (see regulation 5(2) of the SEA Regulations).

29. The consultation and publicity requirements are set out in section 7, which so far as relevant provides:

> "(1) This section sets out the consultation and publicity requirements referred to in sections 5(4) and 6(7).
>
> (2) The Secretary of State must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal. This is subject to subsections (4) and (5).
>
> (3) In this section 'the proposal' means -
>
> > (a) the statement that the Secretary of State proposes to designate as [an NPS] for the purposes of this Act or
> >
> > (b) (as the case may be) the proposed amendment.
>
> (4) The Secretary of State must consult such persons, and such descriptions of persons, as may be prescribed.
>
> (5) If the policy set out in the proposal identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal.
>
> (6) The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal."

30. A proposed NPS must be laid before Parliament (section 9(2) and (8)). The Act thus provides an opportunity for a committee of either House of Parliament to scrutinise a proposed NPS and to make recommendations; and for each House to scrutinise it and make resolutions (see section 9(4)).

31. An NPS is not the end of the process. It simply sets the policy framework within which any application for a DCO must be determined. Section 31 provides that, even where a relevant NPS has been designated, development consent under the PA 2008 is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project". Such applications must be made to the relevant Secretary of State (section 37).

32. Chapter 2 of Part 5 of the Act makes provision for a pre-application procedure. This provides for a duty to consult pre-application, which extends to consulting relevant local authorities and, where the land to be developed is in London, the Greater London Authority (section 42). There are also duties to consult the local community, and to publicise and to take account of responses to consultation and publicity (sections 47-49; and see also regulation 12 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572), which makes provision for publication of and consultation on preliminary environmental information). Any application for a DCO must be accompanied by a consultation report (section 37(3)(c)); and adequacy of consultation is one of the criteria for acceptance of the application (section 55(3) and (4)(a)).

33. Part 6 of the PA 2008 is concerned with "Deciding applications for orders granting development consent". Once the application has been accepted, section 56 requires the applicant to notify prescribed bodies and authorities and those interested in the land to which the application relates, who become "interested parties" to the application (section 102). The notification must include a notice that interested parties may make representations to the Secretary of State. Section 60(2) provides that where a DCO application is accepted for examination there is a requirement to notify any local authority for the area in which land, to which the application relates, is located (see section 56A)) and, where the land to be developed is in London, the Greater London Authority, inviting them each to submit a "local impact report" (section 60(2)).

34. The Secretary of State may appoint a panel or a single person to examine the application ("the Examining Authority") and to make a report setting out its findings and conclusions, and a recommendation as to the decision to be made on the application. The examination process lasts six months, unless extended (section 98); and the examination timetable is set out in the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) ("the Examination Rules"). In addition to local

impact reports (section 60), the examination process involves written representations (section 90), written questions by the Examining Authority (rules 8 and 10 of the Examination Rules), and hearings (which might be open floor and/or issue specific and/or relating to compulsory purchase) (sections 91-93). As a result of the examination process, the provisions of the proposed DCO may be amended by either the applicant or the Examination Authority, eg in response to the representations of interested parties; and it is open to the Secretary of State to modify the proposed DCO before making it.

35. Section 104 constrains the Secretary of State when determining an application for a DCO for development in relation to which an NPS has effect, in the following terms (so far as relevant to these claims):

> "(2) In deciding the application the Secretary of State must have regard to -
>
> > (a) any [NPS] which has effect in relation to development of the description to which the application relates (a 'relevant [NPS]'), …
> >
> > (b) any local impact report …,
> >
> > (c) any matters prescribed in relation to development of the description to which the application relates, and
> >
> > (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (3) The Secretary of State must decide the application in accordance with any relevant [NPS], except to the extent that one or more of subsections (4) to (8) applies.
>
> (4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant [NPS] would be unlawful by virtue of any enactment.

(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with [an NPS] is met.

(9) For the avoidance of doubt, the fact that any relevant [NPS] identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

36. Section 104 is complemented by section 106 which, under the heading "Matters which may be disregarded when determining an application", provides (so far as relevant to these claims):

"(1) In deciding an application for an order granting development consent, the Secretary of State may disregard representations if the Secretary of State considers that the representations -

(a) …

(b) relate to the merits of policy set out in [an NPS]….

(2) In this section 'representation' includes evidence."

That is also reflected in sections 87(3) and 94(8), under which the Examining Authority may disregard representations (including evidence) or refuse to allow representations to be made at a hearing if it considers that they "relate to the merits of the policy set out in [an NPS] …".

37. By section 120(1), a DCO may impose requirements in connection with the development for which consent is granted, eg it may impose conditions considered appropriate or necessary to mitigate or control the environmental effects of the development. Section 120(3) is a broad provision enabling a DCO to make provision relating to, or to matters ancillary to, the development for which consent is granted including any of the matters listed in Part 1 of Schedule 5 (section 120(4)). That schedule lists a wide range of potentially applicable provisions, including compulsory purchase, the creation of new rights over land, the carrying out of civil engineering works, the designation of highways, the operation of transport systems, the charging of tolls, fares and other charges and the making of byelaws and their enforcement.

38. Section 13 concerns "Legal challenges relating to [NPSs]". Section 13(1) provides:

> "A court may entertain proceedings for questioning [an NPS] or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if -
>
> > (a) the proceedings are brought by a claim for judicial review, and
> >
> > (b) the claim form is filed before the end of the period of six weeks beginning with the day after -
> >
> > > (i) the day on which the statement is designated as [an NPS] for the purposes of this Act, or
> > >
> > > (ii) (if later) the day on which the statement is published."

It was under section 13 that the claims by objectors to the ANPS were brought.

The Climate Change Act 2008

39. Again, we gratefully draw on the account given by the Divisional Court. As they explain, the UK has for a long time appreciated the desirability of tackling climate change, and wished to take a more rigorous domestic line. In the 2003 White Paper, "Our Energy Future - Creating a Low Carbon Economy", the Government committed to reduce CO_2 emissions by 60% on 1990 levels by 2050; and to achieve "real progress" by 2020 (which equated to reductions of 26-32%). The 60% figure emanated from the EU Council of Ministers' "Community Strategy on Climate Change" in 1996, which determined to limit emissions to 550 parts per million (ppm) on the basis that to do so would restrict the rise in global temperatures to 2ºC above pre-industrial levels which, it was then considered, would avoid the serious consequences of global warming. However, by 2005, there was scientific evidence that restricting emissions to 550ppm would be unlikely to be effective in keeping the rise to 2ºC; and only stabilising CO_2 emissions at something below 450ppm would be likely to achieve that result.

40. Parliament addressed these issues in the CCA 2008.

41. Section 32 established a Committee on Climate Change ("the CCC"), an independent public body to advise the UK and devolved Governments and Parliaments on tackling climate change, including on matters relating to the UK's statutory carbon reduction target for 2050 and the treatment of greenhouse gases from international aviation.

42. Section 1 gives a mandatory target for the reduction of UK carbon emissions. At the time of designation of the ANPS, it provided:

> "It is the duty of the Secretary of State [then, the Secretary of State for Energy and Climate Change: now, the Secretary of State for Business, Enterprise and Industrial Strategy ('BEIS')] to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline."

The figure of 80% was substituted for 60% during the passage of the Bill, as evolving scientific knowledge suggested that the lower figure would not be sufficient to keep the rise in temperature to 2ºC in 2050. Therefore, although the CCA 2008 makes no mention of that temperature target, as the CCC said in its report on the Paris Agreement issued in October 2016 (see para 73 below):

> "This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperatures to around 2ºC above pre-industrial levels."

The statutory target of a reduction in carbon emissions by 80% by 2050 was Parliament's response to the international commitment to keep the global temperature rise to 2ºC above pre-industrial levels in 2050. Since the designation of the ANPS, the statutory target has been made more stringent. The figure of 100% was substituted for 80% in section 1 of the CCA 2008 by the Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056.

43. The Secretary of State for BEIS has the power to amend that percentage (section 2(1) of the CCA 2008), but only:

(i) if it appears to him that there have been significant developments in scientific knowledge about climate change since the passing of the Act, or developments in European or international law or policy (section 2(2) and (3)): the Explanatory Note to the Act says, as must be the case, that "this power might be used in the event of a new international treaty on climate change";

(ii) after obtaining, and taking into account, advice from the CCC (section 3(1)); and

(iii) subject to Parliamentary affirmative resolution procedure (section 2(6)).

44. Section 1 of the CCA 2008 sets a target that relates to carbon only. Section 24 enables the Secretary of State for BEIS to set targets for other greenhouse gases, but subject to similar conditions to which an amendment to the section 1 target is subject.

45. In addition to the carbon emissions target set by section 1 - and to ensure compliance with it (see sections 5(1)(b) and 8) - the Secretary of State for BEIS is also required to set for each succeeding period of five years, at least 12 years in advance, an amount for the net UK carbon account ("the carbon budget"); and ensure that the net UK carbon account for any period does not exceed that budget (section 4). The carbon budget for the period including 2020 was set to be at least 34% lower than the 1990 baseline.

46. Section 10(2) sets out various matters which are required to be taken into account when the Secretary of State for BEIS sets, or the CCC advises upon, any carbon budget, including:

> "(a) scientific knowledge about climate change;
>
> (b) technology relevant to climate change;
>
> (c) economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sectors of the economy;
>
> (d) fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing;
>
> (e) social circumstances, and in particular the likely impact of the decision on fuel poverty;
>
> (f) …
>
> (h) circumstances at European and international level;
>
> (i) the estimated amount of reportable emissions from international aviation and international shipping …"

Therefore, although for the purposes of the CCA 2008 emissions from greenhouse gases from international aviation do not generally count as emissions from UK sources (section 30(1)), by virtue of section 10(2)(i), in relation to any carbon budget, the Secretary of State for BEIS and the CCC must take such emissions into account.

47. The evidence for the Secretary of State explains that the CCC has interpreted that as requiring the UK to meet a 2050 target which includes these emissions. The CCC has advised that, to meet the 2050 target on that basis, emissions from UK aviation (domestic and international) in 2050 should be no higher than 2005 levels, ie 37.5 megatons (million tonnes) of CO_2 ($MtCO_2$). This is referred to by the respondents as "the Aviation Target". However, the Aviation Policy Framework

issued by the Government in March 2013 explains that the Government decided not to take a decision on whether to include international aviation emissions in its carbon budgets, simply leaving sufficient headroom in those budgets consistent with meeting the 2050 target including such emissions, but otherwise deferring a decision for consideration as part of the emerging Aviation Strategy. The Aviation Strategy is due to re-examine how the aviation sector can best contribute its fair share to emissions reductions at both the UK and global level. It is yet to be finalised.

The SEA Directive

48. Again, in this section we gratefully draw on the careful account given by the Divisional Court. As they explain, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended ("the EIA Directive"), as currently transposed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), requires a process within normal planning procedures. (For the purposes of these claims, the transposing regulations have not materially changed over the relevant period; and we will refer to them collectively as "the EIA Regulations".) The SEA Directive as transposed by the SEA Regulations concerns the environmental impact of plans and programmes. The SEA Directive and Regulations applied to the ANPS. The EIA Directive would apply when there was a particular development for which development consent was sought, at the DCO stage.

49. Recital (1) to the SEA Directive states:

> "Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development."

As suggested here, the SEA Directive relies upon the "precautionary principle" where appropriate.

50. Recital (4) states:

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

51. Recital (9) states:

> "This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in member states or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, member states should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes."

Thus, the requirements of the SEA Directive are essentially procedural in nature; and it may be appropriate to avoid duplicating assessment work by having regard to work carried out at other levels or stages of a policy-making process (see article 5(2)-(3) below).

52. Recital (17) states:

> "The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

53. The objectives of the SEA Directive are set out in article 1:

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

54. Article 3(1) requires an "environmental assessment" to be carried out, in accordance with articles 4 to 9, for plans and programmes referred to in article 3(2)-(4) which are likely to have significant environmental effects. Article 3(2) requires strategic environmental assessment generally for any plan or programme which is prepared for (inter alia) transport, town and country planning or land use and which sets the framework for future development consent for projects listed in Annexes I and II to the EIA Directive. Strategic environmental assessment is also required for other plans and programmes which are likely to have significant environmental effects (article 3(4)). By virtue of sections 104 and 106 of the PA 2008, the ANPS designated under section 5 sets out the framework for decisions on whether a DCO for the development of an additional runway at Heathrow under Part 6 of that Act should be granted. That development would, in due course, require environmental impact assessment under the EIA Directive and Regulations; and there is no dispute that the ANPS needed to be subjected to strategic environmental assessment under the SEA Directive and the SEA Regulations.

55. Article 2(b) of the SEA Directive defines "environmental assessment" for the purposes of the Directive:

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

56. Article 4(1) requires "environmental assessment to be carried out during the preparation of a plan or programme and before its adoption ...", which in this instance would refer to the Secretary of State's decision to designate the ANPS.

57. Article 5 sets out requirements for an "environmental report". By article 2(c):

> "'environmental report' shall mean the part of the plan or programme documentation containing the information required in article 5 and Annex I."

In the case of the ANPS the environmental report was essentially the AoS.

58. Article 5(1) provides:

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

Annex I states, under the heading, "Information referred to in article 5(1)":

> "The information to be provided under article 5(1), subject to article 5(2) and (3), is the following:
>
> > (a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;
> >
> > (b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
> >
> > (c) the environmental characteristics of areas likely to be significantly affected;
> >
> > (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to [the Habitats and Birds Directives];
> >
> > (e) the environmental protection objectives, established at international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
> >
> > (f) the likely significant effects on the environment, including on issues such as biodiversity, population,

human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

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

(i) a description of the measures envisaged concerning monitoring in accordance with article 10;

(j) a non-technical summary of the information provided under the above headings."

Thus, the information required by the combination of article 5(1) and Annex I is subject to article 5(2) and (3), which provide:

> "(2) The environmental report prepared pursuant to paragraph 1 shall include the information that <u>may reasonably be required</u> taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters <u>are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment</u>.
>
> (3) Relevant information available on environmental effects of the plans and programmes and obtained <u>at other levels of decision-making or through other Community legislation</u> may be used for providing the information referred to in Annex I." (Emphasis added)

59. Accordingly, the information which is required to be included in an "environmental report", whether by article 5(1) itself or by that provision in conjunction with Annex I, is qualified by article 5(2) and (3) in a number of respects. First, the obligation is only to include information that "may reasonably be required", which connotes the making of a judgment by the plan-making authority. Second, that judgment may have regard to a number of matters, including current knowledge and assessment methods. In addition, the contents and level of detail in a plan such as the ANPS, the stage it has reached in the decision-making process and the ability to draw upon sources of information used in other decision-making, may affect the nature and extent of the information required to be provided in the environmental report for the strategic environmental assessment.

60. The stage reached by the ANPS should be seen in the context of the statutory framework of the PA 2008, as set out above (see paras 19-38). Section 5(5) authorises the Secretary of State to set out in an NPS the type and size of development appropriate nationally or for a specified area and to identify locations which are either suitable or unsuitable for that development. In addition, the Secretary of State may set out criteria to be applied when deciding the suitability of a location. Section 104(3) requires the Secretary of State to decide an application for a DCO in accordance with a relevant NPS, save in so far as any one or more of the exceptions in section 104(4)-(8) applies, which include the situation where the adverse impacts of a proposal are judged to outweigh its benefits (section 104(7)). Section 106(1) empowers the Secretary of State to disregard a representation objecting to such a proposal in so far as it relates to the merits of a policy contained in the NPS.

61. In the present case, the Secretary of State made it plain in the strategic environmental assessment process that the AoS drew upon and updated the extensive work which had previously been carried out by, and on behalf of, the Airports Commission, including numerous reports to the Airports Commission and its own final report. It is common ground that the Secretary of State was entitled to take that course.

62. Article 6 of the SEA Directive sets out requirements for consultation. Article 6(1) requires that the draft plan or programme and the environmental report be made available to the public and to those authorities designated by a member state under article 6(3) which, by virtue of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. In England, the designated authorities are Natural England, Historic England and the Environment Agency (see regulation 4 of the SEA Regulations). In the case of the ANPS, the Secretary of State also had to consult those designated authorities on the scope and level of detail of the information to be included in the environmental report (article 5(4)).

63. In relation to the consultation process, article 6(2) provides:

> "The authorities referred to in para 3 and the public referred to in para 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure."

64. "The public referred to in [article 6(4)]" is a cross-reference to the rules made by each member state for defining the public affected, or likely to be affected by, or having an interest in the decision-making on the plan. Regulation 13(2) of the SEA Regulations leaves this to be determined as a matter of judgment by the plan-making authority.

65. Article 8 requires the environmental report prepared under article 5, the opinions expressed under article 6, and the results of any transboundary consultations under article 7 to be "taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure".

66. In *Cogent Land LLP v Rochford District Council* [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2, Singh J held that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material (see paras 111-126). He held that articles 4, 6(2) and 8 of the Directive, along with their transposition in the SEA Regulations, are consistent with that conclusion; and that none of the previous authorities on the SEA Directive (which he reviewed) suggested otherwise. He held that SEA is not a single document, still less is it the same thing as the "environmental report". Rather, it is a process, during the course of which an environmental report must be produced (see para 112). The Court of Appeal endorsed this analysis in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] EWCA Civ 88; [2015] Env LR 28, in deciding that SEA failures in the early stages of an authority's preparation of its Core Strategy (a statutory development plan) were capable of being, and were in fact, cured by the steps taken in subsequent stages (see paras 48-54). We agree with this analysis.

67. It follows that strategic environmental assessment may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in article 5 and the consultation requirements in articles 6 and 7.

68. Regulation 12 of the SEA Regulations transposes the main requirements in article 5 of the Directive governing the content of an environmental report as follows (emphasis added):

> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of -
>
> > (a) implementing the plan or programme; and
> >
> > (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations <u>as may reasonably be required</u>, taking account of -
>
> > (a) current knowledge and methods of assessment;
> >
> > (b) the contents and level of detail in the plan or programme;
> >
> > (c) the stage of the plan or programme in the decision-making process; and
> >
> > (d) the extent to which certain measures are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

Schedule 2 replicates the list of items in Annex I to the SEA Directive. No issue is raised as to the adequacy of that transposition.

69. As the Divisional Court observed, it is plain from the language "as may reasonably be required" that the SEA Regulations, like the SEA Directive, allow the plan-making authority to make a judgment on the nature of the information in Schedule 2 and the level of detail to be provided in an environmental report, whether as published initially or in any subsequent amendment or supplement.

Factual background

70. At the heart of the challenge to the ANPS is the Paris Agreement (para 7 above) which acknowledged that climate change represents "an urgent and potentially irreversible threat to human societies and the planet" (Preamble to the Decision to adopt the Paris Agreement). In article 2 the Paris Agreement sought to enhance the measures to reduce the risks and impacts of climate change by setting a global target of "holding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels". Each signatory of the Paris Agreement undertook to take measures to achieve that long-term global temperature goal "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century …" (article 4(1)). Each party agreed to prepare, communicate and maintain successive nationally determined contributions ("NDCs") that it intended to achieve and to pursue domestic mitigation measures with the aim of achieving the objectives of such NDCs (article 4(2)). A party's successive NDC was to progress beyond its current NDC and was to reflect its highest possible ambition (article 4(3)).

71. Notwithstanding the common objectives set out in articles 2 and 4(1), the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any NDC applicable to the state in question. So far as concerns the United Kingdom, it is common ground that the relevant NDC is that adopted and communicated on behalf of the EU, which set a binding target of achieving 40% reduction of 1990 emissions by 2030. This is less stringent than the targets which had already been set in the fourth and fifth carbon budgets issued pursuant to section 4 of the CCA 2008, which were respectively a 50% reduction on 1990 levels for the period 2023-2027 and a 57% reduction for the period 2028-2032.

72. Before the United Kingdom had signed or ratified the Paris Agreement two Government Ministers made statements in the House of Commons about the Government's approach to the Paris Agreement. On 14 March 2016 the Minister of State for Energy, Andrea Leadsom MP, told the House of Commons that the Government "believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law - the question is not whether, but how we do it, and there is an important set of questions to be answered before we do". Ten days later (24 March 2016) Amber Rudd MP, Secretary of State for Energy and Climate Change, responded to an oral question on what steps her department was taking to enshrine the net zero emissions commitment of the Paris Climate Change Conference by stating that "the question is not whether we do it but how we do it."

73. The Government received advice from the CCC on the UK's response to the Paris goal. At a meeting on 16 September 2016 the CCC concluded that while a new long-term target would be needed to be consistent with the Paris goal, "the evidence was not sufficient to specify that target now".

74. In October 2016 the CCC published a report entitled "UK Climate Action following the Paris Agreement" on what domestic action the Government should take as part of a fair contribution to the aims of the Paris Agreement. In that report the CCC stated that the goals of the Paris Agreement involved a higher level of global ambition in the reduction of greenhouse gases than that which formed the basis of the UK's existing emissions reduction targets. But the CCC advised that it was neither necessary nor appropriate to amend the 2050 target in section 1 of the CCA 2008 or alter the level of existing carbon budgets at that time. It advised that there would be "several opportunities to revisit the UK's targets in the future" and that "the UK 2050 target is potentially consistent with a wide range of global temperature outcomes". In its executive summary (p 7) the CCC summarised its advice:

> "Do not set new UK emissions targets now … The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

75. In October 2017 the Government published its "Clean Growth Strategy" which set out its policies and proposals to deliver economic growth and decreased emissions. In Annex C in its discussion of UK climate action it acknowledged the risks posed by the growing level of global climate instability. It recorded the global goals of the Paris Agreement and that global emissions of greenhouse gases would need to peak as soon as possible, reduce rapidly thereafter and reach a net zero level in the second half of this century. It recorded the CCC's advice in these terms:

> "In October 2016 the [CCC] said that the Paris Agreement target 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements', but that the UK should not set new UK emissions targets now, as it already had stretching targets and achieving them will be a positive contribution to global climate action. The CCC advised that the UK's fair contribution to the Paris Agreement should include measures to maintain flexibility to go further on UK targets, the development of options to remove greenhouse gases from the air, and that its targets should be kept under review."

76. In December 2017 Plan B Earth and 11 other claimants commenced judicial review proceedings against the Secretary of State for BEIS and CCC alleging that the Secretary of State had unlawfully failed to revise the 2050 target in section 1 of the CCA 2008 in line with the Paris Agreement.

77. The Secretary of State pleaded:

> "[While] the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain nationally determined contributions to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to 'well below 2ºC' above pre-industrial levels and pursuing efforts to limit them to 1.5ºC. <u>This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim</u>." (Emphasis in original)

The CCC also explained its position in its written pleadings:

> "The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was unfeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement."

78. At an oral hearing ([2018] EWHC 1892 (Admin); [2019] Env LR 13), Supperstone J refused permission to proceed with the judicial review, holding among other things that the Paris Agreement did not impose any legally binding target on each contracting party, that section 2 of the CCA 2008 gave the Secretary of State the power, but did not impose a duty, to amend the 2050 target in the event of developments in scientific knowledge or European or international law or policy, and that on the basis of the advice of the CCC, the Secretary of State was plainly entitled to refuse to change the 2050 target. Asplin LJ refused permission to appeal on 22 January 2019.

79. In January 2018 the CCC published "An independent assessment of the UK's Clean Growth Strategy". In that report the CCC explained that the aim of the Paris Agreement for emissions to reach net zero in the second half of the century was likely to require the UK to revise its statutory 2050 target to seek greater reductions and advised that "it is therefore essential that actions are taken now to enable these

deeper reductions to be achieved" (p 21). The CCC invited the Secretary of State for BEIS to seek further advice from it and review the UK's long-term emissions targets after the publication of the report by the Intergovernmental Panel on Climate Change ("IPCC") on the implications of the Paris Agreement's 1.5ºC goal.

80. In January 2018 the Government published "A Green Future: Our 25 Year Plan to Improve the Environment" in which it undertook to continue its work in providing international leadership to meet the goals of the Paris Agreement (for example, p 118). In early 2018 governments, including the UK Government, were able to review a draft of the IPCC report and in early June 2018 the UK Government submitted final comments on the draft of the IPCC report.

81. On 17 April 2018 the Government announced at the Commonwealth Heads of Government Meeting that after the publication of the IPCC report later that year, it would seek the advice of the CCC on the implications of the Paris Agreement for the UK's long-term emissions reductions targets.

82. At the same time the Government was working to develop an aviation strategy which would address aviation emissions. In April 2018, after public consultation, the Department for Transport published "Beyond the Horizon: The Future of UK Aviation - Next Steps towards an Aviation Strategy" in which it undertook to investigate technical and policy measures to address aviation emissions and how those measures related to the recommendations of the CCC. It stated (para 6.24):

> "The government will look again at what domestic policies are available to complement its international approach and will consider areas of greater scientific uncertainty, such as the aviation's contribution to non-carbon dioxide climate change effects and how policy might make provision for their effects."

83. On 1 May in response to an oral parliamentary question concerning the offshore wind sector Claire Perry MP, Minister of State for Energy and Clean Growth, stated that the UK was the first developed nation to have said that it wanted to understand how to get to a zero-carbon economy by 2050.

84. On 5 June 2018, the Government issued its response to the consultation on the draft ANPS and the Secretary of State laid the proposed ANPS before Parliament. On the same day, the Secretary of State presented a paper on the proposed ANPS to a Cabinet sub-committee giving updated information on the three short-listed schemes and the Government's preference for the NWR scheme. In

relation to aviation emissions it stated that it was currently uncertain how international carbon emissions would be incorporated into the Government's carbon budget framework, that policy was developing and would be progressed during the development of the Aviation Strategy. The Government's position remained that action to address aviation emissions was best taken at an international level.

85. On 14 June 2018 the Chair of the CCC (Lord Deben) and Deputy Chair (Baroness Brown) wrote to the Secretary of State expressing surprise that he had not referred to the legal targets in the CCA 2008 or the Paris Agreement commitments in his statement to the House of Commons on the proposed ANPS on 5 June and stressing the need for his department to consider aviation's place in the overall strategy for UK emissions reduction. They stated that the Government should not plan for higher levels of aviation emissions "since this would place an unreasonably large burden on other sectors".

86. The Secretary of State responded on 20 June 2018 stating that the Government remained committed to the UK's climate change target and that the proposed ANPS made it clear that an increase in carbon emissions that would have a material impact on the Government's ability to meet its carbon reduction targets would be a reason to refuse development consent for the NWR. He stated that the Government was confident that the measures and requirements set out in the proposed ANPS provided a strong basis for mitigating the environmental impacts of expansion. He explained that the forthcoming Aviation Strategy would put in place a framework for UK carbon emissions to 2050, "which ensures that aviation contributes its fair share to action on climate change, taking into account the UK's domestic and international obligations".

87. After the Parliamentary debate on 25 June 2018 (para 11 above), the Secretary of State designated the ANPS as national policy on 26 June 2018 (para 12 above). Section 5 of the ANPS focused on the potential impacts of the NWR Scheme and the assessments that any applicant would have to carry out and the planning requirements which it would have to meet in order to gain development consent. In its discussion of greenhouse gas emissions the ANPS stated that the applicant would have to undertake an environmental impact assessment quantifying the greenhouse gas impacts before and after mitigation so that the project could be assessed against the Government's carbon obligations. In para 5.82 the ANPS stated:

> "Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets."

88. As in this appeal a challenge has been made as to the factual basis of the Secretary of State's decision not to consider the possible new domestic emissions targets which might result from the Paris Agreement, it is necessary to mention the evidence before the Divisional Court on this matter. In her first witness statement Ms Caroline Low, the Director of the Airport Capacity Programme at the Department for Transport, stated (para 458):

> "In October 2016 the CCC said that the Paris Agreement 'is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements' but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy that it is possible that the existing 2050 target could be consistent with the temperature stabilization goals set out in the Paris Agreement. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, my team has followed this advice and considered existing domestic legal obligations as the correct basis for assessing the carbon impact of the project, and that it is not appropriate at this stage for the government to consider any other possible targets that could arise through the Paris Agreement."

89. Her account was corroborated by Ms Ursula Stevenson, an engineering and project management consultant whom the Secretary of State retained to deal with the process for consideration of the environmental impacts of the NWR Scheme. She stated (witness statement para 3.128) that the Department had followed the CCC's advice when preparing the AoS required by the PA 2008 (see para 28 above) and accordingly had considered existing domestic legal obligations to be the correct basis for assessing the carbon impact of the project. She added:

> "At this stage, it is not possible to consider what any future targets [sic] might be recommended by the CCC to meet the ambitions of the Paris Agreement. It is expected that, should more ambitious targets be recommended and set through the carbon budgets beyond 2032, then government will be required to make appropriate policy decisions across all sectors of the economy to limit emissions accordingly."

She emphasised (para 3.129) that the obligations under the CCA 2008 could be made more stringent in future, should that prove necessary, and that the ANPS provided that any application for a DCO would have to be assessed by reference to whatever obligations were in place at that time.

90. The IPCC Special Report on Global Warming of 1.5ºC was published on 8 October 2018. It concluded that limiting global warming to that level above pre-industrial levels would significantly reduce the risks of challenging impacts on ecosystems and human health and wellbeing and that it would require "deep emissions reductions" and "rapid, far-reaching and unprecedented changes to all aspects of society". To achieve that target global net emissions of CO_2 would need to fall by about 45% from 2010 levels by 2030, reaching zero by 2050.

91. The Government commissioned the CCC to advise on options by which the UK should achieve (i) a net zero greenhouse gas target and/or (ii) a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement, including whether now was the right time to set such a target.

92. In December 2018 the Department for Transport published consultation materials on its forthcoming Aviation Strategy. In "Aviation 2050: The future of UK aviation" the Department stated (paras 3.83-3.87) that it proposed to negotiate in the International Civil Aviation Organisation (the UN body responsible for tackling international aviation climate emissions) for a long-term goal for international aviation that is consistent with the temperature goals of the Paris Agreement and that it would consider appropriate domestic action to support international progress. It stated that the Government would review the CCC's revised aviation advice and advice on the implications of the Paris Agreement. In the same month, in a paper commissioned and published by the Department and written by David S Lee, "International aviation and the Paris Agreement temperature goals" the author acknowledged that the Paris Agreement had a temperature-based target which implied the inclusion of all emissions that affect the climate. The author stated that aviation had significant climate impacts from the oxides of nitrogen, particle emissions, and effects on cloudiness but that those impacts were subject to greater scientific uncertainty than the impacts of CO_2. It recorded that examples of CO_2 emission equivalent metrics indicated up to a doubling of aviation CO_2 equivalent emissions to account for those non-CO_2 effects.

93. On 1 May 2019 Parliament approved a motion to declare a climate and environmental emergency.

94. On the following day, the CCC published a report entitled "Net zero: The UK's contribution to stopping global warming", in which they recommended that

legislation should be passed as soon as possible to create a new statutory target of net-zero greenhouse gases by 2050 and the inclusion of international aviation and shipping in that target (p 15). That recommendation, so far as it related to the CO_2 target, was implemented on 26 June 2019 when the Climate Change Act (2050 Target Amendment) Order 2019 amended section 1(1) of the CCA 2008.

95. On 24 September 2019 the CCC wrote to the Secretary of State for Transport advising that the international aviation and shipping emissions should be brought formally within the UK's net-zero statutory 2050 target. The statutory target has not yet been changed to this effect but international aviation and shipping are taken into account when the carbon budgets are set against the statutory target: section 10(2)(i) of the CCA 2008.

96. On 25 June 2020 the CCC published its 2020 Progress Report to Parliament entitled "Reducing UK emissions", in which it recommended that international aviation and shipping be included in the UK climate targets when the Sixth Carbon Budget is set (which should be in 2021) and net zero plans should be developed (p 22). It recommended that the UK's airport capacity strategy be reviewed in the light of COVID-19 and the net-zero target and that action was needed on non-CO_2 effects from aviation (p 180). The parties to this appeal have stated in the agreed Statement of Facts and Issues that it was expected that the Government's Aviation Strategy will be published before the end of 2020.

97. From this narrative of events it is clear that the Government's response to the targets set in the Paris Agreement has been developing over time since 2016, that it has led to the amendment of the statutory CO_2 target in section 1(1) of the CCA 2008 approximately one year after the Secretary of State designated the ANPS, and that the Government is still in the process of developing its Aviation Strategy in response to the advice of the CCC.

98. Before turning to the legal challenges in this appeal it is also important to emphasise that, as we have stated in para 10 above, HAL, FoE and Plan B Earth agree that should the NWR Scheme be taken forward to a DCO application, the ANPS would not allow it to be assessed by reference to the carbon reduction targets, including carbon budgets, that were in place when the ANPS was designated in June 2018. The ANPS requires that the scheme be assessed against the carbon reduction targets in place at the time when a DCO application is determined: para 5.82 of the ANPS which we have set out in para 87 above. There is therefore no question of the NWR Scheme being assessed in future against outdated emissions targets.

The judgments of the Divisional Court and the Court of Appeal

99. A number of objectors to the NWR Scheme and the ANPS brought a large number of disparate claims in these proceedings to challenge the ANPS. The Divisional Court heard the claims on a "rolled up" basis, that is to say by considering the question of whether to grant permission to apply for judicial review at the same time as considering the merits of the claims should permission be granted. The hearing lasted for seven days and involved a full merits consideration of all the claims by the Divisional Court. In a judgment of high quality, described by the Court of Appeal as a tour de force, the Divisional Court dismissed all of the claims. For some claims it granted permission to apply for judicial review and then dismissed them on the merits. For others, it decided that they were not reasonably arguable on the merits and refused to grant permission. After thorough examination, the Divisional Court reached the conclusion that none of the claims which form the subject of grounds (i) to (iv) in the present appeal were reasonably arguable, and accordingly refused permission to apply for judicial review in relation to each of them.

100. In relation to those claims, the Court of Appeal decided that they were both arguable and that they were made out as good claims. Accordingly, the Court of Appeal granted permission in relation to them for the respondents to apply for judicial review of the decision to designate the ANPS and then held that the ANPS was of no legal effect unless and until a review was carried out rectifying the legal errors.

Analysis

Ground (i) - the section 5(8) ground

101. This ground raises a question of statutory interpretation. Section 5(7) and (8) of the PA 2008, which we set out in para 25 above, provide that an NPS must give reasons for the policy set out in the statement and that the reasons must explain how the policy in the NPS "takes account of Government policy relating to the mitigation of, and adaptation to, climate change".

102. Mr Crosland for Plan B Earth presented this argument. Mr Wolfe QC for FoE adopted his submissions. Mr Crosland submits that it was unlawful for the Secretary of State when stating the reasons for the policy in the ANPS in June 2018 to have treated as irrelevant the Government's commitment to (a) the temperature target in the Paris Agreement and (b) the introduction of a new net-zero carbon target. The Government's commitment to the Paris Agreement targets constituted "Government

policy" within the meaning of section 5(8) of the PA 2008 and so should have been addressed in giving the reasons for the ANPS.

103. Plan B Earth advanced this argument before the Divisional Court, which rejected the submission. The Divisional Court held that the Paris Agreement did not impose an obligation on any individual state to implement its global objective in any particular way, Parliament had determined the contribution of the UK towards global targets in section 1 of the CCA 2008 as a national carbon cap which represented the relevant policy in an entrenched form, and the Secretary of State could not change that carbon target unless and until the conditions set out in that Act were met.

104. The Court of Appeal disagreed with the approach of the Divisional Court and held that Government policy in section 5(8) was not confined to the target set out in the CCA 2008. The words "Government policy" were words of the ordinary English language. Taking into account the consequences of the Paris Agreement involved no inconsistency with the provisions of the CCA 2008. Based on the Secretary of State's written pleadings the Court of Appeal concluded that the Secretary of State had received and accepted legal advice that he was legally obliged not to take into account the Paris Agreement and the court characterised that as a misdirection of law. We address that conclusion in the next section of this judgment at paras 124-129 below. The court held that section 5(8) of the PA 2008 simply required the Government to take into account its own policy. The statements of Andrea Leadsom MP and Amber Rudd MP in March 2016 (para 72 above) and the formal ratification of the Paris Agreement showed that the Government's commitment to the Paris Agreement was part of "Government policy" by the time of the designation of the ANPS in June 2018.

105. The principal question for determination is the meaning of "Government policy" in section 5(8) of the PA 2008. We adopt a purposive approach to this statutory provision which expands upon the obligation in section 5(7) that an NPS give reasons for the policy set out in it and interpret the statutory words in their context. The purpose of the provision is to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change. The section speaks of "Government policy", which points toward a policy which has been cleared by the relevant departments on a government-wide basis. In our view the phrase is looking to carefully formulated written statements of policy such as one might find in an NPS, or in statements of national planning policy (such as the National Planning Policy Framework), or in government papers such as the Aviation Policy Framework. For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which might be

characterised as "policy". Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field.

106. In our view, the epitome of "Government policy" is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it is appropriate that there be clear limits on what statements count as "Government policy", in order to render them readily identifiable as such. In our view the criteria for a "policy" to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute "policy" for the purposes of section 5(8). Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification: see for example *Inland Revenue Comrs v MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569 per Bingham LJ; *R (Gaines-Cooper) v Comrs for Her Majesty's Revenue and Customs* [2011] UKSC 47; [2011] 1 WLR 2625, paras 28 and 29 per Lord Wilson of Culworth, delivering the judgment with which the majority of the court agreed, and para 70 per Lord Mance. The statements of Andrea Leadsom MP and Amber Rudd MP (para 72 above) on which the Court of Appeal focused and on which Plan B Earth particularly relied do not satisfy those criteria. Their statements were not clear and were not devoid of relevant qualification in this context. They did not refer to the temperature targets at all and they both left open the question of how the Paris Agreement goal of net zero emissions would be enshrined in UK law. Andrea Leadsom went out of her way to emphasise that "there is an important set of questions to be answered before we do." The statements made by these ministers were wholly consistent with and plainly reflected the fact that there was then an inchoate or developing policy being worked on within Government. This does not fall within the statutory phrase.

107. We therefore respectfully disagree with the Court of Appeal in so far as they held (para 224) that the words "Government policy" were ordinary words which should be applied in their ordinary sense to the facts of a given situation. We also disagree with the court's conclusion (para 228) that the statements by Andrea Leadsom MP and Amber Rudd MP constituted statements of "Government policy" for the purposes of section 5(8).

108. Although the point had been a matter of contention in the courts below, no party sought to argue before this court that a ratified international treaty which had not been implemented in domestic law fell within the statutory phrase "Government policy". Plan B Earth and FoE did not seek to support the conclusion of the Court of Appeal (para 228) that it "followed from the solemn act of the United Kingdom's ratification of [the Paris Agreement]" that the Government's commitment to it was part of "Government policy". The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense.

Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, "are not part of UK law and give rise to no legal rights or obligations in domestic law" (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 55). Ratification does not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty. Moreover, it cannot be regarded in itself as a statement devoid of relevant qualification for the purposes of domestic law, since if treaty obligations are to be given effect in domestic law that will require law-making steps which are uncertain and unspecified at the time of ratification.

109. Before applying these conclusions to the facts of this case, it is necessary to consider another argument which HAL advances in this appeal. HAL renews an argument which the Divisional Court had accepted at least in part. HAL argues that because Parliament had set out the target for the reduction of carbon emissions in section 1 of the CCA 2008 and had established a statutory mechanism by which the target could be altered only with the assent of Parliament, "Government policy" was entrenched in section 1 and could not be altered except by use of the subordinate legislation procedure in sections 2 and 3 of the CCA 2008. The statutory scheme had either expressly or by necessary implication displaced the prerogative power of the Government to adopt any different policy in this field. In support of this contention HAL refers to the famous cases of *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, to which this court referred in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

110. The short answer to that submission is that it is possible for the Government to have a policy that it will seek Parliamentary approval of an alteration of the carbon target, which is to be taken into account in section 5(8) of the PA 2008. The ousting of a prerogative power in a field which has become occupied by a corresponding power conferred or regulated by statute is a legal rule which is concerned with the validity of the exercise of a power, and to the extent that exercise of powers might require reference to the target set out in section 1 of the CCA 2008 it would not be open to the Government to make reference to a different target, not as yet endorsed by Parliament under the positive resolution procedure applicable to changes to that statutory target. However, the rule does not address what is Government policy for the purposes of section 5(8) of the PA 2008. If at the date when the Secretary of State designated the ANPS, the Government had adopted and articulated a policy that it would seek to introduce a specified new carbon target into section 1 of the CCA 2008 by presenting draft subordinate legislation to that effect for the approval of Parliament, the Secretary of State could readily record in the ANPS that the Government had resolved to seek that change but that it required the consent of Parliament for the new target to have legal effect. Further, questions such as how to

mitigate non-CO_2 emissions fell outside the carbon emissions target in the CCA 2008.

111. Turning to the facts of the case, it is clear from the narrative of events in paras 70-96 above that in June 2018, when the Secretary of State for Transport designated the ANPS, the Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development. There was no established policy beyond that already encapsulated in the CCA 2008. The Government followed the advice of the CCC. The CCC's advice in 2016 was that the evidence was not sufficient to specify a new carbon target and that it was not necessary to do so at that time (paras 73-74 above). In early 2018 the CCC invited the Government to seek further advice from it after the publication of the IPCC's report (para 79 above). During 2018 the Government's policy in relation to aviation emissions was in a process of development and no established policy had emerged on either the steps to be taken at international level or about which domestic measures would be adopted; it was expected that the forthcoming Aviation Strategy would clarify those matters (paras 83 and 86 above). The Government's consultation in December 2018 confirmed that the development of aviation-related targets was continuing and in 2020 the Government's Aviation Strategy is still awaited (paras 92 and 96 above).

112. Against this background, the section 5(8) challenge fails and HAL's appeal on this ground must succeed. It is conceded that the Paris Agreement itself is not Government policy. The statements by Andrea Leadsom MP and Amber Rudd MP in 2016, on which Plan B Earth principally founds, do not amount to Government policy for the purpose of section 5(8) of the PA 2008. The statements concerning the development of policy which the Government made in 2018 were statements concerning an inchoate and developing policy and not an established policy to which section 5(8) refers. Mr Crosland placed great emphasis on the facts (i) that the Airports Commission had assessed the rival schemes against scenarios, one of which was that overall CO_2 emissions were set at a cap consistent with a worldwide goal to limit global warming to 2ºC, and (ii) that that scenario was an input into Secretary of State's assessment of the ANPS at a time when the UK Government had ratified the Paris Agreement and ministers had made the statements to which we referred above. But those facts are irrelevant to the section 5(8) challenge. It is not in dispute that the internationally agreed temperature targets played a formative role in the development of government policy. But that is not enough for Plan B Earth to succeed in this challenge. What Mr Crosland characterised as a "policy commitment" to the Paris Agreement target did not amount to "Government policy" under that subsection.

113. Finally, Mr Crosland sought to raise an argument under section 3 of the Human Rights Act 1998 that interpreting section 5(8) so as to preclude consideration of the temperature limit in the Paris Agreement would tend to allow major national

projects to be developed and that those projects would create an intolerable risk to life and to people's homes contrary to articles 2 and 8 of the European Convention on Human Rights ("ECHR"). This argument must fail for two reasons. First, as Lord Anderson for HAL submits, the argument was advanced as a separate ground before the Divisional Court and rejected, that finding was not appealed to the Court of Appeal, and is therefore not before this court. Secondly, even if it were to be treated as an aspect of Plan B Earth's section 5(8) submission and thus within the scope of the appeal (as Mr Crosland sought to argue), it is in any event unsound because any effect on the lives and family life of those affected by the climate change consequences of the NWR Scheme would result not from the designation of the ANPS but from the making of a DCO in relation to the scheme. As HAL has conceded and the respondents have agreed, the ANPS requires the NWR Scheme to be assessed against the emissions targets which would be current if and when an application for a DCO were determined.

Ground (ii): the section 10 ground

114. Mr Wolfe for FoE presented the submissions for the respondents on this ground and grounds (iii) and (iv). Mr Crosland for Plan B Earth adopted those submissions.

115. Section 10 of the PA 2008 applies to the Secretary of State's function in promulgating an NPS. In exercising that function the Secretary of State must act with the objective of contributing to the achievement of sustainable development. Sustainable development is a recognised term in the planning context and its meaning is not controversial in these proceedings. As explained in paras 7 and 8 of the National Planning Policy Framework (July 2018), at a very high level the objective of sustainable development involves "meeting the needs of the present without compromising the ability of future generations to meet their own needs"; it has three overarching elements, namely an environmental objective, an economic objective and a social objective. For a major infrastructure project like the development of airport capacity in the South East, which promotes economic development but at the cost of increased greenhouse gases emissions, these elements have to be taken into account and balanced against each other. Section 10(3)(a) provides that the Secretary of State must, in particular, have regard to the desirability of "mitigating, and adapting to, climate change". Unlike in section 5(8) of the PA 2008, this is not a factor which is tied to Government policy.

116. As it transpired, very little divided the parties under this ground. The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

> "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."

117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a

decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann).

122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings*. In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain (para 71 above), the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS.

123. At para 5.69 of the ANPS the Secretary of State stated:

> "The Government has a number of international and domestic obligations to limit carbon emissions. Emissions from both the construction and operational phases of the [NWR Scheme] project will be relevant to meeting these obligations."

This statement covered the Paris Agreement as well as other international treaties. At para 5.71 the ANPS correctly stated that "[t]he UK's obligations on greenhouse gas emissions are set under the [CCA 2008]". As explained above, the relevant NDCs required to be set under the Paris Agreement were covered by the target in the CCA 2008 and the carbon budgets set under that Act. At paras 5.72-5.73 of the ANPS it was explained how aviation emissions were taken into account in setting carbon budgets under the CCA 2008 in accordance with the advice given by the CCC.

124. We have set out the evidence of Ms Low and Ms Stevenson regarding this topic (paras 88 and 89 above) which confirms that, in acting for the Secretary of State in drawing up the ANPS, they followed the advice of the CCC that the existing measures under the CCA 2008 were capable of being compatible with the 2050 target set by the Paris Agreement. The CCC did not recommend adjusting the UK's targets further at that stage. They were to be kept under review and appropriate adjustments could be made to the emissions target and carbon budgets under the CCA 2008 in future as necessary. According to that advice, therefore, sufficient account was taken of the Paris Agreement by ensuring that the relevant emissions target and carbon budgets under the CCA 2008 would be properly taken into account in the construction and operation of the NWR Scheme. The ANPS ensured that this would occur: see para 5.82 (set out at para 87 above).

125. Therefore, on a correct understanding of the ANPS and the Secretary of State's evidence, this is not a case in which the Secretary of State omitted to give any consideration to the Paris Agreement; nor is it one in which no weight was given to the Paris Agreement when the Secretary of State decided to issue the ANPS. On the contrary, the Secretary of State took the Paris Agreement into account and, to the extent that the obligations under it were already covered by the measures under the CCA 2008, he gave weight to it and ensured that those obligations would be brought into account in decisions to be taken under the framework established by the ANPS. On proper analysis the question is whether the Secretary of State acted irrationally in omitting to take the Paris Agreement further into account, or give it greater weight, than in fact he did.

126. In its judgment, the Divisional Court recorded (para 638) that the Secretary of State accepted that, in designating the ANPS, he took into account only the CCA 2008 carbon emission targets and did not take into account either the Paris Agreement or otherwise any post-2050 target or non-CO_2 emissions (these latter points are relevant to ground (iv) below). However, this way of describing the position masks somewhat the way the Paris Agreement did in fact enter into consideration by the Secretary of State. In the same paragraph, the Divisional Court summarised two submissions advanced by counsel for the Secretary of State as to why the Secretary of State's approach was not unlawful: (i) on its proper construction, and having regard to the express reference to the UK's international obligations in section 104(4) of the PA 2008, the PA 2008 requires the Secretary of State to ignore international commitments except where they are expressly referred to in that Act; alternatively, (ii) even if not obliged to ignore such commitments, the Secretary of State had a discretion as to whether to do so and was not obliged to take them into account. The Divisional Court rejected the first argument but accepted the second. It noted that the Secretary of State was bound by the obligations in the CCA 2008, "which … effectively transposed international obligations into domestic law" (para 643). Beyond that, the Secretary of State had a discretion whether to take the Paris Agreement further into account, and had not (even arguably) acted irrationally in deciding not to do so. It therefore refused to give permission for judicial review of the ANPS on this ground. The Court said (para 648):

> "In our view, given the statutory scheme in the CCA 2008 and the work that was being done on if and how to amend the domestic law to take into account the Paris Agreement, the Secretary of State did not arguably act unlawfully in not taking into account that Agreement when preferring the NWR Scheme and in designating the ANPS as he did. As we have described, if scientific circumstances change, it is open to him to review the ANPS; and, in any event, at the DCO stage this issue will be re-visited on the basis of the then up to date scientific position."

127. Mr Wolfe sought to support the judgment of the Court of Appeal in relation to this ground. He argued that the evidence for the Secretary of State had to be read in the light of the first submission made by his counsel in the Divisional Court, and that the true position was that the Secretary of State (acting by his officials and advisers) had been advised that he was not entitled to have regard to the Paris Agreement when deciding whether to designate the ANPS and had proceeded on that basis, with the result that he had not in fact exercised any discretion in deciding not to have further regard to the Paris Agreement. He also submitted that it was obvious that it was a material consideration. Mr Wolfe was successful in persuading the Court of Appeal on these points (paras 203 and 234-238 of its judgment). The Court of Appeal accepted his submissions that there was an error of law in the

approach of the Secretary of State "because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10" and "[i]f he had asked himself that question … the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account".

128. With respect to the Court of Appeal, they were wrong to overturn the judgment of the Divisional Court on this ground. Mr Wolfe's submissions conflated a submission of law (submission (i) above) made by counsel for the Secretary of State as recorded in para 638 of the judgment of the Divisional Court and the evidence of fact given by the relevant witnesses for the Secretary of State. In making his submission of law, counsel was not giving evidence about the factual position. There is a fundamental difference between submissions of law made by counsel and evidence of fact. Clearly, if the Secretary of State had been correct in submission (i) that would have provided an answer to the case against him whatever the position on the facts. This explains why counsel advanced the submission. But it is equally clear that if that submission failed, the Secretary of State made an alternative submission that he had a discretion whether to take the Paris Agreement further into account than was already the case under the CCA 2008 and that there had been no error of law in the exercise of that discretion. That was the submission accepted by the Divisional Court.

129. In our view, both the submissions of Mr Wolfe which the Court of Appeal accepted are unsustainable. The Divisional Court's judgment on this point is correct. On the evidence, the Secretary of State certainly did ask himself the question whether he should take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the CCA 2008 and concluded in the exercise of his discretion that it would not be appropriate to do so. As mentioned above, this case is in the class referred to in para 121 above.

130. Mr Wolfe sought to suggest that in deciding the case as it did, the Court of Appeal had acted as a first instance court (since the Divisional Court had refused to give permission for judicial review on this ground) and that it had made factual findings to contrary effect which this court was not entitled to go behind. He also submitted that HAL, in its notice of appeal, had not questioned the factual position as it was taken to be by the Court of Appeal and was therefore not entitled to dispute it on this appeal.

131. Neither of these submissions has any merit. The Divisional Court considered the claims brought against the Secretary of State at a rolled up hearing lasting many days and considered each claim in full and in depth. In respect of all aspects of the Divisional Court's decision, both in relation to those claims on which it granted

permission for judicial review but then dismissed the claim and in relation to those claims (including those relating to grounds (i) to (iv) in this appeal) on which after full consideration it decided they were unarguable and so refused to grant permission for judicial review, the Court of Appeal correctly understood that its role was the conventional role of an appellate court, to examine whether the Divisional Court had erred in its decision. In any event, this court can read the undisputed evidence of Ms Low and Ms Stevenson for itself and has the benefit of an agreed Statement of Facts and Issues which makes it clear what the true factual position was. The Court of Appeal was wrong to proceed on the basis of a different assessment of the facts. On a fair reading of HAL's notice of appeal, it indicated that its case under this ground was to be that the Secretary of State had a discretion whether to have regard to the Paris Agreement, which discretion had been exercised lawfully. In any event, that was put beyond doubt by HAL's written case. FoE and Plan B Earth have been on notice of HAL's case under this ground for a long time and are in no way prejudiced by it being presented in submissions to this court.

132. The view formed by the Secretary of State, that the international obligations of the UK under the Paris Agreement were sufficiently taken into account for the purposes of the designation of the ANPS by having regard to the obligations under the CCA 2008, was in our judgment plainly a rational one. Mr Wolfe barely argued to the contrary. The Secretary of State's assessment was based on the advice of the CCC, as the relevant independent expert body. The assessment cannot be faulted. Further, the ANPS itself indicated at para 5.82 that the up-to-date carbon targets under the CCA 2008, which would reflect developing science and any change in the UK's international obligations under the Paris Agreement, would be taken into account at the stage of considering whether a DCO should be granted. That was a necessary step before the NWR Scheme could proceed. Moreover, as observed by the Divisional Court, there was scope for the Secretary of State to amend the ANPS under section 6 of the PA 2008, should that prove to be necessary if it emerged in the future that there was any inconsistency between the ANPS and the UK's obligations under the Paris Agreement.

133. It should also be observed that the carbon emissions associated with all three of the principal options identified by the Airports Commission (that is, the NWR Scheme, the ENR Scheme and the G2R Scheme) were assessed to be broadly similar. Accordingly, reference to the Paris Agreement does not provide any basis for preferring one scheme rather than another. To the extent the obligations under the Paris Agreement have a bearing on the decision to designate the ANPS, therefore, they are only significant if it is to be argued that there should not be any decision to meet economic needs by increasing airport capacity by one of these schemes. But in light of the extensive work done by the Airports Commission about the need for such an increase in capacity it could not be said that the Secretary of State acted irrationally in considering that the case for airport expansion had been sufficiently made out to allow the designation of the ANPS. The respondents did not

seek to argue that this aspect of his reasoning was irrational. As we have noted above, the concept of sustainability in section 10 of the PA 2008 includes consideration of economic and social factors as well as environmental ones.

134. In light of the factual position, it is not necessary to decide the different question whether, if the Secretary of State had omitted to think about the Paris Agreement at all (so that this was a case of the type described in para 120 above), as an unincorporated treaty, that would have constituted an error of law. That is not a straightforward issue and we have not heard submissions on the point. We say no more about it.

Ground (iii): the SEA Directive ground

135. The SEA Directive operates along with the EIA Directive to ensure that environmental impacts from proposals for major development are properly taken into account before a development takes place. The relationship between the Directives was explained by Lord Reed in *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 10-30. The SEA Directive applies "upstream", at the stage of preparation of strategic development plans or proposals. The EIA Directive requires assessment of environmental impacts "downstream", at the stage when consent for a particular development project is sought. Although the two Directives are engaged at different points in the planning process for large infrastructure projects such as the NWR Scheme, they have similar objects and have to deal with similar issues of principle, including in particular the way in which regard should be had to expert assessment of various factors bearing on that process. These points indicate that a similar approach should apply under the two Directives.

136. The SEA Directive is implemented in domestic law by the SEA Regulations. It is common ground that the SEA Regulations are effective in transposing the Directive into domestic law. Accordingly, it is appropriate to focus the discussion of this ground on the SEA Directive itself.

137. The structure of the SEA Directive appears from its provisions, set out and discussed above. The Directive requires that an environmental assessment of major plans and proposals should be carried out. The ANPS is such a plan, which will have a significant effect in setting the policy framework for later consideration of whether to grant a DCO for implementing the NWR Scheme. Therefore the proposal to designate it under section 5 of the PA 2008 required an "environmental assessment" as defined in article 2(b). The environmental assessment had to include "the preparation of an environmental report" and "the carrying out of consultations". An environmental report for the purposes of the Directive is directed to providing a basis for informed public consultation on the plan.

138. The decision-making framework under the SEA Directive is similar to that under the EIA Directive for environmental assessment of particular projects. Under the EIA Directive, an applicant for planning consent for particular projects has to produce an environmental statement which, among other things, serves as a basis for consultation with the public. Under the SEA Directive, the public authority which proposes the adoption of a strategic plan has to produce an environmental report for the same purpose. In due course, any application by HAL for a DCO will have to go through the process of environmental assessment pursuant to the EIA Directive and the EIA Regulations.

139. FoE and Plan B Earth complain that the environmental report which the Secretary of State was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris Agreement. Mr Wolfe pointed out that the Secretary of State did not include the Paris Agreement in the long list of legal instruments and other treaties appended to the scoping report produced in March 2016 (ie after the Paris Agreement was adopted in December 2015 but before it was signed by the UK in April 2016 and ratified by it in November 2016) for the purposes of preparing the draft AoS which was to stand as the Secretary of State's environmental report for the purposes of the SEA Directive for the consultation on the draft ANPS. No reference to the Paris Agreement was included in the AoS used for the February 2017 consultation on the draft ANPS, nor in that used for the October 2017 consultation on the draft ANPS.

140. Against this, HAL points out that the carbon target in the CCA 2008 and the carbon budgets set under that Act were referred to in the AoS, as well as in the draft ANPS itself, so to that extent the UK's obligations under the Paris Agreement were covered in the environmental report. Beyond that, the evidence of Ms Stevenson (who led the team who prepared the AoS on behalf of the Secretary of State) makes it clear that the Secretary of State followed the advice of the CCC in deciding that it was not necessary and would not be appropriate to make further reference to the Paris Agreement in the AoS. The existing domestic legal obligations were considered to be the correct basis for assessing the carbon impact of the project, and it would be speculative and unhelpful to guess at what different targets might be recommended by the CCC in the future. Therefore, despite its omission from the scoping report, when the AoS actually came to be drafted the Paris Agreement (which had been ratified by the UK after the scoping report was issued) had been considered and the Secretary of State, acting by Ms Stevenson and her team, had decided in the exercise of his discretion not to make distinct reference to it.

141. As regards the law, the parties are in agreement. Any obligation to make further reference to the Paris Agreement in the environmental report depended on the application of three provisions of the SEA Directive. Under paragraph (e) of Annex I, the AoS had to provide information in the form of "the environmental protection objectives, established at international, Community or member state

level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation". But, as stated in the introduction to Annex I, this was "subject to article 5(2) and (3)" of the Directive, set out at para 58 above.

142. It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report. It is also common ground that the approach to be followed in deciding whether the Secretary of State has exercised his discretion unlawfully for the purposes of that provision is that established in relation to the adequacy of an environmental statement when applying the EIA Directive, as set out by Sullivan J in *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29 ("*Blewett*"). *Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level. In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) Beatson J held that the *Blewett* approach was also applicable in relation to the adequacy of an environmental report under the SEA Directive. The Divisional Court and the Court of Appeal in the present case endorsed this view (at paras 401-435 and paras 126-144 of their respective judgments). The respondents have not challenged this and we see no reason to question the conclusion of the courts below on this issue.

143. As Sullivan J held in *Blewett* (paras 32-33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal *Wednesbury* principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation "gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies". The EIA Directive and Regulations do not impose a standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 Sullivan J warned against adoption of an "unduly legalistic approach" in relation to assessment of the adequacy of an environmental statement and said:

> "… The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that 'an [environmental impact assessment] application' (as defined in the Regulations) must be accompanied by an environmental

> statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, at p 404, the purpose is 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations …, but they are likely to be few and far between."

Lord Hoffmann (with whom the other members the Appellate Committee agreed on this issue) approved this statement in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587, para 38.

144. As the Divisional Court and the Court of Appeal held in the present case, the discretion of the relevant decision-maker under article 5(2) and (3) of the SEA Directive as to whether the information included in an environmental report is adequate and appropriate for the purposes of providing a sound and sufficient basis for public consultation leading to a final environmental assessment is likewise subject to the conventional *Wednesbury* standard of review. We agree with the Court of Appeal when it said (para 136):

> "The court's role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information 'may reasonably be required' when taking into account the considerations referred to - first, 'current knowledge and methods of assessment'; second, 'the contents and level of detail in the plan or programme'; third, 'its stage in the decision-making process'; and fourth 'the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment'. These requirements leave the authority with a

> wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional 'Wednesbury' standard of review - as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

145. The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134-135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, para 50, "[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed …".

146. The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex

environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.

147. The appositeness of Sullivan J's analysis in *Blewett* at para 41, quoted above, has been borne out in this case. The draft ANPS issued with the AoS for the purposes of consultation included the statement that it was compatible with the UK's international obligations in relation to climate change. Concerns about the impact of the expansion of Heathrow on the UK's ability to meet its climate change commitments were raised in representations made during the consultation. In the Government's response to the consultation published on 5 June 2018 these representations were noted and the Government's position in relation to them was explained (paras 8.18-8.19 and 8.25). The Government's view was that the NWR Scheme was capable of being compatible with the UK's international obligations and that there was no good reason to hold up the designation of the ANPS until future policy in relation to aviation carbon emissions, which was in a state of development internationally and domestically, was completely fixed. Accordingly, it is clear that the public was able to comment on the Paris Agreement in the course of the consultation and that their comments were taken into account in the environmental assessment required by the SEA Directive. It again appears from this material that the Secretary of State did have regard to the Paris Agreement when deciding to designate the ANPS.

148. As we have said, Mr Wolfe did not challenge the legal framework set out above. In particular, he did not challenge the appropriateness of applying the *Wednesbury* standard in relation to the exercise of discretion under article 5(2) and (3). Instead, in line with his submission under ground (ii) above, his submission was that the Secretary of State had decided that the Paris Agreement was not a relevant statement of international policy falling within Annex I, paragraph (e), because he had been advised that it was legally irrelevant to the decision he had to take as to whether to designate the ANPS. Thus, according to Mr Wolfe, the Secretary of State had never reached the stage of exercising his discretion whether to include a distinct reference to the Paris Agreement in the AoS. The Secretary of State's decision that the Paris Agreement was irrelevant as a matter of law was wrong, and therefore the Secretary of State had erred in law because he simply did not turn his mind to whether reference to it should be included in the environmental report (the AoS). This was the argument which the Court of Appeal accepted at paras 242 to 247. The Court of Appeal's reasoning on this point was very short because, as it pointed out, it followed its reasoning in relation to the respondents' submissions in relation to section 10 of the PA 2008 (ground (ii) above).

149. In our view, as with the ground (ii) above, Mr Wolfe's submission and the reasoning of the Court of Appeal cannot be sustained in light of the relevant evidence on the facts. As we have explained, the Secretary of State did not treat the Paris Agreement as legally irrelevant and on that basis refuse to consider whether reference should be made to it. On the contrary, as Ms Stevenson explains in her evidence, in compiling the AoS as the environmental statement required under the SEA Directive the Secretary of State decided to follow the advice of the CCC to the effect that the UK's obligations under the Paris Agreement were sufficiently taken into account in the UK's domestic obligations under the CCA 2008, which were referred to in the ANPS and the AoS. Further reference to the Paris Agreement was not required. As we have already held above, this was an assessment which was plainly rational and lawful.

150. Therefore, we would uphold this ground of appeal as well. Having regard to the evidence regarding the factual position, the Divisional Court was right to reject this complaint by the respondents (paras 650-656). The Secretary of State did not act in breach of any of his obligations under the SEA Directive in drafting the AoS as the relevant environmental report in respect of the ANPS, and in omitting to include any distinct reference in it to the Paris Agreement.

Ground (iv) - the post-2050 and non-CO_2 emissions grounds

151. This ground concerns other matters which it is said that the Secretary of State failed to take into consideration in the performance of his duty under section 10(2) and (3) of the PA 2008. Those provisions, as we have said, obliged the Secretary of State in performing his function of designating the ANPS to do so "with the objective of contributing to sustainable development" and in so doing to "have regard to the desirability of … mitigating, and adapting to, climate change".

152. FoE has argued and the Court of Appeal (paras 248-260) has accepted that the Secretary of State failed in his duty under section 10 to have regard to (i) the effect of emissions created by the NWR Scheme after 2050 and (ii) the effect of non-CO_2 emissions from that scheme. The Divisional Court dealt with this matter together with the matter which has become ground (ii) in this appeal, namely whether the Secretary of State failed to have regard to the Paris Agreement in breach of section 10, as issue 19 in the rolled up hearing (paras 633-648, 659(iv)) and held that that FoE's case was not arguable. The Court of Appeal (para 256) correctly treated this issue as closely bound up with what is now ground (ii) in this appeal. It is not in dispute in this appeal that in assessing whether the Secretary of State was bound to address the effect of the post-2050 emissions and the effect of the non-CO_2 emissions in the ANPS we are dealing with the third category of considerations in Simon Brown LJ's categorisation in *R v Somerset County Council, Ex p Fewings* (para 116 above). The Secretary of State had a margin of appreciation

in deciding what matters he should consider in performing his section 10 duty. It is also not in dispute that it is appropriate to apply the *Wednesbury* irrationality test to that decision (para 119 above). The task for the court therefore is one of applying that legal approach to the facts of this case.

153. We address first the question of post-2050 emissions before turning to the non-CO_2 emissions.

(i) post-2050 emissions

154. FoE's argument on the relevance to the objectives of the Paris Agreement of the impacts of emissions after 2050 was straightforward. An assessment of the impact of the emissions from aircraft using the North West Runway by reference to a greenhouse gas target for 2050 fails to consider whether it would be sustainable for the additional aviation emissions from the use of the North West Runway to occur after 2050 given the goal of the Paris Agreement for global emissions to reach net zero in the second half of the century.

155. HAL submitted that the Secretary of State's approach is entirely rational. Lord Anderson points out, and FoE accepts, that the Airports Commission assessed the carbon emissions of each of the short-listed schemes over a 60-year appraisal period up to 2085/2086 and that the same appraisal period was used in the AoS which accompanied the ANPS. The Secretary of State therefore did take into account the fact that there would be carbon emissions from the use of the North West Runway after 2050 and quantified those emissions. It was not irrational to decide not to attempt to assess post-2050 emissions by reference to future policies which had yet to be formulated. It was rational for him to assume that future policies in relation to the post-2050 period, including new emissions targets, could be enforced by the DCO process and mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth.

156. In our view, HAL is correct in its submission that the Secretary of State did not act irrationally in not attempting in the ANPS to assess post-2050 emissions against policies which had yet to be determined. It is clear from the AoS that the Department for Transport modelled the likely future carbon emissions of both Heathrow and Gatwick airports, covering aircraft and other sources of emissions, to 2085/2086 (paras 6.11.1- 6.11.3, 6.11.13 and Table 6.4). As we have set out in our discussion of ground (i) above, policy in response to the global goals of the Paris Agreement was in the course of development in June 2018 when the Secretary of State designated the ANPS and remains in development.

157. Further, as we have already pointed out (paras 10 and 98 above), the designation of the NWR Scheme in the ANPS did not immunise the scheme from complying with future changes of law and policy. The NWR Scheme would fall to be assessed against the emissions targets which were in force at the date of the determination of the application for a DCO. Under section 120 of the PA 2008 (para 37 above) the DCO may impose requirements corresponding to planning conditions and requirements that the approval of the Secretary of State be obtained. Under section 104 (para 35 above), the Secretary of State is not obliged to decide the application for the DCO in accordance with the ANPS if (i) that would lead the United Kingdom to be in breach of any of its international obligations, (ii) that would lead the Secretary of State be in breach of any duty imposed by or under any other enactment, (iii) the Secretary of State is satisfied that deciding the application in accordance with the ANPS would be unlawful by virtue of any enactment and (iv) the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits. There are therefore provisions in place to make sure that the NWR Scheme complies with law and policy, including the Government's forthcoming Aviation Strategy, at the date when the DCO application is determined.

158. There are also mechanisms available to the Government, as HAL submits (para 155 above), by which the emissions from the use of the North West Runway can be controlled.

(ii) non-CO_2 emissions

159. To understand FoE's argument in relation to non-CO_2 emissions, it is necessary first to identify what are the principal emissions which give rise to concern. Mr Tim Johnson, of the Aviation Environmental Federation, explained in his first witness statement that aircraft emit nitrogen oxides, water vapour and sulphate and soot aerosols, which combine to have a net warming effect. Depending on atmospheric humidity, the hot air from aircraft exhausts combines with water vapour in the atmosphere to form ice crystals which appear as linear condensation trails and can lead to cirrus-like cloud formation. Using the metric of radiative forcing (RF), which is a measure of changes in the energy balance of the atmosphere in watts per square metre, it is estimated that the overall RF by aircraft is 1.9 times greater than the forcing by aircraft CO_2 emissions alone, but the RF metric is not suitable for forecasting future impacts. He recognised that there is continuing uncertainty about the impacts of non-CO_2 emissions, which tend to be short-lived, but he stated that there is high scientific consensus that the total climate warming effect of aviation is more than that from CO_2 emissions alone. Scientists are exploring metrics to show how non-CO_2 impacts can be reflected in emission forecasts for the purpose of formulating policy.

160. There is substantial agreement between the parties that there is continuing uncertainty in the scientific community about the effects of non-CO_2 emissions. The Department for Transport acknowledged this uncertainty in the AoS (para 6.11.11):

> "The assessment undertaken is based on CO_2 emissions only … There are likely to be highly significant climate change impacts associated with non-CO_2 emissions from aviation, which could be of a similar magnitude to the CO_2 emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty and have therefore not been assessed. There are also non-CO_2 emissions associated with the operation of the airport infrastructure, such as from refrigerant leaks and organic waste arisings, however, evidence suggests that these are minor and not likely to be material."

The AoS returned to this topic (Appendix A-9, para 9.11.5):

> "In addition, there are non-carbon emissions associated with the combustion of fuels in aircraft engines while in flight, which are also thought to have an impact on climate change. As well as CO_2, combustion of aviation fuel results in emission of water vapour, nitrogen oxides (NO_x) and aerosols. NO_x are indirect greenhouse gases, in that they do not give rise to a radiative effect themselves, but influence the concentration of other direct greenhouse gases … With the exception of sulphate aerosols, all other emissions cause warming. In addition, the flight of aircraft can also cause formation of linear ice clouds (contrails) and can lead to further subsequent aviation-induced cloudiness. These cloud effects cause additional warming. Evidence suggests that the global warming impact of aviation, with these sources included, could be up to two times that of the CO_2 impact by itself, but that the level of scientific uncertainty involved means that no multiplier should be applied to the assessment. For these reasons the [Airports Commission] did not assess the impact of the non-CO_2 effects of aviation and these have not been included in the AoS assessment. This position is kept under review by DfT but it is worth noting that non-CO_2 emissions of this type are not currently included in any domestic or international legislation or emissions targets and so their inclusion in the assessment would not affect its conclusion regarding legal compliance. <u>It is recommended that further work be done on these impacts by</u>

> the applicant during the detailed scheme design, according to the latest appraisal guidance." (Emphasis added)

161. This approach of addressing the question of capacity by reference to CO_2 emissions targets, keeping the policy in relation to non-CO_2 emissions under review and requiring an applicant for a DCO to address such impacts by reference to the state of knowledge current at the time of the determination of its application was consistent with the advice of the CCC to the Airports Commission and to the Secretary of State. The Airports Commission recorded that advice in its interim report in December 2013: because of the uncertainties in the quantification of the impact of non-CO_2 emissions, the target for constraining CO_2 emissions remained the most appropriate basis for planning future airport capacity. The approach of reconsidering the effect of all significant emissions when determining an application for a DCO is reflected in the ANPS which addressed the CO_2 emissions target and stated (para 5.76):

> "Pursuant to the terms of the Environmental Impact Assessment Regulations, the applicant should undertake an assessment of the project as part of the environmental statement, to include an assessment of any likely significant climate factors. … The applicant should quantify the greenhouse gas impacts before and after mitigation to show the impacts of the proposed mitigation." (Emphasis added)

The approach remains consistent with the CCC's advice since the designation of the ANPS. In its letter of 24 September 2019 to the Secretary of State recommending that international aviation and shipping emissions be included in a net-zero CO_2 emissions target, the CCC stated:

> "Aviation is likely to be the largest emitting sector in the UK by 2050, even with strong progress on technology and limiting demand. Aviation also has climate warming effects beyond CO_2, which it will be important to monitor and consider within future policies." (Emphasis added)

162. The Government in its response to consultations on the ANPS (para 11.50) stated that it will address how policy might make provision for the effects of non-CO_2 aviation emissions in its Aviation Strategy. That strategy is due to be published shortly.

163. The Secretary of State when he designated the ANPS was aware that the applicant for a DCO in relation to the NWR Scheme would have to provide an environmental assessment which addressed, and would be scrutinised against, the then current domestic and international rules and policies on aviation and other emissions. He would have been aware of his power to make requirements under section 120 of the PA 2008 and to depart from the ANPS in the circumstances set out in section 104 of that Act (para 157 above).

164. The Court of Appeal (para 258) upheld FoE's challenge stating the precautionary principle and common sense suggested that scientific uncertainty was not a reason for not taking something into account at all, even if it could not be precisely quantified at this stage. The Court did not hold in terms that the Secretary of State had acted irrationally in this regard but said (para 261) that, since it was remitting the ANPS to the Secretary of State for reconsideration, the question of non-CO_2 emissions and the effect of post-2050 emissions would need to be taken into account as part of that exercise.

165. We respectfully disagree with that approach. The precautionary principle adds nothing to the argument in this context and we construe the judgment as equating the principle with common sense. But a court's view of common sense is not the same as a finding of irrationality, which is the only relevant basis on which FoE seeks to impugn the designation in its section 10 challenges. In any event we are satisfied that the Secretary of State's decision to address only CO_2 emissions in the ANPS was not irrational.

166. In summary, we agree with the Divisional Court that it is not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-CO_2 emissions in the ANPS for six reasons. First, his decision reflected the uncertainty over the climate change effects of non-CO_2 emissions and the absence of an agreed metric which could inform policy. Secondly, it was consistent with the advice which he had received from the CCC. Thirdly, it was taken in the context of the Government's inchoate response to the Paris Agreement. Fourthly, the decision was taken in the context in which his department was developing as part of that response its Aviation Strategy, which would seek to address non-CO_2 emissions. Fifthly, the designation of the ANPS was only the first stage in a process by which permission could be given for the NWR Scheme to proceed and the Secretary of State had powers at the DCO stage to address those emissions. Sixthly, it is clear from both the AoS and the ANPS itself that the applicant for a DCO would have to address the environmental rules and policies which were current when its application would be determined.

Conclusion

167. It follows that HAL succeeds on each of grounds (i) to (iv) of its appeal. It is not necessary therefore to address ground (v) which is concerned with the question whether the court should have granted the relief which it did. We would allow the appeal.

Neutral Citation Number: [2021] EWHC 555 (Admin)

Case No: CO/2455/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

ABBOTSKERSWELL PARISH COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT (2) TEIGNBRIDGE DISTRICT COUNCIL (3) ANTONY REW, STEVEN REW AND JILL REW (4) TORBAY AND SOUTH DEVON NHS FOUNDATION TRUST	**Defendants**

- -

- -

Estelle Dehon and Paul Stookes (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Guy Williams (instructed by the **Government Legal Department**) for the **First Defendant**
Charles Banner QC and Matthew Henderson (instructed by **Clarke Willmott LLP**) for the **Third Defendants**
The **Second and Fourth Defendants** did not appear and were not represented

Hearing dates: 2 & 3 February 2021

- -

Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for a statutory review pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") of the decision of the First Defendant ("the Secretary of State"), made on 3 June 2020, to allow an appeal by the Third Defendant ("the Rew family") and grant outline planning permission for a major mixed use development, and full permission for a change of use of agricultural buildings, on land at Wolborough Barton, Coach Road, Newton Abbot TQ12 1EJ ("the Site").

2. The grant of planning permission comprised two distinct elements:

   i) Outline permission for a mixed used development comprising circa 1,210 dwellings, a primary school, up to 12,650 sq. m. of employment floorspace, two care homes, community facilities, retail/local centre floorspace, open space and associated infrastructure. Only the location and access were determined; all other matters were to be approved by the local planning authority as reserved matters, in accordance with a Masterplan and Design Code (also to be approved by the local planning authority), and in accordance with detailed conditions.

   ii) Full permission for a change of use of existing agricultural buildings to a hotel, restaurant and bar, involving erection of new build structures, an access road and parking.

   This claim relates to the grant of outline permission only.

3. The Claimant is the Parish Council for the village and parish of Abbotskerswell which is close to the Site. It objected to the grant of planning permission.

4. The Rew family own the Site and are the applicants for planning permission. The Second Defendant ("the DC") is the local planning authority, which failed to determine the Rew family's application for planning permission. On the Rew family's appeal to the Secretary of State, on 21 June 2018, the DC resisted the grant of planning permission, on the basis of the adverse impact on biodiversity.

5. The issue which concerned the Fourth Defendant (the provider of community health services in the locality) was the subject of a separate claim, which was settled prior to hearing.

6. On 3 July 2018 the Secretary of State recovered the appeal for his own determination. A public local inquiry was held by an Inspector, Frances Mahoney MRTPI IHBC, who sent her Report ("the IR"), dated 4 March 2020, to the Secretary of State. She recommended that planning permission be granted.

7. By a decision letter ("DL") dated 3 June 2020, the Secretary of State agreed with the Inspector's conclusions and recommendation, and so allowed the appeal and granted planning permission.

8. Permission to apply for statutory review was refused by Sir Ross Cranston, sitting as a High Court Judge, on 10 September 2020.

9. At an oral renewal hearing on 8 October 2020, Dove J. granted permission on the Claimant's grounds of challenge numbered 1, 4 and 5. He also ruled that the issues raised in ground 6(b) could be raised by the Claimant as part of grounds 4 and 5, though not as a freestanding ground of challenge.

Grounds of challenge

10. The Claimant challenged the grant of planning permission on the following grounds:

i) **Ground 1**: the Secretary of State erred in law by granting planning permission without having assessed any material environmental information relating to the assessment of greenhouse gas ("GHG") emissions and climate change, in breach of the requirements of Article 2(1) of Directive 2011/92/EU ("the EIA Directive 2011") and regulation 3(4) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations 2011").

ii) **Ground 4**: the Secretary of State erred in law by granting planning permission without first obtaining the requisite detailed information required to assess the likely significant effects on biodiversity, in particular, the Greater Horseshoe Bat ("GHB"), and instead relying upon such information to be submitted at reserved matters stage, in breach of the requirements of Article 2(1) of the EIA Directive 2011.

iii) **Ground 5**: the Secretary of State erred in law by granting planning permission in breach of regulation 70(3) of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations 2017") which provides that outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval for any reserved matters.

iv) **Ground 6(b)** (only as part of Grounds 4 and 5): the Secretary of State failed to understand Policy NA3(n) of the Local Plan, and/or acted irrationally, in granting planning permission on the basis of a GHB Mitigation Plan which was generalised rather than bespoke, and did not identify how adverse effects on the integrity of the South Hams Special Area of Conservation ("SAC") would be avoided.

Planning history

11. The Site lies on the southern fringe of Newton Abbot. It is 66.72 ha in size and comprises undulating agricultural land, woodland, and several farm buildings.

12. The GHB is a European protected species and a significant proportion of the British population is contained within a series of caves in the Teignbridge and South Hams area. In consequence the SAC was established pursuant to Directive 92/43/EEC ("the

Habitats Directive") and the relevant regulations. It includes five Sites of Special Scientific Interest. The bats use the wider countryside of South Devon for commuting, foraging, roosting and mating.

13. The Site is not within the SAC. The Inspector found that the Site is outside the normal foraging range of the GHB population within the SAC (IR53) but it is part of a broader area of land over which the GHB population within the SAC travels from one component part of the SAC to another, occasionally foraging en-route (IR54). The earlier view that they travelled along "strategic flyways" or "critical corridors" had been disproved, and there was a consensus of scientific opinion at the Inquiry that the bats travelled in low numbers, widely dispersed across the landscape (IR56).

The Local Plan

14. The Site was allocated for a mixed use development, including housing, in Policy NA3 of the Teignbridge Local Plan 2013-2033. Policy S4 expresses the District's future housing needs as an average of 620 dwellings per year. The Local Plan seeks to cluster its main future development needs into its main towns, and Newton Abbot is the largest of the main towns within the district. The Local Plan projects delivery of 1500 dwellings by 2033 from the NA3 allocation, with a target of 20% affordable homes. This development will deliver 1,210 new homes, including 20% affordable homes. A smaller development at Langford Bridge Farm is also proposed for the NA3 Wolborough allocation.

15. Policy NA3 of the Local Plan provides:

> "**NA3 Wolborough** A site of approximately 120 hectares is allocated at Wolborough to deliver a sustainable, high quality mixed-use development which shall:
>
> a) include a comprehensive landscape and design led masterplan for the strategic site allocation, produced with meaningful and continued input and engagement from stakeholders;
>
> b) deliver 10 hectares of land for employment development, for office, general industrial or storage and distribution uses as appropriate to the site and its wider context, ensuring that there is also a mix of unit size to enable businesses to start up and expand; support will also be given to employment generating uses provided that they are compatible with the immediate surroundings and do not conflict with town centre uses;
>
> c) deliver at least 1,500 homes with a target of 20% affordable homes;
>
> d) provide social and community infrastructure including a youth centre, local shops, community facilities and a site of 5 hectares for a 420 place primary school including early years

> provision and a secondary school or other further education facility;
>
> e) provide a vehicular route connecting the A380 South Devon Link Road with the A381;
>
> f) create a network of green infrastructure that contributes to the overall strategic network;
>
> g) respect the setting of the parish church of St Mary the Virgin;
>
> h) provide a green buffer between development and Decoy woods;
>
> i) protect and enhance the Wolborough Fen Site of Special Scientific Interest and flight routes and foraging areas of greater horseshoe bats *(emphasis added)*;
>
> j) enhance or mitigate any impact on county wildlife sites, cirl bunting territories and barn owl sites;
>
> k) maximise opportunities for the generation of on-site renewable energy at a domestic scale and investigate opportunities for community scale renewable energy generation *(emphasis added)*;
>
> l) create areas for local food production;
>
> m) provide formal and informal recreation space; and
>
> n) a bespoke Greater Horseshoe Bat mitigation plan for Wolborough must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the foraging area and strategic flyway used by commuting Greater Horseshoe Bats associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects *(emphasis added).*"

16. In addition to the express provision for the GHB in criteria (i) and (n) of Policy NA3, the Local Plan provided protection for GHBs in the area, as follows:

    i) Policy EN8 Biodiversity Protection and Enhancement; EN9 Important Habitats and Features; Policy EN10 European Wildlife Sites and EN11 Legally Protected and Priority Species;

    ii) Policy WE11 Green Infrastructure and the South Hams SAC Mitigation Strategy Supplementary Planning Document; Policy HT3 Heart of Teignbridge - Green Infrastructure.

17. Following examination by an Inspector ("the Local Plan Inspector"), the DC adopted the Local Plan on 6 May 2014.

18. In 2014, the Claimant applied under section 113 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") to quash parts of the Local Plan, in particular Policy NA3. The Claimant alleged that there had been a failure to comply with the Habitats Directive and the Conservation of Habitats and Species Regulations 2010 in that more extensive GHB assessments ought to have been undertaken, and GHB mitigation measures put in place, at strategic, settlement and site level, before the Local Plan was adopted. The adopted policies were therefore undeliverable. The Inspector ought not to have approved the proposed Local Plan and the Council ought not to have adopted it.

19. In a judgment handed down on 16 December 2014, I dismissed the claim, for the reasons set out at [35] to [38] in the extract in Appendix 1.

20. The Claimant was refused permission to appeal by Sullivan LJ on the papers, and by Underhill LJ at a renewal hearing (Case No. C1/2015/0076). In this claim, the Claimant placed reliance upon Underhill LJ's judgment, and therefore it is included as Appendix 2 to this judgment.

21. The Abbotskerswell Neighbourhood Plan 2016-2033 was made on 31 October 2017. According to the IR, at [17], it accepts the principle of the NA3 allocation but highlights concerns in respect of the protection of the natural environment and the setting of Abbotskerswell in the landscape. It provides for the establishment of green infrastructure to minimise the impact of the allocation at NA3.

Application for planning permission

22. The Rew family applied for planning permission on 9 June 2017. The application was supported *inter alia* by an Environmental Statement ("ES"), dated June 2017, followed by several addendums. The DC did not determine the appeal, and so the Rew family appealed to the Secretary of State. The appeal was recovered by the Secretary of State because "it involves proposals which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities" (Secretary of State's recovery letter dated 3 July 2018, quoted at IR2).

The Inspector's Report

23. The Inquiry sat on 26-28 March 2019 and 11-13 June 2019, with a site visit on 13 June 2019 and closings in writing on 10 July 2019. The Claimant took part as a Rule 6 Party.

24. The Inspector wrote a careful and detailed Report, dated 4 March 2020.

25. The Inspector set out the relevant planning policies supporting the principle of the development at the Site, including in particular Policy NA3 (IR15-18).

26. The Inspector recorded that the DC did not dispute the principle of development at the Site, but rather it disputed whether the Rew family had provided such information as the Secretary of State (as the competent authority) reasonably required for the purposes of undertaking an appropriate assessment (IR19, 32-33, 369). However, the DC subsequently changed its position on receipt of the 2019 Bat Survey, after the conclusion of the hearings, and then accepted that the Secretary of State had sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC could be carried out at the outline stage consistent with the provisions of the Habitats Regulations (IR429).

27. The Inspector recorded that the Claimant did maintain an objection to the principle of development (IR34, 370).

28. The Inspector set out the cases at the Inquiry for the Rew family, the DC and the Claimant at length (IR35-256). This included the positions of the parties on alleged deficiencies in the ES, including on matters of climate change (IR83-95, 207-215), and the impacts on GHBs and the SAC (IR43-65. 102-149, 179-206).

29. The Inspector found that the principle of a mixed-use development on the Site "had been long established through appropriate and thorough planning processes" and that to question this principle "would fundamentally undermine the strategies and objectives of the Development Plan which has already been open to public scrutiny through consultation and examination and final adoption by the Council" (IR372-374).

30. The Inspector recorded that the Local Plan Inspector had described the allocation of the Site as "being a sustainable urban extension to Newton Abbott in a highly sustainable location", and thus she considered that the amount of traffic generated by the development would be tempered by the number of residents using the new bus service as well as walking or cycling into Newton Abbot (IR396, 443).

31. Contrary to the Claimant's submissions to the Inquiry, the Inspector reached a judgment that the information contained in the ES and the Addendums was sufficient (IR397).

32. The Inspector set out her findings on GHBs and the impact on the SAC at IR413 to 436.

33. The Inspector recorded at IR432 that the parties agreed an Appropriate Assessment was required, as "the appeal proposal represents a permanent and irreversible change to the functioning of this part of the landscape for the GHBs who commute through it".

34. The Inspector undertook the Appropriate Assessment and concluded, at IR436:

> "… the above measures of mitigation would be sufficient to ensure that the proposed development would not, beyond scientific doubt, have an adverse effect on the integrity of the South Hams SAC, nor would it result in a diminishing of the quality and importance of the SSSI as an ecological habitat. I consider it reasonable to deal with these matters at an outline

stage in the knowledge of the various survey work outcomes, the conclusions of the LP Examining Inspector, the terms of the proffered mitigation and securing conditions and obligations, and the opportunity to re-visit the assessment at the reserved matters stage. These measures, to be delivered through conditions and the S106 obligations, would comply with LP Policy NA3 i) and n) which seek to protect the relevant ecologically important habitats, along with Policies EN8, EN9 and EN10, the objective of which is the maintenance and enhancement of biodiversity as a key element of sustainable development."

35. In addressing the planning balance, the Inspector concluded at IR448:

> "448. ….. LP Policy NA3 a) seeks the submission of a comprehensive landscape and design led masterplan for the strategic site allocation, produced with meaningful and continued input and engagement from stakeholders. The submitted Illustrative Masterplan, in the context of an outline planning proposal which, essentially seeks to confirm the LP allocation for mixed use development covering the appeal site, as the largest section of that strategic commitment to growth, enshrined in the Development Plan, has come forward as a result of some pre-application consultation with the Council as well as the community. This appeal, and the consideration of the planning application before that, also gave an opportunity for parties to consider the conceptual development criteria and impacts. By the very evidence to the Inquiry stakeholders have engaged on the basis of the Illustrative Masterplan as an informing resource. The Design and Access Statement presents a direction of travel for the more detailed design of the scheme which, through a process of design evolution in which stakeholders should continue to be involved, would become apparent at the reserved matters stage. I consider that the spirit of LP Policy NA3 a) has been responded to and for this development to be delivered in a timely fashion to make the contribution that the Council anticipates from it in respect of the economic and social well-being of the District, progress forward must be made."

36. Therefore the Inspector found that the proposed development was in accordance with the development plan, and the presumption in favour of sustainable development in paragraph 11(c) of the National Planning Policy Framework ("the Framework") applied (IR449, 450).

37. After assessing heritage harm (which is not relevant to this claim), the Inspector decided to recommend that planning permission be granted for both the full and outline proposals.

The Secretary of State's decision

38. On 3 June 2020 the Secretary of State issued a decision letter, agreeing with his Inspector, allowing the appeal and granting planning permission for the proposed development.

39. The Secretary of State agreed with the Inspector's findings that the ES, along with other documents, contained sufficient information for him to assess the environmental impact of the proposed development (DL5).

40. He agreed with the Inspector that, in the light of the allocation in Policy NA3 Wolborough for a sustainable extension for Newton Abbot, the determination of this appeal should not question the principle of a mixed-use development in this location (DL17-18).

41. The Secretary of State undertook an Appropriate Assessment at DL25 – 36. He concluded that there would be no adverse effect on the integrity of the SAC. In reaching this judgment, he took into account, at DL33:

> "… the GHB Mitigation Plan, which will establish networks of connected and continuous habitat corridors extending across the appeal site and the wider landscape, preserving permeability across the landscape and allowing GHBs to continue commuting between parts of the SAC and outlying roosts. The corridors within the scheme will include reinforced hedgerows, which provide foraging grounds. There would also be a wetlands SUDS habitat that would provide further foraging habitats. A detailed lighting strategy to be delivered as part of a Reserved Matters applications would ensure minimal disturbance from light spill (IR428). The Secretary of State is content that these would all be secured by planning conditions."

42. The Secretary of State also recorded at DL35, that he had reconsulted Natural England on the results of the 2019 Bat Survey and "Natural England have now confirmed that it is satisfied that the further and up-to-date GHB survey provides a suitable evidence base to inform a Habitats Regulations Assessment. They consider that the Secretary of State as the competent authority has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC can be carried out under the outline permission consistent with the provisions of the Habitats Regulations".

43. The Secretary of State agreed with the Inspector that the Site was "highly sustainable" and that the proposed development would provide options for modes of transport other than the car (DL44).

44. Overall, the Secretary of State reached the view that the proposed development was in accordance with the development plan as a whole, and the public benefits of the scheme – 1,210 new homes, including 20% affordable housing, commercial space, a new school and community facilities – outweighed the heritage harm. The material considerations indicated a decision in line with the development plan (DL48-52).

45. Accordingly, the Secretary of State allowed the appeal and granted planning permission, subject to conditions (DL52).

Conditions

46. The justification for the conditions was set out at IR301-321.

47. The conditions attached to the outline planning permission materially included:

i) **Condition 6** requiring a Masterplan and Design Code to be submitted and approved by the DC, prior to the submission of any reserved matters applications in relation to any phase. The Masterplan and Design Code shall include an explanation of how the design approach and layout (including landscaping and lighting) will achieve the proposed mitigation in the ES and the GHB Mitigation Plan, and shall include the location and accommodation of existing GHB corridors and the creation of additional GHB habitats and linkages (see Condition 6(e) and (k)).

ii) **Condition 7** requiring an ecological mitigation strategy, based on the proposed mitigation in Chapter 8 of Volume 2 of the ES and the submitted GHB mitigation plan, to be submitted and approved by the DC, prior to any development taking place within each phase.

iii) **Condition 8** requiring a Landscape and Ecology Implementation and Management Plan to be submitted and approved by the DC, prior to any development taking place within each phase.

iv) **Condition 9** requiring a low emissions strategy for mitigating the air quality impacts of the relevant phase, to be submitted and approved by the DC, prior to any development taking place within any phase.

v) **Condition 12** requiring a lighting strategy to be submitted and approved by the DC for each phase of development, prior to the installation of any external lighting on the site within any phase of the development. This shall include a dark areas/corridor map for lighting levels less than 0.5 lux in GHB commuting routes.

vi) **Condition 14** requiring a Construction Environment Management Plan to be submitted and approved by the DC, prior to any development taking place within any phase of the development. This shall require low emission construction vehicles and air quality monitoring. An Ecological Construction Method Statement shall include "how GHB identified corridors will be protected during the construction phase as well as minimising light spill (no more than 0.5 lux in GHB corridors)".

Law

Applications under section 288 TCPA 1990

48. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

49. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

50. The Secretary of State referred to the summary of relevant principles set out by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7].

51. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

52. In *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath said, at [26], that claimants should "distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not … elide the two".

53. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

54. The reasons in a decision letter are required to meet the standard set out in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, per Lord Brown, at [36]:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons

> can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Lord Brown's classic statement was held to be applicable in all planning decision-making in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, per Lord Carnwath, at [35] – [37].

The development plan and material considerations

55. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the PCPA 2004 provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

56. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters….
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk

of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission….. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted….

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment (1995) 71 P. & C.R. 175*, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and

> then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

57. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17].

58. The requirement to take into account material considerations was recently reviewed by the Supreme Court in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52, in the judgment of the Court delivered jointly by Lord Hodge and Lord Sales, at 116 – 122:

> "116. … A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:
>
> > "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."
>
> 117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality

test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann).

122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings*. In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain (para 71 above), the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS."

The EIA Directive 2011 and the EIA Regulations 2011

59. The application for planning permission, and the subsequent appeal, were subject to the EIA Directive 2011 and the EIA Regulations 2011. The EIA Directive 2011 was amended with effect from May 2014 by Directive 2014/52/EU, which required member states to implement the amendments by 16 May 2017. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations 2017"), which came into force on 16 May 2017, implemented the amendments into UK law. However, the transitional provisions in regulation 76(2) of the EIA Regulations 2017 were engaged, as the applicant for planning permission had requested an EIA scoping opinion prior to the commencement of the EIA Regulations 2017, and so the EIA Regulations 2011 continued to apply. Although the Claimant sought to rely on the amended Directive 2014/52/EU in its pleadings, Ms Dehon

accepted at the hearing that this was incorrect, as the EIA Directive 2011 in its unamended form applied.

60. The recital to the EIA Directive 2011 provides:

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

61. Article 2(1) of the EIA Directive 2011 provides:

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

62. The EIA Regulations 2011 implemented the EIA Directive 2011 into UK domestic law. The EIA Regulations 2011 use the term "development" in place of the term "projects" which is used throughout the Directive.

63. "EIA development" is defined in regulation 2(1) as "Schedule 1 development; or Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

64. It was common ground that the proposed development was Schedule 2 development.

65. Regulation 3(4) provides:

> "(4) The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."

66. By regulation 2(1), the term "subsequent consent" is defined as "consent granted pursuant to a subsequent application". A "subsequent application" is defined as:

> "an application for approval of a matter where the approval –
>
> (a) is required by or under a condition to which a planning permission is subject; and
>
> (b) must be obtained before all or part of the development permitted by the planning permission may be begun."

67. Regulation 8 makes provision for subsequent applications where environmental information has been previously considered. It provides:

> "(2) Where it appears to the relevant planning authority that the environmental information already before them is adequate to assess the environmental effects of the development, they shall take that information into consideration in their decision for subsequent consent.
>
> (3) Where it appears to the relevant planning authority that the environmental information already before them is not adequate to assess the environmental effects of the development, they shall serve a notice seeking further information in accordance with regulation 22(1)."

68. Regulation 9 makes provision for subsequent applications where environmental information has not been previously provided.

69. The "environmental information" which must be taken into account before determining an application is defined in regulation 2(1) as:

> "… the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development."

70. Regulation 2(1) further defines an "environmental statement" as a statement:

> "(a) that includes such information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4."

71. Thus, the information required under Part 1 is such as is "reasonably required" whereas the information required under Part 2 is a mandatory minimum requirement.

72. Schedule 4 provides as follows:

> "**Information for inclusion in environmental statements**
>
> **Part 1**
>
> 1. Description of the development, including in particular:

(a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

(c) an estimate, by time and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed development.

2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description of the likely significant effects of the development on the environment which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a) the existence of the development;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant in compiling the required information.

Part 2

> 1. A description of the development comprising information on the site, design and size of the development.
>
> 2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
>
> 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
>
> 4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
>
> 5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

Planning Practice Guidance

73. The Planning Practice Guidance ("PPG") gives guidance on multi-stage consents, at paragraph 053:

> "In cases where a consent procedure involves more than one stage (a multi-stage consent), for example, a first stage involving an outline planning permission and a second stage dealing with reserved matters, the effects of a project on the environment should normally be identified and assessed when determining the outline planning permission."

Outline planning applications and multi-stage consents

74. The difficulties which arise in the use of outline planning procedures in cases where an EIA is required have been considered extensively by the Courts.

75. In *R v Rochdale MBC ex parte Tew* [2000] Env LR 1, Sullivan J. rejected the submission that the use of outline permissions was inherently inconsistent with the requirements of the EIA Directive, but he recognised that a bare outline application would not comply with those requirements. In *R v Rochdale MBC ex parte Milne* [2001] Env LR 22, which concerned the same proposal, Sullivan J. said:

> "93. In my judgment, integrating environmental assessment into the domestic procedure for seeking outline planning permission, which acknowledges this need for flexibility for some kinds of building projects, is not contrary to the objectives of the Directive…. Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the

> environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed, it is not accurate to equate the approval of reserved matters with "modifications" to the project. The project, as it evolves with the benefit of approvals of reserved matters, remains the same as the project which was assessed."

76. In *R (Wells) v Secretary of State for Transport, Local Government and the Regions* (C-2101/02) [2004] 1 CMLR 31, the ECJ held:

> "50. As provided in Art.2(1) of Directive 85/337, the environmental impact assessment must be carried out "before consent is given".
>
> 51. According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question "at the earliest possible stage" in the decision-making process.
>
> 52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."

77. In *Commission of the European Communities v United Kingdom* (C-508-03) [2006] QB 764, the ECJ held that a grant of outline planning permission and an approval of reserved matters, taken together, constituted development consent within the meaning of Article 2(1) of EIA Directive 85/337/EEC. The effect of projects that were likely to significantly affect the environment had to be assessed before development consent was given, applying *Wells*. So where national law provided for a two-stage consent procedure consisting of a principal decision and an implementing decision which could not extend beyond the parameters of the principal decision, the project's likely environmental effects had to be identified and assessed at the time of the procedure relating to the principal decision. However, the assessment could be carried out in the course of the later procedure relating to the implementing decision, but only if those effects were not identifiable until then. The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, which provided that an environmental impact assessment could only be carried out at the initial outline planning permission stage, and not at the later reserved matters stage, were contrary to Article 2(1) and Article 4(2) of the Council Directive 85/337, as amended. The regulations were subsequently amended.

78. In *R (Barker) v Bromley LBC* [2006] UKHL 52, [2007] 1 AC 470, the House of Lords considered the effect of the ruling in *Commission v UK*, which had been given in response to a preliminary reference in that case. Lord Hope said, at [22] to [25]:

> "22. It does not follow however, where planning consent for a development takes this form, that consideration must be given to the need for an EIA at each stage in the multi-consent process. The first recital in the Directive indicates that the competent authority must take account of the effects on the environment of the project in question at the earliest possible stage in all the technical planning and decision-making processes: see also Wells, para 51. In the case of a Schedule 2 development the competent authority must decide at the outset whether an EIA is needed because the development is likely to have significant effects on the environment. An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be obtained and considered before outline planning permission is granted. The need for an EIA at the reserved matters stage will depend on the extent to which the environmental effects have been identified at the earlier stage.
>
> 23. If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: *R v Rochdale Metropolitan Borough Council, Ex p Milne* (2001) 81 P & CR 365, para 114, per Sullivan J.
>
> 24. As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed

> description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.
>
> 25. In my opinion it is plain that the appellant is entitled to a declaration that by precluding any consideration for the need for an EIA at the stage when, following the grant of outline planning permission for the development, consideration is being given to an application for approval of reserved matters the 1988 Regulations failed fully and properly to implement the Directive."

79. In *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] EWCA Civ 262, the Court of Appeal confirmed that it is lawful to leave the final details (for example, of a landscaping scheme) to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given, provided that constraints were placed on the planning permission within which future details could be worked out (per Waller LJ at [32] – [33], [45]).

80. In *R (Squire) v Shropshire Council* [2019] EWCA Civ 888, the Court of Appeal summarised the legal principles at [14] – [15]:

> "14. In Case C-2/07 *Abraham v Wallonia* [2008] Env. L.R. 32, the European Court of Justice emphasized (in paragraph 26 of its judgment) that an EIA "must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment …". In her opinion in that case Advocate General Kokott said (at paragraph 75) that "the aim of [EIA] is for the decision on a project to be taken with knowledge of its effects on the environment and on the basis of public participation"; that "[investigation] of the environmental effects makes it possible … to prevent the creation of pollution or nuisances where possible, rather than subsequently trying to counteract them"; and that "[the] requirement of public participation implies that the participation can still influence the decision on the project".
>
> 15. Domestic case law acknowledges that an environmental statement will not always contain the "full information" about a project, and that the EIA regulations "recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting

> 'environmental information' provides the local planning authority with as full a picture as possible" (see the judgment of Sullivan J., as he then was, in *R. (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin), at paragraph 41, citing the speech of Lord Hoffmann in *R. v North Yorkshire County Council, ex p. Brown* [2000] 1 A.C. 397, at p.404)."

81. In the context of paragraph 153 of the Framework and a local plan policy on energy and zero carbon, the High Court in *R (Hewitt) v Oldham Metropolitan Borough Council* [2020] EWHC 3405 (Admin) held that it was permissible to address climate change matters at the reserved matters stage (per Julian Knowles J. at [236], [237], [242]).

Review of the adequacy of an environmental statement

82. The role of the Court in reviewing the adequacy of the assessment in an environmental statement has been recently reviewed by the Supreme Court in *Friends of the Earth* at [142] to [146]:

> "142. It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report. It is also common ground that the approach to be followed in deciding whether the Secretary of State has exercised his discretion unlawfully for the purposes of that provision is that established in relation to the adequacy of an environmental statement when applying the EIA Directive, as set out by Sullivan J in *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29 ("*Blewett*"). *Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level. In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) Beatson J held that the *Blewett* approach was also applicable in relation to the adequacy of an environmental report under the SEA Directive. The Divisional Court and the Court of Appeal in the present case endorsed this view (at paras 401-435 and paras 126-144 of their respective judgments). The respondents have not challenged this and we see no reason to question the conclusion of the courts below on this issue.
>
> 143. As Sullivan J held in *Blewett* (paras 32-33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements

of the Directive, and its decision is subject to review on normal *Wednesbury* principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation "gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies". The EIA Directive and Regulations do not impose a standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 Sullivan J warned against adoption of an "unduly legalistic approach" in relation to assessment of the adequacy of an environmental statement and said:

> "… The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that 'an [environmental impact assessment] application' (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, at p 404, the purpose is 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations …, but they are likely to be few and far between."

Lord Hoffmann (with whom the other members the Appellate Committee agreed on this issue) approved this statement in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587, para 38.

144. As the Divisional Court and the Court of Appeal held in the present case, the discretion of the relevant decision-maker under article 5(2) and (3) of the SEA Directive as to whether the information included in an environmental report is adequate and appropriate for the purposes of providing a sound and sufficient basis for public consultation leading to a final environmental assessment is likewise subject to the conventional *Wednesbury* standard of review. We agree with the Court of Appeal when it said (para 136):

> "The court's role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information 'may reasonably be required' when taking into account the considerations referred to - first, 'current knowledge and methods of assessment'; second, 'the contents and level of detail in the plan or programme'; third, 'its stage in the decision-making process'; and fourth 'the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment'. These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional 'Wednesbury' standard of review - as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

145. The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134-135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, para 50, "[the] court has

> always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed …".
>
> 146. The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined."

83. Ms Dehon submitted that the judgment of the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446, at [137], established that a more intensive standard of review should be applied where there was a "patent defect" in the assessment, such as in the case of *Squire*. Ms Dehon submitted that this conclusion was not disturbed by the Supreme Court when it reversed the Court of Appeal's decision. She submitted that the failure to make any reference to GHG emissions was a "patent defect" in the ES in this claim.

84. In *Squire*, which concerned the likely environmental effects of spreading manure from the proposed intensive poultry development on to neighbouring fields, the Court of Appeal held, at [69], that the environmental statement was:

> "deficient in its lack of a proper assessment of the environmental impacts of the storage and spreading of manure as an indirect effect of the proposed development. In this respect it was not compliant with the requirements of the EIA Directive and the EIA Regulations".

Although the local planning authority had regard to the control which the Environment Agency would exercise over the farm by means of the environmental permit, it failed to consider what measures would be required in respect of third party land, not covered by the permit.

85. In my judgment, Ms Dehon's legal analysis is incorrect. Neither *Squire* nor *Plan B* established a separate category of unlawfulness based on "patent defect". The deficiencies in the assessment in *Squire* demonstrated conventional public law errors (i.e. irrationality and failure to take into account relevant considerations), which resulted in a breach of the requirements of the EIA Directive and regulations. As Holgate J. said in *R (Finch) v Surrey County Council* [2020] EWHC 3559 (Admin), at [120]:

> "….the challenge in *Squire* succeeded because of a "patent defect" in the ES and EIA (*Plan B Earth* at [137]). It was plainly irrational for the local authority to have based their decision on an EIA which had completely failed to address an "obviously material consideration" (*R (Blewett) v Derbyshire County Council* [2004] Env. LR. 29 and *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179 at [53] to [55])…."

86. The adequacy of the ES in this claim falls to be assessed according to conventional *Wednesbury* principles, as set out by the Supreme Court in *Friends of the Earth*.

The Habitats Directive and the Habitats Regulations 2017

87. Directive 92/43/EEC ("the Habitats Directive") makes provision for the conservation of special areas of conservation, designated by Member States. Article 6 provides, so far as is material:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated ….
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to an appropriate assessment of its implications for the site in view of the site's conservation

objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

88. The Habitat Regulations 2017 give effect to the Habitats Directive in domestic law.

89. Regulation 63 of the Habitats Regulations 2017 provides, so far as is material:

"**Assessment of implications for European sites and European offshore marine sites**

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.
>
> ….."

90. Pursuant to regulation 70 of the Habitats Regulations 2017, regulation 63 applies to the grant of planning permission on an appeal under section 78 of the TCPA 1990. Regulation 70 provides, so far as is material:

> "(1) The assessment provisions apply in relation to—
> …..
>
> (c) granting planning permission, or upholding a decision of the local planning authority to grant planning permission… on determining an appeal under section 78 of that Act (right to appeal against planning decisions) in respect of such an application; on an application under Part 3 of the TCPA 1990 (control over development);
>
> …
>
> (2) Where the assessment provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission, or, as the case may be, take action which results in planning permission being granted or deemed to be granted, subject to those conditions or limitations.
>
> (3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site or a European offshore marine site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

> (4) In paragraph (3), "outline planning permission" and "reserved matters" have the same meanings as in section 92 of the TCPA 1990 (outline planning permission)."

91. Thus, by regulation 70(3) of the Habitats Regulations 2017, UK domestic law expressly requires an authority to undertake an appropriate assessment before granting outline planning permission, in those applications for planning permission where the assessment criteria in regulation 63 of the Habitats Regulations 2017 are met.

92. Guidance on the content of an appropriate assessment has been given by the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Coöperatieve Producentenorganisatie van de Nedelandse Kokkelvisserji UA intervening)* [2005] All ER (EC) 353:

> "52. As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.
>
> 53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.
>
> 54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field…
>
> …..
>
> 56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned."

93. In Case C-461/17 *Holohan v An Board Pleanala*, the CJEU set out the requirements of a lawful appropriate assessment under Article 6(3) of the Directive in the following terms:

> "33. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on

> the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no reasonable scientific doubt as to the absence of such effects (judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C- 243/15, EU:C:2016:838, paragraph 42 and the case-law cited).
>
> 34. The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (judgment of 25 July 2018, *Grace and Sweetman*, C- 164/17, EU:C:2018:593, paragraph 39 and the case-law cited)."

94. In *R (Champion) v North Norfolk DC* [2015] 1 WLR 3710 at [41], Lord Carnwath held that, while a high standard of investigation was required, the assessment had to be appropriate to the task in hand, and it ultimately rested on the judgment of the local planning authority:

> "41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met (and see paras 41-43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal "screening opinion" in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment". "Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All ER (EC) 353, para 107:
>
>> "the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even

> though, from an objective point of view, there is no absolute certainty."
>
> In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

95. The Secretary of State referred me to the summary of principles by Peter Jackson LJ in *Mynnyd y Gwynt Ltd v Secretary of State for Business Energy and Industrial Strategy* [2018] 2 CMLR 34 at [8]:

> "8. The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions:
>
> (1) The environmental protection mechanism in art.6(3) is triggered where the plan or project is likely to have a significant effect on the site's conservation objectives: *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) EU:C:2004:482; [2005] 2 C.M.L.R. 31 at [42] ("*Waddenzee*").
>
> (2) In the light of the precautionary principle, a project is "likely to have a significant effect" so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: *Waddenzee* [2005] 2 C.M.L.R. 31 at [44].
>
> (3) As to the appropriate assessment, "appropriate" indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgement of the authority: *R. (on the application of Champion) v North Norfolk DC* [2015] UKSC 52, Lord Carnwath at [41] ("*Champion*").
>
> (4) The question for the authority carrying out the assessment is: "*What will happen to the site if this plan or project goes ahead; and is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?"*: *Sweetman v An Bord Pleanà la* (C-258/11) EU:C:2013:220; [2013] 3 C.M.L.R. 16, Advocate General at para. 50.
>
> (5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused: *Waddenzee* [2005] 2 C.M.L.R. 31 at [56]–[57].

> (6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned: *Waddenzee,* Advocate General at paras 107 and 97, endorsed in *Champion* [2015] UKSC 52 at [41] and by Sales LJ in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 at [78] ("*Smyth*").
>
> (7) The decision-maker must consider secured mitigation and evidence about its effectiveness: *European Commission v Germany* (C-142/16) EU:C:2017:30 at [38].
>
> (8) It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: *R. (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49].
>
> (9) The relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* [2015] EWCA Civ 174 at [80]."

96. The summary of principles in *Mynnyd y Gwynt Ltd* did not include the decision of the CJEU in *People Over Wind & Anor v Coillte Teoranta* (Case C-323/17 & C-294/17), [2018] PTSR 484, to the effect that, on a proper interpretation of Article 6(3) of the Habitats Directive, it was not appropriate, at the initial screening stage, to take account of mitigation measures. However, mitigation measures are to be taken into account when subsequently undertaking an appropriate assessment.

97. The Claimant relied in particular upon the judgment of the CJEU in the joined cases of *Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg* (C-293/17 & C-294/17) [2019] Env LR 27, (referred to as "Dutch Nitrogen"). The CJEU held that it was for the national courts to conduct a thorough examination of the scientific soundness of the appropriate assessment (at [101] and [110]). The CJEU also gave guidance in relation to mitigation at the appropriate assessment stage. The Court made it clear that, if the expected benefits or mitigations are "uncertain" at the time of the appropriate assessment, either because the procedures needed to accomplish them have not yet been carried out, or because the level of scientific knowledge does not allow them to be identified and quantified with certainty, then they cannot be taken into account (at [121] – [132]).

98. There are binding domestic authorities to the effect that the relevant standard of review by the Court is *Wednesbury* rationality, and not a more intensive standard of review. In *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [2015] PTSR 1417, Sales LJ said, at [78] – [80]:

> "78. A further issue arising from Mr Jones's submissions concerns the standard of review by a national court supervising the compliance by a relevant competent authority with the legal

requirements in Article 6(3) of the Habitats Directive. Although the legal test under each limb of Article 6(3) is a demanding one, requiring a strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations. As AG Kokott explained in para. 107 of her Opinion in *Waddenzee*, the conclusion to be reached under an "appropriate assessment" under the second limb of Article 6(3) cannot realistically require the attainment of absolute certainty that there will be no adverse effects; the assessment required "is, of necessity, subjective in nature". The same is equally true of the assessment at the screening stage under the first limb of Article 6(3). Under the scheme of the Habitats Directive, the assessment under each limb is primarily one for the relevant competent authority to carry out.

79. Mr Jones submitted that Patterson J erred in treating the assessment by the Inspector of compliance of the proposed development with the requirements of Article 6(3) as being a matter for judicial review according to the *Wednesbury* rationality standard. He said that in applying EU law under the Habitats Directive the national court is required to apply a more intensive standard of review which means, in effect, that they should make their own assessment afresh, as a primary decision-maker.

80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant standard of review is the Wednesbury standard, which is substantially the same as the relevant standard of review of "manifest error of assessment" applied by the CJEU in equivalent contexts: see *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114; [2013] JPL 1027 , [32]-[43], in which particular reference is made to Case C-508/03, *Commission of the European Communities v United Kingdom* [2006] QB 764, at paras. [88]-[92] of the judgment, as well as to the *Waddenzee* case. Although the requirements of Article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this Court in the Evans case (see para. [43]), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue."

99. These passages in *Smyth* were cited with approval in *Mynnyd y Gwynt Ltd*, at [8], per Peter Jackson LJ.

Ground 1

100. The Claimant submitted that the Secretary of State erred in granting planning permission without having assessed any material environmental information relating to the assessment of GHG emissions and climate change, in breach of Article 2(1) of the EIA Directive 2011 and Regulation 3(4) of the EIA Regulations 2011.

101. The Claimant re-stated the submissions which were made to the Inquiry. It referred to the IEMA (Institute of Environmental Management & Assessment) principles on climate change and GHG emissions for EIAs. The Claimant also referred to the advice given by the DC to the Rew family, on 27 November 2015, to the effect that the ES scoping report should include the effects of the project on GHG emissions. The Claimant contrasted the lack of reference to GHG emissions in the ES for this development with the ES addendum (January 2019) for the Langford Bridge Farm proposal which specifically addressed GHG emissions.

102. I refer to the relevant statutory framework and case law at paragraphs 59 to 86 above.

103. As the Secretary of State correctly submitted, climate change is a matter falling within Part 1 of Schedule 4 to the EIA Regulations 2011. It follows, pursuant to the definition of "environmental statement" in regulation 2 of the EIA Regulations 2011, that the Secretary of State was only required to consider the adequacy of such information on climate change in the ES as "may reasonably be required". In deciding what information is "reasonably required" in an ES, the Secretary of State had a "wide range of autonomous judgment on the adequacy of the information provided" and "must be free to form a reasonable view of its own on the nature and amount of information required", subject only to review on *Wednesbury* grounds (*Friends of the Earth*, at [144]). As I have already explained, there is no separate ground of review where there is a "patent defect" in assessment (e.g. the case of *Squire*).

104. In my view, it is apparent from the decision letter that the Secretary of State reached a judgment that the information provided in the ES, and the additional information provided, was sufficient, and that no further information, including on climate change, was reasonably required. At the Inquiry, the Claimant contended that the information provided on climate change was inadequate (IR207 – 215). The Rew family submitted that the Claimant's contentions were without merit, unsupported by any evidence, and failed to recognise the allocated status of the Site (IR83 – 95). It seems that the Inspector was not persuaded by the Claimant's references to the IEMA principles, the Langford Bridge Farm assessment of GHG emissions or the DC's advice on the scoping opinion (summarised at paragraph 101 above). At IR397, the Inspector concluded:

> "397. Given the size of the appeal site, the nature and scale of the proposed development and the potential impact on environmental resources, an Environmental Statement (ES) was produced for the proposed development. It sprang from

> previous work included in the environmental assessment relevant to the LP, although was more detailed in respect of being site specific. Various inadequacies have been alleged in respect of the content and coverage of the ES. It has been supplemented through this appeal with additional clarification and evidence. A further Addendum was submitted partly dealing with Air Quality and this too has been taken into account in the consideration of this appeal. I am also conscious that this is a site which has already been through a LP Examination and subjected to a raft of environmental testing, at that stage, for the Allocation to be adopted. The ES should not be used as a means of delaying already tested development by tying it up in legal knots. The ES should be a proportionate response to the scale and nature of development, its location, as well as considering what has gone before in respect of environmental assessment and decisions taken. The Council did not allege any deficiency in the generality of the environmental assessments submitted and subsequently supplemented. They were able to come to reasoned conclusions on the environmental effects of the appeal proposal save for the impact upon the GHBs which this Report will come to. I too consider the submitted environmental assessments to be sufficient to appropriately inform this decision."

105. The Secretary of State expressly agreed with the Inspector, stating at DL5:

> "Having taken account of the Inspector's comments at IR397, the Secretary of State is satisfied that the Environmental Statement and other additional information provided complies with the above Regulations and that sufficient information has been provided for him to assess the environmental impact of the proposal."

Thus, on my reading of the decision, the Secretary of State considered the Claimant's criticisms but rejected them.

106. In my view, the Secretary of State was entitled to reach these conclusions, for the reasons which he gave, and by reference to the IR and other material before him.

107. The Site was allocated for development in the Local Plan, and therefore the Secretary of State concluded that the principle of development was already established and should not be questioned (DL17, 18). Thus, on this issue, he accepted the submissions of the Rew family and the DC, and rejected the submissions of the Claimant (IR19; IR34, IR369-375).

108. The Site had "already been through a LP examination and subject to a raft of environmental testing, at that stage, for the Allocation to be adopted" (IR397).

109. The Local Plan Inspector's Report (April 2014) assessed the soundness of the proposed Local Plan's provision on climate change:

> "Does the LP address issues of climate change satisfactorily? Is Policy EN3 regarding carbon reduction justified and consistent with national policy in the NPPF? Will increased employment lead to more very unclear commuting by car?
>
> 16. The overall strategy would create the most sustainable pattern of development through urban extensions. It would reduce travel by car through encouraging walking and cycling and would enable more effective and efficient public transport services. Policy EN3 is intended to ensure implementation of Policy S7, which seeks to achieve a reduction of carbon emissions in line with the national target in the Climate Change Act 2008 of an 80% reduction between 1990 and 2050… ."

110. In his report at paragraph 75, the Local Plan Inspector concluded "after careful consideration of the many objections to its development, I have come to the same conclusion as the Council that the NA3 development would provide for a sustainable urban extension to Newton Abbot and is sound".

111. Policy NA3 Wolborough states that the site allocation will deliver a "sustainable" development, and the supporting text at 7.25, refers to the "opportunity to create a sustainable neighbourhood for Newton Abbott".

112. Policy S6 Resilience provides that the Council will work with communities, developers and infrastructure providers to ensure that the future impact of climate change and fossil fuel scarcity is minimised through adaptions and mitigation. Policy EN4 Flood Risk addresses flood risk at new developments.

113. Policy S7 Carbon Emission Targets sets out the strategy for the reduction of carbon emissions, in accordance with Government statutory targets. The supporting text at 2.34 explains that car mileage per person is higher in smaller settlements because of the need to travel further to access jobs, services and facilities. Since travel is a key emitter of carbon dioxide, the concentration of development in the larger and more sustainable developments forms a key element in the sustainable strategy of the Local Plan.

114. Policy EN3 Carbon Reduction Plans provides that development proposals should seek to minimise their carbon footprint to achieve the carbon emissions target in Policy S7. Major developments will be required to produce a carbon reduction plan. According to the supporting text at 5.12, such plans could include transport assessments, indicating sustainable transport modes; the design of buildings, going beyond building regulation requirements; renewable energy within the Site and rain water harvesting.

115. Policy NA3 Wolborough provides, at criterion (k), that development shall "maximise opportunities for the generation of on-site renewable energy at a domestic scale and investigate opportunities for community scale renewable energy generation". See also the supporting text at 7.38.

116. Policy EN6 Air Quality provides that the Council will act to improve air quality, meeting national targets. Major developments will be required to provide sufficient information to assess their impact.

117. Policy S9 Sustainable Transport provides for sustainable transport, helping to deliver a low carbon economy.

118. In her Report, the Inspector referred to the sustainability of the Site, consistently with the Local Plan strategy, at IR15-22, IR369-375, IR396, IR404-412 (air quality and traffic) and at IR443.

119. The sustainability of the Site, in accordance with the strategy in the Local Plan, was identified by the Secretary of State as a public benefit. He said, at DL44:

> "As set out at IR443, the appeal site is in a location accessible to services and facilities described as "highly sustainable" and the encouragement of cycling, walking, implementation of the Travel Plan, along with the provision of the new circular bus route, would provide options for other modes of transport other than the car…"

120. The Local Plan was subject to a sustainability appraisal and a Strategic Environmental Assessment ("SEA") which specifically considered climate change, both generally, and in respect of the allocation under Policy NA3. The sustainability appraisal was supplemented by two addendum appraisals. It was assessed that the shift to housing in sustainable travel locations near to existing towns, and away from the villages and rural areas, would result in "a significant benefit in climate change terms" (Further Addendum to the Sustainability Appraisal at p.80). The appraisals and the SEA were examined and endorsed by the Local Plan Inspector. The Secretary of State was entitled to proceed on the basis that the appraisals and the SEA complied with the requirements of the SEA Directive (see *R (Noble Organisation Ltd) v Thanet DC* [2005] EWCA Civ 782, [2006] Env LR 8, at [37]).

121. As to the evidence in support of the application for planning permission, the assessments in the ES which were relevant to climate change were as follows:

    i) Chapter 10: Transport & accessibility, with an addendum report;

    ii) Chapter 11: Water resources, flood risk and drainage;

    iii) Chapter 12: Air quality, with an addendum report;

    iv) Chapter 14: Cumulative effects.

122. Pursuant to Policy NA3 criterion (k), an Energy Strategy Statement dated June 2017 was submitted with the application. Consistently with the guidance in the supporting text to Local Plan EN3, the proposed strategy was to reduce energy demand through energy efficiency improvements, such as enhanced insulation and air permeability, which would achieve a carbon reduction of approximately 5% over Building Regulations 2013 levels. The use of renewable technologies would only be appropriate on a plot by plot basis. Solar panels and waste water heat recovery systems would be suitable for houses, and a ground source heat pump for the school and local centre. A Waste Audit Statement covering the principles of recycling was also submitted.

123. The Inspector's Report considered the assessments which were submitted, and reached conclusions on issues relating to air quality (IR404 – 414), flood risk (IR398 - 403), and transport (IR389 - 396). The Secretary of State considered these issues at DL37 – 39, and agreed with the Inspector's conclusions. He found, at DL49, that the proposal would deliver a new link road that would help to improve air quality in the District. He also imposed conditions on the permission, as recommended by the Inspector, including a requirement for a design code (which addresses pedestrian and cycleways and the collection of waste and recycling), a low emissions strategy to address air quality, and a Construction Environment Management Plan (requiring low emission construction vehicles).

124. In the light of the factors set out at paragraphs 107 to 123 above, I consider that the Secretary of State acted rationally in rejecting the Claimant's submission that the environmental information provided was inadequate because it did not address GHG emissions, despite the DC's advice for the scoping opinion, and the IEMA principles, which had been applied in the Langford Bridge Farm ES. GHG emissions had been considered in the context of the Local Plan, the sustainability appraisal and the SEA. After much deliberation, it was decided that the Site should be allocated for a mixed use development, despite the Claimant's objections to the development. The Site was highly sustainable and it accorded with the strategy of reducing car travel, identified as a major contributor to GHG emissions. The application for planning permission accorded with the development plan. It is apparent that the Secretary of State had climate change issues well in mind, in particular, the sustainability of the Site, transport, flood risks, air quality and a low emissions strategy. In my judgment, the Claimant has not surmounted the high hurdle of demonstrating that the Secretary of State exercised his judgment irrationally in concluding that he had the environmental information which was reasonably required to determine the appeal, in accordance with Article 2(1) of the EIA Directive 2011 and regulation 3(4) of the EIA Regulations 2011.

125. Alternatively, even if there was an error of law in determining the appeal without more information about GHG emissions, I would have declined to quash the decision, because it would inevitably have been the same, absent the legal error, applying the test in *Simplex GE (Holdings) v Secretary of State for the Environment* [1989] 57 P & CR 306, at [42], and *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin), per Dove J. at [78] – [85].

126. In considering what, if any, difference a GHG emission assessment could have made, it is instructive to consider the assessment in the Langford Bridge Farm ES addendum which the Claimant presented as a model which this ES should have followed. It observed (at 15.20) that assessment of GHG emissions was an "emerging practice". It identified the significant carbon emissions generated by the current agricultural use, as a result of nitrous oxide in fertilisers, methane gas from cows and manure, and fuel used in agricultural machinery (at 15.22). It then assessed GHG emissions at the construction and operational phase of the development, concluding that they would not be significant and did not require mitigation. It went on to identify climate change impacts which did require mitigation at the detailed design stage, including flood risks; protection of site habitat and species from climate change; and risks to construction employees.

127. If a similar assessment had been carried out in this case, it would first have identified the likely extent of GHG emissions from the current agricultural use, and the likely extent of GHG emissions from the building and vehicles at the proposed development. It would then have considered how the emissions could be reduced. I take into account that the Langford site is much smaller, and therefore I assume that the impact of the built development will be less than at this Site.

128. Whatever the outcome of the GHG emission assessment, it is clear from the decision that the Secretary of State would not have re-opened the Local Plan strategy that considerably more homes were needed in the District, and that urban extensions were the most sustainable locations, because of the reduction in travel, and therefore carbon emissions. Indeed, the Local Plan strategy was informed by a strategic assessment of climate change factors, including GHG emissions. Moreover, the Secretary of State expressly rejected a challenge to the principle of development at this Site, pursuant to Policy NA3 Wolborough.

129. The proposed development was in accordance with the development plan, and at DL49, the Secretary of State found that the benefits (housing, a school, commercial space, employment opportunities and economic benefits) attracted significant weight in favour of the proposal. Even if the GHG emissions generated by the proposed development were treated as a material consideration against the proposal (which is far from certain), I have no doubt that the Secretary of State would have concluded that it was outweighed by the benefits of the proposal.

130. For these reasons, Ground 1 does not succeed.

Ground 4

131. Under Ground 4, the Claimant submitted that the Secretary of State erred in law by granting outline planning permission without first obtaining the requisite detailed information required to assess the likely significant effects on biodiversity, in particular, the GHB, and instead relying upon such information to be submitted at reserved matters stage, in breach of the requirements of Article 2(1) of the EIA Directive 2011.

132. The Claimant referred to the need for more detailed information on the GHB "strategic flyway". At the Inquiry, the Claimant relied on the updated report of Conservation First, Berthinussen A & Altringham J of May 2019: "The likely impact of the proposed NA3 Wolborough development and associated mitigation, with particular reference to greater horseshoe bats of the South Hams Special Area of Conservation" which noted that:

> "The mitigation plan provided in the HRA is again vague and lacks important detail. 'Dark corridors' are proposed across the site for commuting bats but these are narrow and close to roads, footpaths and buildings and are likely to be subject to light, noise and recreational disturbance. Effective mitigation for light pollution will be essential, but very little information is provided. The corridors will also be severed in multiple places by access roads, which may act as barriers or create a collision

> mortality risk for bats attempting to cross them. Most of the proposed mitigation measures have not been proven to be effective, such as plantings and raised embankments to guide bats over roads, temporary guides such as Heras fencing or 'dead hedging' and new or relocated roosting structures. Where new plantings or habitat are proposed, little consideration is given to the time it will take for them to become established or the need for them to be functional in advance of any impacts (i.e. prior to construction commencing). It is also not clear whether mitigation measures, such as corridors, will be integrated with those in the adjacent NA3 Wolborough development or existing habitats in the wider landscape…."

133. The Claimant criticised mistakes in the statement of Mr Seaton, planning agent for the Rew family, and the evidence of Dr Holloway to the Inquiry that strategic flyways could be as little as 15 – 20 metres in width, based on the case of *R (Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 (Admin). The Claimant also submitted that the assessment of the cumulative impacts on the GHB was not sufficiently robust.

134. In my judgment, the Claimant's challenge did not fully reflect the legal framework within which the Secretary of State's decision was made. Although the EIA Directive 2011 and the EIA Regulations 2011 provide that environmental effects are to be taken into account at the earliest possible stage, and before consent is given (see paragraphs 60 to 65 above), the case law has made it clear that, where national law provides for a multi-stage procedure, and the environmental effects are identified and assessed at outline stage, details of the development (including further assessment of environmental effects, if required) may be finalised at reserved matters stage, within the parameters set by the grant of outline permission and the conditions attached thereto (see paragraphs 74 to 81 above). Regulation 8 of the EIA Regulations 2011 makes provision for the relevant planning authority to seek further environmental information, if required (for example, at reserved matters stage).

135. Biodiversity, in particular the impact on GHBs, is a matter falling within Part 1 of Schedule 4 to the EIA Regulations 2011. It follows, pursuant to the definition of "environmental statement" in regulation 2 of the EIA Regulations 2011, that the Secretary of State was only required to consider the adequacy of such information on GHBs as "may reasonably be required". In deciding what information is "reasonably required" in an ES, the Secretary of State had a "wide range of autonomous judgment on the adequacy of the information provided" and "must be free to form a reasonable view of its own on the nature and amount of information required", subject only to review on *Wednesbury* grounds (*Friends of the Earth*, at [144]). There is no separate ground of review for cases, such as *Squire*, where there has been a "patent defect" in assessment.

136. In this case, the Secretary of State reached a judgment that the information provided in the ES was sufficient, and that no further information, including on matters of biodiversity, was reasonably required (DL15). He agreed with the judgment reached by the Inspector on this issue at IR397.

137. The Secretary of State and the Inspector took full account of the "various inadequacies" that the Claimant alleged as to the content and coverage of the ES

(IR397, DL5). This included the Claimant's evidence and submissions on the lack of sufficient biodiversity information on GHB, which were set out in detail at IR179-206**.** These submissions have simply been repeated in this claim.

138. However, the Secretary of State and the Inspector also took into account the evidence and submissions of the DC and Natural England (whose views as a statutory consultee should be given considerable weight, and only departed from for cogent reasons: see *Mynydd v Gwynt Ltd*, per Peter Jackson LJ, at [8]). Their views differed from those of the Claimant. Both the DC and Natural England concluded, in the light of the 2019 Bat Survey, that there was sufficient information on the impact on GHBs and the SAC available to the Secretary of State.

139. The Inspector summarised her findings on the evidence at IR420 to 429:

> "420. The appellants' bat surveys indicate that the areas of wooded edge and hedgerow habitats together with areas of grazed pasture are likely to be used on occasion by individual GHBs. However, based on the normal foraging range of some 4 km, the distance between the component SAC parts and the appeal site, and the nature of the GHB actual flight distances, it places any claimed importance of the site as a likely foraging area in doubt265. Therefore, it is reasonable to conclude that the appeal site does not lie within any defined sustenance zone in relation to any European designated site.
>
> 421. The concept of Strategic Flyways (SF) was considered by the parties and one was identified running westwards along the southern boundary of the appeal site. However, the identification of this SF was not based on site-specific radiotracking data, but on assumed occurrences. This reduces the reliance which can be placed on any value which could be ascribed to the SF for the GHB population specific to the SAC. More recent guidance identifies that outside of sustenance zones GHBs are dispersed widely and in low numbers using a complex network of commuting routes, rather than just a few key SFs. New draft guidance will replace SF with Landscape Connectivity Zones which coalesces the entire network of flyways in recognition of the need to maintain permeability across the SAC landscape and is based on a better understanding that GHBs are widely dispersed. The appeal site would be outside of the 4 km Sustenance Zone but within the Landscape Connectivity Zone so would still trigger a detailed assessment. This emerging guidance would further reduce any reliance on SF as a restrictive feature in development terms"
>
> 422. It seems to me that currently the value of the appeal site for GHBs is as part of a more extensive network of 'pathways' which allows the bats to travel between roost sites across the South Devon countryside which could include journeys to and from the five component parts of the SAC from more distant roosts such as Conitor Copse.

423. One of the main issues for the Council and Natural England in respect of the body of evidence already submitted by the appellants to comply with the Habitats Directive and requirements of the Habitat Regulations, was that the bat survey work dated back to 2013-2014 and was considered insufficient to inform a Habitat Regulation Assessment. However, the Council had commissioned in 2019 their own Bat Survey dated November 2019, which was submitted in evidence and can be considered a reliable and up to date GHB survey based upon best practice. Natural England was consulted on survey scope and methodology.

424. The most recent Bat Survey dated November 2019 concludes that bats were observed to favour substantial hedgerows and tree lines (especially adjacent to pasture), woodland edge and dark lane habitats. Key areas included Stonemans Hill to the west of the appeal site, Priory Road to the south and hedgerow networks linking these with Wolborough Barton and Decoy Brake woodland. The fields and hedgerows between the woodland and the industrial estate off Kingskerswell Road is a current key area and beyond the boundaries of the appeal site. These areas mainly bound the appeal site but are established routes upon which the proposed development would not impact. No GHB roosts were identified on the appeal site in this recent survey and this confirms the outcome in this regard of the 2013-2014 survey. The Illustrative Masterplan has incorporated a route along the southern boundary which would allow for a number of pathways along hedgerows and lanes along which the GHBs can fly and forage. The ability of bats to fly along the identified main route within the Bat Survey 2019 would be retained. Green corridors could also be incorporated to enable GHBs and other bats to access transient foraging areas within Wolborough Fen and the woodland of Decoy Country Park. This would allow bats to continue to move through the landscape unimpeded and with access to impromptu feeding areas.

425. At the time the LP Examining Inspector was considering LP Policy NA3 the concept of the SF was unchallenged. The Examining Inspector reported that whilst a bat flyway ran along the southern boundary of the site the Council's expert witness indicated that a buffer of green space did not necessarily have to be 500m wide to be effective and that there would be adequate space for the flyway to be properly protected. Natural England at the LP Examination stage stated that the Plan proposals would provide for satisfactory protection of the bats and raised no objection to the allocation.

426. The Examining Inspector's conclusions set out that the network of commuting routes/pathways should be wide enough

to allow for sufficient habitat along its path which GHBs can traverse. The 250 metres wide main pathway achievable within the development parameters would serve as an effective bat highway.

427. On the basis of the outcomes of the most recent bat survey the Council is content that in so far as assessing if the competent authority now has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC can be carried out under the outline permission consistent with the provisions of the Habitats Regulations. Natural England's position has been that in the absence of an up to date bat survey there would be insufficient information on which to complete an assessment to conclude that there would be no adverse effect on the integrity of the site. Having evaluated the Bat Survey 2019 Natural England considered some comparison work necessary between the surveys from 2013-2014 and that of 2019 to ascertain whether the mitigation measures proffered in the GHB Mitigation Plan would still stand as being relevant. However, as the Council highlight there are some variations in the survey protocol/analysis between the surveys which make such a comparison of limited value. The overall results of the 2019 survey, in the context of the results from the 2013-2014 survey would be sufficiently robust to inform an AA and mitigation at outline stage.

428. The approach of the GHB Mitigation Plan is to establish networks of connected and continuous habitat corridors extending across the appeal site and to the wider landscape. The retention and enhancement of green space is also key to the strategy. The Plan includes the retention of a green corridor of some 250 metres in width which would preserve the permeability across the landscape for the GHBs allowing commuting between the parts of the SAC and outlying roosts. The corridors within the scheme include reinforced hedgerows which are valuable commuting features for GHBs as well as providing habitats for foraging. The wetland SUDS habitat, including a marshy/meadow grassland and orchard areas, would also provide valuable foraging habitat. The detailed lighting strategy to be included at reserved matters stage would ensure minimal disturbance to GHB foraging and commuting habitat as a result of light spill.

429. The up to date Bat Survey has allowed the Council to move their position to one of agreeing that matters in respect of the following can be agreed at reserved matters stage with the imposition of conditions on any grant of outline permission to secure those details which would in essence only come about through the detailed design of the scheme: route of the new

> Spine Road, lighting assessment, identification and retention of GHB corridors and other GHB habitats to be overlaid with the finalised Masterplan. The Council are now content that the competent authority has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC could be carried out at this outline stage consistent with the provisions of the Habitats Regulations."

140. Although the Inspector recorded the evidence of Dr Holloway, on behalf of the Rew family, on the required width of strategic flyways (at IR60), which I accept appears to have been based on a misreading of the judgment in *R (Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 (Admin), the Inspector did not adopt Dr Holloway's approach in her findings.

141. The cumulative effects of the Wolborough NA3 allocation were considered in section 8.8.5 of the ES in June 2017. However, by the date of the Inquiry, the DC had resolved to grant planning permission for a development at Langford Bridge Farm on a site which exceeded its allocation by some 7.53 ha. Therefore an Addendum to the ES was prepared in April 2019 to assess the implications of the extended site, in so far as it had not already been assessed. It considered the Langford Bridge ES, which assessed the impact on GHB and included a suite of mitigation and monitoring measures. The Inspector assessed the cumulative and in-combination effects of the Langford Bridge Farm development at IR430 – 431, on the basis of the environmental information for both sites, and the assessments and conclusions of the DC when considering the application for planning permission. She accepted that there would be permanent and irreversible change to the functioning of the area for the GHBs who commute to and from the SAC. However, she was satisfied that the mitigation measures proposed would be sufficient to ensure that the proposed development would not have an adverse effect on the integrity of the SAC. The Inspector's assessment was, in my view, sufficiently robust.

142. The Secretary of State assessed the impact on GHBs and the SAC at DL25 to 36. He confirmed at DL35, that he had reconsulted Natural England on the results of the 2019 Bat Survey and that Natural England "consider that the Secretary of State as the competent authority has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC can be carried out under the outline permission consistent with the provisions of the Habitats Regulations".

143. The Secretary of State, at DL31, agreed with the finding of the Inspector that the Site, which is located between 7 km and 20 km from the Site of Special Scientific Interest ("SSSI") components of the SAC, did not fall within any defined sustenance zone for GHBs. Rather, the value of the Site for GHBs was as part of a network of commuting routes, which could include journeys to and from the five component parts of the SAC.

144. On this basis, the Secretary of State and the Inspector found that there was a need to ensure landscape permeability, and that the measures set out in the GHB Mitigation Plan, which will establish networks of habitat corridors across the site and the wider landscape, would preserve permeability and allow GHBs to continue commuting (DL31-36, IR424-436**)**. Weight was also placed on the green corridors in the

illustrative masterplan and the light strategy to be included as reserved matters (IR424, DL33). The Secretary of State and the Inspector reached the judgment that these mitigation measures would all be secured by planning conditions and that it was appropriate for these to come about through the detailed design of the development (DL33; IR429, 436). This was reflected in the framework of planning conditions, tying the GHB Mitigation Plan to the Masterplan and Design Code and the ecological mitigation strategy, which would require approval by the local planning authority prior to the submission of reserved matters and/or prior to any development taking place on phases (conditions 6 and 7).

145. I accept that it was reasonable for the Secretary of State to conclude that the identification of the location of GHB corridors and habitat, and "dark areas" in the lighting strategy, was most appropriately and effectively undertaken in conjunction with the proposals for the detailed design and layout of the development.

146. In my judgment, the Secretary of State made a series of rational planning judgments, based on the evidence, which cannot be impugned on *Wednesbury* grounds.

147. Therefore Ground 4 does not succeed.

Ground 5

148. Under Ground 5, the Claimant submitted that the Secretary of State failed to comply with regulation 70(3) of the Habitats Regulations 2017, which provides that outline permission must not be granted unless the competent authority is satisfied (whether by conditions or otherwise) that no development likely adversely to affect the integrity of a European site could be carried on whether before or after approval of any reserved matters. The Claimant alleged that the Secretary of State misunderstood the level of scrutiny and certainty necessary in order to take mitigation measures into account in light of the Dutch Nitrogen cases (see paragraph 97 above).

149. In particular, the Claimant criticised the Secretary of State's reliance upon an Illustrative Masterplan which did not demonstrate mitigation with any certainty; a lighting strategy about which no details were provided; and the bespoke GHB Mitigation Plan, which was vague and lacked important detail, according to the analysis of Dr Berthinussen and Professor Altringham.

150. Under Ground 6(b) (pleaded in its Reply), the Claimant submitted that the bespoke GHB Mitigation Plan, required by Policy NA3(n), had to be approved before planning permission was granted. It could not be left to reserved matters stage. This was confirmed by Underhill LJ in his judgment refusing permission to appeal against the dismissal of the Claimant's challenge to the Local Plan (paragraphs 4 and 10, at Appendix 2).

151. At IR304-307, the Inspector explained that the size and extent of the proposal meant that there would be several phases of development, carried out by a number of different developers. Part of the reason that Policy NA3(n) requires a bespoke GHB Mitigation Plan to be submitted and approved before planning permission was granted was to ensure the overall co-ordination of all developers in all phases, so that there

would be no adverse effect on the SAC and the GHBs, alone or in combination with other developments.

152. In my judgment, it was apparent from the way in which the Claimant presented its submissions that essentially its case was that all details of matters which could affect site integrity had to be provided at outline stage. I accept the Secretary of State's submission in response that the Claimant has misunderstood regulation 70(3) of the Habitats Regulations 2017 as it expressly provides that the role of conditions and limitations in contributing to the avoidance of adverse effects to integrity can be taken into account when considering applications for outline planning permission. The approach contended for by the Claimant, whereby all details of matters which may affect site integrity have to be assessed at the outline stage, would effectively require an application for a full planning permission. This would render the role of outline planning permissions in relation to development requiring appropriate assessment nugatory and would mean that the wording in regulation 70(3) is meaningless.

153. I note that there is no equivalent provision to regulation 70(3) in the Habitats Directive, and so it is not referenced in the CJEU case law. This is probably because the UK's two-stage consent procedure (outline planning permission followed by approval of reserved matters) does not exist in other EU Member States (see *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin), at [49]).

154. In any event, it forms no part of the *ratio* of the Dutch Nitrogen cases that the competent authority may not take into account conditions and limitations in contributing to the avoidance of adverse effects to the integrity of the site.

155. It is the responsibility of the competent authority to undertake an appropriate assessment, and in the course of doing so, to make a judgment as to whether the information available is sufficient to dispel all reasonable scientific doubt. The guidance in the Dutch Nitrogen cases at [101] and [110] concerning national courts undertaking an examination of the scientific soundness of the appropriate assessment does not indicate that the court should deviate from a review of the Secretary of State's conclusions in the appropriate assessment only on *Wednesbury* grounds (see paragraphs 98 and 99 above).

156. The Claimant's approach to regulation 70(3) of the Habitats Regulations 2017, and the Rew family's response to it, were considered at IR43-50, and the Inspector set out her conclusion at IR436. On my reading of the IR, the Inspector rejected the Claimant's approach. The Secretary of State agreed with the Inspector's conclusions at DL25-36**.**

157. The Inspector undertook a detailed consideration of the GHBs and the impact on the SAC, at IR413 to 432, much of which is quoted at paragraph 139 above. She expressly considered the GHB mitigation plan and the lighting strategy, and the Langford Bridge Farm proposal. She correctly set out the test to be applied under the Habitats Directive and the Habitats Regulations 2017, at IR433-434. She concluded at IR436:

> "… the above measures of mitigation would be sufficient to ensure that the proposed development would not, beyond scientific doubt, have an adverse effect on the integrity of the

> South Hams SAC, nor would it result in a diminishing of the quality and importance of the SSSI as an ecological habitat. I consider it reasonable to deal with these matters at an outline stage in the knowledge of the various survey work outcomes, the conclusions of the LP Examining Inspector, the terms of the proffered mitigation and securing conditions and obligations, and the opportunity to re-visit the assessment at the reserved matters stage. These measures, to be delivered through conditions and the S106 obligations, would comply with LP Policy NA3 i) and n) which seek to protect the relevant ecologically important habitats, along with Policies EN8, EN9 and EN10, the objective of which is the maintenance and enhancement of biodiversity as a key element of sustainable development."

158. The Secretary of State undertook an appropriate assessment at DL25 – 36, drawing on the Inspector's findings in the IR. He expressly had regard to the GHB Mitigation Plan and the lighting strategy, and he was satisfied that these matters would be secured by the planning conditions proposed in Annex B to his decision letter (DL33). At DL34, he placed reliance upon the opinion of Natural England, the statutory consultee, which considered that "the Secretary of State had sufficient evidence to be satisfied that no development likely to adversely affect the integrity of the SAC could be carried out under the outline permission consistent with the provisions of the Habitats Regulations". He concluded, at DL36, that there would be no adverse effect on the integrity of the SAC.

159. The Secretary of State's decision imposed a framework of planning conditions relating to GHBs (condition 6 (Masterplan and Design Code), condition 7 (ecological mitigation strategy), and condition 12 (lighting)) which set out clearly defined parameters for the approval of reserved matters, which enabled the Secretary of State to conclude, with sufficient certainty, that the proposed development would not adversely affect the integrity of the SAC. The GHB Mitigation Plan was tied to the Masterplan and Design Code and the ecological mitigation strategy, which would require approval prior to the submission of reserved matters and/or prior to any development taking place. Under condition 6, the Masterplan and Design Code was to be formulated broadly in accordance with the submitted Design and Access Statement and Illustrative Masterplan, and specific requirements were set out at (a) to (k). The careful way in which the conditions were drafted ensured that all developers at all phases would have to comply with the Masterplan and Design Code and the ecological mitigation strategy. Under condition 15, the Construction Environment Management Plan (CEMP) and Ecological Construction Method Statement protected GHB corridors and minimised light spill during the construction phases.

160. As I have already stated under Ground 4, I accept that it was reasonable for the Secretary of State to conclude that the identification of the location of GHB corridors and habitat, and the "dark areas" for the lighting strategy, was most appropriately and effectively undertaken in conjunction with the proposals for the detailed design and layout of the development.

161. As to Ground 6(b), I do not consider that Underhill LJ's judgment provides any support for the Claimant's challenge.

162. In respect of the settlement level plans, Mr Seaton explained in his witness statement, at paragraph 7.2, that at Local Plan stage "there was never any hint of a settlement level plan for Newton Abbot". That accords with paragraph 76 of my judgment in the Local Plan challenge where I said:

> "76. Natural England also recommended provision for bespoke settlement mitigation plans in three areas <u>(excluding the Newton Abbot area which affects the Claimant)</u>, and the Council agreed to do this. Paragraph 5.29 of the Plan provided:
>
> > "Bespoke mitigation plans will be provided at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combinations impacts from developments proposed in the Plan."" (*emphasis added*)

163. In respect of the bespoke GHB Mitigation Plan, required by Policy NA3(n), this was duly submitted to, and approved by, the Secretary of State in the course of the planning permission procedure. At the Inquiry, and in this Court, the Claimant challenged the adequacy of the bespoke GHB Mitigation Plan, submitting that all details should be approved at outline stage. The Secretary of State, in the exercise of his planning judgment, took a different view. Underhill LJ's judgment does not touch on this issue, since the application for planning permission and the GHB Mitigation Plan post-dated the challenge to the Local Plan which he was considering.

164. In conclusion, I do not consider that the Secretary of State failed to comply with regulation 70(3) of the Habitats Regulations 2017. He made a series of legitimate planning judgments, which are not capable of challenge on *Wednesbury* grounds. Therefore Ground 5 does not succeed.

Conclusion

165. For the reasons set out above, the claim is dismissed.

Appendix 1

Extracts from the judgment of Lang J. in *Abbotskerswell PC v Teignbridge DC & Secretary of State for Communities and Local Government* [2014] EWHC 4166 (Admin)

34. The Claimant argued that the final sentence of paragraph 44 of *Sweetman* – "It is for the national court to establish whether the assessment of the implications for the site meets these requirements" – should be interpreted to mean that the Court should conduct a full merits review of the Council's assessment, rather than applying a *Wednesbury* test.

35. The Defendants agreed that the process of drafting and adoption of the Local Plan triggered the obligations under Regulation 102 of the Habitat Regulations 2010. Thus, prior to adoption, the First Defendant had to ascertain that the Local Plan would not adversely affect the integrity of the Special Area of Conservation, applying the test of no reasonable scientific doubt.

36. I accept the Defendants' submission that, under Regulation 102(4), this was a judgment for the plan-making authority to make, and so it is only reviewable by the court on conventional judicial review grounds. This is confirmed by the following authorities: *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2013] PTSR 406 per Pill LJ at [31]; *Feeney v Oxford City Council* [2011] EWHC 2699 (Admin) at [81]; *R (Evans) v. Secretary of State for Communities and Local Government & Ors* [2013] EWCA Civ 114, at [32] – [40]. *Cairngorms Campaign v Cairngorms National Park Authority* [2013] CSIH 65, at [63] to [64]. In my judgment, it is plain from paragraph 46 of the judgment in *Sweetman* that the decision is one for the "competent national authority" to take, not the court. I do not consider that the final sentence of paragraph 44 is a sufficient basis upon which to find that the domestic authorities on the standard of the court's review should not be followed and applied.

37. Applying the appropriate legal tests, I have not been able to discern any error of law in the steps taken by the Council and its exercise of judgment, pursuant to the Directive and the 2010 Regulations.

38. I consider that the Council acted in accordance with its obligations under the Habitats Directive and Regulations, acted rationally, took into account all relevant considerations and applied the NPPF. It undertook all the assessments which were required at this stage of the planning process. It consulted, and responded constructively to recommendations in the Habitats Regulations Assessments, and to concerns raised by Natural England. This is demonstrated by the iterative process which I summarise below.

39. The draft RSS required that 15,900 homes should be provided across the district from 2006 to 2026, including at least 2,000 in the south west of Exeter and 8,000 in the Newton Abbot area.

40. In 2009, the Council undertook a full Strategic Housing Land Availability Assessment, assessing more than 300 sites. The assessment panel included representatives of Natural England, the Environment Agency and other statutory

agencies. Each site was the subject of detailed appraisal, including the potential impact on the GHB, based on earlier radio-tracking records of bat movement.

41. Following the changes introduced by the Localism Act 2011, including the abolition of regional strategies, the Council had to re-consider the form and content of the proposed Local Plan.

42. In May 2010, Natural England produced the Consultation Zone Planning Guidance for the South Hams SAC with the aim of ensuring "that the relevant planning authorities are in a position to meet the statutory obligations associated with the Greater Horseshoe Bat conservation interest of the South Hams SAC". The Guidance identified the sustenance zones and strategic flyways used by the GHB. It is apparent from the evidence that the Council followed this Guidance.

43. The Teignbridge Core Strategy: Issues and Alternative Options document was published for consultation in June 2010. Natural England's response identified environmental constraints to accommodating growth, including the protection of bats.

44. In September 2010, a draft Habitats Regulations Assessment was undertaken. It produced a series of recommendations, which guided further work on the Local Plan. In respect of the South Hams SAC it stated:

> "there are a range of impact types including land take, light pollution, severance of flyways and possible changes to management of remaining farmland. Appropriate mitigation will include lighting control, hedge protection and financial or other contribution to habitat enhancement."

45. In March 2011, Kestrel Wildlife Consultants, acting on behalf of the Council, produced a site screening for the Chudleigh Caves SSSI, the key site within the South Hams SAC. Sites were assessed as green (unlikely to affect the integrity of the SAC); orange (effect would depend upon the details of the proposal and the form of mitigation provided) and red (unlikely that effective mitigation or compensation would be possible). Mr Thornley, the Council's planning officer with responsibility for preparation of the Local Plan, said in his witness statement that the Kestrel report informed the place-level distributions in the Preferred Options document.

46. The Teignbridge Local Plan Preferred Options document was finalised in November 2011 and consulted upon from January to March 2012. It was accompanied by a Habitats Regulations Assessment dated November 2011. It identified the proposed housing allocations which were within, or adjacent to, bat sustenance zones or strategic flyways and therefore had the potential to negatively impact the GHB and the SAC. It recommended further assessments by a bat expert and advised that "once sites are known, Appropriate Assessments may be needed, and depending on the level of impacts, mitigation may be required or an alternative site may need to be found".

47. Natural England responded to the consultation by letter dated 16th December 2011, seeking clarification on the stage at which any appropriate assessments would take place, in particular, whether it would be at the level of this plan or "down the line" at lower tier plan or project stage. The letter added:

> "14. We accept it may be necessary to rely upon "down the line" assessment for at least some policies and proposals. The draft Natural England guidance sets out the criteria under which lower tier assessment may be acceptable and we would encourage you to check that these apply wherever lower tier assessment is considered.
>
> 15. One of the criteria is whether at lower tier stage there would be freedom to change the nature and/or scale and/or location of the proposal in order to avoid adverse effects…."

48. Mr Thornley explained in his witness statement that, in the light of the November 2011 Habitats Regulations Assessment and the consultation responses, the Council gathered additional evidence. Kestrel was commissioned to undertake appraisals of the site at Bovey Tracey, Kingsteignton, Newton Abbot and Kingskerswell. Mr Thornley said that the policy wording and site allocations set out in the Preferred Options document were refined by the Council to take account of the recommendations made following these appraisals, when formulating the Proposed Submission version of the Local Plan.

49. In September 2012, the Proposed Submission Local Plan together with the Sustainability Appraisal and the Strategic Environmental Assessment, were considered and approved by the Council's Overview and Scrutiny Committee, the Executive, and the full Council. The Claimant objected specifically to the proposed housing allocation in policy NA3 at Wolborough (near Abbotkerswell) and, through its Councillor, put forward an alternative location, Conitor Copse. This site was investigated but had to be rejected as it contained a cave supporting a bat roost and included a strategic flyway.

50. In October 2012 a further Habitats Regulations Assessment was produced, in light of the further evidence and amended proposals. Its conclusions on the South Hams SAC were:

> "Those allocations assessed as likely to impact the South Hams SAC were assessed by a suitable expert, who advised on how to avoid harm to the bats. This included redrawing of some boundaries, dropping of one potential additional allocation and specific survey/mitigation measures recommendations for others. Specific reference is made to survey/mitigation requirements in key proposals. Natural England's South Hams SAC – guidance for planners' ('GHB protocol' in screening table) will be followed. None of the remaining Allocations are assessed as causing impacts that would be impossible to mitigate."

51. Natural England made its consultation response by letter dated 19th December 2012. It listed the policies it considered to be unsound. The list did not include NA3 In relation to the South Hams SAC it said:

> "We have based our response on the Reports commissioned by the Authority… which considered many sites and made one of three observations
>
> - That there would be no impact on the SAC.
> - That there were Likely Significant Effects but it was considered impacts on the SAC could be mitigated against.
> - That there were Likely Significant Effects but it was considered that impacts on the SAC could not be mitigated against.
>
> Many of the sites were in the second category and Natural England is satisfied that it is appropriate for some sites to be assessed for HRA at a project stage and therefore does not object to the allocation of those sites. However, the report has indicated that for some of the allocated sites, delivery was questioned. In addition, cumulative sites of housing … adjacent to … mineral and waste development have not been considered…"

52. Natural England welcomed the inclusion of policies in relation to provision of green infrastructure.

53. Submission of the Local Plan was deferred to allow further work to be undertaken on the Habitats Regulations Assessment (as well as some other issues). The Council commissioned Kestrel to prepare a supplementary report with a review of the evidence relating to bats in the District, the assessment of local plan allocations and the potential impact on the South Hams SAC.

54. A revised Habitats Regulations Assessment was produced in June 2013, which addressed concerns raised by Natural England, among others. It made a number of case specific recommendations. In respect of a number of policies, including NA3, it added a specific requirement:

> "A bespoke GHB mitigation plan … must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the local foraging area and as part of a strategic flyway used by commuting GHBs associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects."

55. It also recommended that the Council should prepare and publish, a GHB Mitigation Strategy, in collaboration with the other planning authorities with responsibility for the South Hams SAC, as a supplementary planning document. It would identify the requirements and measures necessary to mitigate the likely effects of all types of

developments (both alone and in-combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC. This Strategy would eventually replace the guidance published by Natural England in 2010.

56. The Assessment concluded:

> "With the above measures in place … it is advised that the Teignbridge Local Plan can be concluded to be in accordance with the requirements of the Habitats Regulations and parent European Directives."

57. The recommendations in the Habitats Regulations Assessment were added to the Proposed Submission, which already contained requirements to take account of the need for bat mitigation and the strategic requirement in relation to European protected species.

58. In response to further consultation, Natural England confirmed in a letter of 18th June 2013 that the Habitats Regulations Assessment had been satisfactorily concluded.

59. The Local Plan was formally submitted for examination in June 2013, together with the Habitats Regulations Assessment. The examination sessions held by the Inspector included SAC issues. There was debate about the effectiveness of GHB mitigation and whether it was sufficient for the Council to provide for bespoke mitigation plans before planning permission was granted on any individual project.

60. After the examination, a further addendum to the Strategic Environmental Assessment was produced in December 2013. Section 4 contained an assessment of the likely in-combination and cumulative impact on the region. Under the heading "Greater Horseshoe Bat South Hams SAC", it stated:

> "There exists a risk of potential in-combination effects of development in Teignbridge and in neighbouring authorities with responsibilities for the South Hams SAC, on the integrity of bat habitat including roosts, flyways and areas for foraging. Principally this is through severance and light pollution.
>
> The HRA indicates that potential in-combination effects on the South Hams SAC, through development in Teignbridge and in neighbouring planning authorities (Dartmoor National Park, Torbay and South Hams), can be mitigated through the introduction of a landscape scale Greater Horseshoe Mitigation Strategy. This should be prepared and published in collaboration with other planning authorities with responsibilities for the South Hams SAC as a supplementary planning document. The Strategy can replace relevant guidance by Natural England and identify the requirements for a provision of measures necessary to mitigate the likely affects (sic) of all types of developments (both alone and in combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC.

> The Council has proposed minor changes to the … submission which make clear the requirement for the Greater Horseshoe Bat Mitigation Strategy and securing bespoke greater horseshoe bat mitigation plans for large-scale development proposals. The Teignbridge Green Infrastructure Strategy (July 2011) has identified a series of green corridors that could support and enhance the main strategic flyways around Newton Abbot, Kingsteignton, Kingskerswell and Bovey Tracey."

61. In his Report delivered on 9th April 2014, the Inspector found:

> "15. A raft of policies, EN8 – EN12, are directed specifically at protecting biodiversity, important habitats, priority species and flora. Natural England raised no objection to the broad approach of these policies. The detailed policies for site allocations include appropriate criteria to mitigate and/or offset any impact on protected species or habitats, with particular reference to bats, given the proximity of the South Hams SAC … On balance, subject to provisions relating to some specific sites, I agree the benefits of new housing outweigh the environmental disadvantages at those particular locations."

62. In relation to specific sites, the Inspector gave careful consideration to the provision for the protection of GHB, and concluded that it was sufficient. He attached considerable weight to the fact that the proposals were not objected to by Natural England. He accepted that the requirement for a bespoke GHB mitigation plan to be approved before planning permission could be granted for a specific project was an appropriate safeguard.

63. Immediately before the Local Plan was adopted, Natural England sought some further changes, and these too were incorporated by the Council. In an email dated 2nd May 2014, Natural England said that settlement level bespoke mitigation plans were needed at Bovey Tracey, Chudleigh and Kingsteignton. It said it would be sufficient if this was set out in the text accompanying the policies. It did not need to be incorporated into the wording of the policies themselves.

64. I return now to the Claimant's criticisms of the Local Plan.

65. In my judgment, the Council and the Inspector acted lawfully in concluding, in the exercise of their planning judgments, that the Local Plan provided sufficient protection for the GHB. Pursuant to regulation 102(4) of the 2010 Regulations, the Council ascertained that the Local Plan would not adversely affect the integrity of the SAC.

66. It is apparent from the evidence which I have summarised above that the Council did undertake extensive Habitats Regulations assessments, in compliance with the Habitats Directive and Regulations. Those assessments were properly taken into account by the Council in formulating the Local Plan.

67. The Plan's policies provided effective protection for GHBs. Policy EN10 of the Local Plan expressly stated:

"European Wildlife Sites including…South Hams…will be protected. Development that is likely to have a significant effect on the integrity of a European Wildlife Site will be subject to assessment under the Habitats Regulations 2010 and will not be permitted unless adverse effects can be fully mitigated and/or compensated. Further specific requirements are set out below.

Roosts, strategic flyways and sustenance zones for greater horseshoe bats, which constitute the special interest of the South Hams Special Area for Conservation will be protected, and where possible, enhanced to reflect the specific requirements of that species. In locations within or adjoining such roosts, strategic flyways and sustenance zones, there may be the need to include protection zones or removed certain permitted development rights (particularly lighting and wind turbines) to protect their continued use…

…A Habitat Regulations Assessment (HRA), required under the Habitats Directive, has been undertaken on the policies within the Local Plan to ensure there will not be an adverse effect on any such site. Additionally, it is a requirement under the Habitat Regulations that any development proposals which may have an impact on a European Site are subject to further assessment in order to avoid harm to those sites."

68. Policy EN11 provided:

"To protect and expand the presence of legally protected and S41 List priority species, development which would be likely to directly or indirectly harm such a species will not be permitted unless:

…

e) for legally protected species favourable conservation status is maintained."

69. Policy S5 provided:

"…The Council will:

…

f) ensure that the provision of new infrastructure will only be approved where the planning authority has ascertained that it would not adversely affect the integrity of any European sites; and

g) all mitigation for impacts to European sites shall be considered as critical in the Infrastructure Delivery Plan and

> sufficient contributions, to ensure that provisions remain in the long-term, will be taken from the CIL pot for Habitat Regulations mitigation measures before funding is used for other types of infrastructure."

70. Policy WE11 provided on Green Infrastructure:

> "(g) appropriate suitable alternative natural green spaces required by Habitat Regulations to relieve recreational pressure on European sites; and strategic and detailed design requirements delivered as part of green infrastructure to mitigate the loss of foraging habitat and linear features used as flyways by Greater Horseshoe Bats will be identified in the proposed South Hams SAC Mitigation Strategy Supplementary Planning Document." (The accompanying text then cross-referred to paragraph 5.29, set out at paragraph 78 below)

71. Natural England's 2010 Planning Guidance on GHBs provides detailed advice on the adverse impact of development. It was intended to provide guidelines to ensure that the requirements of the Habitat Regulations 2010 could be met by new developments, including details of survey specifications. In my view, it is a valuable safeguard against harm to the SAC and GHB from ill-considered development.

72. Additionally, the Local Plan provided for mandatory site-specific bespoke mitigation plans, as recommended in the Habitats Regulations Assessment. These would necessarily require an impact assessment. In my view, the Council was entitled to conclude that bespoke GHB mitigation plans in relation to specific development sites would be both more appropriate and effective if undertaken at planning permission stage, when the scope and details of the project would be known to the Council and the developer. The Local Plan was a high-level strategic document, setting out broad allocation policies, but without project detail.

73. I do not consider that this approach was contrary to the general principles expressed in the opinion of A.G. Kokott in *Commission v UK* C-6/04 and in *Hart District Council v The Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), per Sullivan J. at [55] – [56].

74. Importantly, this approach was approved by Natural England, the statutory consultee. The Council was entitled to give "significant", "great" or "considerable" weight to the views of Natural England: see *Forest of Dean Friends of the Earth v Forest of Dean District Council* [2014] Env LR 3 at [80]; *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) at [72].

75. The Council's recent decision to grant outline planning application for housing at Chudleigh, and to defer the bespoke mitigation plan until the stage of approval of reserved matters, is not the approach expressly set out in the Local Plan, which provides that the plan must be "approved before planning permission is granted". It would not be appropriate for me to express a view on the lawfulness of the Chudleigh decision, since it is the subject of a separate judicial review claim, but I agree with the Council that it does not provide a reliable basis for assessing the lawfulness and effectiveness of the Local Plan if the decision was contrary to it.

76. Natural England also recommended provision for bespoke settlement mitigation plans in three areas (excluding the Newton Abbot area which affects the Claimant), and the Council agreed to do this. Paragraph 5.29 of the Plan provided:

> "Bespoke mitigation plans will be provided at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combinations impacts from developments proposed in the Plan."

77. Neither Natural England nor the Council considered it was necessary for this provision to be incorporated into the policies (as opposed to the accompanying text) nor that the settlement plans had to be completed before the Local Plan could be adopted. Natural England recommended that the settlement plans needed to be in place before any development took place whereas the Council did not commit to this. These were judgments for the Council to make; in my view, they do not render the Local Plan unlawful. In this context, it is significant that the Habitats Regulations Assessment did not recommend settlement plans, in addition to the site-specific bespoke mitigation plans. The Council was justified in concluding that, pending completion of the settlement plans, the mandatory obligation to approve a bespoke GHB mitigation plan for each site, which would have to be compliant with the general GHB policies, including consideration of 'in-combination' effects of other development, would meet the requirements of the Habitats Directive and Regulations.

78. The Local Plan provided for the preparation of a strategic GHB mitigation strategy. Paragraph 5.29 provided:

> "The greater horseshoe bat is a European protected species … [The] caves are a designated Special Area of Conservation and have very strong protection (as set out above). This species has particular needs and there are particular roosts, flyways and foraging areas which they use. They are very sensitive to changes in these areas, and therefore it is important that the areas are identified and protected, and if possible their potential enhanced. Further, more detailed, guidance has been prepared by Natural England …. The Council, in collaboration with the other planning authorities with responsibilities for the South Hams SAC, will prepare and publish, as a supplementary planning document (SPD) a Greater Horseshoe Bat Mitigation Strategy. This will eventually replace the above guidance published by Natural England. The proposed Mitigation Strategy SPD will identify the requirements for and provision of measures necessary to mitigate the likely effects of all types of development (both alone and in combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC."

79. Thus, the Council made provision for a mitigation strategy in the terms recommended in the Habitats Regulations Assessment, which did not require that it be completed

before adoption of the Local Plan, nor that there should be a moratorium on development until it was completed.

80. The strategy was intended to be a Supplementary Planning Document to provide further support to the Local Plan. It was not envisaged that it would be prepared in advance of the Local Plan; this would not be realistic as a document prepared jointly between a number of local planning authorities would take time to produce and agree. Paragraph 5.29 (adopting the wording of the Habitats Regulations Assessment) provided that this strategy would "eventually" replace the Planning Guidance by Natural England, implying that this would not occur immediately. In the meantime, the existing Planning Guidance published by Natural England would remain in place to guide any decisions on planning applications. The Habitats Regulations Assessment expressly recognised in its recommendations and conclusions that "Any applications received in advance of the completion of this work [i.e. the new strategic mitigation strategy] will have to consider the in-combination impacts which are likely to require greater consideration of other plans and projects and greater evidence base" (paragraph 13.6 of the June 2013 assessment).

81. In my judgment, the Council's approach was a legitimate exercise of judgment by the Council which was not unlawful. Importantly, it was approved by Natural England, the statutory consultee.

82. The Claimant's complaint that the mitigation provided for by the Plan was neither effective nor enforceable, and so undeliverable, is not supported by the evidence. In reality, it reflects a difference of opinion on the merits of the planning policies adopted by the Council and approved by the Inspector, rather than grounds for a legal challenge.

83. The Inspector gave careful consideration to the provision for the protection of the GHB in the Local Plan, and concluded that it was sufficient, and complied with the requirements of the Habitats Directive and the Regulations. He did not consider that the safeguards proposed in the plan – the strategic mitigation strategy, settlement and site mitigation plans – had to be in place in advance of adoption of the Local Plan. He attached considerable weight to the fact that the proposals were not objected to by Natural England. On the evidence, the Inspector was entitled to conclude that the housing policies were capable of delivery, whilst still according sufficient protection to the GHB. He said, at paragraph 137:

> "The discussion of all of the issues throughout this report indicates that the Plan is reasonably robust and has sufficient flexibility to deliver the outcomes intended, particularly with regard to housing and employment growth, together with continued environmental protection."

84. This was a planning judgment with which the Claimant disagreed but, in my view, cannot successfully challenge in law. For the reasons I have already given, I consider that the Inspector was entitled to conclude that the Local Plan met the statutory requirements and was sound, applying the criteria in the NPPF.

Appendix 2

Case No: C1/2015/0076

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division, High Court
Mrs Justice Lang

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

LORD JUSTICE UNDERHILL

- -

Between :

ABBOTSKERSWELL PARISH COUNCIL	**Appellant**
- and -	
TEIGNBRIDGE DISTRICT COUNCIL & ANR	**Respondents**

- -
- -

Ms Jenny Wigley (instructed by **Richard Buxton Environmental & Public Law**) for the **Appellant**
Mr Michael Bedford (instructed by **Teignbridge District Council Legal Services**) for the **Respondents**

Hearing date : 05 June 2015

- -

Approved Judgment

Lord Justice Underhill :

1. This is a renewed application for permission to appeal against a decision of Lang J dismissing the Applicant's application under section 113 of the Planning and Compulsory Purchase Act 2004 to quash all or part of the Teignbridge Local Plan. Since it is a permission application I will not rehearse the background to the claim or the Judge's reasoning. Exceptionally, because of the time pressure created by a following hearing, I have reserved my judgment. The Applicant has been represented by Ms Jenny Wigley of counsel. Also exceptionally, Mr Michael Bedford of counsel has appeared for the Respondent, and I invited his submissions on some particular points.

2. There are three grounds of appeal, which I take in turn.

3. As to ground 1, when I first read the papers, starting with paras. 34-36 of the judgment of Lang J, I understood the issue to be one of general principle about the standard of review to be applied by the Court in considering an appropriate assessment under the first limb of article 6.3 of the Habitats Directive, or of a plan or project adopted in the light of such an assessment under the second limb (or, to put it in domestic terms, under sub-paras. (1) or (4) of reg. 102); and that appears to have been Sullivan LJ's approach when considering the case on the papers. But Ms Wigley accepts that there is now, even if there may not have been before, binding authority at this level that as regards matters of judgment and evaluation the Court's role is limited to a *Wednesbury*-type review: see *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, at paras. 78-80. The way that she puts her case is that the specific defects which she alleges in the Plan do not, at least arguably, involve any question of judgment or evaluation, but constitute plain lacunae in the protection afforded: these would appear to engage the jurisdiction of the Court even without reference to the passage in the judgment of the ECJ in *Sweetman* [2014] PTSR 1092 to which she attaches importance. I turn therefore to consider those defects.

4. The starting-point for the Applicant's case in this regard is that the "appropriate assessment" carried out on behalf of the Respondent by Kestrel Wildlife Ltd recommended three ways in which the integrity of the relevant site, as regards the greater horseshoe bat, should be protected against adverse impact. Taking them in ascending order of generality:

   (1) The second bullet point under the relevant heading in para. 13.6 of the assessment reads:

   > "For some proposals, it will be necessary for a bespoke Greater Horseshoe Bat Mitigation Plan to be prepared, submitted and agreed prior to the grant of *any planning permission* [my emphasis]. Such plans will need to demonstrate with very high levels of certainty that there will be no adverse effect on the integrity of the South Hams SAC."

   This is the specific site-level protection.

(2) The "Supplementary Report on Greater Horseshoe Bats and the South Hams SAC" recommends "a series of bespoke Greater Horseshoe Bat Mitigation Plans … to be developed for each of the major settlements" – elsewhere referred to as a "settlement plan". The description of these plans under para. 2.2.1 of the Supplementary Report identifies five such settlements and says "these plans will need to be prepared and submitted by the developer and agreed with the Council *before planning permission is granted* [again, my emphasis]". The purpose is to inform mitigation measures over a wider area than the allocated sites, in order to reflect the range over which bats may forage.

(3) The third bullet point in para. 3.16 of the Primary Assessment reads:

> "Potential 'in-combination' effects on the South Hams SAC will be mitigated through the preparation of a landscape scale Greater Horseshoe Bat Mitigation Strategy. Any applications received in advance of the completion of this work will have to consider the in-combination impacts which are likely to require greater consideration of other plans and projects and greater evidence base."

5. The question is whether those requirements were adequately incorporated in the Plan.

6. As to (1), there is no dispute. In respect of each site where an allocation is made, the relevant policy contains a provision as follows:

> "A bespoke Greater Horseshoe Bat mitigation plan for [the site] must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the foraging area within the SAC sustenance zone and as part of a strategic flyway used by commuting Greater Horseshoe Bats associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects."

7. As regards (2) and (3), policy EN10 – "European Wildlife Sites" – contains a general policy that "roost strategic flyways and sustenance zones" for Greater Horseshoe Bats "will be protected and, where possible, enhanced to reflect the specific requirements of that species", with various particular points being made. The policy ends:

> "A Habitat Regulations Assessment (HRA), required under the Habitats Directive, has been undertaken on the policies within the Local Plan to ensure that there will not be an adverse impact on any such site. Additionally, it is a requirement under the Habitat Regulations that any development proposals which may have an impact on a European Site are subject to further assessment in order to avoid harm to those sites."

The supporting text, at para. 5.29, contains the following passage:

> "Further, more detailed, guidance has been prepared by Natural England, the 'South Hams SAC – Greater Horseshoe Bat Consultation Zone Planning Guidance' which indicates the location of these zones. The Council, in collaboration with the other planning authorities with responsibilities for the South Hams SAC, will prepare and publish, as a supplementary planning document (SPD), a Greater Horseshoe Bat Mitigation Strategy. This will eventually replace the above guidance published by Natural England. The proposed Mitigation Strategy SPD will identify the requirements for and provision of measures necessary to mitigate the likely affects of all types of developments (both alone and in combination with other projects) in all areas where there could be an adverse affect on the integrity of the South Hams SAC. Bespoke mitigation plans will be produced at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combinations impacts from development proposed in the Plan."

8. The text, though not explicitly the policy, thus provides for both the settlement level bespoke mitigation plans recommended in the assessment and the "landscape level" Bat Mitigation Strategy – i.e. items (2) and (3). But the Applicant's point is that no timescale is provided for either measure to be taken and, more specifically, there is no requirement that the plans or strategy be in place before planning permission is granted in respect of any of the allocated sites. That is a frank departure from the recommendations of the appropriate assessment and thus, it is said, constitutes not simply a difference of evaluation on a matter of planning judgment but a failure which makes it impossible, as required by the Directive, to ascertain that the Plan would not adversely affect the integrity of the relevant sites.

9. I am afraid I cannot accept that that is arguable. It is necessary to consider separately the settlement level plans and the landscape mitigation strategy.

10. So far as the settlement level plans are concerned, the absence of a specific requirement in the Plan that these should be completed before any planning application is determined does not compromise the protection of the site. It remains a requirement of the grant of planning permission that the developer can demonstrate that there will be no adverse effect on the site either as a result of his own development or (importantly) "in combination with other plans or projects": see the quote from the policy at para. 6 above. If he is unable to do so because that is impossible without a settlement-level plan of the type recommended in the supplementary report, then permission must be refused.

11. As for the landscape-level strategy, it is clear that the assessment itself did not anticipate that it would be in place before any permission could be granted in accordance with the allocations in the Plan. That is apparent from the reference in the passage quoted at para. 4 (3) above to "any applications received in advance of the completion of this work".

12. I turn to ground 2. The main point concerns the Council's failure to adopt Natural England's advice, in its email of 2.5.14, that the text of the Plan should explain that settlement-level mitigation plans should be in place before any development is permitted. I agree with Sullivan LJ that it is not arguable that this was an error of law, for essentially the same reason as I have given at para. 10 above. Generalisations about the weight to be given to Natural England's views, and the involvement of members, have to be read in the context of the particular departure in question. I am not convinced that in observing that there was no such requirement in the original assessment Lang J overlooked what had been said in Kestrel's supplementary report; but even if she did the basic point is unaffected. Ms Wigley's point about the supposed inconsistency in the Council's approach to other aspects of Natural England's advice is, with respect, a debating point: what matters is simply whether its failure to follow its advice in this particular respect was justified.

13. As to ground 3, this was somewhat refined in Ms Wigley's advocate's statement from the point made in the original skeleton, which seemed to me unarguable in the light of the fact that the assessment itself did not require the landscape-level strategy to be in place before any development was permitted (and nor did Natural England). But the reformulated submission that the Plan involved "putting off indefinitely" the completion of the landscape-level strategy and the settlement-level plans seems to me equally unsustainable. It is true that no deadline was specified, but that is quite different from a decision to "postpone indefinitely". The Plan is clearly to be understood as requiring them to be got on with with reasonable expedition, and – to repeat – if they are not in place and if absence of risk cannot be shown without them permission cannot be granted. In addition, as regards the landscape-level strategy, it is clear that the Council – like Kestrel – recognised that this would take a little time, because of the need to involve other authorities. I can see nothing arguably unlawful in any of this. Nor is it inconsistent with the principle enunciated by A-G Kokott that assessments should be carried out at the earliest possible stage: it is still necessary to decide what that requires in the circumstances of a particular case.

14. For those reasons, despite Ms Wigley's well-constructed skeleton argument and advocate's statement and her careful development of them in submissions, I would refuse permission to appeal.

Neutral Citation Number: [2022] EWHC 3002 (Admin)

Case No: CO/3002/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN MANCHESTER

Friday 25th November 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of MACINTOSH VILLAGE (MANAGEMENT) LIMITED)	**Claimant**
- and -	
MANCHESTER CITY COUNCIL	**Defendant**
-and-	
GMS (PARKING) LIMITED	**Interested Party**

- -

- -

John Hunter (instructed by Keystone Law) for the **Claimant**
Christopher Katkowski KC and **Alan Evans** (instructed by City Solicitor) for the **Defendant**
Paul Tucker KC and **Stephanie Hall** (instructed by Town Legal) for the **Interested party**

- -

Hearing date: 9/11/22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....
THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. With the permission of the Court of Appeal granted on 19 May 2022, the Claimant ("MVML") seeks judicial review of a decision of the Planning and Highways Committee ("the Committee") of the Defendant ("the Council"). The decision was to grant planning permission to the Interested Party ("GMS") for a proposed development on the site of an existing multi-storey car park ("MSCP") between Great Marlborough Street and Hulme Street in Manchester City Centre ("the Site"). The Site is just south of Manchester Oxford Road train station, in the direction of ManCoCo coffee, in an area containing commercial and residential developments as an active frontage to a railway viaduct. The proposal would involve the construction of a 55-storey tower block, comprising 853 units of purpose built student accommodation and 786m2 of incubator workspace for small and medium-sized enterprises, together with ancillary amenity space, public realm and other associated works. Under the proposal, the MSCP will be reconfigured and made smaller. GMS owns part of the Site. The proposal would involve a "construction" phase. During construction, there would be two tower cranes on the Site, one of whose base would be within a space which would continue to operate as a car park. The use of tower cranes means a necessary period of crane "assembly" before the crane starts to be used, and a period of crane "dismantling" after its use has finished. The existing MSCP is on five storeys with a lift. It has 391 spaces including 20 disabled parking spaces. The reconfigured car park would have four storeys of parking with a lift. It would have 101 spaces, including 5% (ie. 5) disabled parking spaces, and 20% of the 101 being fitted with an electric car charging point. There would be a loss of 290 spaces, the partial demolition of the surplus part, modification to height and elevations, and the construction of 5 storey external ramps. I was shown plans which show the existing, transitional and final layout of the car park.

2. A chronological outline of some key steps within the planning process is as follows. GMS's application for planning permission was made on 13 September 2018. An Environmental Statement was prepared. Representations were made concerning the proposal. There were three rounds of neighbour notification. An Officers' Report was prepared for a meeting on 21 January 2021 at which consideration of the application was deferred. An Amended Environmental Statement (the "AES") was provided by GMS on 24 May 2021. There was a fourth-round of neighbour notification. The OR was issued on 21 June 2021 for a meeting scheduled for 1 July 2021. MVML's fourth-round representations ("the July Representations") were provided by it on 1 July 2021 and sent direct that morning to all members of the Committee (the "Members"). The Meeting took place at 3pm that day. The Meeting was recorded on a video, from which a transcript was produced to assist the Court. The planning permission decision notice was issued on 23 July 2021, setting out the permission and its accompanying 44 planning conditions. The planning policies to which I refer in this judgment are published online. Also available online (by searching the Council's website using reference "121252/FO/2018") are key planning documents. That includes the OR and the AES. Where I give apparently extraneous paragraph numbers in this judgment, that is no more than as a navigational aid for the parties and anyone who wants to follow the greater detail by accessing the publicly available sources. Where passages quoted in this judgment contain numbers in square brackets, these have been added by me for ease of later cross-referencing.

3. MVML is described in the grounds for judicial review as "a residents' management company representing nearly 500 leaseholders in Macintosh Village, many of whom have residents' rights to park at the existing car park". These "residents' rights to park" (the "RRPs") are important to understanding this case. They are also important to understanding the proposed development. It is because of the RRPs that the reconfigured MSCP is proposed to be retained at the Site. Moreover, the number of RRPs accounts for the size of the proposed reconfigured MSCP. The following points are all made within the Planning Officers' Report issued on 21 June 2021 ("the OR"). The existing MSCP has 391 spaces. Between 30-40 of the current 391 spaces are in use at any one time. The leasehold arrangements for RRPs are for approximately 90 to 100 spaces. The proposed reconfiguration would reduce the MSCP to 101 spaces, that being "the required number" to be "made available for those with a right to park in the car parking". Because the RRPs are of such significance in this case, I will start this judgment by recording that the OR made two basic points about them (the "Two Basic Points"): [BP1] that all those with RRPs will retain a right to a parking space within the proposed reconfigured MSCP; and [BP2] that these spaces will be kept "operational at all times", during the construction phase for the development, and after its completion. The Two Basic Points [BP1] and [BP2] can be clearly seen from these passages, all taken from the OR:

> ***[I]t is understood that there is a leasehold arrangement for approximately 90 to 100 spaces. The proposal [BP1] would retain the spaces which are subject to the lease arrangement and [BP2] would be kept operational at all times in line with the current provision.***
>
> ***The spaces which are on a long lease hold arrangement to residents who live in Macintosh Village would be retained and would be available [BP2] during construction and [BP1] once the development becomes operational.***
>
> ***It is understood that since the applicant purchased the car park the rights of the residents to park in the car park have been retained. The rights would be maintained should planning permission be granted. The appropriate number of car parking spaces would be retained and made available [BP2] during construction and [BP1] when the redevelopment works have been completed.***

4. There was an Agreed List of Issues and I am going to address each of the Agreed Issues in this judgment, though not in the same sequence as they appeared in the List. I will give each issue a shorthand name. Two ancillary applications were made at the hearing before me. First, there is an application by MVML to rely, as further evidence in these proceedings, on a witness statement of MVML's Mr Halley dated 5 October 2022. Secondly, there is an application by MVML – treated by everyone as an application to amend the grounds for judicial review – to take a new legal point about consultation and the AES. In relation to these ancillary applications, all Counsel sensibly agreed that I should receive all evidence and hear all submissions, to be able to see and understand and reach a view (in legal Latin: "de bene esse"), so as then give my rulings on the ancillary applications within this judgment.

<u>The Cranes Issue</u>

5. I start with this Agreed Issue, which I have labelled the Cranes Issue:

> ***Whether Officers seriously misled the Committee in advising in the OR and/or at the Meeting that access to the car park would only be restricted for very short periods while cranes were***

> ***being assembled and dismantled at the beginning and end of the demolition/construction phase.***

This is ground for judicial review whose focus is on what was said by planning officers (the "Officers") to Members of the Committee, "in the OR" and "at the Meeting".

6. Starting with the OR, under a heading "Construction programme and works", Officers said this to Members:

> ***[OR1] For crane erection, assembly and removal would require some general access road closure on Great Marlborough Street. Access to the car parks on either side of the road, including the MSCP, would be maintained through safe management. Some short term full road closures would be unavoidable, but this is a very common requirement for construction sites in the city centre.***
>
> ***[OR2] During these periods, some intermittent car park entry/exit restrictions would be implemented. These are expected to be short in duration for up to 30 minutes at a time. Any short-term closures would be managed and would only be in place when loads are lifted over the car park during crane assembly/removal.***
>
> ***[OR3] Car park users would be given prior notification of any restrictions. If access is required without prior notice, or in the event of an emergency, the car park areas would be made safe in order to facilitate the request for access at the earliest opportunity. It is envisaged that this would be for short periods during lifting operations.***
>
> ***[OR4] Once the crane has been erected, there would be no other instances during normal construction where loads would be required to pass over the MSCP. General construction exclusions zones would only apply to specific construction areas of the MSCP which include its roof. The car park would remain in use with appropriate protection measures in place to ensure segregation from the construction site. The lifts and main stair core would remain accessible. Any changes to access routes would be communicated in advance and clearly sign posted. Crash decks would be introduced around the development for added safety measure.***

This, as I will explain, is said by MVML to have been materially misleading.

7. At the Meeting, there were these key statements, in the sequence in which they can be found in the transcript. First, the transcript contains this reference to what had been said in the "ante chamber" by Councillor Jeavons (not a Member of the Committee), referring to "access" being "guaranteed":

> ***[M1] Councillor Jeavons informs the Community present the site visit was not well attended, very short and the planning officer warned the committee to put no weight on access to the car park as the officer had been assured by the agent this was not an issue and would be guaranteed.***

Secondly, there is what was said by GMS's agent John Cooper, who told Members:

> ***[M2] Safe access to the car park will be maintained, the only disruption will be during crane assembly and dismantling, which we be minimal and prior notification will be given to local residents.***

Thirdly, there is what was asked by Councillor Stogia (a Member of the Committee):

> ***[M3] [G]iven that this application has been doing the rounds for 4 years now there seems to still be quite a lot of confusion around parking arrangements for residents. Could you clarify what are the arrangements for residents that own a parking space during the construction phase and also what are the arrangements afterwards.***

Fourthly, there is what was said by the Lead Planning Officer David Roscoe, who told Members:

> ***[M4] [R]ight, parking rights, those who have a right to park in the car park that will be protected during the construction phase , so it will be operational and accessible. I think there will be a couple of occasions when it's not fully accessible and that will be when the crane(s) are being erected and when the cranes are being dismantled. There will be some disruption then. And there might be occasional (stresses the word) disruption during the construction period but people will be given advance notice of that but to all intents and purposes , er , the car park remain operational for the duration , for those who have a right to park, throughout the construction period and then their space will be available on an ongoing basis once the scheme is complete.***

Fifthly, there was what was asked by Councillor Davies (a Committee Member):

> ***[M5] I have a few questions about the guarantee, Councillor Jeavons raised the fact there was no written guarantee that parking would be available during the construction period which may well be over 5 years. We have had verbal guarantees but I am wondering where is the written guarantee. What we have heard again today is that they're maybe some times , they're maybe some times undefined and not limited where that guarantee cannot be given. I think there has been a suggestion that alternative provision might be made. Can I point to people who may not be aware , that adding a parking space to an apartment usually adds on average £20,000 pounds to the cost of an apartment in the city centre. That significantly increases the mortgage that people need in order to buy the apartment and people who are concerned about parking and parking safely put a great deal of time and effort in choosing their apartment with regards to parking facilities. So for example a woman who is let's say a medical professional who is often working late hours would think very carefully about where she was able to park, returning home from work or indeed social activity late at night and how she would get back to her flat safely. So this vagueness is not meeting the needs that people thought there were meeting when they purchased their apartment.***

Sixthly, there is what was said in response by Mr Roscoe:

> ***[M6] In terms of the guarantees for the parking spaces, hopefully the construction management plan covers that but we would be very happy to suggest another condition that requires a management strategy for how the car parking spaces are kept available, operational and accessible at all times during the construction/demolition phase. So we could attach an additional condition to the concern, to address the concern raised by councillor Davies.***

As I will explain, of the statements made at the Meeting it is that final statement from Mr Roscoe (at [M6]) which is what MVML says was materially misleading.

8. The "construction management plan" to which Mr Roscoe referred at the Meeting (at [M6]) was described in proposed Planning Condition No.11 ("PPC11") – included within the OR. It said:

> ***[PPC11] Notwithstanding highways logistics plan stamped as received by the City Council, as Local Planning Authority, on the 24 May 2021, prior to the commencement of development, a detailed construction management plan outlining working practices for the proposed development construction shall be submitted to and approved in writing by the Local Planning Authority. For the avoidance of doubt the construction management plans shall include: [i] Display of an emergency contact number; [ii] Measures to protect the River Medlock from spillages, dust and debris; [iii] Communication strategy with residents; [iv] Tower Crane Strategy; [v] Details of Wheel Washing; [vi] Dust suppression measures; [vii] Compound and hoarding locations where relevant; [viii] Location, removal and recycling of waste; [ix] Routing strategy and swept path analysis; [x] Parking of construction vehicles and staff; and [xi] Sheeting over of construction vehicles. Manchester City Council encourages***

> ***all contractors to be 'considerate contractors' when working in the city by being aware of the needs of neighbours and the environment. Membership of the Considerate Constructors Scheme is highly recommended. The development shall be carried out in accordance with the approved construction management plans for the duration of the demolition and construction parts of the development. Reason: To safeguard the amenities of nearby residents and highway safety, pursuant to policies SP1, EN9, EN19 and DM1 of the Manchester Core Strategy (July 2012).***

In the final version of this Planning Condition No.11 ("FPC11"), the text was the same as PPC11 (set out above) except that there was the following insertion into the list of matters required to be included in the construction management plan:

> ***[FPC11] … [iva] Temporary pedestrian and vehicular access arrangement to the Multi-Storey Car Park (including disabled access); …***

9. So far as concerns an "additional condition" – to which Mr Roscoe referred at the Meeting (at [M6]) – there was in the event this further final Planning Condition No.44 ("FPC44") when planning permission was granted on 23 July 2021:

> ***[FPC44] Prior to the works commencing on the demolition and remodelling of the Multi Storey Car Park (MSCP) and construction works hereby approved, a management strategy to ensure the car park remains operational and available at all times for the duration of the demolition, remodelling and construction works shall be submitted for approval in writing by the City Council, as Local Planning Authority. This strategy shall include temporary vehicle and pedestrian access arrangements (including disabled access) to ensure safe and unimpeded access to the car park at all times together with a communication strategy with car park users to outline any circumstances which may arise which would result in unavoidable restriction of access to the car park, on the grounds of safety only. Restricted access should be kept to an absolute minimum. The management strategy shall be implemented and remain in place for the duration of the demolition, remodelling and construction works. Reason - In the interest of preserving access for the car park users at all times and to ensure a strategy is in place to minimise any restrictions to the car park on the grounds of safety only pursuant to policy DM1 of the Manchester Core Strategy (2012).***

10. As has been seen above, there was a "highways logistics plan" described in the text of PPC11, set out for Members in the OR. On that topic GMS had provided Officers with a "GMS Highways & Logistics Review" (April 2021) which said this about "road closures":

> ***No full road closures will be necessary for extended periods, but there will be intermittent periods of road closures for high risk items of work. i.e. crane erection.***

In fact, that text was repeated in the main body of the OR itself under the heading "Construction programme and works", immediately preceding [OR1]. The Highways & Logistics Review had gone on to say this, under the heading "Tower Crane Strategy – Safety & Operational Considerations":

> ***Live Car Park Access***
>
> - ***During general operation, full unhindered access will be available for car Park users. During erection we have outlined a safe operation where access is restricted but made available upon request in the event of an emergency or unplanned journey.***
> - ***No loads will be lifted over the car park or access routes whilst it is live, and crash decks will be introduced to areas adjacent to the GMS development as an added safety measure.***
> - ***Experience and learning to be taken from operating cranes in and above a live building on London Leadenhall.***

11. There are two further sources which will feature in the discussion of the Cranes Issue. One is an email dated 8 February 2021 ("the February Email") from GMS, provided to Officers. It had contained GMS's response to certain matters which had been raised by objectors to GMS's application for planning permission. The February Email was not before Members, but it and the Highways & Logistics Review are relevant to whether the OR was materially misleading. Under a heading "Construction Delivery", the February Email told Officers this:

> ***[FE1] By way of further clarification, the contractor has provided additional detail regarding the stages of crane assembly, which is provided below.***
>
> ***[FE2] Components of two tower cranes will arrive to site in pieces and will be assembled in position. The location of the crane towers is identified within the submitted planning drawings. The cranes towers will be hoarded off at all levels of the MSCP and all requisite safety measures will be taken. Furthermore, the crane locations will ensure all required spaces within the MSCP remain safe, accessible and operational throughout the demolition and construction period.***
>
> ***[FE3] During construction, the cranes will be programmed with automated restrictions, thereby ensuring that no oversailing of the operational public highway or private land will occur. Where oversailing occurs (i.e. outside the Applicant's ownership), this will be within the site boundary at all times.***
>
> ***[FE4] Crane erection and assembly will require some general access road closure of Gt Marlborough Street. Despite the general access road closure, access to the car parks on either side of the road will be maintained through safe management. Some short term full road closures will be unavoidable, but this is a very common requirement for construction sites in city centre locations. During these periods, some intermittent car park entry / exit restrictions will be required, but these would only be expected to only last a maximum of 30 minutes at a time. Any short-term closures will be managed and would only be in place when loads are lifted over the car park. The remaining days for crane assembly are to rope, test and commission.***
>
> ***[FE5] All surrounding residents and businesses will be given advance warning of the crane assembly and dismantle periods, and an on-site management team will be available throughout.***
>
> ***[FE6] The LPA and Highways Authority have also been consulted on the construction methodology and have raised no concerns.***

12. The final source is a witness statement in these proceedings from GMS's Edward Cade (13 October 2022). Obviously, this document was not before Officers or Members. It is before this Court. In it, Mr Cade tells me that:

> ***Safe and unimpeded access (including disabled access) to the MSCP will be available to MSCP users at all times apart from during crane erection/removal and infrequently on occasions when loads are lifted over the MSCP at which time restrictions may be necessary for safety reasons. Further details of these infrequent restrictions on access will be included in the management plans.***

13. I turn to the relevant law. There was no dispute as to the following applicable legal principles which feature in the analysis of the Cranes Issue (and will feature later too). As Lindblom LJ explained in R (Mansell) v Tonbridge & Malling BC [2017] EWCA Civ1314 [2019] PTSR 1452 at §42(2)(3): (1) the OR is "to be read … with reasonable benevolence" as a "fair reading" and "as a whole"; (2) there must be an "error" in Officers' "advice" which "has gone uncorrected before the decision was made"; (3) the

question is whether Officers "materially misled the Members on a matter bearing upon their decision", the error being "such as to misdirect the members in a material way" so that "but for the flawed advice it was given, the committee's decision would or might have been different"; (4) a "line" has to be drawn "between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so"; that drawing that line "will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it"; (5) species of misleading error are where a planning officer (a) "has inadvertently led a committee astray by making some significant error of fact", or (b) "has plainly misdirected the members as to the meaning of a relevant policy", or (c) has "simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law"; and (6) "unless there is some distinct and material defect in the officer's advice, the court will not interfere". As to (5)(c) – the species of having "simply failed to deal" by giving "explicit advice" – this is "broader than a duty not actively to mislead" and "includes a positive duty to provide sufficient information and guidance to enable the Members to reach a decision applying the relevant statutory criteria" or "legal test": see R v Durham County Council, ex p Lowther [2001] EWCA Civ 781 at §98. That, then, is the applicable law.

14. I can now turn to the argument. Mr Hunter's argument on this ground for judicial review is as follows. The OR (at [OR2]) was straightforwardly communicating to Members that there would be no "short-term closures" except "during crane assembly/removal". At the Meeting, Mr Roscoe's statement (at [M6]) was, again, straightforwardly communicating that there would be no closure at any time during the construction/demolition phase. At [M6], Mr Roscoe was saying there would be "guarantees" of accessibility "at all times". He was saying this "to address the concern" which Councillor Davies had raised (at [M5]), namely that there "may be some times" where the "guarantee" to which Councillor Jeavons had referred "cannot be given". Members were being told, straightforwardly, that there were no times which would not be covered, by a "guarantee", and that the guarantee of no closure would apply at any and all times. This was "materially misleading", on a point of clear significance. That clear significance is evidenced by the way in which it featured in the discussion at the Meeting at [M1]-[M6]. It links to the Basic Point [BP2]. The fact that it was "materially misleading" can be seen from several sources. First, because the February Email (as seen at [FE4]) was describing some intermittent car park entry/exit restrictions as being required during these periods, with a maximum of 30 minutes, where these periods were not limited to crane "erection and assembly" but included loads being lifted over the car park (ie. lifted by operational cranes). That was misstated in the OR (at [OR2]), through the inclusion by Officers of the additional phrase "during crane assembly/removal". Secondly, because the position has now been confirmed by the witness evidence of Mr Cade for GMS. He speaks of restrictions which may be necessary for safety reasons apart from during crane erection/removal, when loads are lifted (ie. by operational cranes) over the MSCP. Thirdly, because FPC44 is not the "guarantee" of accessibility "at all times" that Members were being promised. Rather, it allows for restriction of access to the car park, at any time, not limited to assembly/removal of a crane. Furthermore, although referable to the management strategy (FPC11), FPC44 ultimately entitles GMS "unilaterally" to impose restrictions on access to the car park. In any event, enforcement of FPC44 is "unrealistic". For all these reasons, the Officers' advice to Members, in the OR and at the Meeting, was

"materially misleading" and vitiates the decision to grant planning permission, in accordance with the relevant legal principles in Mansell and Lowther. That is the essence of the argument for MVML on the Cranes Issue.

15. I cannot accept this argument. I do not accept that a Member would have understood from Mr Roscoe's response at the Meeting (at [M6]) that the reference to "guarantees" and "at all times" meant an absolute and wholly unqualified prohibition on any restriction of access to the car park. That would have meant Mr Roscoe contradicting what he had just said (at [M4]): that there "might" be a need for "occasional" disruption during the "construction period", in addition to occasions where there would not be full access while cranes were being erected and dismantled. FPC44 itself contains the words "ensure" and "at all times". It is designed to secure access to parking spaces in the MSCP for those with RRPs, which access is continuing and at all times. That purpose is not inconsistent with there being some safety-based intermittent interruption, where strictly necessary. It would have defied common sense, and been clearly contrary to the public interest, if a planning condition was to be designed to preclude a restriction of access which was "unavoidable", "on the grounds of safety", and "kept to an absolute minimum". FPC44 contains all of these as express preconditions to restrictions on access. As Mr Tucker KC for GMS pointed out, were it otherwise, Members would have been being told that a planning condition would preclude any restriction on access even if the tower crane had seriously been vandalised and needed urgently to be secured to make access to the car-parking spaces safe. The same would be true if there were otherwise an urgent need to make repairs to the tower crane to protect car park users.

16. That, in my judgment, is sufficient to dispose of this ground for judicial review. Indeed, anything else risks falling in a trap of engaging in an inapt textual analysis, reading documents as if they were statutes. Having said that, I will engage in a wider-ranging consideration of the materials described above, lest it be thought that a further analytical exercise is warranted. I will do so, to see what such an exercise would reveal. I start with the remaining exchanges at the Meeting. The essential vice identified by Councillor Stogia (at [M3]) was the need for clarification, to avoid confusion. The essential vice identified by Councillor Davies (at [M5]) – picking up on the position of Councillor Jeavons (at [M1]) – was about a guarantee being in writing. FPC44 provides that clarity, in writing. It imposes very strict criteria for temporary restricted access, necessitated by safety. There is no reason to think that it would not be enforced in accordance with its terms; nor that a guarantee would be more likely to be enforced in accordance with its terms if it allowed no safety-based qualification at all. Turning to the OR, I do not accept that [OR2] was a material misdescription of the message in the February Email (at [FE4]). That passage was introduced as additional detail regarding stages of crane assembly (see [FE1]). The description of "during these periods" was in a paragraph (ie. [FE4]) which began with the description of what would be required for "crane erection and assembly". But even if in the summary in the OR (at [OR2]) Officers had misread the February Email, because they ought to have appreciated that "loads" could be "lifted over the car park" by the cranes themselves, necessitating intermittent short-term closures, that was the very point which Mr Roscoe explained at the meeting when he said there might be occasional disruption during the construction period (at [M4]). That was a point which Mr Roscoe brought to the attention of Members notwithstanding that GMS's agent Mr Cooper had referred only to disruption during crane assembly and dismantling (see [M2]). Whether all these statements are viewed straightforwardly and read benevolently and as a matter of common sense, or

even if for that matter subjected to close textual scrutiny, the answer is the same. There is nothing here which constitutes materially misleading advice, so as to trigger the vitiating flaw identifiable in the case law.

17. The answer to the Cranes Issue is "no". This ground for judicial review fails. To this, I add the following footnote. In the July Representations MVML put a key objection to the OR in this way:

> ***The car park will be manifestly restricted from access throughout the 5-7 years of construction. The officer has late in the report buried this fact and prefers to use [the phrase] the car park will be operational at all times… During the 5-7 years car park owners will be restricted for up to 30 minutes from entering/exiting the car park when the tower crane is moving. When a tower crane is not moving the construction site is not working…***

The objection being made here is that whenever the tower crane was operational ("moving" and therefore "working"), access to the MSCP would be restricted, which would continue throughout the "5-7 years" of the "construction". The first answer to that is that an operational tower crane is not to be equated with "loads" being lifted by the crane "over" the car park. Mr Tucker KC showed me the diagrams which clearly depict the reach of the tower crane boom (the arm), over the construction site beyond the MSCP. These show clearly how the tower crane would operate – "moving" and "working" – by lifting loads over the construction site and not the car park. The second answer is that nothing was "buried" in the OR or by Officers. The February email – and the Highways & Logistics Review – were clearly intended to be being fairly and accurately summarised (at [OR1] to [OR4]). And Mr Roscoe explained the point about "occasional disruption during the construction period" at the Meeting (at [M4]). The third answer is that the planning condition which was discussed and then imposed (FPC44) by means of its strict criteria, with the focus on the minimum necessary interference to secure safety, demonstrates that the spectre of restricted access portrayed by MVML in the July Representations does not reflect the reality as appreciated by Members when this topic was being discussed and addressed. It was, of course, directly linked to Basic Point [BP2] which I identified at the start of this judgment.

<u>The Dust Issue</u>

18. I turn next to this Agreed Issue, which I have labelled the Dust Issue:

> ***Whether the AES was legally inadequate due to a failure to consider the risk to the health of car park users during the demolition/construction phase from exposure to known carcinogens such as mercury, asbestos and polycyclic aromatic hydrocarbons (PAHs) (and whether any such failure was remedied by the contents of the OR).***

As can be seen, the particular focus for the purposes of this ground for judicial review is on the AES.

19. In legal terms there are three key reference points. First, there are the Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 (the "2017 Regulations"). They are applicable to this case. They require that an environmental statement describe direct and indirect significant effect of the proposed development on the human health of the population: see regulation 18(3)(b)(c)(f), Schedule 4 §4 and regulation 4(2)(a). They also require that the environmental information – including the legally adequate environmental statement – must be examined by the decision-maker

to arrive at a reasoned conclusion on significant effects, integrated into the planning permission decision: see regulation 26(1). Secondly there are the governing legal principles regarding legally inadequate environmental statements which vitiate a planning decision. These was identified by Sullivan J in R (Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin) at §§40-41. It is for the planning authority to consider whether the environmental statement has failed to identify any particular environmental impact, or has wrongly dismissed it is unlikely or not significant; and to consider whether mitigation measures are inadequate or insufficiently detailed (Blewett at §40). The 2017 Regulations should be interpreted as a whole and in a common sense way with the purpose of ensuring the planning decisions are made on the basis of full information, but without unrealistic expectations, the question for the judicial review Court being whether "the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations" (Blewett at §41). Thirdly, there is a principle exemplified by Gillespie v First Secretary of State [2003] EWCA Civ 400 [2003] Env LR 30, that duties under the 2017 Regulations cannot unlawfully be deferred or abdicated. Gillespie is a case about 'screening' decisions (decisions about whether to insist on an environmental statement) and deferral of environmental assessments to be addressed through the implementation of planning conditions. Gillespie reflects the importance of contemporaneous insistence on – and consideration of – legally adequate environmental statements, at the time of the planning decision. It does not detract from the Blewett principles.

20. MVML's arguments focus in particular on the assessment in the AES of potential risk to relevant "receptors" (AES §14.6); where those receptors for received dose of carcinogens during the construction phase were identified as being "on-site workers" and "off-site receptors", the latter including "off-site residents" (AES §§14.45-14.46); and where "specific mitigation measures" were identified "to address potential adverse impacts to demolition/ construction personnel from contaminated soil and ground gas… during the site works", including appropriate PPE (gloves and overalls), monitoring of gas and oxygen concentrations and so on (AES §14.60). This, in a context where it is common ground that "car park users were not identified as potential receptors", as was expressly accepted in the Mr Katkowski KC's skeleton argument on behalf of the Council. Also relevant are PPC11 and FPC11 the terms of which, as has been seen, would require a Construction Management Plan which deals with "dust suppression measures".

21. The essence of the argument advanced by Mr Hunter is as follows. The identification of "receptors" ignored the important category of "on-site residents" (or, put another way, "on-site non-workers"). Assessment of the health impacts on car park users was vital. It could not be deferred to a later stage, through the later identification and implementation of a Construction Management Plan and dust suppression measures within PPC11 (which became PFC11). The AES needed to be legally adequate and comprehensive, so as to comply with the 2017 Regulations and achieve the statutory purposes of prior consultative assessment. Local residents who are car park users were assessed as "receptors" when present "off site" in the living rooms of their neighbouring homes, but not when entering the Site as users of the car park. That was an important blindspot in the AES, on a health issue of clear and obvious significance. Given the absence of an assessment, and given the statutory consultative role played by an environmental statement, this serious deficiency could not in principle be cured by

anything said by Officers in the OR or at the Meeting. Nor indeed was the blind spot even purportedly filled by Officers in the OR or at the Meeting. The materiality of the issue is reinforced by Basic Point [BP2] and by the fact that the central purpose of issuing the AES was to deal with health impacts, and in particular dust and contaminants, from exposure to known carcinogens during the demolition/construction phase. The Blewett principles were infringed in the circumstances of the present case, by the blindspot relating to car park users as unidentified and unassessed "receptors".

22. I cannot accept these submissions. The answer lies in reading the AES straightforwardly and as a whole. There was no blind spot. The AES describes the construction phase Environmental Management Plan as outlining "measures to be implemented to mitigate potential environmental impacts on site operatives" but also on "the local community" to ensure "acceptable and safe levels" (AES §4.32). The phrase "the local community" is clearly intended to, and does, extend to all those locals who stand to be affected, but are not "site operatives". Moreover, the AES refers (AES §4.33) to appropriate measures which will be taken "to suppress dust and reduce potential risk of contamination effects to negligible in line with best practice". That is in the context of protecting both "site operatives" and "the local community". The AES contains a table (AES Table 14.1) which addresses "potential contaminant linkages for baseline, construction and operational phases". There are separate rows within that table for mercury impacts, PAH impacts, and asbestos impacts. Within that table, the receptors identified and assessed include "current site users", described as "site visitors and commercial workers". Plainly, "commercial workers" is referable to "on-site workers". But equally plainly, "site visitors" therefore includes on-site non workers. That would include a "visitor" who came to inspect the base of the tower crane in the car park, or to mend an electrical charging point. It would include a local resident who came to and from a parked car. It would not be restricted to local residents when located in their homes. It is in that context that, for the construction phase, the "mitigation measures" described in the AES involve "specific measures to mitigate the potential for dust" provided in the air-quality chapter of the AES and recommending the "site-specific dust management plan" to be developed for the Site, to provide protection from generation of dust with contaminants that may pose a risk to human health (AES §14.55). That "dust management plan" is a specific "mitigation measure" which is general in its effect and includes the protection of car park users. By contrast, there are the specific mitigation measures (AES §14.60) to address potential adverse impacts to "demolition/ construction personnel" during the "site works". Those specific mitigation measures are described as including PPE (gloves and overalls), the monitoring of gas and oxygen concentrations in excavations, site rules about washing hands before eating, clear signage of contaminated land, and adequate site security to prevent trespassers. Those specific mitigation measures are plainly concerned with construction personnel gaining access to the "construction site" area within the Site. But even in that context, visitors are addressed by reference to preventing their gaining access (as trespassers). This does not cover car park users for the simple and straightforward reason that they will not be located within the demolition/construction site to which the demolition/construction personnel have access, still less will they be handling contaminated soil or being exposed ground gas within that demolition/construction area. The mitigation for the broader risks for visitors to the broader site have already been addressed through the "site-specific dust management plan" referred to elsewhere in the AES. Then there is a table concerned with "residual effects" (AES Table 17.2). This summarises residual effects in respect of each health related topic, both during construction and operation.

It covers contaminated dust including PAH and asbestos and air-quality (PM10 emissions and so on). The "mitigation measures" to address those effects is the implementation of the "CEMP" including the "dust suppression measures" and "air-quality monitoring". This is a reference to the dust suppression measures included within the Construction Management Plan required to be submitted and approved by FPC11, the text of which was before Members as PPC11.

23. I do not accept that there is any 'blindspot' regarding car park users within the analysis in the AES, still less one which meets the legal test in Blewett for vitiating consequence and intervention by the judicial review Court. There is therefore no question of any deferral or abdication of the assessment and appraisal, unlike Gillespie where the prospect of future consideration of appropriate planning conditions had erroneously been regarded as being a reason for not insisting on any environmental statement at all. There is no question of the OR 'curing' some legal breach embodied in the AES. What the OR demonstrates is the evaluative judgment of the adequacy of the AES, as recognisably a question for Officer and Members, under Blewett. The OR presented for Members the AES and referenced its substantive topic areas including human health. The OR recorded Officer's conclusion on adequacy: "It is considered that the environmental statement has provided the Local Planning Authority with sufficient information to understand the likely environmental effects of the proposals and any required mitigation". That was the Blewett 'judgment call', addressed for Members and put before Members, by Planning Officers. It was a lawful 'judgment call' for Officers to make and Members to accept, as they did. Elsewhere in the OR, evaluative conclusions were reached, by reference to dust and impacts of the development on air-quality, that the proposal would comply with relevant policies relating to air-quality. That conclusion was unimpeachable and is rightly not impugned.

24. The answer to the Dust Issue is "no". The AES was not legally inadequate. There is this footnote to the Dust Issue. In the July Representations, MVML said this: "There is no mitigation proposed for nor consideration of car park [users] during [the demolition and construction] phase beyond reporting". The answer is that this is not correct. There was "consideration" of car park users, when the AES is read fairly and as a whole. And there is very clearly "mitigation proposed" to protect them, namely the "site-specific dust management plan" described in the AES, under the heading "mitigation measures" and "construction phase" (AES §14.55).

The Disabled Car Park Users Issue

25. I turn to this Agreed Issue:

Whether the [Council] failed to comply with the Public Sector Equality Duty.

I have labelled this the Disabled Car Park Users Issue, because this is a ground for judicial review whose focus is very squarely on the question of disabled parking spaces and disabled access within the reconfigured car park proposed within the development. Mr Hunter relied on the reduced number – 5 – of disabled parking bays. He criticised their lack of proximity to the lift, as depicted on the plans. He submitted that planning condition 31 ("FPC 31") which was placed before Members in draft ("PPC31"), and the new planning condition FPC44 (which I have set out already) requiring the management strategy to ensure that the MSCP remains operational at all times, with vehicle and pedestrian access arrangements "including disabled access", are insufficient. That is because they defer to a later stage the statutory public sector equality duty ("PSED"), of "due regard", required to be discharged contemporaneously and proactively.

26. Section 149(1) and (3) of the Equality Act 2010 provide that:

> ***(1) A public authority must, in the exercise of its functions , have due regard to the need to … (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it …. (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to: (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it.***

27. As with other Issues, the relevant legal principles are not in dispute. The PSED was described in the following way by Lord Neuberger in Hotak v Southwark LBC [2015] UKSC 30 [2016] AC 811 at §75: the duty must be exercised in substance, with rigour and with an open mind; it is for the decision-maker to determine how much weight to give to the duty; the question for the Court is whether it can be satisfied that there has been a rigorous consideration of the duty, with a proper and conscientious focus on the statutory criteria; if there has been, the Court cannot interfere simply because it would have given greater weight to the equality implications of the decision. As the Divisional Court explained in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) at §91: the due regard duty must be fulfilled before and at the time that a particular decision that will or might affect disabled people is being considered by the relevant public authority; it involves a conscious approach in state of mind; and it will not be discharged by attempts to justify a decision has been consistent with the exercise of the duty when the duty was not in fact considered before the decision was taken. As the Court of Appeal explained in Gathercole v Suffolk County Council [2020] EWCA Civ 1179 at §23: the duty is a continuing one.

28. In my judgment, the answer to the Disabled Car Park Users Issue is "no". The Council did not fail to comply with the PSED. I am satisfied that there was a rigorous consideration of the duty, with a proper and conscientious focus on the statutory criteria. The starting point is that Officers and Members had the PSED and its content well in mind. It had been accurately summarised for Members, as a relevant "legal duty", in the OR. The section of the OR headed "other legislative requirements' told Members this:

> ***S149 (Public Sector Equality Duty) of the Equality Act 2010 requires due regard to the need to: Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. The Equality Duty does not impose a legal requirement to conduct an Equality Impact Assessment. Compliance with the Equality Duty involves consciously thinking about the aims of the Equality Duty as part of the process of decision-making.***

The PSED was also explicitly referenced by the lead Planning Officer at the meeting in his opening remarks where he drew attention to the July Representations received from MVML on the day of the Meeting. Members were told: "Issues have been raised in relation to… the Public Sector Equality Duty. We have looked at these and are satisfied that the issues are adequately covered in the report".

29. So far as the substantive arrangements are concerned, no concern or complaint has been made in MVML's arguments on the PSED, in relation to any aspect of the proposal other than disabled parking within the reconfigured MSCP. But before turning to that topic, it is worth recording that the planning documents reflect careful consideration of wheelchair users throughout. By way of example, the OR described the proposal for the purpose built student accommodation units, emphasising that "9% of the development would be adaptable and suitable for wheelchair users". The OR also recorded that: "Highway Services recommend the provision of an on street car clubs/ disabled bay to service the development, which would require the conversion on one of the on street parking bays)". That was a recommendation made during the decision-making process. It was accepted. The OR makes repeated reference to the car parking "on street bays for disabled people", describing the site as "car free", "except for disabled and servicing provision". That is a clear reference to the disabled parking bay recommended by Highway Services, with disabled parking within the MSCP being addressed in the next sentence. So far as that is concerned, the OR identifies that of the 101 car parking spaces, 5% would be disabled accessible. That is a reduced number, but it is not a reduced percentage, in the context of an overall reduction from 391 to 101 spaces. That was an entirely sensible and appropriate percentage, and no higher percentage is put forward as appropriate. Nor has it been suggested by MVML that there are more than 5 local residents with LRRPs. That point would have been very easy to make in the representations made about the proposal. As to the appropriateness of the configuration of disabled parking spaces compared to the location of the lift, that is a 'judgment call'. As was pointed out, a not dissimilar configuration applies in the existing car park.

30. It is no deferral or abdication of the PSED for appropriate planning conditions to be proposed and adopted. FPC31 was adopted, referring to the need for approved final details of disabled access and number and location of disabled parking bays. It states:

> ***[FPC31]: Prior to the first use of the modified multi storey car park hereby approved, final details of the layout of the car park, pedestrian and vehicular access (including disabled access) and security measures shall be submitted for approval in writing by the City Council, as Local Planning Authority. This shall include dimensions of the parking bays, details of measures to segregate vehicles from pedestrians (at the entrance to the car park and within the car park itself), number and location of disabled parking bays, location of a minimum of 20% 7kw electric vehicle charging points, details of CCTV provision and any other security measures. Reason - In order to ensure that the car layout and function of the car park is acceptable pursuant to policies SP1 and DM1 of the Manchester Core Strategy (2012).***

As has been seen, FPC44 requires an approved management strategy prior to any works commencing which will ensure access including temporary vehicle and pedestrian access arrangements are "including disabled access". The reference to "temporary vehicle and pedestrian access arrangements" as "including disabled access" so as to "ensure safe and unimpeded access to the car park at all times" plainly encompasses "disabled access" from the street to the car park. Moreover, PPC11 was amended in FPC11 to insert as required content of the construction management plan: "Temporary pedestrian and vehicular access arrangement to the Multi-Storey Car Park (including disabled access)". None of this is abdication or deferral of a duty. Rather, it is the adoption of appropriate protective mechanisms to ensure that the desired and envisaged impact as to disabled access is followed through to practical implementation, with sufficient flexibility, in the context of an important and continuing duty.

The Consultation Issue

31. I turn to this Agreed Issue:

> ***Whether the Defendant failed to carry out lawful consultation on the amendments to the ES in accordance with regulation 25 and the Sedley principles and/or failed to take into account relevant environmental information contrary to regulation 26 of the EIA Regulations.***

32. Once again, the applicable legal principles were not in dispute. The "Sedley principles" are the basic essential requirements of a lawful consultation process at common law, including "that the product of consultation must be conscientiously taken into account": see R (Moseley) v Haringey LBC [2014] UKSC 56 [2014] 1 WLR 3947 at §25. Regulations 25 and 26 of the 2017 Regulations contains consultative duties, making provision to the following effect. Where an environmental statement is supplemented with "additional information" (regulation 25(1)) certain notification requirements arise including a prescribed 30-day period for response (regulation 25(3)(h)(l)). There is a prohibition on the planning application being determined until the expiry of the prescribed 30-day period (regulation 25(7)). The planning authority is statutorily required to "examine" (regulation 26(1)(a)) the "environmental information", which includes any "representations duly made" by any person about the environmental effects of the development (regulation 2(1)). A separate regulatory scheme requires that an officers report be issued a clear "five working days" before the meeting to which it relates.

33. The focus of this ground for judicial review is on the combined effect of three actions on the part of Officers. The first was the action on Monday 21 June 2021 of issuing the OR for the scheduled Meeting on Thursday 1 July 2021, three days before the Thursday 24 June 2021 deadline for representations within the prescribed 30-days in response to the AES of 24 May 2021. The second was the action, being aware that MVML wished to make "late" representations, of sending an email on Friday 25 June 2021 stating that "any late comments … will be presented verbally in accordance with our normal procedures". The third was the action, at the Meeting itself, of not giving a verbal presentation summarising the July Representations, insofar as they responded to the AES. The third action was embodied in this statement by the lead planning office to Members at the Meeting:

> ***We have received a late representation this morning, which we believe has been circulated to you Chair and all committee members. We have been asked to read to read it verbatim but on the basis that all members have received it we do not consider this to be necessary. Issues have been raised in relation to Human Rights and the Public Sector Equality Duty. We have looked at these and are satisfied that the issues are adequately covered in the report. Chair, the vast majority of the issues that have been raised have been addressed in the report and previously in the printed report. Thanks Chair.***

34. Mr Hunter submits, in essence, as follows. The first of those actions (issuing the OR ahead of the AES consultation deadline) indicated a "predetermination" and "closed mind", at least so far as Officers and "appearances" are concerned. Responses to the AES had not been awaited, so that they could be considered and addressed. Councillor Davies encapsulated this prejudicial procedural flaw when he protested at the Meeting in these terms:

> ***Firstly I just want to make the point about the issue about the consultation date and the report. The consultation date ended according to our website on the 24th June (close of day) and I***

> ***was sent a copy of the report on the 23rd June. Now I know this was the fourth round of consultation but I believe this last round of consultation, which in fact caused the deferral of the consideration of this application was I believe at the request of the applicant because there was some technical issues with the environmental report which had been submitted by an expert team on behalf of the applicant. I believe those technical issues were in fact errors , which then had to be corrected. So it is not unreasonable to assume there may well have been some considerable alterations in what the objectors and the community were going to be saying. I am not happy with the idea that a report is issued and sent to committee before the deadline has expired. I know we accept late representations but when councillors have given so much time to reading the reports, we really, really do want to be assured that those reports have been written after considerations of any representations made within the standard deadline. I am not going to labour the point any more I just want to take this opportunity to make my view known for the record.***

That first action, moreover, had the prejudicial effect of leading in the MVML to conclude that it was wasting its time by submitting the detailed representations which at that stage it had prepared in draft, prior to the 24 June 2021 deadline. This is explained in the further evidence of MVML's Mr Halley dated 5 October 2022. Further, the Sedley requirements were engaged by reason of the second action (the email of 25 June 2021) which communicated that late representations would be considered. As to the third action (what was said to Members at the Meeting), it was wrong and unjustified for Officers to tell Members that the "issues" which had been "raised" in the July Representations – or the "vast majority" – had been addressed in the OR. New points were raised, albeit in the context of existing topics, and it was wrong and unjustified not to summarise these verbally. Especially given what had been said in the email of 25 June 2021. The important new points raised are exemplified by a point about the AES not addressing the health implications of dust on car park users, and by a point about the AES having being based on outdated air quality data. There was a material deviation from the consultative duties identified in the 2017 Regulations. It matters. Indeed, the high threshold for legal test for substantive challenge to a defective environmental statement in <u>Blewett</u> – seen above in discussing the Dust Issue – is borne out of a latitude afforded to the judgment of those who have adhered to the consultative duties, being deliberately linked to the importance of the public consultation whose purpose is to allow inaccuracies, inadequacies or incompleteness in an environmental statement to be pointed out as deficiencies by those being consulted: see <u>Blewett</u> §39. In all these circumstances and for these reasons, the Council failed to carry out lawful consultation on the AES in accordance with regulation 25 of the 2017 Regulations, breached the Sedley principles, and failed to take into account relevant "environmental information contrary to regulation 26 of the EIA Regulations.

35. I cannot accept those submissions. In my judgment the answer to the Consultation Issue is "no". The first point is that there cannot be any breach of the Council's duties under regulation 25 or regulation 26 of the 2017 Regulations, arising out of the way in which Officers dealt with the July Representations responding to the AES. The Council had clearly communicated to MVML that the 30-day prescribed deadline for response to the AES was 24 June 2021. MVML knew full well what the deadline was. It did not file its July Representations, including its response to the AES, by that deadline. It decided instead to wait and provide a composite response – to the AES and to the OR – in the form of the July Representations, provided to Members on the morning of the Meeting. It does not assist that Mr Halley's evidence attributes this decision to the receipt of the OR ahead of the deadline for response to the AES. He describes MVML as having been ready to throw in the towel. But the fact is that MVML knew and missed

the deadline under the 2017 Regulations. As Mr Hunter accepted in his oral submissions, the failure by MVML to meet the 30 day prescribed deadline within regulation 25(3) must, as a matter of proper interpretation of regulation 2(1), mean that the representations were not "duly made", from which it follows that there was no statutory duty under regulation 26(1)(a) to "examine" that information. That alone is fatal to the invocation of the 2017 Regulations under this ground for judicial review.

36. Even leaving that problem to one side, it is in my judgment impossible to characterise the Officers' decision to proceed to issue the OR on 21 June 2021 as reflecting a real or perceived "predetermination", or "closed mind" so far as any representations responding to the AES were concerned. It is common ground that there were applicable requirements imposing obligations to issue the OR five clear working days before the Meeting. Given the date scheduled for the Meeting, that requirement would have been breached if Officers had waited for the deadline and then finalised the OR. There was no legal duty to reschedule the Meeting for a later date, in light of the combined effect of the requirements relating to the OR and responses to the AES. These are in separate regulatory frameworks, whose drafters could easily have imposed a prohibition on the issuing of a report until after considering responses received within a consultation period. There is no such prohibition. It is not unlawful – and not unfamiliar – for officer reports to be prepared and issued for a meeting, notwithstanding it being known or expected that there are to be representations which will be considered. There may be a supplementary report or verbal update, as appropriate. What steps to take is a 'judgment call'. But none of this, in principle or in the present case, constitutes an actual or apparent predetermination or closed mind by Officers, still less by Members.

37. Next, nothing in the email of 25 June 2021 committed Officers to presenting comments verbally at the Meeting. There was no clear and unambiguous representation to that effect. The email stated was that were any comments received would be presented verbally "in accordance with our normal proceedings". That was not a promise to summarise verbally any representations, independently of their content. The "normal" position would apply, with Officers exercising a judgment as to what course was appropriate. Officers were not required either to read out the July representations as they had evidently been invited by MVML to do, nor to offer a summary or highlights package, in circumstances where the 'judgment call' was that matters were adequately dealt with in the OR and that Officers did not need to say more, in circumstances where – as the Lead Planning Officer pointed out to Members – the July Representations had been sent to and received by each of the Members. The Lead Planning Officer did draw attention to two legal points raised in the July Representations, namely the PSED and the Human Rights Act. When I examine the points used by Mr Hunter as his best illustrations of new matters calling for verbal summary on the part of Officers, the picture is very clear. So far as concerns the first point, about harm to car park users, what MVML was saying was plainly linked to the same point which it had previously made in the third round of notification and consultation. That was summarised in the OR under the topic of "contamination", where MVML was recorded as calling for details of the "containment strategy and safety" by way of "mitigation". The July Representations maintained that there was "no mitigation" and "no consideration" of car park users – see my footnote to the Dust Issue – but this was not a new issue or topic. It was dealt with in the AES: see the Dust Issue above. Secondly, so far as concerns air quality and data, the July Representations themselves emphasised that what MVML was saying was part of the same "long-standing" issue, referring to the

heavy focus in all of the rounds of consultations from the community on contaminated dust and concrete dust emissions to the air.

38. There was no lack of conscientious consideration, whether on the part of Officers or on the part of Members. The fact that the Lead Planning Officer was telling members that issues had been raised within the July Representations in relation to human rights and the PSED demonstrates that the July Representations had been read and considered. So does the assessment that the "vast majority" of the issues had been raised and addressed in the OR. That was an assessment plainly open to Planning Officers, acting reasonably. The assessment that it was not necessary in all the circumstances to say more about the contents of the July Representations, in circumstances where all members had received those representations, was not unfair or a procedural impropriety, but was reasonably open to Officers. Finally, all of this was in a context where MVML's chair had – and took – the opportunity of addressing Members orally, identifying any headline points.

39. There are footnotes to this ground for judicial review. First, I record that ultimately neither Mr Katkowski KC nor Mr Tucker KC resisted the Court considering the new witness of Mr Halley for the purpose of his placing before the court his explanation of the circumstances and thinking which led MVML to 'hold back' the representations in response to the AES beyond the given deadline of 24 June 2021 and provide them only on 1 July 2021. That was the only issue on which reliance was ultimately placed by Mr Hunter on that witness statement: Mr Hunter dealt by way of oral submissions with best examples of new points said to have been raised in the July Representations. I will formally grant MVML permission, for the purpose and to the extent indicated, to adduce that evidence. But this ground for judicial review fails for the reasons which I have explained.

The Send-A-Copy Issue

40. I turn to this Agreed Issue, which I am labelling as "Send-A-Copy":

> ***Whether MVML should be permitted to rely on the additional argument that the Defendant breached the EIA Regulations as a result of failing to send a copy of the amendments to the AES to those it was required to under regulation 25.***

There are three aspects: whether MVML should be permitted to rely on this argument (process); whether the argument is right as to breach (substance). In order to be a successful ground for judicial review, the breach would need to be such as to vitiate the decision to grant planning permission.

41. So far as substance is concerned, the applicable law is found in the 2017 Regulations. In the context of supplementing an environmental statement with "additional information", regulation 25(3) makes provision for notification of the fact that additional information has been received, together with notification of details of how that additional information can be accessed, so that members of the public can make representations within the prescribed 30-day period. Regulation 25(4) makes distinct provision, in the case of those who are listed as having a statutory entitlement to be notified of an environmental statement. I will call these "special consultees". In the case of special consultees to whom an environmental statement was previously sent, what regulation 25(4) provides is that the Council must "send a copy" of the further information to each such person.

42. So far as the process point is concerned, MVML asks for permission to rely on the new ground for judicial review on the following basis. MVML and its representatives say that they only became aware very recently – on 13 October 2022 – that notification letters sent to the relevant list of special consultees had not included "a copy" of the AES, but had instead provided a website link for where it (and other documents) could be accessed. In those circumstances, the new ground of challenge was identified and promptly put forward in MVML's skeleton argument dated 18 October 2022. The point that is raised is a straightforward legal point. It admits of no need for any further evidence. It was raised promptly and well before the substantive hearing on 8 November 2022. In all those circumstances, in my judgment, Mr Katkowski KC and Mr Tucker KC – who identified no prejudice – were wise to focus their attention not so much on the lateness of the point, but on whether there was anything of substance in it.

43. Mr Hunter submits as follows. The 2017 Regulations very deliberately impose an obligation to "send a copy" of the AES to the list of special consultees. It cannot, in principle, be right for the Council to rely as being compliant with the Regulations on the distinct, deliberately and less exacting standard of action required in the case of members of the public, namely alerting them to information and informing them as to where it can be found online: regulation 25(3). The legal duty to "send a copy" under the Regulations is clear, express and important. The category of special consultees is important, which is why they are singled out for the enhanced duty. There is relevant prejudice to the Claimant. Those special consultees who should have been "sen[t] a copy" of the AES would – had that occurred – been in the fully and directly informed and prompted position required by the Regulations. They, or one of them, may very well have made representations against the grant of planning permission. That would, or at least could, have been material to the decision taken by the Committee. Since the AES was never "sen[t]" to the relevant persons, the statutory provision in regulation 25(7)(a) bites. That provision (discussed in the context of the Consultation Issue) provided that determination of the planning application was statutorily prohibited, absent compliance with the Regulations. The Court ought not to speculate as to what the position would have been had there been compliance. Rather the Court should recognise the vitiating flaw involved in the clear breach of the statutory obligation, and the prohibition, and quash the grant of planning permission as a consequence.

44. Beyond the terms of the 2017 Regulations the key legal reference point is <u>R (Champion) v North Norfolk District Council</u> [2015] UKSC 52 [2015] 1 WLR 371. There, the Supreme Court dealt with a case concerning the absence of an environmental statement, which default was said to trigger a prohibition on the grant of planning permission under the regulations (<u>Champion</u> at §8). The Court discussed the discretion to refuse a remedy on judicial review, in the context of a legal defect in the procedure leading to the grant of planning permission. This principle was articulated (at §54): "even where a breach of the EIA regulations is established, the Court retains a discretion to refuse relief if the [claimant] has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice". In that case, the discretion to refuse judicial review was exercised because (§62): "There is no reason to think that a different process would have resulted in a different decision, and [the Claimant's] interests have not been prejudiced". The Court also endorsed (at §64) observations from earlier case law about the environmental impact assessment process being intended to be an "aid to efficient and inclusive decision-making", and "not an obstacle race", and about cases in which it was "difficult to see what practical benefit

other than that of delaying development" would result to a claimant from putting a planning application through a "further procedural hoop". Finally, the Supreme Court emphasised (§66) that the common law based approach to 'materiality' and the discretionary refusal of a remedy on judicial review was freestanding and independent of the new statutory developments of the "highly likely … not substantially different test" inserted into section 31 of the Senior Courts Act 1981.

45. I am refusing permission to amend the grounds for judicial review in respect of the Send-A-Copy ground for judicial review. I do so on the basis that the point does not cross the familiar permission-stage threshold of arguability with a realistic prospect of success. It is right in principle that a contested, post-permission application to amend and add a ground for judicial review should not sidestep that arguability test. In this case, where the substantive hearing has been reached and the argument has been heard in full to see where it leads ("de bene esse"), a ground which is unarguable will fail.

46. As to the Regulations, they do not require the sending to special consultees of a "hard copy" of the additional information. The phrase is "must send a copy", not "must send a hard copy". It would be bizarre, in the context of regulations whose central ethos is environmental protection, for there to be a mandatory printing of lengthy documents, then required to be transported, to arrive onto the desk of a recipient in an envelope. I would accept with little hesitation that an email to a special consultee, to which the AES is a pdf email attachment, would not "breach" the statutory duty. It follows that the copy can lawfully be 'one click away'. It is "sent" by a communication which puts it 'on a plate' for the recipient. But the recipient can read it from the screen. If the 2017 Regulations had intended to impose a duty to send a "hard copy", that is what the drafters would have said. I would also accept that an email containing a "hyperlink" which was a direct "click" to a pdf document hosted on a website, would not be a "breach" of regulation 25(4). The covering letter would no doubt need to be worded so as to present the pdf document to the reader, as an attachment or hyperlinked: 'here it is'. In the present case the letter which I was shown, sent by email did refer to the AES and did contain a hyperlink. That hyperlink was to the relevant planning application page on the Council's website, and the recipient would need to enter the reference number given in the letter in order to access the information. A line has to be drawn somewhere, and there are distinct arrangements for different consultees. I can see that, at least arguably, that did not constitute "sending a copy" of the document.

47. But none of this goes anywhere. This is very clearly a case falling within the principles identified in Champion. Indeed, the passages in Champion could have been written for this case. Here, there is a list of relevant special consultees. Three of them were arms of the Council itself: the planning authority; the environmental health officers; and the highway authority. Mr Katkowski KC tells me, on instructions, that all of those did have a copy of the document. I accept that. Remaining entities on the list were Historic England, the Greater Manchester Archaeological Advisory Service, Transport for Greater Manchester, Manchester Airports Group/NATS, Places Matter, Environment Agency and United Utilities. Mr Katkowski KC tells me – and I accept – that the Secretary of State would also stand as a special consultee and the letter which I was shown was to the Secretary of State. The position is that each of those recipients were told by notifying letter about the AES and its nature. Each was told where they could access the AES. Each was given a hyperlink, and the reference number. Each was told that they had a prescribed timeframe for any response. Each had previously been

notified of this planning application. Each who wished to do so was already engaged in the planning process. Nobody asked to be sent "a copy" of the AES more directly. There is no suggestion that any of them wished to respond and were impeded in doing so. There is, moreover, no suggestion of any link between any of them and any relevant and material point of controversy put forward by MVML as a material controversy arising out of the AES. I am satisfied that no viable point can survive the sensible discipline described in Champion. I would have refused judicial review on this ground. But since the point does not in my judgment cross the threshold of arguability with a realistic prospect of success, I will refuse permission to amend. It follows that the answer to the Send-A-Copy Issue is "no".

The Injunction Issue

48. I turn to this Agreed Issue is this:

> ***Whether the OR seriously misled/misdirected the Committee advising that the private third-party private rights to park in the MSCP [were] not a material planning consideration, including whether the rights would preclude the implementation of the proposal.***

Given the emphasis on "rights" which would "preclude" implementation, and given the focus in the argument on the prospect of holders of RRTPs being entitled to an injunction, I have labelled this the Injunction Issue. The repetition of the word "private" is derived from the OR.

49. This Issue is concerned with the criterion of "deliverability". There are two applicable planning policies, and one passage of explanatory text invoked by MVML as an aid to interpretation. First, there is Policy H12 of the Council's July 2012 "Local Development Framework: Core Strategy". Policy H12 is entitled "Purpose Built Student Accommodation" and is as follows (here the paragraph numbering is in the policy itself):

> ***The provision of new purpose built student accommodation will be supported where the development satisfies the criteria below. Priority will be given to schemes which are part of the universities' redevelopment plans or which are being progressed in partnership with the universities, and which clearly meet Manchester City Council's regeneration priorities.***
>
> ***1. Sites should be in close proximity to the University campuses or to a high frequency public transport route which passes this area.***
>
> ***2. The Regional Centre, including the Oxford Road Corridor, is a strategic area for low and zero carbon decentralised energy infrastructure. Proposed schemes that fall within this area will be expected to take place in the context of the energy proposals plans as required by Policy EN5.***
>
> ***3. High density developments should be sited in locations where this is compatible with existing developments and initiatives, and where retail facilities are within walking distance. Proposals should not lead to an increase in on-street parking in the surrounding area.***
>
> ***4. Proposals that can demonstrate a positive regeneration impact in their own right will be given preference over other schemes. This can be demonstrated for example through impact assessments on district centres and the wider area. Proposals should contribute to providing a mix of uses and support district and local centres, in line with relevant Strategic Regeneration Frameworks, local plans and other masterplans as student accommodation should closely integrate with existing neighbourhoods to contribute in a positive way to their***

vibrancy without increasing pressure on existing neighbourhood services to the detriment of existing residents.

5. Proposals should be designed to be safe and secure for their users, and avoid causing an increase in crime in the surrounding area. Consideration needs to be given to how proposed developments could assist in improving the safety of the surrounding area in terms of increased informal surveillance or other measures to contribute to crime prevention.

6. Consideration should be given to the design and layout of the student accommodation and siting of individual uses within the overall development in relation to adjacent neighbouring uses. The aim is to ensure that there is no unacceptable effect on residential amenity in the surrounding area through increased noise, disturbance or impact on the streetscene either from the proposed development itself or when combined with existing accommodation.

7. Where appropriate proposals should contribute to the re-use of Listed Buildings and other buildings with a particular heritage value.

8. Consideration should be given to provision and management of waste disposal facilities, that will ensure that waste is disposed of in accordance with the waste hierarchy set out in Policy EN19, within the development at an early stage.

9. Developers will be required to demonstrate that there is a need for additional student accommodation or that they have entered into a formal agreement with a University, or another provider of higher education, for the supply of all or some of the bedspaces.

10. Applicants/developers must demonstrate to the Council that their proposals for purpose built student accommodation are deliverable.

The deliverability criterion is H12 at §10. It is cast in strong terms: "must demonstrate".

50. Secondly, there is Policy EN2 of the same Core Strategy, entitled "Tall Buildings".

[1] Tall buildings are defined as buildings which are substantially taller than their neighbourhoods and/or which significantly change the skyline. Proposals for tall buildings will be supported where it can be demonstrated that they

• Are of excellent design quality,

• Are appropriately located,

• Contribute positively to sustainability,

• Contribute positively to place making, for example as a landmark, by terminating a view, or by signposting a facility of significance, and

• Will bring significant regeneration benefits.

[2] A fundamental design objective will be to ensure that tall buildings complement the City's key existing building assets and make a positive contribution to the evolution of a unique, attractive and distinctive Manchester, including to its skyline and approach views.

[3] Suitable locations will include sites within and immediately adjacent to the City Centre with particular encouragement given to non-conservation areas and sites which can easily be served by public transport nodes.

[4] Elsewhere within Manchester tall building development will only be supported where, in addition to the requirements listed above, it can be shown to play a positive role in a coordinated place-making approach to a wider area. Suitable locations are likely to relate to

existing district centres. The height of tall buildings in such locations should relate more to the local, rather than the City Centre, urban context.

[5] By their very size tall buildings can have a significant impact on the local environment and its micro-climate. It is therefore expected that this impact be modelled and that submissions for tall buildings also include appropriate measures to create an attractive, pedestrian friendly local environment.

[6] It will be necessary for the applicant/developer to demonstrate that proposals for tall buildings are viable and deliverable.

The deliverability paragraph is EN2 at [6]. It is cast in strong terms: "necessary … to demonstrate".

51. Thirdly, there is §12.15 of the explanatory text to Policy EN2 (Tall Buildings). It states:

12.15 It is crucial that the viability and deliverability of a proposed tall building be proven. Unimplemented planning permissions for tall buildings can have a significant impact on land value and can distort the market in an unacceptable manner. This can hinder the development of the site for other uses and can have an adverse impact on the developability of other sites. This can have a significantly negative impact on the regeneration of an area.

The key word in §12.15 is "unimplemented", relied on as casting light on what is meant by "deliverability".

52. The focus of this ground for judicial review is on the OR. The key reference point is the following passage under the heading "Issues" and the sub-heading "Principle of the redevelopment of the site and contribution to regeneration":

[1] The existing 391 space MSCP would be partially demolished and reconfigured. The spaces which are on a long lease hold arrangement to kick residents who live in Macintosh Village would be retained and would be available during construction and once the development becomes operational.

[2] Macintosh Village Residents Company, which includes those with a right to park within the MSCP, consider that the any grant of planning permission would interfere with their legal rights to park/rights of way in the MSCP, afforded to them in their 999 year lease.

[3] They have obtained a legal opinion which notes their opposition to the redevelopment of the car park. It states that the redevelopment, insofar as it would reduce the number of spaces available, is not permissible by the lease in or of itself and that the development of the car park (both during the construction phase and upon the completion) would likely result in actiona[ble] interference with the rights of tenants with the benefit of the right of way and the right to park. The legal opinion concludes that the tenants with the benefits of the rights would be able to seek to restrain such interference by injunction.

[4] The private third-party private rights to park in the MSCP are protected and enforced through other legal means and are not a material planning consideration, including whether the rights would preclude the implementation of the proposal. Should they believe that their legal rights would be affected by the implementation of the proposed development, they would need to pursue this separately from the planning process.

[5] Macintosh Village Residents Company disagree with this position and state that the presence of such rights affect the deliverability of the scheme which, they believe, is material to the planning decision.

[6] It is understood that since the applicant purchased the car park the rights of the residents to park in the car park have been retained. The rights would be maintained should planning

> ***permission be granted. The appropriate number of car parking spaces would be retained and made available during construction and when the redevelopment works have been completed.***
>
> ***[7] Any commercial parking rights at the MSCP have either expired or have been surrendered. A restrictive covenant lies outside of the applicant's ownership and is not affected by this planning application.***
>
> ***[8] The applicant has a track record of delivering student accommodation schemes. It is not material to the determination of this planning application whether the applicant chooses to then sell their interest in a site and all obligations are attached to the land and not the applicant in any event.***

The key statement which is characterised by Mr Hunter as materially misleading is in the first sentence of paragraph [4]. The "legal opinion" referred to at paragraph [3] was a Counsel's Opinion, of which that paragraph is an accurate and fair summary.

53. Mr Hunter's argument, in essence, involves the following steps. First, that deliverability is a material planning consideration. Secondly, that on its objectively correct legal interpretation (reflected in §12.15 of EN2's explanatory text), what deliverability means is that the proposal would be implemented. Thirdly, that it follows that anything which would preclude the implementation of the proposal – including private third-party RRTPs – is in principle itself a material planning consideration. Fourthly, that it follows that the OR was materially misleading in describing the private third-party RRTPs as "not a material planning consideration" even if, as was being contended by MVML, their enforcement by injunction "would preclude the implementation of the proposal". That is the essence of the argument. Mr Tucker KC, for his part, readily accepted the correctness of the first and second steps.

54. Mr Hunter argues as follows. The key is OR at paragraph [4]: "third-party private rights to park in the MSCP … are not a material planning consideration, including whether the rights would preclude the implementation of the proposal". This straightforwardly told Members to put out of their minds – and treat as legally irrelevant – the private third-party RRTPs in the MSCP, including whether the rights would "preclude" the "implementation" of the proposal. But whether the RRTPs "would preclude the implementation" was at the heart of "deliverability", properly interpreted and correctly understood. The point goes further. Members were also told at paragraph [4] why they did not need to worry about the impact on implementation of private RRTPs. That was because these private rights could be "enforced" through "legal means". This was all the wrong way round. The fact of this enforcement through these legal means was precisely why Members did need to worry about the impact of private RRTPs. An injunction would scupper delivery. An injunctable development was not deliverable. The point needed to be addressed, as a material planning consideration, not put to one side. That is the argument.

55. Like the Cranes Issue, this ground for judicial review is about whether Officers gave advice to Members which was "materially misleading". The basic legal principles applicable to that are derived from Mansell and Lowther, and I do not repeat them. However, given the four steps in the argument, there are these further basic legal principles also in play. The "proper interpretation" of a planning policy is a question for the judicial review Court, approached objectively, in accordance with the language used, read in its proper context: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 [2014] PTSR 983 at §18. The explanatory text which accompanies a planning policy

can be "plainly relevant" to the interpretation of the policy: R (Cherkley) v Mole Valley DC [2014] EWCA Civ 567 at §16. Policy statements are not to be interpreted, not as if they were statutory or contractual provisions, remembering that they may involve broad statements of policy and may be framed in language whose "application" to a given set of facts requires the exercise of "judgment" challengeable only on conventional public law unreasonableness grounds: Tesco at §19. A "material planning consideration" will arise from a planning policy which "expressly or impliedly" identifies it as a consideration "required" to be taken into account "as a matter of legal obligation" or as being "so obviously material" as to "require" direct consideration: R (Samuel Smith Old Brewery) v North Yorkshire [2020] UKSC 3 [2020] PTSR 221 at §32.

56. The position in law as to private rights and their enforcement is that these are not, in and of themselves and without more, a "material planning consideration"; but they can, in principle, become one, viewed through the 'prism' of an applicable policy whose contents lead to that consequence. The interface between private law rights and the prism of planning policy was illustrated in several of the cases which I was shown. An example is the way in which the "right to light" and interference with solar panels on a rooftop were a material planning consideration through the 'prism' of a planning policy concerned with climate change: see R (McLellan) v Medway Council [2019] EWHC 1738 (Admin) [2019] PTSR 2025 §§34-36. I was shown Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281 with its statement of principle (at 1294) that any consideration "which relates to the use and development of land" is "capable" of being a planning consideration; and (at 1295) that drawing lines between "public" and "private" interests can be a "false distinction" in a planning context. Reference was made to Fitzpatrick Developments Ltd v Minister of Housing and Local Government (1965) 194 EG 911 where planning permission was capable of becoming unproblematic if private rights to protection against noise were considered enforceable through abatement action. I was shown R (St Modwen Developments Ltd) v Secretary of State for Communities and Local Government [2016] EWHC 968 (Admin) (upheld at [2017] EWCA Civ 164). That judgment includes a discussion of "deliverability" arising from the express terms of national planning policies relating to housing developments, where one such national planning policy (§34) expressly referred to the need for "confidence that there are no legal or ownership problems, such as unresolved multiple ownerships, ransom strips tenancies or operational requirements of landowners", which served as an aid to interpretation of another national planning policy on housing development deliverability (§36). Mr Tucker KC accepted, by way of an example, that if the viability of a project depended on a third party agreeing to sell land, and if there were clear evidence of an unwillingness to sell, that could be an example of private rights being a "material planning consideration", by reason of an applicable policy criterion of "deliverability".

57. I turn to what I made of Mr Hunter's arguments under this ground for judicial review. The starting point is this. I accept his step one: that "deliverability" as described in criterion §10 of Policy H12, and as described in paragraph [6] of Policy EN2, constitutes a "material planning consideration". The wording of the policies has that consequence. I would also accept his step two: that what "deliverability" means, in both Policies H12 and EN2, is 'sufficient prospect of practical implementation'. That is a straightforward idea, remembering the nature of planning policies and the way in which they are to be interpreted. It is the natural and ordinary meaning of the word "deliverable": it is about whether the planning applicant has put forward a proposal

which has the "ability" to be "delivered". It calls for evaluative planning judgments in its "application". It is a practical, real world question; not a theoretical construct. This approach is reflected in EN2's explanatory text at §12.15, which clearly identifies the mischief and purpose as being to avoid "unimplemented" planning permissions, given negative impacts (as described in that paragraph). So far so good for Mr Hunter's argument. It follows that if, for example, Officers told Members that what "deliverability" means is that the design of a building is demonstrably capable in theory of being constructed without falling down, that would be a misappreciation. Similarly, if Officers told Members that "deliverability" means that the developer is a "fit and proper person", that would be a misappreciation. I would therefore go along with Mr Hunter for the first two steps of his argument. So far so good.

58. But steps three and four are where the trail goes cold. In my judgment, the 'hard-edged' questions of right and wrong, answered on a correctness standard within the supervisory jurisdiction of the Planning Court, at that point hand over to questions of evaluative judgment and appreciation for Officers and Members to consider and weigh up. Once "deliverability" is recognised as a "material planning consideration", and once its straightforward meaning has not materially been misunderstood, the evaluative exercises which then arise are in my judgment characterised as questions of "application" of the policies, questions of judgment, questions of nuance and degree. That is not to abdicate the Court's supervisory jurisdiction. Instead, it is to locate its nature within the principle of reasonableness in which an in-built latitude is recognisable at all times. This is Tesco §19.

59. In my judgment the reasoning in the OR – on a fair reading as a whole and with reasonable benevolence – does not fall foul of the Tesco duty to give policy its "proper interpretation", nor the Mansell duty not materially to mislead members. The OR did not materially mislead or misdirect Members. The answer to the Injunction Issue is "no". I will explain why. The first point is that there was, in my judgment, no misdirection anywhere in the OR – still less when read fairly and as a whole – as to the legally correct meaning of "deliverability". Under the heading "policy", the OR identified relevant policies including EN2 ("Tall Building") which it summarised, and H12 ("Purpose Built Student Accommodation") which it set out in full. Members were therefore expressly told by the OR that criterion §10 in Policy H12 was that applicant/developer "must demonstrate" to the Council that their proposals for Purpose Built Student Accommodation are "deliverable". Nowhere in the OR was there any statement that deliverability was irrelevant or immaterial or to be ignored. Nowhere in the OR was there any statement attributing to "deliverability" a meaning other than that connoting the practical prospect of implementation. The OR recorded Officers' planning assessment in the context of H12 that: "The proposals are in accordance with this policy and this is discussed in detail below". The OR went on later to say this:

> ***Finally, policy H12 discusses the importance of deliverability. The applicant is one of the largest student accommodation providers in the UK with extensive experience of developing and managing large student residential schemes with knowledge of the market and type of products students are looking for. They are committed to delivering this proposal and would commence work should permission be granted.***
>
> ***The proposal would comply with the requirements of policy H12 in full and with the detailed criteria in the December 2020 Executive report…***

There is no perceptible material misdirection in this passage. Deliverability is rightly being treated as a material planning consideration. The clear focus, moreover, is on practical implementation.

60. Secondly, the passage which is criticised from OR paragraph [4] needs to be seen in the context of the OR as a whole, but also in the context of paragraphs [1] to [8] in which it appears. On a fair reading of the wider passage, a number of key points were being made. One was the expression of the Officers' view at [4] that private third party RRTPs in the MSCP, which are protectable and enforceable through other legal means, were "not a material planning consideration". Another was the expression of the view also at [4] that whether that protection and enforcement would "preclude the implementation of the proposal" was also "not a material planning consideration". Pausing there, in my judgment, there was no misdirection in law in those statements. There was no error of objective interpretation. "Deliverability" is, of itself, a "material planning consideration". Private third party RRTPs in the MSCP are not, of themselves, a "material planning consideration". The question whether enforcement of those RRTPs would preclude implementation was not, of itself, a "material planning consideration". That is for the reason given by Mr Katkowski KC. It is because these are not matters which policy EN2 or H12 "expressly" identified as considerations "required" to be taken into account by the Council "as a matter of legal obligation"; they are not matters which policy EN2 or H12 "impliedly" identified as considerations "required" to be taken into account by the Council "as a matter of legal obligation"; and they were not matters "so obviously material" as to "require" direct consideration: <u>Samuel Smith</u> §32. I agree with Mr Katkowski KC: it is not the case that every feature which could logically be identified as falling within the ambit of a "material planning consideration" (here, a planning policy criterion) is elevated itself into being a "material planning consideration". This is a classic area of "application" and "evaluation", for Officers and Members to consider.

61. Thirdly – and importantly – on a fair reading of the OR, the point raised by MVML about the planning 'prism' was addressed. Officers expressed the view (at [4]) that whether third party private RRTPs would be protected and enforceable by legal means so as to preclude implementation of the proposal was "not a material planning consideration". Officers communicated to Members the answer to that which was being put forward by MVML. Officers identified the planning policy 'prism' point being made, explaining (at [5]) that MVML "disagree" and were expressing the view that "the presence of such rights" affected the "deliverability" of the scheme which was "material to the planning decision". At that point, Officers could have told Members that this was all nothing to the point. It is of significance that Officers chose not to leave it there. Rather, what followed were three paragraphs [6], [7] and [8] which were responsive, from an evaluative planning perspective, to the point made and recorded at paragraph [5] from MVML. The first responsive point made (at [6]) emphasised to Members the two Basic Points [BP1] and [BP2] identified at the start of this judgment: that the private RRTPs would be maintained should planning permission be granted, with the appropriate number of car parking spaces available, and that that would happen both during construction and after the redevelopment works had been completed. The point being made was that what were – undoubtedly – the primary rights in play, namely the right to park in the MSCP, were being fully protected by the proposed development. The second of the three paragraphs (at [7]) was making a point about the expiry or surrender of any other commercial parking, and the fact that there was a restrictive

covenant but it was not affected by the planning application. That was significant. It meant all private rights to park had been identified and secured; there were no other rights; there was no preclusion by restrictive covenant; and there would be enough spaces. The fact that those with RRTPs would not be competing with others meant that this was not going to be a 'musical chairs' scramble: there would be a parking space for everyone. The third paragraph (at [8]) was emphasising the point made elsewhere, as being relevant to practical implementation, namely the track record which GMS had, of 'delivering' student accommodation schemes. In my judgment, what Officers were making were relevant and proper points to make, as a matter of evaluative planning judgment, to be put alongside the claim being made by MVML about an injunction to secure private rights.

62. Fourthly, it is clear that Officers had read and considered the substantive content of the legal opinion. It was summarised for Members at paragraph [3]. Members' attention was specifically there being drawn to the point made by Counsel about actionable interference with RRTPs from a reduced number of spaces available. Officers also identified correctly (at [3]) that the conclusion of the legal advice of Counsel was that the tenants with the benefit of the rights "would be able to seek to restrain such interference by injunction". The word "seek" is significant. It was the word used by Counsel. Counsel did not express the view that an injunction would be granted. Pausing there, the key point at [3] about a reduced number of spaces available to residents with RRTPs is exactly what was being addressed in the later paragraphs (at [6] and [7]). Officers were identifying for Members that the RRTPs would be "retained" and "maintained", with sufficient spaces, because "the appropriate number" was being retained and made available; that this was so at all times during construction and after completion; and that there would be no competing with others for insufficient spaces. On a fair reading as a whole, all of that was to engage, to a degree considered appropriate as a matter of evaluative judgment, with the thrust of what had been summarised (at [3]).

63. Fifthly, the logic of the argument raises a number of practical questions. What more – in an area of evaluative planning judgment – were Officers and Members required to do, whether as a matter of "obligation", or because it was so "obvious"? It is easy to say that Officers should have 'addressed' whether the private RRTPs would be likely to preclude the practical implementation of the development. But what does that mean? Did Officers have to assess the prospect of a court granting an injunction to halt the development? Did they have to assess the prospect of any litigation being settled, and at what price? Is that what was being required of them by a planning policy which made no reference to private rights or injunctions? These questions provide a helpful cross-check. And it is appropriate to inject a solid dose of perspective and practical realism, in examining the inexorable legal logic of characterising private RRTPs which would or could preclude the implementation of a proposal as a "material planning consideration". A position would presumably need to be taken as to whether it was right or wrong, as a predictive assessment of a court enforcing private law rights and as a predictive assessment of GMS being unable to reach a settlement in litigation of that kind, that the development would be thwarted. Taking a view would become especially important given that the prospect of an injunction was strongly contested by GMS. Mr Hunter very fairly showed me that GMS had adopted the position that there was "no credible basis for an injunction". In my judgment, it is unrealistic to treat the policies as requiring more – as a matter of "obligation" or as being "obvious" – that that Officers

and Members should note the position and identify some headline points about it, as Officers did at [6] to [8]. I do not accept that there was any greater legal obligation.

64. Sixthly, the sense of perspective and realism and the recognition that we are in the sphere of evaluative judgment are reinforced by considering the legal opinion on which reliance was being placed. I have read and considered that opinion, written by Counsel Andrew Skelly. It certainly expresses the view that the proposed redevelopment of MSCP would "likely" result in "actionable interference" with private RRTPs. But I find myself asking what it was that Counsel was being told would be the practical implications for those with private car parking rights of the development going ahead. Counsel was plainly reliant on instructions which came from MVML and its representatives. He said so. He recorded that he had been told that access to and egress from the MSCP would be "denied" at "various" times "throughout" a 6 year period. This sounds a lot like what was said in the July Representations, which I described in the footnote to the Cranes Issue. As has been seen in the discussion of that topic, this would not be a fair description of the position as assessed by Officers, explained to Members and then secured through FPC44. Another problem is that Counsel appeared ultimately to proceed on the basis of a "substantial interference" which "must" arise from competing "with the same number of persons" as in the past for the 391 space car park, in what was now to be a 102 space car park. That sounds a lot like Counsel doubting the adequacy of the number of spaces. This was the point addressed by Officers in the OR at [6] and [7]. I have not been asked to reach a conclusion on whether an injunction would be likely; still less on whether injunction proceedings would be likely to be settled. Nobody says I am in a position, or should seek, to do so. All of this brings into further, sharp focus whether there really was a consideration to be addressed by Officers, as a matter of "obligation" or because it was "obvious".

65. Where the analysis ends up, in my judgment, is squarely in the realms of classic evaluation, involving judgment calls about relevance and weight. It was for Officers to evaluate to make of this and to make such points as they considered helpful. I note that this ground for judicial review is not put on the basis that a planning authority could not reasonably consider the criteria within policy H12 to be met, as Officers assessed that they were. That was reasonable and the approach was lawful. What was ultimately expressed by Officers on deliverability was confidence that, given their track record, GMS demonstrated a sufficiently strong prospect – that sufficiency itself being an evaluative calibration – of practical implementation such that the deliverability criterion was satisfied. I can find no public law error in the OR, remembering the questions of application, evaluation and weighing in the balance, and the identification of relevant matters within a reasoned appraisal are all primarily a function of the judge mental latitude entrusted to the planning authorities. What is said is that a group of people with established RRTPs, each met by Basic Points [BP1] and [BP2], each of whom would retain that right within a car park designed to have a sufficiency of capacity to cater for them all, protected by a continuity of access throughout with the rigours of a safety and necessity-based test for any exceptional intermittent interruption in access, whose health and safety and disability access needs had all been appraised, protected and addressed, and who GMS was saying would benefit from improvements to the MSCP from the proposed reconfiguration, would establish an actionable interference and injunct the proposed development. That is striking. Planning officers did not purport to assess the prospect in court in a private law action, nor the prospect of settlement (and nor have I). They articulated points which were relevant as they saw it (and so, along

the way, have I). For the reasons that I have given the answer to the Injunction Issue is "no" and this ground for judicial review fails.

Conclusion

66. The application for judicial review is dismissed. The contested application to adduce the further evidence is granted in part. The application for permission to amend the grounds is refused. Having circulated this judgment are confidential draft I am able here to deal with any consequential matters. The parties are agreed that the appropriate costs order is that MVML pay the Council's costs in the sum of £10,000. Mr Hunter seeks permission to appeal on the Injunction Issue, arguing in essence that there is a real prospect that the Court of Appeal would find that the OR materially misled Members (1) by telling them that the prospect of an injunction was an "irrelevant" consideration or (2) by failing to tell them that it was a "relevant" consideration (so that, while the Committee did not necessarily have to assess "how likely" an injunction was, they could not "entirely ignore" the matter unless "satisfied" it had "no real prospect"). Mr Evans responds that clear answers lie in the judgment, in particular as to reading the OR as a whole, recognising the evaluative judgment in play, and applying the solid dose of perspective of practical realism. My assessment is that the proposed appeal does not have a real prospect of success and for that reason I will refuse permission to appeal.