CAS-02641-G8G7M5

Model Farm

Appellant's Outline Response to Undated EIA Representations submitted by Dennis Clarke

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1. INTRODUCTION

1.1 This document constitutes an initial response to Mr Clarke's representations, which were received in full by the Appellant on 20 February 2026. The Appellant reserves the right to alter or expand this Response during the Inquiry and, specifically, in its closing submissions. The intention, in setting out the Appellant's response in outline, is to aid the efficient running of the Inquiry. This note focusses on legal matters; evidential matters will be addressed by the Appellant's witnesses.

1.2 These submissions seek to respond to what the Appellant understands to be Mr Clarke's main legal points, focussing on his criticisms of the Appellant's case, rather than points he makes against the LPA, PEDW or employees of those organisations.

1.3 The Appellant notes that Mr Clarke submitted his document not only on his own behalf but also on behalf of "various other residents who have contributed" to its content. The Appellant does not know who these other residents are and therefore refers to Mr Clarke throughout as the originator of the Representations which he has submitted.

1.4 The Town and Country Planning (Environmental Impact Assessment Regulations)(Wales) 2017 are referred to throughout this document as "the EIA Regs" and Directive 2011/92/EU is referred to as "the Directive".

2. ART 10a OF THE DIRECTIVE AND REG 43 OF THE EIA REGS

2.1 A theme of Mr Clarke's Representations is that Art 10a and Reg 43 directly impose or require the imposition of criminal sanctions on persons, including expert advisors, local government officers and officers of PEDW, in respect of alleged breaches of the EIA Regs. It is important to realise, however, that this is not the effect of Art 10a or Reg 43 provides. Moreover, it would not be for the Inquiry to consider matters potentially arising under the general criminal law, even if there had, prima.facie, been any criminal conduct.

2.2 Art 10a provides:

> " Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive."

2.3 Regulations transposed the Directive into Welsh law. The Directive no longer has direct effect in Wales as a result of Brexit but has the status of "assimilated EU law" pursuant to the Retained EU Law (Revocation and Reform) Act 2023 ("REULA"), s.5. Its interpretation is therefore governed by the European Union (Withdrawal) Act 2018, s.6. In short, this means that a court or tribunal is not bound by any principles laid down, or any decisions made, on or after 2020 by the European Court, though regard may be had to anything done afterwards by that Court or emanations of the EU, so far as relevant.

2.4 The Directive was amended by the addition of Art 10a (amongst others) by European Directive 2014/52/EU ("the 2014 Directive"). Welsh Government ("WG") amended the previous EIA Regs to effect the transpositions at that time required by European law. The result was the 2017 EIA Regs.

2.5 WG issued an Explanatory Memorandum to the EIA Regs: https://senedd.wales/media/bz1lpvq4/sub-ld11027-em-e.pdf.

In Appx 1 to the Explanatory Memorandum, WG summarised the main amendments to the 2011 Directive as a result of the 2014 Directive, together with a paragraph relating the amendment to the domestic planning system. The Appendix stated, in relation to Art 10a:

> " Art 10a - Penalties for infringements of national provisions.
>
> Unauthorised development. The exercise of enforcement powers provided in the TCPA is at the discretion of local authorities. However, that discretion cannot over-ride the requirements of the EIA Directive. When considering whether to take enforcement proceedings planning authorities must therefore consider whether the development is EIA development – i.e. whether it falls within Schedule 1 or 2 and is likely to have significant environmental effects - before it takes its decision. If the planning authority concludes the development is EIA development, then its exercise of discretion will be influenced by the need to comply with the legal requirements of the Directive. The planning system already operates a system enabling enforcement where unauthorised development has occurred. As this provision reinforces existing systems and should not cause any additional burden on any parties.
>
> Environmental reports (and other information) that are misleading
>
> At present, if someone were to intentionally make a false certificate, intending by doing so to make a gain for themself or another, it would constitute the offence of fraud by false representation. As such, legislation is already in place to provide a system of penalties for false or misleading information in EIA applications. As the legislation is already in existence, there is no additional burden on any parties."

2.6 Mr Clarke has also referred to the EIA Regs, r.43, which provides as follows:

> "Relevant planning authorities, in the exercise of their enforcement functions, must have regard to the need to secure compliance with the requirements and objectives of the Directive."

This regulation sits within Part 10 UNAUTHORISED DEVELOPMENT. Definitions for Part 10 are provided by r.42, making clear that "enforcement functions" refers to the powers exercisable in relation to breaches of planning control by LPAs under Part 7 of the Town and Country Planning Act 1990 ("TCPA 1990").[1] This Part of the

[1] These powers are replicated, with minor amendments of no consequence for the purposes of these submissions, in Part 4 of the Planning (Wales) Bill 2025. A motion for the Bill to be passed is scheduled for

EIA Regs accordingly ensures that enforcement functions in relation to unauthorised development are carried out consistently with the objectives of the EIA Directive, as explained by WG in the first part of their Appendix note on Art 10a. R.43 does not impose "a wide ranging obligation … on the LPA and PEDW to get things right, even after they had gone wrong" (Mr Clarke's Representation p.7).

2.7 Turning now to the second part of WG's Appendix note, and the burden of much of Mr Clarke's submissions, WG are, of course, correct in stating that the general criminal justice system would, in principle, cover offences of dishonesty committed in the context of planning applications and appeals. As submitted above, such matters are beyond the scope of the Inquiry. Mr Clarke says that he disavows any intention of accusing anybody of deliberate wrongdoing.[2]

2.8 There are some important points of EIA law which should be borne in mind when considering the criticisms raised in Mr Clarke's submissions. These are raised now with the intention of shedding light and reducing heat at the Inquiry.

2.9 The first principle is that the adequacy of the ES is primarily a matter of judgment for the decision maker (i.e., now, the Minister, advised by the Inspector). This judgment is subject to the supervisory jurisdiction of the courts, exercised via a statutory form of judicial review pursuant to the TCPA 1990.[3] This jurisdiction is an important part of the system of domestic law which enforces the Assimilated EU Law. It is, however, a limited jurisdiction, exercised in accordance with well-established principles approved in caselaw at the highest level.

2.10 In R.(Blewett).v.Derbyshire.CC [2003] EWHC 2775 (Admin) at first instance,[4] Sullivan J made the following general observations:

> " 36…….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 Regulation 2 (so that the local planning authority is unable to grant planning

debate in Senedd on 10 March 2026:
https://business.senedd.wales/mgIssueHistoryHome.aspx?IId=46434, accessed 5.3.2026.
[2] Mr Clarke's Submissions, 7.
[3] Reproduced in Planning (Wales) Bill, s.376. See generally n 2.
[4] The first instance judgment is appended to these submissions as Appendix 1. The decision was affirmed on appeal, but the Court of Appeal did not consider the EIA point.

permission: see regulation 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 Regulation 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 Regulation 17 of the Regulations and Article 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 Regulation 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 Regulation 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 Schedule 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 Schedule 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 County Council ex parte Brown [2000] 1 AC 397, at page 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." (emphasis added)

2.11 The Blewett.approach was affirmed by the Supreme Court in the context of the SEA Directive and the Planning Act 2008 in R. (oao. Friends. of. the Earth). v. Heathrow. Airport [2020] UKSC 52 at paragraphs 142 - 3, recognising the consensus between the parties that it was correct.[5] The Court observed:

" 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...

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..." (emphasis added)

2.12 Subsequently, the High Court has applied the Blewett.approach in the context of the 2017 EIA Regulations (the parallel English provisions to the Welsh EIA Regs) in R.(oao.Macintosh.Village.(Management).Ltd).v.Manchester.City.Council. [2022] EWHC 3002 (Admin) at paragraphs 19, 23.[6]

2.13 Therefore, it is clear that the Assimilated EU Law does not require an ES to be perfect. Still less does it exclude the scope of judgment about environmental effects or their significance. And it absolutely does not expect the compilers of

[5] See Appendix 2 to these submissions for full judgment.
[6] See Appendix 3 to these submissions for full judgment.

an ES and members of the public necessarily to agree about the contents: in R. (Bedford.and.Clare).v Islington.LBC [2002] EWHC 2044 (Admin) at [203], Ouseley J said:

> "...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 Regulation 3(2) on the local authority's part in granting planning permission on the basis of that Environmental Statement."[7]

2.14 The Inquiry is part of the process whereby matters of criticism and disagreement can be aired (subject, of course, to the Inspector's discretion as to relevance and fairness) and resolved by the Inspector / Minister.

3. REGULATION 58: OBJECTIVITY AND BIAS

3.1 It is not for the Appellant to answer for the LPA and PEDW, but, again, in an effort to throw light on the matter, these submissions set out the legal position. First, it is assumed that the reference to "Regulation 52" (p. 8, line 1 of Mr Clarke's Representation) is a typographical error for r.58, which follows it in his text.

3.2 R.58 deals with conflicts of interest and was introduced in 2017, to transpose art. 9a of the 2014 Directive. As the WG Explanatory Memorandum explains,

" LPAs are already subject to provisions with regard to conflict of interest within the Town and Country Planning General Regulations 1992.

Therefore as this provision reinforces existing legislation this should not cause any additional burden on any parties."

3.3 Mr Clarke notes that the LPA recorded a conflict of interest in this case, but seems to suggest that the making of alleged procedural errors by the LPA / PEDW means that they are now or may be conflicted for the purposes of this Regulation. He develops this thought later on in the Representation in criticisms of individual officers. Clearly, if he can establish that there have been procedural errors, they must be considered and steps taken in response (as the Appellant agreed at Day 1 of the Inquiry in 2025, in not resisting the adjournment). But such matters do

[7] See Appendix 4 to these submissions for full judgment.

not, in themselves, contravene r.58 and there has, moreover, been nearly a year's adjournment for Mr Clarke and all other interested people to study and comment on the ES.

4. REGULATION 17(4) AND 'CERTIFICATION' OF WITNESSES

4.1 Mr Clarke suggests that the fact that the ES does not contain any statements of truth is (to put matters neutrally) an omission and he makes a number of related allegations about the Appellant and its professional team. The suggestion is misconceived and the imputations are unwarranted. The declaration which he cites on p.12 of the Representation relates to non-statutory PEDW practice relating to expert evidence at a planning inquiry. There is no obligation, statutory or otherwise, to include such a declaration in an ES and it is not conventional to do so.

4.2 R. 17(4) requires an ES to

> " (a)be prepared by persons who in the opinion of the relevant planning authority or the Welsh Ministers, as appropriate, have sufficient expertise to ensure the completeness and quality of the statement;
>
> (b)contain a statement by or on behalf of the applicant or appellant describing the expertise of the person who prepared the environmental statement;..."

The ES complies with this statutory requirement at Vol.3, Appendix 1.4 Statement of Expertise. Unfortunately, the wrong regulation is cited but the obligation is identified and the relevant information given.

4.3 The Statements of Evidence submitted on behalf of the Appellant contain a Statement of Truth.

5. OUTLINE PLANNING APPLICATIONS AND EIA

5.1 Another key theme of Mr Clarke's representations is his contention that the ES is incomplete either because the Appeal Scheme has been submitted, in part, in outline; and/or because certain matters (in particular, related to drainage), as well as reserved matters, are proposed to be dealt with by way of condition.

5.2 It is lawful to grant planning permission on an application (or appeal) which is wholly or partly in outline: see R.v.Rochdale.MBC.ex.parte.Milne (2001) 81 P & CR 27[8] . Such a permission should be subject to conditions or other parameters (such as a section 106 agreement and conditions) which 'tie' the scheme to that which has been assessed. This principle is reflected in draft conditions 1 and 5. Land use is controlled by draft conditions 39 and 40. Matters relating to drainage, water and contamination, including potential risks to ground and surface waters, are to be controlled by draft conditions 9 – 12, 24 - 27. Draft condition 19 provides for a CEMP, as anticipated / requested by NRW. The PEDW Completeness Report[9] recognises that Flooding/Hydrology were scoped out of the ES and expressed satisfaction with this position. The application was supported by a Sustainable Drainage Assessment (which included pre-application consultation responses from the SAB authority and Dwr Cymru Welsh Water), and expressed satisfaction with this position. Mr Clarke produces no evidence to invalidate PEDW's judgment; the cases upon which he relies concerned brownfield sites with histories of significant contamination and are distinguishable.[10] The approach of the Appellants, endorsed by PEDW, is lawful and Ouseley J's remarks set out at paragraph 2.13 above on differences of opinion are pertinent, as is the following paragraph from Milne:

> " 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."

[8] See Appendix 5 to these submissions for full judgment

[9] Appendix 1.1 to September 2024 issue of the ES; see paragraphs 25,27.

[10] It should be noted that the Sustainable Drainage Assessment was submitted with the planning application before it was amended. It therefore considers matters on the basis of the original red line (corresponding to Area A), although taking into account the proposals to dedicate Area B as country park. The application was subsequently amended to include Area B within the red line. This is the explanation of the point raised by NRW in their letter of 2.3.2022, noted by Mr Clarke on his p.92.

6. MR CLARKE'S GENERAL OBJECTIONS TO THE ES AND APPEAL

6.1 We do not seek, in this document, to comment on matters of evidence (e.g. the approach to cumulative assessment). Nor do we intend to respond to Mr Clarke's speculations about the positions of third parties.

6.2 The Representation repeatedly asserts that the Non-Technical Summary ("NTS") is inadequate. Schedule 4 of the Regs prescribes the information for inclusion in ES. Paragraphs 1 to 8 set out the matters of which descriptions are to be included. Paragraph 9 requires "A non-technical summary of the information provided under paragraphs 1 to 8", without further specification. The Completeness Report notes the inclusion of the NTS without further comment; it is not the subject of the further requirements set out in Annex 1 to that letter. Plainly, the document is a NTS of the ES; the statutory requirements are satisfied.

6.3 None of Mr Clarke's tabulated points at pp.67-8 identifies matters which invalidate the ES. It should be noted that r. 17(3)(b) and Schedule 4 of the EIA Regs require an ES to contain, respectively, assessments and descriptions of the "likely significant effects," "any identified significant effects" and "the expected significant effects". Suggestions that the Appellant's team have watered down the requirements of the Regs are misplaced. (emphasis added)

6.4 Notice of Appeal: the appeal was validly made under s.78 TCPA 1990 and has, properly, been accepted by PEDW. This provision applies, irrespective of EIA arguments.

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17 March 2026

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.

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
Lord Anderson of Ipswich KBE QC
Michael Humphries QC
Richard Turney
Malcolm Birdling
(Instructed by Bryan Cave Leighton Paisner LLP)

Respondent (1)
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^{o}C above, and if possible to 1.5^{o}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 may reasonably be required 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 are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
>
> (3) Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation 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 as may reasonably be required, 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. This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim." (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).

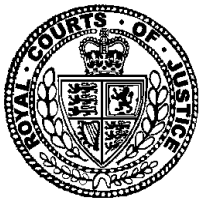
164. The Court of Appeal (para 258) upheld FoE's challenge stating the precautionary principle and common sense suggested that scientific uncertainty was not a reason for not taking something into account at all, even if it could not be precisely quantified at this stage. The Court did not hold in terms 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: [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.

[redacted]

.....
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.

The Cranes Issue

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.

The Dust Issue

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 Blewett – 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 Blewett §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 R (Champion) v North Norfolk District Council [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 (Champion 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: Samuel Smith §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.

CO/0529/2002, Neutral Citation Number: [2002] EWHC 2044 Admin

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

Royal Courts of Justice
The Strand
London

Wednesday 31st July, 2002

B e f o r e:

MR JUSTICE OUSELEY

- - - - - - -

THE QUEEN
ON THE APPLICATION OF
(1) EDWARD BEDFORD
(2) ELIZABETH CLARE

Claimants

- v -

LONDON BOROUGH OF ISLINGTON

Defendant

- and -

ARSENAL FOOTBALL CLUB PLC

Interested Party

- - - - - - - - -

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MR ROBIN PURCHAS QC and MISS KAREN McHUGH
(instructed by London Borough of Islington Legal Services
Department) appeared on behalf of THE DEFENDANT

MR DAVID ELVIN QC and MR DANIEL KOLINSKY (instructed by Messrs Gouldens, London EC4M 7NG) appeared on behalf of the INTERESTED PARTY

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

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 10 December 2001, at which local residents on both sides and the developer were heard, Islington resolved to grant planning permission for all three developments. On 30 May 2002, following the conclusion of an agreement under section 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 10 December 2001 were launched by the Islington Stadium Communities Alliance ("ISCA") and four individual local residents. Sullivan J refused permission on paper on 19 April 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 30 May 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 10 December 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 10 December 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 section 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] AC 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: section 11 and Schedule 4, paragraph 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 LJ demonstrated by his quotations from paragraphs 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 Schedule 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] AC 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 paragraphs 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 paragraphs 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 30 April 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 (ie nature Conservation, Design and Employment policies for Ashburton Grove which may be breached by the proposals). RB points to PPG 12 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 Nov 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 paragraph 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 paragraphs 49-50 of IS/C/General/1, paragraphs 16-19 of IS/R/Proposals/2, paragraph 15 of IS/R/Implementation/2 and paragraph 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 10 December 2001:

> "7. PLANNING POLICY
>
> 7.1Unitary Development Plan 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.
>
> 7.1.1The 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.
>
> 7.1.2Sometimes 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.

....

7.14The 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 25th June 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 13th December 2001 and it expected that the Council would adopt the revised UDP in mid January 2002.

....

7.16A 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 paragraphs 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 section 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 section 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 section 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 section 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 section 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 section 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 pre-empt 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] JPL 682, CA, Stephenson LJ 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] JPL 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 section 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 <u>its</u> 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 Part 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 section 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 The Queen on the application of J A Pye (Oxford) Ltd v Oxford City Council (CO2001/2494/QBACF, 25.7.2002) in which at paragraph 32 Pill LJ said:

> "Local planning authorities should, however, bear in mind, and I would respectfully underline, Lord Scarman's comments in Westminster, reflected in paragraph 3.17 of PPG 12, 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 section 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 (paragraph 67). The definition of supplementary planning guidance in PPG 12, which has a statutory status by reason of Regulation 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 Admin 870, and in particular paragraphs 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 paragraphs 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 section 36(2) applies. I accept that the Local Plan as altered or as replaced must satisfy the requirements in section 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 section 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 section 36(2) and the plan is liable to be quashed under section 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 section 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 section 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. PPG 12 discusses supplementary planning guidance. In paragraph 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 section 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 paragraphs 63-66.

57. I should also refer to paragraph 67 in the light of what the Court of Appeal said in paragraph 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 paragraph 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 paragraph 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 paragraph 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 sections 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 section 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 Article 8 or Article 1, 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 The Queen (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions [2002] EWCA Civ 737, paragraphs 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 paragraphs 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 section 100C(1), to subsection (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 section 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 subsection (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 Part I, paragraph 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 paragraph 7 of Part II of Schedule 12A:

> "Information falling within any paragraph of Part 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 regulation 3 of the Town and Country Planning General Regulations 1992 (SI 1992 No 1492)."

79. Regulation 3 of the Town and Country Planning (General) Regulations 1992 provides:

> "Subject to regulation 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 section 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 10 December 2001 and copies provided. As a matter of fact it was not listed as a background document in any agenda report. Mr Robin Purchas QC, for Islington, submitted that the document did not fall within the scope of section 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 paragraph 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 Schedule 12A, Part I, paragraph 7. It is perfectly obvious that it was assessed as confidential on a reasonable basis. Accordingly, section 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 Schedule 12A, Part II, paragraph 7, together with Regulation 3 of the 1992 General Regulations, meant that Part I, paragraph 7, was disapplied. I note that the exemption in Part I, paragraph 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 Regulation 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 Regulation 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 paragraph 7 of Part II to Schedule 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 section 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 parte Doody [1994] 1 AC 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&CR 197, 208, subsequently applied by the Court of Appeal in R v Secretary of State for the Environment, ex parte Slot [1998] JPL 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 EHRR 205, at paragraph 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 paragraph 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 14 June 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 section 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 section 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 section 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 section 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] AC 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 section 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 10 December 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 discretion 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 1932 hours to 0015 hours. It was divided into three sections for the three applications. Fifty 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 parte Brown [1997] Env LR 100. In that case Ognall J cited from the judgment of McCullough J in R v London Borough of Camden, ex parte Cran and others (1995) 94 LGR 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 29 October 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 5 October 2001; a letter from Arsenal FC's planning consultants with enclosures dated 15 November 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 paragraph 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 Regulation 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 7 December 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 21 November 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 6 December 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 parte Coughlan [2000] QB 213, 258-259 (paragraph 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 10 December. 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 Regulation 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 regulation 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 section 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 WLR 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 section 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 paragraphs

7.1 in the Overview Report and paragraphs 7.1.8 and 7.1.9:

> "7.1 Unitary Development Plan
>
> 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.
>
> ....
>
> 7.1.8 Departures from Adopted UDP Policies 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 (ie 1994) UDP policies outlined in the table below.
>
> ....
>
> 7.1.9 Departures from Proposed UDP Policies 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 paragraph 7.1.8 is the plan directly engaged by section 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:

> "7.1.10 Making Decisions on Departure Applications
>
> 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, paragraph 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 pages 88 and 90, deals with the breach of UDP policy and concludes in paragraph 40.1.8-40.1.9:

> "40.1.8My 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.
>
> 40.1.9The 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 re-located."

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 page 108 of the Ashburton Grove Report:

> "47.2.4Four 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.
>
> ....
>
> 47.2.18I 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 10 December 2001:

> "Following discussions at the Arsenal Review Group meeting on 6th December, 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 paragraph 59.2 on page 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 30 April 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 15 November 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 paragraph 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 10 December 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 15 November 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 m 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 S106 requirements. Indeed it can be, but not to any significant level, unless one is prepared to reduce the 'biggies' which are Affordable Housing & 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 £50m '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 page 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 27 May 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 8 July 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:

> “5.1 Inter-dependence 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.
>
> 5.1.1In 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 paragraph 23 of her second witness statement:

> "The e-mails should also be read in the context of negotiations to ensure that the proposed S106 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 section 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 1 November 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 7 November 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 paragraph 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 12 November 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 paragraph 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 27 May 2002, in paragraphs 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 section 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 pages 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 27 November 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 8 July 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 police Env 16 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 paragraph 25:

> "In my e-mail of 27 November 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 paragraph 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 5 November 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 14 November 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% 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, page 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% 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 28 June, 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% was a reference to capacity. The reference to 25% was a reference to the percentage of demand with which capacity of 10% additionally could cope. 10% was additional available rail/tube transportation capacity; 25% 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 paragraph 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% 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% 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 paragraph 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 paragraphs 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, paragraph 3.18, stating that improvements at Holloway Road could not be guaranteed before the opening of the stadium, with paragraph 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 paragraph 3.18. It is also a fall-back obligation in Schedule 1 to the section 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, paragraphs 3.19 and 3.20, with the Overview Report, paragraph 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 paragraph 1.22 of Appendix 4 on the prospects of 75% completion of the EDCPZ delivering 20% modal split to car, and paragraph 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 pages 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 7 private waste facilities/skip hire businesses within approximately 3 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 section 106 agreement, Schedule 1, section 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 paragraph 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 page 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

(Volume 1, page 310, paragraph 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 (Volume 1, page 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 QC 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 paragraphs 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 paragraphs 26.13 and 14 of the Overview Report, and in the appendix dealing with transportation at paragraphs 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 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 Regulation 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 Regulation 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 paragraph (1) stated that it was to be provided for such purposes."

197. An Environmental Statement is defined in Regulation 2(1) as follows:

> "'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."

198. Schedule 4 of Part I deals with the information which is to be included in Environmental Statements. Schedule 4, Part I, paragraphs 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 Schedule 4 requires by way of a description or analysis of the likely significant effects: see, for example R v Rochdale MBC, ex parte Milne [2001] Env LR 406, paragraphs 104-106 (Sullivan J), and R (on the application of Barker) v Bromley LBC [2001] EWCA Civ 1766, [2002] PLCR 8, paragraphs 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 Regulation 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 19 October 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 19 October 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's decision on the CPZ (this is because the ES Regs require the 'likely' env effects be assessed, not the 'worst case' env effects. However, the Regs 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 18 February 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 fireproof 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% pushes the traffic impacts to an unacceptable level. This is important because any more car use than 20% 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 19 October 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% 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%), 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 paragraph 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 paragraph 15:

> "In reaching this judgment I had regard to the fact that a 20% 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 paragraphs 1.6 and 1.24, draws attention to the basis of the Environmental Statement and to the way in which the section 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, ie 88%. So that aspect has been covered in terms of pedestrian impact and bus and tube travel. The section 106 agreement, as the EDCPZ is extended and public transport improvements are implemented, will reduce the car split in the longer term to 12%. In effect, therefore, it would be said that a likely effect in the short to medium term, namely the extra 8% 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% 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 paragraph 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 [Volume 2, pages 111-112]. There was indeed a further e-mail on 7 November 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) paragraphs 8 and 14 of Mr Fiumicelli's first witness statement, and paragraph 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 paragraph 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, paragraph 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 paragraph 7.3. Odour in operation is dealt with at paragraphs 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 paragraph 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 paragraph 35 of his affidavit (Volume 1, page 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] PLCR 519. At paragraph 12 Sedley LJ said:

> "It is fundamental to section 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 section 106 obligation 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 LJ 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 section 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 section 106 agreement is described by Miss Cluett in her second witness statement at paragraph 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 14th February 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 19th February Planning Committee was also available on the Council's web-site. Comments on the s106 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 s106 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 23 April 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 Schedule 1 to the section 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 section 106 agreement impose an obligation on Arsenal FC to carry out the terms of Schedule 1 which contain clauses dealing with the Stadium Travel Plan, to take the chief example relied on, in particular clauses 9.1 - 10.1. They read:

> "9.1All reasonable endeavours shall be used to work with LBI to work towards achieving the Modal Split Target.
>
> 9.2The Stadium shall only be used in accordance with the Stadium Travel Plan and the approved Stadium Travel Plan shall be complied with.
>
> 9.3The Monitoring Programme shall be implemented and funded.
>
> 9.4All reasonable endeavours shall be used to ensure that upon commencement of use of the Stadium for a Major Event no more than 20% 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.
>
> 9.5Until 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% 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
>
> 10.1The Retention of Visitors Measures shall be complied with in accordance with the Stadium Travel Plan."

234. The modal split target, which is referred to in clause 9.1, is the 88:12 split. The Stadium Travel Plan is dealt with in Schedule 11 to the section 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 Schedule 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 Visitors Measures are effective.
>
> Measures: AFC shall liaise with all relevant bodies, including LBI (Planning & Transportation functions), Transport for London, London Underground Limited, 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 Clause 11), such measures may include:
>
> (a) an approved 'Car Part Management Agreement' for the stadium car park;
>
> ...."

235. Schedule 12 to the section 106 agreement deals with monitoring in the same vein. Clause 8.1 of the section 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 clause 9.1 of Schedule 12, or the immediate 80:20 requirement in clause 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 clause 8.1 recoups any power which it might be said that the local planning 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 section 9 of Schedule 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 18 February 2002 in which this issue was discussed, and which is set out above in this judgment. The Overview Report Appendix A7 at page 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 section 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 19 February 2002 and the reason given:

> "The Heads of Terms (No 9) required AFC to use 'best endeavours' to ensure that no more than 20% 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 paragraphs 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 s106 Agreement to Planning Committee of 19th February 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 paragraph 26.13.1 of the Overview Report and Appendix 4, paragraphs 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] FSR 335. In relation to "best endeavours", Buckley LJ said at page 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 & Ors v Enron Europe Ltd [1997] CLC 329 at pages 339 and 342 in the judgment of Kennedy LJ:

> "In P & O Property Holdings Ltd v Norwich Union (1994) P&CR 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 LJ said at p16A 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 article 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 25 September 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 section 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 paragraph

9.4 of Schedule 12 the obligation is to "ensure" that 20% car mode, which is the key provision, is met, and this is stronger than the provision in clause 9.1 which is "to work towards" 12%. Second, the fall-back obligation in clause 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% is not qualified. Nor, third, is it irrelevant that Schedule 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 Schedule 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 clause 7.2 of the section 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% or reach 12%. 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% -- 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% 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 section 106 agreement did not prevent

both new and old stadia being used at the same time. The Heads of Terms for the section 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 section 106 agreement the obligation appears in Schedule 1, clause 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 7 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 19 February 2002. Rather no change was envisaged. In Report D, paragraph 18.1, it was stated that the section 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 section 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 section 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 paragraph 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 section 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.

Conclusion

253. It will be apparent that there are a large number of points where I do not consider that Mr McCracken has raised an arguable case. Taking a generous view of what is arguable, it could be said that his points in relation to whether or not there should be a public inquiry in its various facets, the disclosure of the DTZ Report and whether an 80:20 modal split should have been considered in the Environmental Statement, constitute arguable points. If I were to be particularly precise I would give permission for those to be argued and dismiss them on their substantive merits. The other points I do not consider to be arguable and I would not

give permission for them. It may be, however, that that overall is too refined an approach. Unless specific representation is made in relation to that, I would propose simply to grant permission and refuse relief on its merits.

254. MISS McHUGH: My Lord, I am grateful. My Lord, I would seek costs o behalf of --

255. MR JUSTICE OUSELEY: Do you want to say anything about that?

256. MISS McHUGH: I do not, my Lord.

257. MR JUSTICE OUSELEY: Mr Elvin?

258. MR ELVIN: My Lord, I would have invited that course of action.

259. MR JUSTICE OUSELEY: Mr Pike, I grant permission without differentiating between the points, but I refuse your applications on the merits.

260. MR PIKE: Thank you, my Lord.

261. MISS McHUGH: My Lord, I somewhat jumped the gun then.

262. MR JUSTICE OUSELEY: That is all right.

263. MISS McHUGH: My Lord, I seek costs on behalf of the local authority. My Lord, I would say that your judgment on the merits in this matter has been emphatic. In my submission, there was no justification for this claim to be brought and the local authority is entitled to its costs. May I ask for my costs, not to be enforced save in accordance with section 11 of the Access to Justice Act, for the period after 29 April 2002. That was the point at which the grant of Legal Services Funding was provided -- and I have seen a note in respect of that certificate. But, my Lord, in respect of the period before that, the claim having been originally lodged by these claimants and others on 1 February --

264. MR JUSTICE OUSELEY: Sorry, what was the date of the Legal Services Funding?

265. MISS McHUGH: 29 April 2002, and the claim was originally lodged on 1 February. I would ask for my costs in the normal way. I would simply draw your Lordship's attention to the fact that this claim has been persisted, notwithstanding the very detailed responses that are set out in the witness statements originally served by my clients in respect of the original claim, and indeed persisted in even after the even more detailed responses provided in the second set of witness statements provided, and indeed in our response and the detailed acknowledgement of service.

266. MR JUSTICE OUSELEY: Yes.

267. MISS McHUGH: Unless I can assist your Lordship further?

268. MR JUSTICE OUSELEY: No.

269. MR ELVIN: My Lord, firstly, can I thank your Lordship for taking the trouble for giving such a detailed and careful judgment over a period of time from the end of the argument, which must have left your Lordship little time for anything else. Secondly, can I make a Bolton application for a second set of costs? My Lord, can I hand up Bolton and just remind your Lordship --

270. MR JUSTICE OUSELEY: You are going to have a long, hard road on that one.

271. MR ELVIN: My Lord, I am instructed to pursue it, if your Lordship would bear with me.

272. MR JUSTICE OUSELEY: Yes.

273. MR ELVIN: Your Lordship will be familiar with the general rule. Can I just draw your Lordship's attention to the reason why two sets of costs were actually awarded in the Bolton case?

274. MR JUSTICE OUSELEY: Yes.

275. MR ELVIN: It is page 1179, the last page in the judgment of Lord Lloyd of Berwick. Three reasons are given: first, the case raised different questions of principle and if the decision had been quashed there would have been a clear difference of position between the Secretary of State and the developer. Secondly, the scale of the development and the importance of the outcome for the developers were of an exceptional size and weight and it was an unusual case in relation to where the objectors came from. My Lord, point 3 is irrelevant for current considerations. What I do say in this case is that there are a whole series of issues of principles where, had your Lordship been against the grant of planning permission, clearly referring matters very much back into the melting pot as between AFC and Islington, and this could not be regarded as other than an exceptional development both in terms of Islington and of Arsenal. Arsenal's interest is obvious. Your Lordship is aware of the level of development for both and the level of commitment, and the amount of time and effort put into it by Arsenal and its advisers.

276. Secondly, your Lordship is aware of the considerable importance of the proposals in terms of the Borough as a whole. Your Lordship has already made ample reference to those matters in his judgment. I do not propose to take your Lordship to them specifically, but your Lordship will recall the comments in the transcripts of the meeting. My Lord, this is not by any reasonable description an exceptional case as far as the development is concerned and as far as the position of the developers is concerned.

277. So, my Lord, firstly, I draw upon those clear analogies with the reasons given by Lord Lloyd for awarding two sets of costs. Secondly, my Lord, we have contributed significantly to this case in terms of the evidence. Your Lordship has drawn, in part, on the evidence from Mr Hepher and Mr Spencer and that evidence has been provided consistently to assist the court in a way which the court has clearly found of some help during the course of argument and in your Lordship's judgment.

278. Thirdly, if I might say so, your Lordship has also taken points on board that were run by us specifically, in addition to those run by my learned friends Mr Purchas and Miss McHugh for the authority. Can I remind your Lordship that it was Arsenal that raised the Davies and Allen points and the detailed issues of relationship between the UDP and section 70, the range of mechanisms which did not require an inquiry, the City of Edinburgh case, the approach to section 54A, the Coughlan case, aspects of the consultation proposals and certain aspects of the 106, and other arguments. So, my Lord, there were a number of the issues which your Lordship has adopted in his judgment on matters raised by us specifically rather than by the London Borough of Islington, albeit that they were additional matters to those raised by Islington.

279. My Lord, given those factors, I would respectfully submit that this is a genuine exception to the normal presumption that there should only be one set of costs, and I would ask your

Lordship to make that order.

280. MR JUSTICE OUSELEY: Thank you. Mr Pike, deal, first of all, with Miss McHugh.

281. MR PIKE: My Lord, yes. Firstly, my Lord, it is the case that Islington forced in essence ISCA -- Islington Stadium Community Alliance -- to lodge an early claim because it was against the resolution. Since Burkett, my Lord, it is accepted that we may challenge the grant. So, in my submission, my Lord, it would be unfair to require costs against the claimants individually.

282. Secondly, my Lord, the claimants were different when these proceedings commenced. To impose a liability for costs on them in a joint and several manner once some of them dropped out and some of them stayed in, in my submission, would be punitive and unfair. Those are my submissions on Miss McHugh's point.

283. MR JUSTICE OUSELEY: So you are not taking issue with the general point in relation to costs? You are taking issue with the point in relation to costs before --

284. MR PIKE: Before 22 April, my Lord, yes. I cannot resist any application for costs since then, my Lord, no.

285. MR JUSTICE OUSELEY: No.

286. MR PIKE: As regards my learned friend Mr Elvin's submission, my Lord, firstly, in my submission, this is no different from any other application where planning permission is granted and the decision is challenged, when the planning permission may or may not be overturned. The effect of overturning the planning permission may be different for Islington and Arsenal in that it could be said it is different in every single case where planning permission is challenged -- whether that challenge is successful or not.

287. MR JUSTICE OUSELEY: I do not think, Mr Pike, I need trouble you in relation to Mr Elvin.

288. MR PIKE: Thank you, my Lord. Those are my submissions on costs, my Lord.

289. MR JUSTICE OUSELEY: I shall deal with the costs matters in reverse order. Miss McHugh, I should give you a chance. Do you want to come back?

290. MISS McHUGH: My Lord, perhaps just on one matter. As to the suggestion that Mr Pike has made that his clients were forced into making an application. I am sure your Lordship will be aware how the matters arose.

291. MR JUSTICE OUSELEY: Well, remind me.

292. MISS McHUGH: My Lord, what occurred is that we received a letter from the Islington Stadium Community Alliance and the solicitors on their behalf, indicating that they had woken up to the fact that there might be a delay point raised against them if they did not proceed to make their application. We indicated, quite properly, that we did not take the view that they had acted promptly in accordance with the rules and therefore a delay point might well be taken against them and it was as a result of that that they proceeded to make their application. That is not a matter that can be blamed on the local authority; it is a matter for the claimants whether they decide they wish to make an application at all. I simply address that point. I do not think I have anything to say on the question as to whether or not it would be punitive.

293. MR ELVIN: My Lord, may I make one further submission? I believe at that time it was because that the application was subject to a direction which would account for the delay, or at least the timescale and the timetable.

294. MR JUSTICE OUSELEY: The application for costs by Islington in relation to the period covered by the grant of Legal Services Commission Funding is granted. They are not to be enforced other than in accordance with section 11 of the Access to Justice Act.

295. So far as the costs incurred before the grant of Legal Services Commission Funding, I see no reason why the costs should not follow the event in the normal way. I appreciate that because of uncertainty it has now been resolved in favour of the claimants. It would now be possible for them to have delayed the issue of proceedings, but it is for claimants to decide what proceedings to issue and in what form. If they issue proceedings and some withdraw and some lose them, then that is a matter which they must bear in mind when they initiate proceedings. The costs before that date therefore will be paid by the claimants, including the claimants who have ceased their proceedings. That cannot obviate the costs obligation which they incur.

296. I do not propose to make an order in favour of Arsenal FC. This is a case in which of course Mr Elvin's presence was something to which Arsenal FC were entitled. He does have a separate interest, but it was not at the time a conflicting interest. But the entitlement to separate representation, and an interest separately to protect, does not of itself warrant the grant of a second set of costs. It is, if I might say so, almost inevitable that the interested party, in instructing counsel in relation to these matters, will be able to make a significant contribution to the argument and that the interested party will be able to make significant contribution to the evidence. I am grateful for Mr Elvin's contributions. It would be a matter of speculation as to whether, had he not attended and had Mr Purchas had an extra hour or so, Mr Purchas might not also have made those points as opposed to leaving them for others to make.

297. Although I accept that this is an exceptional, large-scale development with a significant commitment, the key, in my judgment, to the award of a second set of costs is a separate interest with separate arguments that have to be promoted. There has not been so much of a difference between the interested party and the defendant that I consider it would be appropriate to make a second order of costs in this case. Accordingly, that application is refused.

298. MR McHUGH: My Lord, I am sorry, I get to my feet once more. My learned friend Mr Elvin has very kindly assisted me by indicating that what I should have asked for was the order to be determined in accordance with the Access to Justice Act. I think I simply said “not to be enforced”.

299. MR JUSTICE OUSELEY: That is very helpful. Thank you very much. I am afraid I still have not learnt what the proper order actually is, Miss McHugh, and I am always interested to hear counsel's various renditions of it.

300. MR ELVIN: My Lord, can I raise two short matters by way of correction? My Lord, your Lordship erroneously referred to Richards J's judgment as being 7 June. It was actually 30 May.

301. MR JUSTICE OUSELEY: Why did I think that?

302. MR ELVIN: Perhaps because the order was sealed on 7 June.

303. MR JUSTICE OUSELEY: Thank you.

304. MR ELVIN: My Lord, having cited from Milne and Barker when dealing with the Environmental Statement issues, your Lordship then mentioned scrutiny by the Mayor of London and the Secretary of State. My Lord, as a matter of fact the Secretary of State did not say he was satisfied. The Secretary of State specifically said that he had not considered the Environmental Statement.

305. MR JUSTICE OUSELEY: I am sorry, but I did not make that mistake without having had it put in front of me in that way, but I will note it.

306. MR ELVIN: I am obliged, my Lord.

307. MR JUSTICE OUSELEY: I do not think it alters the substance of the point. Thank you, Mr Elvin.

308. MR PIKE: My Lord, there is the matter of permission to appeal, my Lord. I appreciate the lateness of the hour, and I do not wish to detain the court but --

309. MR JUSTICE OUSELEY: No, no, you must make it.

310. MR PIKE: -- but I must ask for permission, my Lord. I ask for permission, my Lord, on three grounds: firstly, on the basis of the EDP inquiry issue; secondly on the basis of the 80:20 modal split in the Environmental Statement --

311. MR JUSTICE OUSELEY: What, the ones I specifically thought might be arguable? I was being as generous as I could.

312. MR PIKE: You were being generous, my Lord. The third is the DTZ report, my Lord. I was going to ask for a fourth, but in the light of what your Lordship said I shall not be pursuing that.

313. Firstly, my Lord, as regards the EDP issue, the planning brief itself characterises itself as SPG once adopted. Now, in my submission, my Lord, supplementary planning guidance is just that. It is planning guidance detail and it should not offer an alternative --

314. MR JUSTICE OUSELEY: But it does not matter what it is called. If it had not called itself supplementary planning guidance, would you have had a case?

315. MR PIKE: My Lord, it is what that purports to do, in my submission. It purports to be an alternative to policies in the development plan. My Lord, in my submission, the Court of Appeal decision in Pye is, respectfully, against your Lordship in his decision this afternoon.

316. MR JUSTICE OUSELEY: Well, it may be, but I wondered just reading the passage to which they draw attention, one sentence, without being too pernickety about what they say, I can see why they take that point, although I am not sure that it is an entirely accurate understanding of that paragraph. But on the assumption that I can see, looking at that sentence, that it might be thought that that is too narrow an approach, if they disagree with the basic thrust of the point, I would have expected them to make that clear and to have come out with something which says you cannot have anything other -- rather like Mr McCracken says, you are allowed SPG in the PPG12 sense, and nothing else. But once they said, as they do, that you can have a draft UDP -- a draft plan which obviously has real potential to be different -- and you are allowed to give that weight, it does not seem to me that that is consistent at all with his argument.

317. MR PIKE: Well, my Lord, my submission is not that you cannot have anything outside, it is that when you purport to introduce policies, that they must be SPG and that, my Lord, is what the Court of Appeal is saying. My Lord, my submission is this: that it is trite law that the Planning Acts are a comprehensive code and that the sections must refer to each other. Now, your Lordship said that there is no duty in section 17 which arises for determination of planning permission and that these factors must be taken into account in relation to SPG -- well, essentially section 36. My Lord, in our submission, that is not the case. It is a comprehensive code. One must look to sections such as section 36 when seeking to determine a planning application, and that the Court of Appeal -- the principle and policy of the judgment in Pye leads towards that. In our submission, my Lord, that is why there is a real prospect of success in an appeal on this point.

318. MR JUSTICE OUSELEY: Well, Mr Pike, it has only been with the most generous view that I thought you had an arguable point in a number of respects. I do not think any of them has a reasonable prospect of success. If you want to say I am wrong in relation to that, you will have to persuade the Court of Appeal. I am not going to grant you permission.

319. MR PIKE: My Lord, there are two other points. Does your Lordship not wish me to --

320. MR JUSTICE OUSELEY: Well, that is your best one. What is the next one?

321. MR PIKE: Merely on the 80:20 modal split, my Lord. The point is a short one. It is this: the London Borough of Islington saw 80:20 as the likely effect. They did not provide an assessment of it and your Lordship has sought, in my respectful submission, to draw inferences from parts of the reports that they were satisfied that 88:12 or 80:20 would be the likely (inaudible) of different parts, but the e-mail of 19 October of last year, my Lord, at 103, Volume 2, clearly says that the Council considered that 80:20 was the likely split and that Arsenal refused to do it on that basis, my Lord.

322. MR JUSTICE OUSELEY: Yes. That is the one point, if I were being strict about it, in analysing where I would grant you permission to apply for judicial review, I would have said: yes, you would be able to argue that point, if I was going through a strict analysis of what I thought was properly to be granted permission to argue. But I do not consider it to be a point that has a reasonable prospect of success on appeal, once the basis of that point is understood.

323. The modal split has two areas of impact. The first is the pedestrian crowds, tubes, crowding and so on. That is considered, if you like in the worst case, if you have an 88:12 modal split. The car aspect is the other side of the coin. But the car aspect is a continuance of the same on a 20% modal split, and that has not been at issue either. So it does seem to me very difficult, when the point is properly understood, to see why it should be said that the approach of the local authority, which as I understand it, was to see -- I appreciate not in the e-mails, but when they subsequently thought about the point in the way which appears from the analysis that then followed with SDG and their own officers thinking about how you actually got to a 20% modal split. They appreciated that they did not actually need it in order to look at the likely environmental effects. It was either effectively base line or existing, or the worst case had been examined. I cannot see how you get round that, and your submissions have not addressed that, which is the point I am perhaps making.

324. MR PIKE: Well, you have made it clear, my Lord.

325. MR JUSTICE OUSELEY: Yes.

326. MR PIKE: My Lord, our submission is that that is not, with respect, a correct analysis.

327. MR JUSTICE OUSELEY: That is a point you will have to argue. I do not think that is a reasonably arguable point.

328. MR PIKE: The last point, my Lord -- I will make it brief -- is the DTZ Report. Simply this: members did not have a chance to assess for themselves the basis for the --

329. MR JUSTICE OUSELEY: That is a matter for Islington. It is not a matter for you.

330. MR PIKE: My Lord, when the viability of the project is a material consideration --

331. MR JUSTICE OUSELEY: You never demonstrated it was a material consideration. Your clients never raised the point at all that you were able to demonstrate to me about materiality. Mr Dunkley putting argument in his witness statement does not make it so.

332. MR PIKE: My Lord, off the top of my head I can at the very least recall the GOA Report which states in terms that it is a material consideration. I do not have, I am afraid, at my fingertips the other appropriate references but --

333. MR JUSTICE OUSELEY: I was waiting for it throughout your argument.

334. MR PIKE: It is the appearance of fairness which is important in a situation like this.

335. MR JUSTICE OUSELEY: Yes.

336. MR PIKE: And if the officers themselves have not -- your words, my Lord, were that they had "the gist" of the appraisal. Well, the gist, my Lord, in my submission, is more than just a conclusion and the officers only had the conclusion and members of the public -- and the claimants only had the conclusion.

337. MR JUSTICE OUSELEY: Yes.

338. MR PIKE: And that, in my submission, is not the gist.

339. MR JUSTICE OUSELEY: No.

340. MR PIKE: Those are my submissions, my Lord. I shall not trouble you further.

341. MR JUSTICE OUSELEY: Yes. I think all of the points you raise have to be taken beyond a theoretical legal level, and this is one of the problems I have had with Mr McCracken's arguments. They had to be taken beyond a theoretical level and applied to the actual circumstances of this case. When applied to the actual circumstances of this case, it seems to me that they are points that have no reasonable prospect. So I refuse permission.

342. MR ELVIN: Your Honour, can I trespass on your patience with one last matter?

343. MR JUSTICE OUSELEY: Yes.

344. MR ELVIN: My Lord, there are two matters. Firstly, your Lordship is well aware of the critical time so far as Arsenal is concerned with these matters.

345. MR JUSTICE OUSELEY: Yes.

346. MR ELVIN: Could I ask your Lordship for an indulgence that the order be drawn up

immediately? It is important that Arsenal has the order if at all possible within the next few days.

347. MR JUSTICE OUSELEY: I am told it will go out before the end of the week.

348. MR ELVIN: I am very grateful. My Lord, the second point is, anticipating that an application may be made to the Court of Appeal, and given the urgency of the matter, your Lordship has power under Part 52.4 to prescribe the time within which an application for permission is made to the Court of Appeal. The lower court may direct the appropriate time limit. The normal time period is fourteen days from the date of your Lordship's judgment. Given the urgency of the matter, this is a case in which, I would respectfully suggest, the claimants, if they are going to go further, ought to deal with the matter straight away and I would ask your Lordship to abridge time for making an application to the Court of Appeal to seven days, that time, if it is necessary to specify, to run during the vacation.

349. MR PIKE: My Lord, it is, as you will be aware, a long decision of your Lordship's. It is a very detailed and very closely reasoned decision. A transcript will not be available for several days. In my submission, it would certainly be unsuitable and inappropriate to abridge that time to seven days from today's date.

350. MR JUSTICE OUSELEY: I am not going to abridge time. There seems no point in relation to that. I appreciate that it is important for Arsenal, but I find it difficult to see that seven days in this context is going to be critical and I am aware, as you say, that it was a long judgment. You have to consider matters carefully. I am not going to abridge time.

R. v. ROCHDALE METROPOLITAN BOROUGH COUNCIL ex parte MILNE

QUEEN'S BENCH DIVISION (Sullivan J.): July 31, 2000[1]

(2001) 81 P. & C.R. 27

H1 *Town and country planning—Outline application for permission—E.C. Directive 85/77—E.C. Directive 97/11—Town and Country Planning (Assessment of Environmental Effects) Regulations 1988—Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999—Environmental information—Whether outline application may be made for development requiring environmental assessment—Whether failure to give information required by regulations—Town and Country Planning Act 1990, section 54A—Whether proposal in accordance with development plan*

H2 In August 1998 the first respondent granted outline permission for a business park and full permission for the construction of a spine road to serve the park. The applications for these permissions had been supported by an environmental statement. The applicant and others successfully challenged the validity of the permissions ("the *Tew* case"). The court held that whilst the first respondent took into consideration environmental information about the effects of carrying out a business park development 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 permission; nor was it the development for which permission was granted; nor was the information sufficient in any event to comply with the requirements of Schedule 3 to the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. The first respondent did not therefore have power to grant permission for the business park. It also held that the first respondent had erred in concluding that the business park application complied with criterion (d) in a UDP policy ("EC/6"). That policy, which was to be "strictly applied", required under criterion (d) the creation of public open space within the application site. The applicants for planning permission made extensive revisions to the form of the outline application for the business park and minor amendments to the full application for the spine road. They added a full application for permission to construct the estate roads leading off the spine road together with surface water attenuation areas. Incorporated into the business park application were a masterplan and a schedule of development. The latter gave a summary of the hectarage and floorspace for each use on each plot on the application site. The application sought approval for siting on, and means of access to, 7 out of the 20 plots. Details of landscaping, design and external appearance of all the buildings were reserved. A new environmental statement was prepared and submitted with the applications in July 1999. In the report to committee, an officer of the first respondent concluded that only the part of criterion (d) relating to the creation of formal rights of access by the public was not being achieved at that stage. An extensive area of land was to be left open and appropriately landscaped pursuant to conditions on the permission for the business park. He did not consider this made the application contrary to the UDP. The first respondent granted the three permissions on December 17, 1999. The applicant challenged the validity of these permissions on the following grounds. First, the application for outline permission did not satisfy the requirement in paragraph 2(a) of Schedule 3 to the assessment regulations because it did not provide "a description of the development proposed". Further, the application did not provide

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

such a description which was sufficient for the purposes of that paragraph, because although information was provided in respect of the size or scale of the development, design was a reserved matter. Second, the same criterion of UDP policy was not satisfied and the development was not in accord with the development plan. Even if it the failure to meet the criterion did not have that consequence, the report to the committee of the first respondent should have referred to the rejection by the UDP Inspector of a request that the criterion should be omitted from policy. Moreover, the first respondent had 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 public open space. Instead it relied on an offer from the North West Development Agency ("NWDA") to transfer land to the first respondent to secure public access to the open space, which was unenforceable and an immaterial consideration.

H3 **Held**, dismissing the application, that the submission that an application for outline planning permission could not satisfy the requirement in paragraph 2(a) of Schedule 3 to the assessment regulations because it did not provide "a description of the development proposed", was not well-founded. First, the regulations should be construed, so far as possible, to accord with the objectives of the Directive. Article 3 of the Directive stated that the environmental impact assessment should identify, describe and assess the environmental effects of projects "in an appropriate manner, in the light of each individual case". Since the "description of the project" required by article 5(2) was a means to that end, in that it provided the starting point for the assessment process, there was 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 required "description 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 (Schedules I and II of the assessment regulations). It was for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that under the Directive it had "full knowledge" of the likely significant effects on the environment. This flexibility inherent in the approach to "a description of the development proposed" was transposed into paragraph 2(a) of Schedule 3 to the regulations, in that the description must comprise "information about the site and design and size or scale of the development". One could provide "information about" those matters without providing every available piece of information about them. The information required was sufficient information to enable the "main" or "likely significant" effects on the environment to be assessed under paragraphs 2(b) and (c) of Schedule 3, and the mitigation measures to be described under paragraph 2(d). Whether the information provided was sufficient for these purposes was for the local planning authority, or on appeal or call-in, the Secretary of State, to decide, subject to review on Wednesbury grounds. The first respondent was entitled to say that it had sufficient information about the design of the project to enable it to assess its likely significant effect 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. A great deal of information was provided in the application documents about the design of the business park, even though the details of the design and external appearance of individual buildings were not given. As for the second ground, criterion (d) was the most, but not the only relevant policy in the UDP. The application was assessed against 23 separate policies, one of which was EC/6. It could not be sensibly 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. The officer was not required to draw the attention of the committee to the views of the UDP Inspector, since his recommendations had been incorporated into the text of policy EC/6 as adopted, and which was set out in full in the report. The Council could have considered whether dedication could 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.

H4 **Cases referred to:**

(1) *Berkeley v. Secretary of State for the Environment* [2000] 3 W.L.R. 420.
(2) *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 W.L.R. 1447.
(3) *R. v. London Borough of Hammersmith and Fulham ex parte Trustees of the CPRE (London Branch)*, unreported, June 12, 2000.
(4) *R. v. London Borough of Bromley ex parte Baker*, unreported, April 3, 2000.
(5) *R. v. North Yorkshire County Council ex parte Brown* [2000] 1 A.C. 397.
(6) *R. v. Rochdale Metropolitan Borough Council ex parte Tew* [1999] 3 P.L.R. 74.
(7) *R. v. Secretary of State for the Environment ex parte Webster* [1999] J.P.L. 1113.
(8) *The Dutch Dykes Case* [1999] 3 C.M.L.R. 1.
(9) *World Wildlife Fund v. Bozen* [2000] 1 C.M.L.R. 149.

H5 **Legislation construed:**

EC Directive 85/77, Articles 2(2), 3 and 5.2; Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, Schedule 3, paragraph 2(a); Town and Country Planning Act 1990, sections 54A and 70.

H6 **Application** for judicial review of the decisions by Rochdale Metropolitan Borough Council dated December 17, 1999 to grant outline planning permission for the development of a business park, full planning permission for the construction of a spine road to serve the park and full permission for the construction of estate roads leading off the spine road as well as surface water attenuation measures.

H7 *John Howell*, Q.C. and *Kate Marcus* for the applicant.
Timothy Straker, Q.C. and *Celina Colquhoun* for the first respondent.
Brian Ash, Q.C. and *Helen Greatorex* for the second respondent.

SULLIVAN J.

Introduction

1 This is round 2 of the battle for Kingsway Park. Round 1 concluded with my judgment May 7, 1999, reported as *R. v. Rochdale Metropolitan Borough Council ex parte Tew and Others* [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 The 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 development 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 I 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 DI 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 development that falls within Schedule 1 or Schedule 2. An outline application with only one or two matters any application for outline planning permission for a development that falls within 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): ...
> (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."

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 Al, A2 and A3;
> Leisure in use Classes D2 and sui generis;
> Housing in use Class Cl;
> 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 7 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", etcetera. 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*, imposed:

28 [Condition] 1.7:

"The development on this site shall be carried out in substantial accordance with the layout included within the Development Frame-

work 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 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 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 TJDP. 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 Assess-

ment", 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 E.S. 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 E.S. 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 IJDP 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 judgment 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. page 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, 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 etcetera, 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 judgment 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 parte 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 judgment 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 89H, he referred to a number of the recitals, laying particular stress upon the tenth:

"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 County Council ex parte 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 the [preamble] to 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 eleventh 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 environmental 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 parte the Trustees of the London branch of the CPRE*, (unreported) June 12, 2000, paragraphs 24 and 39 to 41, and Jackson J. in *R. v. London Borough of Bromley ex parte Baker*, (unreported) April 3, 2000, paragraph 105.

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 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, [but] 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 assessment 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.

Applicant to pay the first respondent's costs, subject to the usual legal aid order; Permission to appeal refused.

H8 *Reporter*—Scott Lyness.