Case No: C1/2004/2499

Neutral Citation Number: [2005] EWCA Civ 782
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
THE HON MR JUSTICE RICHARDS
C1/2004/2499 QBACF

Royal Courts of Justice
Strand, London, WC2A 2LL
Tuesday, 28 June 2005

Before :
LORD JUSTICE AULD
LORD JUSTICE MUMMERY
and
LORD JUSTICE GAGE

- -

Between :

THE QUEEN ON THE APPLICATION OF THE NOBLE ORGANISATION LIMITED	**Appellant**
- and -	
THANET DISTRICT COUNCIL	**Respondent**
- and –	
- (1) ROSEFARM ESTATES PLC	**Interested Parties**
- (2) RANK GROUP PLC	

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Richard Gordon QC and Mr James Pereira (instructed by SJ Berwin) for the Appellant
Miss Alice Robinson (instructed by **Thanet District Council**) for the Respondent
Mr Christopher Katkowski QC and Mr David Blundell (instructed by Richards Butler and Cripps Harries Hall) for the Interested Parties

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Judgment

Auld LJ :

Introduction

1. This is an appeal by the Noble Organisation Limited ("Noble") from an order of Richards J [2004] EWHC 2576 (Admin) dismissing its claim for judicial review of a decision of the Thanet District Council ("the Council") of 24th May 2004 approving matters reserved on the grant of outline planning permission for a leisure development on part of an area of land known as the Eurokent Business Park in Ramsgate on the Isle of Thanet, without having required an environmental impact assessment ("EIA") in respect of those matters.

2. The appeal concerns a challenge by Noble, a commercial competitor to Rank Group PLC ("Rank") which has a commercial interest in the development of the site in respect of which the Council has granted the first Interested Party, Rosefarm Estates PLC ("Rosefarm") outline planning permission for a leisure park and has approved matters reserved by that permission. Noble bases its challenge to the Council's approval of the reserved matters on its failure to require an EIA. It maintains that such an assessment was required in the circumstances of this case under Council Directive 85/337/EEC, as amended, ("the Directive") as implemented by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the Regulations"). Regulation 4 of the Regulations provides, so far as material:

> "(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.
>
> (2) The events referred to in paragraph (1) are –
>
> (a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations;
>
> or
>
> (b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development.
>
> (3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development.
>
> …
>
> (5) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2

development is EIA development the authority or the Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

(6) Where –

(a) a local planning authority adopt a screening opinion; or

(b) the Secretary of State makes a screening direction under these Regulations;

to the effect that development is EIA development -

(i) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion;

(ii) the authority or the Secretary of State, as the case may be, shall send a copy of the opinion or direction and a copy of the written statement required by sub-paragraph (i) to the person who proposes to carry out, or who has carried out, the development in question."

(7) The Secretary of State may make a screening direction irrespective of whether he has received a request to do so.

…."

3. It is apparent from those provisions that whether a development is EIA development may result from: 1) a decision of an applicant to submit an environmental statement in his application; or 2) a decision of the relevant planning authority in the form of an adoption of a "screening opinion" that it is EIA development; or 3) a screening direction of the Secretary of State to that effect.

4. Schedule 2 lists a number of forms of development, any part of which "is to be carried out in a sensitive area" *or* one which respectively exceeds or meets any threshold or criterion specified in relation to it (as defined in regulation 2). The selection criteria for a local planning authority or the Secretary of State in deciding whether the proposed development is EIA development for this purpose are set out in Schedule 3, paragraph 1 under the heading "Characteristics of development":

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

(a) the size of the development;

(b) the cumulation with other development;

(c) the use of natural resources."

Normally, it is at the outline planning permission stage that consideration should be given to whether an EIA is necessary.

5. The role of such an assessment has its origin in the Directive, which, as I have said, the Regulations have implemented. In outline, the Directive as implemented, requires that, before the grant of "development consent" for a project likely to have significant effects on the environment, there must be an assessment of those effects. "Development consent" is defined in Article I of the Directive as "the decision of the competent authority which entitles the developer to proceed with the project". For projects falling within Schedule 1 to the Regulations (Annex I to the Directive) such an assessment is always required. For projects that fall within Schedule 2 to the Regulations (Annex II to the Directive), such as those featuring in this appeal, it is for the competent authority to determine whether the project is likely to have significant effects on the environment so as to require an assessment. Such a determination can only be challenged on conventional *Wednesbury* principles: see *R (Jones) v Mansfield Council* [2003] EWCA Civ 1408, at paras. 14-18.

6. The fundamental issue raised by this appeal is whether the Council's decision not to require an EIA in respect of the application for approval of the reserved matters is unlawful. Laws LJ, in granting permission to appeal, stated that "it raises an issue about the tension between procedural autonomy of domestic law and the effectiveness of EU law which should be examined."

The facts

Stage 1 – The business park outline permission

7. The facts of the matter have also been well rehearsed by Richards J in his judgment, sections of which I gratefully reproduce, with some adaptation and addition in the following summary. There are broadly speaking three stages in the story. The first may be called "the business park outline permission". The formal validity of the decision, as distinct from the reasoning or lack of which gave rise to it, is not under challenge. On 18th June 1997 the Council granted an outline planning permission for a business park on a 53.65 hectare site at Ramsgate in the Isle of Thanet. More specifically, the permission covered a mixed-use development for business and commerce, comprising use classes A2 (financial and professional premises in excess of 930 sq m.), B1 (business), B2 (general industrial) and B8 (storage and distribution), together with recreational use associated with a particular recreation ground.

8. Rosefarm did not provide an environmental impact assessment with its planning application. The Council seemingly did not require one. And there is no evidence to indicate what, if any, consideration it gave to the matter, in particular whether to undertake a screening exercise in order to decide whether to require such an assessment. There was, however, an officer's report recommending the grant of outline planning permission, indicating that the principle for the development was to be found in the development plan process. That was a reference to the Isle of Thanet Local Plan, then in draft, which had been adopted in April 1998 following consideration of objections and a recommendation by the local plan inspector.

9. The maximum time limit for challenging that permission by way of judicial review expired without challenge in September 1997, and it has now been implemented in part.

Stage 2 – The leisure park outline permission

10. The second stage in the story is the grant of "the leisure park outline permission", again, the formal validity of which, as distinct from the reasoning or lack of it giving rise to it, is not under challenge. On 24th January 2002, some four and a half years after the grant of the business park outline permission, the Council granted Rosefarm outline planning permission for a leisure development on a 3.54 hectare plot on the business park site, namely for –

> "development of leisure units, including multiplex cinema, leisure facilities and fitness suite (use class D2), restaurant and drive-through restaurant (use class A3), together with access, car parking, servicing, landscaping and associated works."

Rosefarm had included with the application for permission illustrative layout plans indicating that the proposed development might comprise a multiplex cinema, a health and fitness club, a further leisure unit of the same size, a restaurant and a fast food or drive-through restaurant. However, the grant of permission was not tied to those plans. All details of siting, design, external appearance, means of access and landscaping were left for approval as reserved matters.

11. Again, the Council had not required an EIA with the application. On the contrary, on 27th June 2000, some 18 months before the grant, its planning committee had approved its officers' advice to Rosefarm that such an assessment was not required for the following reasons -.

> "In accordance with the requirements of the Environmental Impact Assessment Regulations, together with the accompanying Circular 2/99, regard has been had to the planning history of the site, the scale and nature of the proposed use and relationship to the surroundings.
>
> The application site, as part of the EuroKent Business Park, currently enjoys the benefit of outline planning consent for industrial/commercial development, falling within Use Classes B1, B2, B8 and A2. Therefore, the size of the application site, coupled with the planning history, would mean that the proposed leisure development would not be on a significantly greater scale, of a different nature, or produce a significant, additional, environmental impact above that which would be generated by the approved use for the site."

12. The maximum time limit for challenging the permission and/or the screening opinion expired, without challenge, in April 2002.

Stage 3 – the approval of the reserved matters under the leisure park outline permission

13. The third stage in the story is the approval of reserved matters under the leisure park outline permission ("the leisure park reserved matters approval"), which the Council gave on 24th May 2004, two years after the grant of that permission. It is the only decision under direct challenge in these proceedings. On 1st April 2004, Rosefarm, in seeking that approval, described its proposed development, which had an over-all floor-space of less than 10,000 sq m., as:

> "erection of a detached, multiplex cinema (use class D2) together with associated car parking, servicing, vehicle access and landscaping."

The Council, acting through one of its officers and with the concurrence of the Chairman of its Planning Committee, made a screening decision not to require an environmental impact assessment. The officer's reasoning, in a letter of 19th May 2004 to Rosefarm's solicitors was as follows:

> "The Council, as Local Planning Authority, has now had the opportunity to give consideration to the nature and form of the development and, in accordance with the requirements of the above Regulations, can confirm that the development does not fall within Schedule 1 of the Regulations. However, as an infrastructure project, it falls within Schedule 2 in respect of which the Council is required to consider whether an Environmental Impact Assessment (EIA) is required to be submitted, as the area of the site exceeds 0.5 hectares.
>
> Under the circumstances, the Council is required to have regard, firstly, to the characteristics of the development. In this respect, the Council notes that this application constitutes a further reserved matters submission pursuant to an extant outline planning consent for those uses specified within the application the subject of this screening; the land was originally consented for business park purposes; the site area is only some 3.54 hectares and the overall floor-space of the development is less than 10,000 sq m. As such this proposal would not be on a significantly greater scale or of such a different nature to require the submission of an EIA, taking into account the likely use of natural resources; the production of waste; potential for pollution; likely nuisances and the risk of accidents. Finally, the Council considers that accumulation with other development would not alter this situation, particularly in view of the fact that the original business park planning consent and the outline approval of the adjoining Westwood Cross development were both in place at the time of the approval of the outline consent to which these reserved matters relate.
>
> Turning now to the location of the development the Council considers that the development site is not located within an environmentally sensitive or densely populated area.

> Furthermore, the surroundings of the site are not considered to comprise a landscape of historical, cultural or archaeological significance.
>
> Finally, with regard to the characteristics of the potential impact of the development, the area likely to be affected by the development would be local; the proposal is not of a trans-frontier nature and the impact will not be of a particular magnitude or complexity. In particular, given the extant planning consents, it is considered that the activity associated with the development, including traffic levels, will not be sufficient to justify the submission of an EIA, having regard to the duration, frequency and reversibility of the impact.
>
> In conclusion, the Council, as Local Planning Authority, therefore confirms that this development does not require the submission of an EIA in accordance with terms of the above Regulations.
>
> I would further confirm that, in reaching the above decision, the Council is cognisant of the facts that an EIA was determined not to be required in respect of the outline consent to which these reserved matters related and that, following referral, the outline planning application was not called in for determination by the Secretary of State."

14. I should pause in the narrative here to mention that part the argument of Mr Richard Gordon QC, in support of Noble's claim, is that this reasoning was flawed. He submitted that, therefore, as a matter of domestic law, it undermined the leisure outline planning permission. He added that, as a matter of EU law, an EIA should be capable of being required at the approval of reserved matters stage. His submission on the latter point was prompted by:

    i) An as yet unresolved reference by the House of Lords to the European Court of Justice under Article 234 of the EC Treaty in *R v London Borough of Bromley, ex p Barker* of 30th June 2003 (on appeal from [2001] EWCA Civ 1766) on a similar, but not identical issue. In *Barker*, unlike this case, there was no clear evidence of the possible need for an EIA having been considered at the outline planning permission stage, and the issue was whether, in the absence of a requirement by a planning authority for an EIA at that stage, domestic law *precluded* it from requiring one at the approval of reserved matters stage.

    ii) A decision of the European Court of Justice in *Wells v Secretary of State for Transport, Local Government and the Regions* [2004] 1 CMLR 31 in relation to old permissions granted under the Planning and Compensation Act 1991 to which new conditions had been attached providing for approval of reserved

matters.[1] The Court held that, although as a matter of EU law, environmental matters should normally be considered at the earliest possible stage in the decision making process, that is, at the outline permission stage, but that, where the full potential environmental effect is not identifiable at that stage, it should be considered at the approval of reserved matters stage. At paragraphs 51 to 53 of its judgment the Court said:

> "51. According to the first recital in the preamble to the directive the competent authority is to take account of the environmental effects of the project in question 'at the earliest possible stage' in the decision-making process.
>
> 52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.
>
> 53. … In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment."

The Court, in referring to member states' obligation under EU law to take all necessary measures under the principle of co-operation in good faith laid down in Art 10 EC, to nullify unlawful consequences of a breach of Community law, held, at paragraphs 64-69 of its judgment, that such measures potentially included revocation or suspension of planning consents.

15. Returning to the narrative, it was in accordance with its officer's advice, as set out in paragraph 14 above, that the Council approved Rosefarm's reserved matters application. By this stage, the second interested party, Rank, had acquired a commercial interest in the proposed development. Noble is a commercial competitor of Rank and has an interest, though not a legal interest, in the adjoining Westwood Cross development to which the Council's officer referred in giving his reasons for advising the Council not to require an EIA.

The Judgment

16. The Judge held that the Council's approval of the reserved matters was not unlawful because:

[1] The EIA Regulations did not apply to the imposition of conditions on these old mining permissions. However, the proposed development was Schedule 2 development under the Directive, having direct effect given the failure of the Regulations to implement it in that respect.

i) It was entitled to have regard to the existence of the two extant and valid planning permissions, namely the 1997 business park outline permission and the 2002 leisure park outline permission, and to the 2000 screening decision that the latter did not require an EIA, none of which had been challenged at the time or since (paras 35-37 of the judgment)

ii) The Council had properly considered whether the reserved matters would be likely to have significant effects on the environment. In so holding, the Judge laid great stress on the reasoning of the Council's officer in his letter of 19th May 2004, in particular that it was, in part, a comparative exercise and, in part, an examination of the reserved matters. He said that the essential comparison was with the leisure park outline permission, not the business park outline permission, and that "overall the council … [had done] a reasonable job of going through" the list of the relevant criteria in Schedule 3 to the Regulations and in "determining in the light of them that an EIA was not needed" (paras 42-45). The Judge added some observations about the inappropriateness of comparison with the business park outline permission (paras 46-47), remarks on which Mr Gordon, for Noble, was to rely in his submissions before us:

> "46. If the essential comparison had been with the business park outline planning permission rather than with the leisure outline planning permission, … [counsel for Noble's] submissions might have had more force to them. I can see why it might be said to be inappropriate, when considering whether an EIA was needed at the reserved matters stage, to base the decision on a comparison with a different and larger development in respect of which, on the claimant's case, the need for an EIA had not been considered at all. *There might be an element of circularity or illogicality in reasoning along the lines of 'no EIA is needed because the effects will not be significantly greater than those of another development, in relation to which the need for an EIA was not considered'.* [my emphasis]
>
> 47. But the same does not apply to a comparison with the leisure outline planning permission. Express consideration was undoubtedly given at the outline planning permission stage to whether an EIA was needed, and a reasoned decision was reached that it was not. In principle, therefore, I see no reason why, in determining whether an EIA was required at the reserved matters stage, there was anything wrong in comparing the reserved matters with the development approved by the outline planning permission. In that connection I should also note that, although …[counsel] criticised the lack of specificity of the development for which the leisure outline planning permission was granted, the substance of the reserved matters was very similar to the substance of the development shown in the illustrative layout plans that accompanied the application for outline planning permission."

iii) It was not permissible, as a matter of domestic law, to challenge the leisure park outline planning permission by alleging that the screening decision in respect of that permission was flawed, since that would amount in domestic law to "a naked, if indirect, challenge to the validity of that permission and the related screening decision". As to the effect of the European Court's decision in *Wells* on the obligation to nullify the consequences of a breach of the Directive, the Judge said:

> "48. …On normal domestic law principles, as discussed above, such a challenge to the validity of an earlier decision is impermissible. I see nothing in the EIA regime that subverts the normal position. What the Court said in *Wells* about the obligation to nullify the consequences of a breach of the Directive is not to be taken as calling into question the validity of earlier decisions which are no longer open to challenge under domestic law. The obligation was expressed to be subject to national procedural rules (with a standard proviso concerning the principles of equivalence and effectiveness). The particular issue in *Wells* was whether an earlier permission could be revoked or modified, rather than whether it could be treated as invalid; and even that particular issue was clearly stated to be a matter for determination by the national court applying national procedural rules. If, moreover, it were possible to mount indirect challenges of this kind to the validity of earlier EIA decisions, that would destructive of legal certainty, which is as much a principle of EC law as of domestic law."

The issues on appeal

17. The appeal concerns the following issues:

i) whether the reserved matters approval was "in substance" based on reasoning that involved comparison with the business park outline permission and was in consequence, unlawful as a matter of domestic law;

ii) whether the reserved matters approval was based on a comparison with the leisure park outline permission and was, in consequence, unlawful as a matter of domestic law;

iii) whether the Council's conduct of the screening exercise in relation to the application for approval of reserved matters was perverse; and

iv) whether the formal validity of each of the two outline planning permissions and/or the screening opinion in relation to the latter provides the Council with a defence even if those decisions, albeit unchallenged, were unlawful; and

v) whether the Court should make a reference to the European Court of Justice pursuant to the Article 234 of the EC Treaty as to whether a planning authority has *power* to require an EIA in relation to an application for approval of reserved matters where it has determined at the outline planning stage that an

EIA is unnecessary and has granted outline permission subject to reservation of certain matters for later approval.

Grounds of appeal and submissions

18. Mr Gordon put at the heart of his submissions that, although the only decision under formal challenge in these proceedings is the approval of reserved matters under the leisure park outline permission, the three stages cannot sensibly be separated. He argued that that approval should be quashed for one or both of the following reasons:

    i) it was based upon a comparison with the grant of the business park outline permission, in respect of which there had been no consideration of EIA; and/or

    ii) it was based upon a comparison with the leisure park outline permission, which he maintained, was unlawful as a result of the decision not to require an EIA and which, on any lawful determination, permitted development likely to have significant environmental effects.

(i) Comparison with the business park outline permission

19. Mr Gordon relied upon the fact, as indicated in the officer's screening opinion on the reserved matters application, and noted by the Judge in paragraphs 42 and 46 of his judgment, that the officer had included a comparison with the business park outline permission as well as with the leisure park outline permission. He also relied upon the secondary effect of the business park outline permission on the leisure park planning permission, namely the knock- on effect upon the reserved matters approval in that the screening opinion for the latter included reasoning based upon a comparison with the scale and nature of the environmental effects that would be generated by the business park permission. And he pointed to the Judge's observation in paragraph 46 about the possible circularity in reasoning in concluding that no EIA was needed in respect of the leisure park outline permission and/or approval of its reserved matters because they would not be significantly greater than those of the business park outline permission in relation to which the need for an EIA was not considered. He maintained that a reasonable planning authority, having considered a screening opinion - if there had been one - for the business park, *could* have concluded that an EIA was necessary and, therefore, that want of such consideration rendered that and the subsequent permission unlawful, citing the reasoning of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, at 615A-616G.

20. Miss Alice Robinson, on behalf of the Council, submitted in reply on this issue: 1) that there was simply no evidence before the Judge one way or another whether the Council had considered the need for an EIA at the business park outline permission stage; and 2) that, as the Judge found, its decision to grant that permission had been informed by the Local Plan inspector's report and recommendations, which showed that he had considered the proposed development and its effects in detail. But more importantly, she, and also Mr Christopher Katkowski QC, who appeared for Rosefarm and Rank, emphasised that the Judge, in paragraphs 42 – 45 of his judgment (see my summary at paragraph 17(ii) above), considered "the essential comparison" in the officer's screening opinion at the approval of the reserved matter stage was with leisure park outline permission, not with the business park outline permission.

21. In my judgment, Miss Robinson and Mr Katkowski were right to place emphasis on the Judge's observation in paragraph 42 of his judgment that the Council's officer's "essential comparison" was with the leisure outline planning permission, not the business park permission, and that the officer's references to the latter were "very much secondary". In the same paragraph he also described the leisure outline planning permission as the starting point and the end point. And as to his observation in paragraph 46 about the possible "element of circularity or illogicality" of such a comparison, it was introduced by the following sentence:

> "*If* the essential comparison had been with the business park outline planning permission rather than with the leisure outline planning permission, …[Noble's counsel's] submissions might have had more force to them." [my emphasis]

22. As to Mr Gordon's argument based on the knock-on effect of the lack of a screening opinion for the business park outline permission on the screening decision for the leisure park outline permission and reserved matters approval, the last was only in part, as the Judge observed, a comparative exercise. And, as Mr Katkowski pointed out, the Council also took many other matters concerning the reserved matters themselves into account (see paragraph 14 above).

(ii) Comparison with the leisure park outline planning permission

23. Mr Gordon's main submission on this issue was that the Council had insufficient material as to the nature and extent of the development proposed in the leisure park outline application to enable it to make a definitive decision as to its possible environmental impact. He noted that the application for permission was accompanied by illustrative material only, which material did not form part of the permission, and that it amounted to permission for the development in principle only, with no limitation on floor-space, the size of buildings proposed or the balance of proposed uses within the site. He submitted, therefore, that the Council had acted unlawfully in granting that permission, as it also had done, in the absence an EIA, in granting the business park outline permission. He submitted that the Council had acted unlawfully for a third time in deciding at the reserved matters proposals stage that no EIA was necessary; because it had no factual basis for concluding that the proposals would not be significantly greater than or different from those approved in the leisure park outline permission (see paragraph 14 above). He submitted in reliance upon those propositions that the formal validity of the two outline permissions and of the screening opinion in respect of them does not provide a defence to this challenge to the approval of the reserved matters.

24. The "unlawfulness" of which Mr Gordon complained consisted, he said, of violations of two basic propositions of law, namely:

    i) When determining whether proposals are likely to have significant environmental effects, a planning authority must have sufficient information before it to assess the main likely effects of the proposals, albeit that the extent of the information required for a screening opinion is less than that when undertaking an EIA: see *R v Rochdale MBC, ex p Tew* [1999] 3 PLR 74, per Sullivan J at 96A and 97B-C; *Maureen Smith v Secretary of State for the*

Environment, Transport and Regions [2003] JPL 1316, CA, per Waller LJ at paras 24 – 27, with whom Sedley LJ and Black J agreed.

ii) A planning authority must ensure that outline planning permission is adequately controlled by conditions so that the environmental effects of proposals later considered for reserved matters approval are not materially different from those considered at the outline stage: see *ex p Tew,* per Sullivan J at pages 96F and 97E-F; *R v Rochdale MBC, ex p Milne* [2001] P & CR 27, per Sullivan J at para 93.

25. Miss Robinson's primary submission was to adopt the Judge's ruling, at paragraph 48 of his judgment (see paragraph 17(iii) above) that this was an impermissible challenge to the validity of the leisure park outline permission. However, she also argued that it had been appropriate for the Council, when considering at the approval of reserved matters stage whether the proposed leisure park would be likely to have significant environmental effects, to compare any such effects with those already present or in respect of which the planning permission had been given. She referred to paragraph A18 of Circular 2/99, which indicates, under the heading –

> "Urban development projects (including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas",

the relevance of the scale of the proposal and its comparison with existing development or that for which there is planning permission. She also challenged Mr Gordon's description of the permission as "open-ended" and, as such, one that was not capable of assessment in the screening exercise, making the following points. It was not for development of an indeterminate scale; it was circumscribed by the size of the site, 3.5 ha., the description of the development and as depicted in the illustrative lay-out plan, and the conditions requiring approval of the reserved matters themselves; the proposed development was less than one of the indicative thresholds advised in paragraph A19 of Circular 2/99, namely less than 5 ha.; and there was no indication that it would be higher than either of the other two, namely provide for more than 10,000 m² of new commercial floor-space or would have "significant urbanising effects in a previously non-urbanised area (e.g. a new development of more than 1,000 dwellings)". And, whether the Council had sufficient information to consider whether the development would be likely to have significant effects on the environment was a matter for its planning judgment, challengeable only on a *Wednesbury* basis.

26. Regulation 2(1) of, and paragraph 1(a) of Schedule 4 to, the Regulations requires an environmental statement to contain a description of the proposed development, including:

> "a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases".

27. A similar, but less prescriptive provision in paragraph 2 of Schedule 3 to the former Town and Country Planning (Assessment of Environmental Effects Regulations) 1988 (SI 1988/1199) ("the Assessment Regulations 1988") was considered by

Sullivan J in *ex p Tew,* in which the two planning permissions under review had been supported by environmental statements made pursuant to the Town and Country Planning (Applications) Regulations 1988 (SI 1988/1812) ("the Applications Regulations 1988"). No question directly arose, as it does in this case, as to the degree of particularity required in or with an outline application to enable a planning authority to determine whether it should consider the need for an environmental statement. However, he held, at page 86E, expressly adopting a "purposive" interpretation of the relevant provision, that an application for outline permission had to include particulars then specified in a form,

> "but only in so far as they are appropriate to the kind of development that is being proposed. It is in the nature of an outline application that many of the particulars sought will not be available at the outline stage, and hence it will not be appropriate to provide them …"

And, in cases where an environmental statement was required, he contrasted the requirement in those Regulations with that in the Applications Regulations 1988. At page 94B, he said:

> "The assessment regulations provide a mechanism for the collation of, and consultation upon, environmental information. That information does not have to be contained within the application for planning permission."

At page 96B-C, he set out the requirements for an outline application in regulation 3 of the Applications Regulations:

> "While a bare outline application is permissible on a purposive approach to regulation 2 of the applications regulations, an environmental statement based upon such an application could not begin to comply with the requirements of Schedule 3 to the assessment regulations, whether one adopts a literal or a purposive approach to para 2(a) of Schedule 3. I would not wish to go as far as Mr Howell and say that it is not possible to make any application for outline planning permission for a development that falls within Schedule 1 or Schedule 2. An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested in para 42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with requirements of para 2(a) of Schedule 3.
>
> …. I can understand the advantages of an illustrative master-plan in an ordinary outline application for a business park, but *once* it is decided that such a project falls within Schedule 2, Schedule 3 requires the environmental statement to assess the

> likely impact of a development that might or might not be carried out depending upon whether subsequent submissions for approval of reserved matters are or are not in accordance with an illustrative master-plan." [my emphasis]

28. Sullivan J considered the matter again in relation to the same proposed development in *ex p Milne,* in which, he said, at paras 122 and 127 of his judgment:

> "122 … 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' significant effects, it is entirely consistent with the objectives of the Directive to adopt a cautious 'worst case' approach. …
>
> …
>
> 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."

29. As noted by the Judge at paragraph 10 of his judgment, a decision of a planning authority that it has sufficient information to decide whether a proposed development would be likely to have significant effects on the environment for the purposes of the Regulations can only be challenged on a *Wednesbury* basis. Direct authority for that proposition is to be found in the judgment of Dyson LJ, with whom Laws and Carnwath LJJ agreed, in *R(Jones) v Mansfield DC* [2003] EWCA Civ 1408, at paragraphs 17 and 39:

> "17. Whether a proposed development is <u>likely</u> to have <u>significant</u> effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case. The use of the word 'opinion' in regulation 2(2) is, therefore, entirely apt. In my view, that is in itself a sufficient reason for concluding that the role of the court should be limited to one of review on *Wednesbury* grounds."
>
> "39. I accept that the authority must have sufficient information about the likely impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and

> comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case."

Those observations are of a piece with observations of Pill LJ, with whom Laws and Arden LJJ agreed, in *Bellway Urban Renewal Southern v Gillespie* [2003] JPL 1287, CA, at para 35; see also per Ouseley J in the Divisional Court in *Younger Home v FSS* [2004] JPL 950, at paras 59-64 (not challenged in the Court of Appeal), per Sullivan J in *ex p Milne* (2001) at paras 122 and 127 that the planning authority in that case was entitled to have regard to the uncertainties inherent in an outline application, including any illustrative material and to form a judgment as to what is likely based on his experience.

30. It follows from the above judicial discussion of the matter, the broad and flexible outcome of which I agree, that it is a matter of planning judgment of a planning authority, challengeable only on a *Wednesbury* basis, whether it has sufficient material before it at the outline planning stage to decide whether a proposed development would be likely to have such significant effects on the environment as to require an EIA. In this case I can see no basis for a *Wednesbury* challenge of the Council's decision not to require an EIA at the leisure park outline permission stage. In particular, I accept Miss Robinson's submissions, which I have summarised in paragraph 26 above as to the adequacy of the particularity of the proposed development at the outline stage to enable the Council to conclude that it did not require an EIA or, at least, that such conclusion is not *Wednesbury* challengeable.

(iii) Stage 3 – approval of reserved matters – Perversity

31. Mr Gordon also submitted – though very much as a "fall-back" argument - that the Council's approach in conducting a screening exercise at the approval of reserved matters stage was *Wednesbury* unreasonable, since the leisure park outline permission had been so open-ended that approval of the reserved matters would inevitably have lesser effects than the permission. In the result, he submitted, the comparison made in the screening exercise between the outline permission and approval of reserved matters made it inevitable that that the latter would have lesser significant environmental effects.

32. Miss Robinson's and Mr Katkowski's response to this contention was that, given the uncertain nature of the law as to the stage or stages in the planning process at which an EIA could be required, there was nothing perverse about the Council conducting a screening exercise at the reserved matters stage even though it had already done so at the permission stage and concluded that an EIA was not necessary. They submitted that in such circumstances it would be more absurd if the Council could not have had regard to the outline planning permission and the earlier screening exercise; and the fact that it may have conducted a further unnecessary screening exercise and given its

opinion that an EIA was still not necessary cannot sensibly render that decision unlawful.

33. The uncertainty in the law to which Miss Robinson and Mr Katkowski were referring in making that submission is that to which I have already partly referred in paragraph 15 of this judgment. In early 2004 when the Council was considering approval of the reserved matters, the House of Lords was– and still is – awaiting a ruling of the European Court on its reference in *Barker*. The Judge, in paragraph 39 of his judgment, acknowledged this dilemma for local planning authorities:

> "There is a real artificiality in the very nature of the EIA exercise undertaken by the council at the reserved matters stage in this case, given that (i) a considered decision was taken at the outline planning permission stage that an EIA was not needed, and (ii) reserved matters should not have materially greater effects if any are to fall within the scope of the outline planning permission at all. In a case where, as here, the need for an EIA had been considered and rejected in a reasoned decision at the outline planning permission stage, and no challenge had been brought to that decision, I would be surprised if the law required further consideration to be given to the question of an EIA at the reserved matters stage. *Barker* might be considered a more problematic case on its facts since in that case there was no clear evidence that the need for an EIA had been considered at all by the decision-maker at the outline planning permission stage (see the judgment of the Court of Appeal [2001] EWCA Civ 1766, at para 6). I recognise, however, that one cannot reliably predict either the outcome of the reference in *Barker* or its implications for a case such as this as the present. In the state of uncertainty created by *Barker*, it is entirely understandable that the council saw fit, as a precautionary measure, to give further consideration to the question of an EIA at the reserved matters stage. By following that course it cannot be taken to have been impliedly accepting that its consideration of the EIA issue at the outline planning permission stage was in some way defective. There is no foundation at all for such an inference. The only inference that can reasonably be drawn is that the Council was doing the best it could to cover all eventualities in an uncertain legal position."

34. In any event, as Miss Robinson observed in her submissions, it cannot, as a matter of logic or law, necessarily follow that where development permitted at the outline stage was not considered to be EIA development that reserved matters when formulated cannot be so. In some cases comparison with an outline permission may show that the reserved matters, as formulated, go further than the outline permission or have likely significant effects that were or may have been overlooked at the outline permission stage. Far from the Council's decision to undertake the further screening exercise approaching the high threshold for *Wednesbury* irrationality, I agree with the Judge that it was eminently rational for it to do so, for the reasons he gave. The

leisure park outline permission set out clearly the particular nature and the limits of the proposed development, attaching to its permission standard reserved matters (see paragraph 11 above), applying to it standard proposed matters. There was nothing "open-ended" about it.

35. Moreover, as Miss Robinson pointed out, the Judge, at paragraph 42 of his judgment, properly characterised the screening opinion as in part a comparative exercise and in part an examination of the reserved matters. To the extent that it was a comparative exercise, it was, as the Judge said, essentially with the leisure park outline permission, not with the business park permission. And, in respect of the leisure park outline permission, there was no scope for a knock-on effect from the absence, if there was one, of a screening exercise in the business park outline permission, which, in my view, as I have said, resulted in a lawful screening opinion in its own right at the stage of the application for the leisure park outline permission.

36. Mr Katkowski, who adopted Miss Robinson's submissions on this and other issues, added a further telling point against the perversity challenge, namely that the reserved matters application was made pursuant to an extant outline planning permission in respect of the leisure park. If the Council had not taken that permission into account, as distinct from its reasons for granting it, it would have failed to have regard to a relevant consideration.

(iv) The formal validity of the two outline permissions and the screening opinion in respect of the second as a defence

37. The Judge did not determine whether either of the two outline permissions would have been quashed if there had been a challenge within time. He relied upon their formal validity as a bar to a direct or indirect challenge in these proceedings in respect of the reserved matters approval. This is how he put it in paragraphs 35 – 37 of his judgment:

> "35. The starting point must be the validity of the outline planning permissions granted in June 1997 and January 2002 respectively, for the business park and the leisure development respectively. They were not challenged at the time, there has been no application to challenge them out of time, and there would be no realistic prospect of time being extended so as to permit a challenge now. On the basis of well established principles supported by the authorities … including the dicta of Lord Diplock in *Hoffmann-La Roche* and *O'Reilly v Mackman,* those earlier consents must be given all the effects in law of valid decisions. The same applies to the June 2000 screening decision that the application for the leisure outline planning permission did not need to be accompanied by an EIA.
>
> 36. In those circumstances the council was plainly entitled, when considering the application for reserved matters approval, to have regard to the earlier decisions. In particular, the two outline planning permissions were extant, lawful consents in respect of the same site (or, in the case of the business park permission, in respect of a larger area of land of which the site

> formed part) and were properly taken into account as material considerations. Indeed, the application for reserved matters approval was necessarily premised on the validity of the leisure outline planning permission pursuant to which the application was made.
>
> 37. Equally, the claimant is plainly not entitled to use the present claim as a means of mounting an indirect or collateral challenge to the validity of the earlier decisions."

38. However, in relation to the earlier decisions, Mr Gordon submitted that, as a matter of domestic law, their formal validity cannot provide a defence to this challenge based on their unlawfulness and the effect of that unlawfulness on the reserved matters approval. In the alternative, he maintained that if it did provide such a defence in domestic law, it would, in any event, conflict with the principle of effectiveness in EU law.

39. As to domestic law, he maintained that the courts have recognised that unlawful reasoning in one planning decision may vitiate a later planning decision reliant upon the same reasoning, notwithstanding the formal validity of the earlier decision at the time when the later one was made. He cited two cases as illustrations.

40. The first was *GLC v Secretary of State for the Environment* (1985) JPL 868, in which Woolf J, as he then was, gave the GLC permission to apply for judicial review of the *reasons* underlying an inspector's decision upholding a planning decision that the GLC had directed, rather than the decision itself, observing at 870:

> "if [the inspector's] reasoning was wrong, it would … be cumbersome for the whole of the procedure of refusing planning permission and an appeal to be gone through before the matter could be decided."

However, as the editors of the report, in a note to it, observed, this was not a limitation case where the actual decision based on reasoning sought to be challenged was out of reach of the courts; it was one in which there remained two routes for judicial review, and Woolf J, in the passage cited, was simply suggesting taking the shorter of them.

41. Mr Gordon's second illustration was *R (Redditch BC) v FSS* [2003] 2 P & CR 338, in which he maintained that Wilson J did the same thing to the opposite effect. He refused to give permission to the planning authority to challenge an inspector's reasoning in upholding its own unchallenged planning decision, because he considered that the issue of concern to the authority had become academic. However, in refusing permission Wilson J accepted, at paragraphs 27 to 30 of his judgment, that, were similar reasoning to be followed in a future case, the matter could then be the subject of challenge. But, again, the case is not concerned with finality of a decision by reason of limitation; it was concerned with the validity of reasoning of a decision, where the decision itself was not challenged, but the authority had concern for future decisions if similar reasoning were to be relied upon again.

42. As Miss Robinson and Mr Katkowski submitted, the domestic law principle is clear, and was correctly applied by the Judge, namely that administrative acts are valid unless and until quashed by a court: see *Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, HL, per Lord Diplock at 366A-E; and *R v Restormel BC, ex p Corbett* [2001] EWCA Civ 330, [2001] 1 PLR 108, per Schiemann LJ at paras 15 and 16. If the time has passed for them to be challenged by way of judicial review, they stand notwithstanding that the reasoning on which they are based may have been flawed: see *O'Reilly v Mackman* [1983] 2 AC 237, HL, per Lord Diplock at 283F. For an example of the application of that principle in a closely related context to planning, see *Lovelock v Minister of Transport* (1980) P& CR 336, CA, per Lord Denning MR at 345, in which the Court declined to quash a compulsory purchase order, notwithstanding its unlawfulness, because the challenge was too late.

43. As Mr Katkowski observed, the principle does not *remove* the possibility of challenge; rather, it allows for the regulation of challenge in respect of forum, standing and timing, all in the interest of efficient administrative decision-making. The principle, as he observed, is of fundamental importance and is representative of a broader legal concern, that of legal certainty. In the exercise of powers by public authorities, it is clearly in the public interest that their decisions cannot be open to challenge long after they have been taken and acted upon.

44. In my view, it is clear law, and clear on the facts, that Noble cannot now challenge directly or indirectly either of the outline planning permissions or the screening decision in respect of the second of them. The challenge to the decision at the approval of reserved matters stage not to require an EIA is, in the way it has been formulated by Mr Gordon, in effect, an impermissible collateral challenge to those decisions. And as Miss Robinson and Mr Katkowski added, this is not a case, as in *GLC* or considered in *Redditch*, where there is a challenge within time of a decision based on arguably flawed reasoning. To say, as does Mr Gordon, that both cases proceeded on the basis that a later decision adopting the erroneous reasoning of an earlier decision would be open to challenge, is not to the point. Nor does it assist him in making any wider challenge than that the screening opinion on the reserved matters application should be quashed if based on unlawful reasoning. It is true, as Mr Gordon emphasised, that there is a difference between a challenge to validity of an earlier decision and the reasoning underlying it, but in this case there is no scope for such a challenge of the approval, without an EIA, of reserved matters, since the Council in so deciding has not relied on its 2000 screening decision in respect of the 2002 leisure park outline permission, but simply took that permission into account.

45. The relevance of the outline planning permissions, EIA lawful or otherwise, is that they would have certain effects, and the Council in its screening exercise at the approval of the reserved matters stage, concluded that those matters were unlikely to have any greater significant environmental impact than already the consequence of the leisure park outline permission. And, insofar as the Council, in formulating its reserved matters screening opinion, had regard to the fact that the Council had not considered the development permitted by leisure park outline permission to be EIA development, its decision was, for the reasons I have given, lawful.

The effect of EU law on formal validity

46. In the alternative and in any event, Mr Gordon submitted that the principle of formal validity is overcome in the circumstances of this case by two EU rights of a person in the position of Noble, rights that the European Court of Justice ruled in *Wells* are of direct effect: 1) as to lawful consideration whether an EIA was required of the reserved matters application; and 2) to ensure that the Council, as an organ of the state, takes all measures within its sphere of competence to remedy any failure to carry our environmental assessment.

47. As to the first of those propositions, Mr Gordon referred the Court to the following passage from the first of three rulings of the European Court in *Wells*, at 1058:

> "1. Article 2(1) of Council Directive 85/337 of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment, read in conjunction with Art 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as s. 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a development consent within the meaning of Art. 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.
>
> In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment."

48. The bounds of this right have yet to be resolved in the *Barker* reference, in particular as to whether, when it has been considered at the outline permission stage that no EIA is necessary, domestic law may *preclude* one at a later stage. However, here, the Council, unlike the local planning authority in *Barker*, proceeded on the basis that it was legally required to undertake a screening exercise at the reserved matters stage to determine whether an EIA was required at that stage, notwithstanding its decision at the outline stage that one had not been required.

49. As to his second proposition based on the Council's Community law duty to remedy its earlier omission and/or decision not to undertake an EIA, Mr Gordon referred the Court to the third of the European Court's rulings in *Wells*:

> "3. Under Art. 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Art. 2(1) of Directive 85/337.
>
> The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those

> governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).
>
> In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."

50. Mr Gordon submitted that an unlawful failure to consider an EIA at the business park outline permission stage and/or to undertake one at the leisure park outline permission stage triggered this remedial obligation at the approval of reserved matters stage, having regard to the proposition in *Wells* that an EIA should be conducted at the earliest possible stage for identifying and assessing "all the effects which the project may have on the environment".

51. As I have noted in paragraph 17(iii) above, the Judge, in paragraph 48 of his judgment, distinguished *Wells* in that, there, the issue was whether an earlier permission could be revoked or modified rather than whether it could be treated as invalid, an issue that is expressly reserved by the third ruling in *Wells* to be a matter for national courts applying their own procedural rules. For convenience, I repeat here part of the Judge's words that I have set out:

> "What the Court said in *Wells* about the obligation to nullify the consequences of a breach of the Directive is not to be taken as calling into question the validity of earlier decisions which are no longer open to challenge under domestic law."

52. Mr Gordon submitted that the Judge's ruling in that paragraph mis-characterised the European Court's ruling as giving overriding status to formal validity of earlier decisions by reference to member-state procedural autonomy. Such an outcome, he suggested, would render the ruling in *Wells* a "dead-letter". He submitted that, on the contrary, the Court's reasoning in that case was that member-state procedural autonomy is subservient to the principle of effectiveness of EU law. This is how the Court put it at paragraph 70 of its judgment:

> "…under Art 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Art. 2(1) of the Directive 85/337.
>
> The detailed procedural rules applicable in that context are a matter for the domestic legal order of each member State, under the principle of procedural autonomy of the Member States, *provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that*

> *they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).* [my emphasis]
>
> In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."

53. By reference to that passage, in particular to the well established EU principle of effectiveness, Mr Gordon submitted that the Judge's approach to the domestic principle of formal validity infringes that principle. If the Judge had paid proper regard to it, he submitted, he should have ruled that the Council at the approval of reserved matters stage, failed to conduct a lawful screening exercise so as to enable him to determine whether it was defective and, if so, to quash it and re-determine the matter lawfully, pursuant to Article 10 of the Treaty.

54. Mr Gordon relied in support of this argument based on the EU principle of effectiveness in this context on an obiter observation of Ouseley J in *Younger Homes (Northern) Ltd v First Secretary of State & Calderdale MDC* [2004] JPL 950. The issue in that case was whether the Secretary of State could rely upon a formally valid, but unchallenged legally defective, opinion of a local planning authority to justify his failure to adopt a screening opinion under regulation 8 of the Regulations. Mr Gordon submitted that the following reasoning of Ouseley J, in holding that the Secretary of State could not do so, was equally applicable against the Council in this case. In paragraph 86 the Judge said:

> "… There would be a considerable hole in the Regulations and in the ability of the United Kingdom to meet its Directive obligations if the fact that the decision under challenge was that of the Secretary of State meant that the decision which he relied on, but which was unlawful, was thereby shielded from scrutiny and his own become protected. The administrative inconvenience to the process is in essence no different from that which arises in respect of any process which can be challenged at the end on grounds which were available for challenge at an earlier stage."

55. Mr Gordon maintained that the practical consequence of what happened where there may be a duty to remedy prior breaches of the EIA Directive are that a formally valid, though defective, decision at the outline permission stage not to require an EIA would, given the nature of a reserved matters application, normally result in such an exercise being unlawful at that stage. In that respect, he added, the Judge's decision here may be affected by the answer to be given by the European Court to the critical question referred in *Barker*, namely whether, where it has been decided at the outline permission stage not to conduct an EIA, national law may "preclude" the authority from requiring an EIA at the approval of reserved matters stage.

56. Before considering these arguments and the responses to them in a little detail, I should note the opening submissions of Mr Christopher Katkowski, on behalf of Rosefarm as the First Interested Party, that Noble has not alleged that: 1) our domestic rules as to the availability of judicial review made it impossible in practice or excessively difficult for it to challenge either of the outline planning permissions or the screening opinion in relation to the latter that it did not require an EIA assessment; or 2) the rules regulating the availability of judicial review in this field disproportionately penalise it.

57. Both Miss Robinson and Mr Katkowski submitted that our domestic law principles as to formal validity of decisions are not inconsistent with *Wells* or the EC principle of effectiveness and are of a piece with the effectiveness that the European Court accords to measures of Community institutions. Miss Robinson summarised the effect of that principle by reference to the principles established by the European Court in Case–312/93 *Peterbroeck. Van Campenhout & Cie SCS v Belgium* [1995] ECR I-4599, para 12, applied by the Court in *Wells*, at paras 64 -70 (see, as to para 70, paragraph 49 above), and acknowledged that procedural autonomy of member states is subject to that principle. Examples of similar treatment by the Court of Community measures are Case-101/78 *Granaria BV v Hoofproduktschap voor Akkerbouwprodukten* [1979] ECR 623, at para 5; and Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859, at para 64. Nor can it be said, as Mr Gordon suggested, that the Judge, in paragraph 48 of his judgment treated *Wells* as giving overriding status to the formal validity of earlier decisions by reference to member state procedural autonomy.

58. On the simple issue whether our domestic procedural rules infringe the EU principle of effectiveness by rendering the exercise of the relevant community rights "impossible in practice or excessively difficult", my firm view is that it does not. It has to be remembered too that the European Court in *Wells* was simply concerned with EU law, not as to the position in national law; the conflict, if any, between the two was not resolved, because on remission of the case to the domestic court, the matter was resolved by a consent order.

59. In considering whether a national procedural provision renders application of community law impossible in practice or excessively difficult, it is necessary, as the European Court stated in *Peterbroeck*, at para 14, to look at its role in its domestic context and in the light of the basic principles of the domestic legal system, including the principle of legal certainty. As to domestic rules of limitation, the Court has upheld the importance of giving certainty to public decisions by holding that the application of reasonable time limits for challenging them does not infringe the principle of effectiveness; see Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, where the Court, at 1997, stated:

> "Applying the principle of co-operation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.
>
> Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to

> determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such further conditions cannot be less favourable than those relating to similar actions of a domestic nature.
>
> …
>
> In the absence of … measures of harmonisation the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.
>
> The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.
>
> This is not the case where reasonable periods of limitation of actions are fixed."

60. Moreover, there is authoritative domestic and EC authority for the proposition that proceedings for judicial review afford adequate protection for community law rights in respect of the validity of public actions; see on this issue *Bourgoin SA v Ministry of Agriculture* [QB] 716, CA, per Parker LJ and Nourse LJ at 785BE and 789G-790D respectively; and *Upjohn Ltd v Licensing Authority established by the Medicines Act 1968* [1999] 1 WLR 927, ECJ, at paras 33-37.

61. Applying those principles to the facts of this case, if either of the two outline planning permissions required and/or were not the subject of valid screening exercise, there was a clear domestic remedy, if exercised promptly, for quashing either of them and/or the screening opinion at the leisure park outline permission stage. The domestic requirement of promptness in the exercise of the remedy, as Miss Robinson observed, strikes a reasonable balance between the need to provide a remedy and, in this instance, the public interest in the effective administration of planning controls and legal certainty. Accordingly, in my view, this challenge to the reserved matters screening opinion was not deprived of effect by the Council's reliance on the formal validity of the outline permissions and the screening opinion in relation to the latter, since they had been challengeable by judicial review, if sought promptly - a sufficient remedy as a matter of community law.

(v) Reference to the ECJ

62. Mr Gordon also submitted that the answers to the various questions that he has raised in this appeal are not clear and has invited the Court to refer a question or a number of questions on the same theme to the European Court under Article 234 EC. His proposed questions are annexed to this judgment.

63. Mr Gordon submitted that a reference is necessary because the question in *Barker* (see paragraph 15(i) above) suggests that the Judge's reasoning is incorrect in confining his consideration to the lawfulness of the Council's approval of the reserved

matters. The main thrust of all of Mr Gordon's proposed questions is whether, where a planning authority, pursuant to national law requirement has considered at an initial stage of the planning process whether an EIA is required pursuant to the Directive and has unlawfully determined that it is not, national law consistently with the Directive, may *preclude* questioning the lawfulness of that earlier decision. He also submitted that if formal validity of the earlier permission bars any challenge to it, it is not clear how the remedial obligation described by the European Court *Wells,* at para 70 (see paragraph 52 above) can ever arise, since such an obligation could only be relevant where there has been an earlier failure to comply with the Directive not remedied at the time.

64. As Miss Robinson submitted, there is no inconsistency in the Judge's decision with the reference in *Barker* and the possible ruling to be given on it by the European Court, since the critical question there is quite different from that proposed by Mr Gordon here. The *Barker* question is whether an EIA of a reserved matters application is *precluded* where, at the outline permission stage, a planning authority has not required an EIA. Here, the issue is whether, at the approval of reserved matters stage, the Council's decision, after conducting a screening exercise, not to require an EIA is lawful.

65. The critical questions for this Court, are: 1) whether, as provided by Article 234, an answer to any of the questions proposed by Mr Gordon are "necessary to enable it to give judgment" and, if so; 2) the Court not being a court of last instance , whether it should exercise its discretion to make a reference (see *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA, per Kerr LJ at 970, at para 23(5), with whom Ralph Gibson and Russell LJJ agreed).

66. Having considered the well known guidance of Lord Bingham MR, as he then was in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland* [1993] QB 534, at 545D-F, and of the European Court in Case C-283/81 *CILFIT*,[1982] ECR 3415, at 3430, paras. 16 – 20, I am of the view this Court should not, as a matter of discretion or otherwise, refer the questions posed by Mr Gordon. As submitted by Miss Robinson and Mr Katkowski, the first question, or sub-question, does not arise because the Council, at the approval of reserved matters stage, has proceeded on the assumption that it should consider again whether to require an EIA. And the remaining two questions, or sub-questions, are unnecessary because the principle of effectiveness as formulated by European Court in *Peterbroeck* (see paragraph 57 above) and in *Wells* (see paragraph 49 above) concern in this case domestic *application* of Community law, which is matter for domestic courts, not its *interpretation,* which is a matter ultimately for the European Court.

67. In summary, the answers to Mr Gordon's proposed questions are clear and render the proposed reference unnecessary for the resolution of this appeal, because: 1) the principle of domestic procedural autonomy has received clear and determinative examination by the European Court in *Wells,* as it applies to issues of the sort raised by this appeal; 2) the principle of presumed validity of administrative acts in EU law is clear; 3) and the application of both principles to the issues raised by this appeal is clear. As the European Court put it in *CILFIT,* at para 16, the correct application of Community law in the circumstances of this case is so obvious as to leave no room for any reasonable doubt as to answers to the proposed questions.

68. Accordingly, I would dismiss the appeal. In doing so I add a note of dissatisfaction at the way the availability of the remedy of judicial review can be exploited – some might say abused – as a commercial weapon by rival potential developers to frustrate and delay their competitors' approved developments, rather than for any demonstrated concern about potential environmental or other planning harm. By the time of the hearing of this appeal, as is often the case, the approved scheme in issue is clearly of a piece with surrounding and much larger approved proposals already taking shape around it. It could not conceivably be regarded as a significant addition to the overall environmental impact of such development. This may be the cause of great economic harm to individual developers and, more importantly, it is likely to frustrate the public interest in much needed regeneration in areas such as the Isle of Thanet. However seemingly complicated the issues are, or how sophisticated and technical the statement of facts and grounds supporting the initial claim for judicial review, they should be subject to rigorous examination by the single judge at the permission stage of a claim for judicial review.

Lord Justice Mummery:

69. I agree.

Lord Justice Gage:

70. I also agree.

Annexe

Reference Questions

(1) Where national law prescribes a two-stage procedure for granting consent before a development project can proceed comprising an initial decision in principle (known as "outline planning permission") and one or more subsequent detailed decisions relating to matters such as access, landscaping and siting, design and external appearance of buildings ("known as reserved matters approval"), for the purposes of Directive 85/337/EEC is "the decision of the competent authority or authorities which entitles the developer to proceed with the project" (article 1(2) of Directive 85/337/EEC ("the Directive")) to be read and construed as meaning only the decision in principle or as meaning both the decision in principle and all subsequent detailed decisions as described?

(2) In circumstances where

i) outline planning permission has been granted following a decision that environmental impact assessment was not necessary, and

ii) the decision that environmental impact assessment was not necessary was based upon unlawful reasoning, and

iii) the outline planning permission could have been but was not quashed in legal proceedings for judicial review,

is a rule of national law that precludes national authorities from questioning the reasoning of the decision not to require environmental impact assessment of the

outline planning permission when determining whether EIA is required of a reserved matters application, consistent with the requirement to consider the need for EIA prior to granting development consent for the purposes of Directive 85/337/EEC as amended?

(3) In the circumstances set out in question (2), is it consistent with article 10 of the Treaty for a rule of national law to preclude national authorities from questioning the reasoning of the decision not to require environmental impact assessment of the outline planning permission when discharging their duty to nullify the effects of a breach of the EIA Directive as explained by the Court in case C-201/02 Wells?