Case No. CO/292/2000

BAILII Citation Number: [2000] EWHC 650 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

CROWN OFFICE LIST

Royal Courts of Justice

Strand,

London,

WC2.

Date: Monday, 31st July 2000

Before:

MR JUSTICE SULLIVAN

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R E G I N A

- v -

ROCHDALE METROPOLITAN BOROUGH COUNCIL

EX PARTE MILNE

- - - - - - - - - - - - - - -

MR J. HOWELL QC & MS K. MARKUS appeared on behalf of the Applicant.

MR T. STRAKER QC & MR P KOLVIN appeared on behalf of the First Respondent.

MR B. ASH QC MR P. GREATOREX appeared on behalf of the Second Respondent.

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J U D G M E N T

Monday, 31st July 2000

MR JUSTICE SULLIVAN:

Introduction.

1. This is round 2 of the battle for Kingsway Park. Round 1 concluded with my judgment on 7th May 1999 reported as **R v Rochdale Metropolitan Borough Council ex parte Tew and Others** [1999] 3 PLR 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 23rd February 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 6th August 1998.

4. The Applicant and others challenged the validity of the planning permissions on five grounds set out on pages 79 E to 80 A. 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 23rd July 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 17th December 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 QC 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 98 G to 99 C.

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 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 99 C 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 90 F.

13. At page 96 C to D I said this:

> "I would not wish to go as far as Mr Howell and say that it is not possible to make any application for outline planning permission for a development that falls within Schedule 1 or Schedule 2. An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested

> in para 42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with the requirements of para 2(a) of Schedule 3."

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

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 96 H 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 98 F 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 100 H to 101 D 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 101 D to F:

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

The amended/new applications.

19. As amended in 1999 the business park application, whilst still an application for outline planning permission, is no longer a "bare outline" application. It comprises the application form which cross refers to and incorporates into the application:

(i) an Attachment which describes the development.

(ii) a Schedule of Development.

(iii) a Development Framework.

(iv) a Masterplan.

20. The attachment describes the proposed development as:

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

21. Details of landscaping, design and external appearance of all the buildings were reserved. The application sought approval for siting and means of access to 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 7 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", et cetera. 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 89 G for the full text of the directive).

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

28. 1.7:

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

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

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

30. Condition 1.8:

> "No building within any plot shall exceed the height specified for buildings within that plot as set out in the 'Schedule of Development ... submitted with and forming part of the application."

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

1.11:

> "The development shall be carried out in accordance with the

mitigation measures set out in the Environmental Statement submitted with the application unless provided for in any other condition attached to this permission.

1.12:

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

1.13:

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

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

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

33. The reason given was:

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

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

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

35. Under the subheading “Policy Setting” Mr Beckwith set out the terms of policy EC/6 in the UDP in full. He added that other policies in the UDP were also relevant in assessing the applications. Having concluded that the distribution of uses within the application accorded with the uses set out in policy EC/6 he examined each of the 16 criteria in the policy in turn and advised that, “The proposals accord with the relevant policies of the UDP and are not departures from the development plan.”

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

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

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

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

the management regime for the open space."

The legislative and policy framework.

38. For practical purposes the legislative framework remains unchanged from that described in Tew. As from 14th March 1999 the assessment regulations referred to in Tew were replaced by the Town and Country Planning, (Environmental Impact Assessment) (England Wales) Regulations 1999, (the 1999 assessment regulations), which apply to any application received after that date. It is common ground that the estate roads application falls under the 1999 assessment regulations. The parties are not agreed as to whether the amended business park and spine roads applications fall under the assessment regulations or the 1999 assessment regulations. It is not necessary to resolve that dispute since the parties are agreed that nothing turns on the minor differences of phraseology between the two sets of regulations. For convenience I will continue to refer to the assessment regulations which are set out in Tew.

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

> "48. Where EIA is required for a planning application made in outline, the requirement of the Regulations must be fully met at the outline stage since reserved matters cannot be subject to EIA. When any planning application is made in outline, the local planning authority will need to satisfy themselves that they have sufficient information available on the environmental effects of the proposal to enable them to determine whether or not planning permission should be granted in principle. In cases where the Regulations require more information on the environmental effects for the Environmental Statement than has been provided in an outline application, for instance, on visual effects of a development in a National Park, authorities should request further information under regulation 19. This may also constitute a request under article 3(2) of the GDPO."

> "82. Whilst every E.S. should provide a full factual description of the development, the emphasis of Schedule 4 is on the 'main' or 'significant' environmental effects to which a development is likely to give rise. In many cases, only a few of the effects will be significant and will need to be discussed in the 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 UDP policy EC/6d.

41. Under the former, it is submitted that, notwithstanding the amendments to the form of the business park application, it still does not provide 'a description of the development proposed', which is sufficient for the purposes of paragraph 2(a) of Schedule 3 to the assessment regulations, because although information is provided in respect of the size or scale of the development, design is a reserved matter. The submission that an application for outline planning permission may not be made for development which requires environmental assessment is renewed and it is further contended that if this submission is not accepted, the description of the development provided in the 1999 outline application was insufficiently detailed to comply with the requirements of Schedule 3.

42. Under the second ground of challenge it is argued that criterion (d) was not satisfied, because the business park planning permission did not require the creation of new public open space and informal recreation areas or the extension and improvement of Stanney Brook Park. Since the UDP required the criteria in policy EC/6 to be "strictly applied", failure to meet criterion (d) meant that the development was not in accord with the development plan, even though it did not infringe other policies. Even if the failure to meet criterion (d) did not have that consequence, Mr Beckwith's report should have

referred to the fact that the UDP inspector had specifically rejected a request made during the course of the UDP inquiry that (inter alia) what is now criterion (d) should be omitted, saying that the open spaces proposed in the policy "are an essential element of the scheme and of the plan's proposals for South Rochdale." Moreover, the Council failed to consider imposing a negative condition preventing the erection of some or all of the proposed buildings until such time as the relevant land had been made available for use as an open space by the public, and instead relied on the NWDA's offer which, since it was unenforceable, was an immaterial consideration.

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

Ground 2.

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

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

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

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

46. Since development plans contain numerous policies, the local planning authority must have regard to those policies (or "provisions") which are relevant to the application under consideration. The initial judgement as to which policies are relevant is for the local planning authority to make. Inevitably some policies will be more relevant than others, but section 70 envisages that the Council will have regard to all, and not merely to some of the relevant provisions of the development plan.

47. In my judgment, a similar approach should be applied under section

54A. The local planning authority should have regard to the provisions of the development plan as a whole, that is to say, to all of the provisions which are relevant to the application under consideration for the purpose of deciding whether a permission or refusal would be “in accordance with the plan”.

48. It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: “is this proposal in accordance with the plan?” The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. In City of Edinburgh Council v. the Secretary of State for Scotland [1997] 1 WLR 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 I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be ‘in accordance with the plan’. Given the

numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes et cetera, it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.

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

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

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

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

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

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

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

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

56. Dedication of the open land along Stanney Brook Corridor as a public open space could not have been achieved by the imposition of a condition. It is true that the Council could have considered whether dedication should be secured by the imposition of a negative condition, but it was not required to

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

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 96 C 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 88 D to 89 H, he referred to a number of the recitals, laying particular stress upon the 10th:

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

60. As mentioned on page 89 C, 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 80 D 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 AC 397, as amplified on page 430 of Berkeley v. Secretary of State for the Environment [2000] 3 WLR page 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 430 H to 431 E, and 432 F.

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 99 D.

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 CMLR 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 CMLR 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 to Directive 97/11 which is set out in full on page 89 G of Tew). It is not aimed at permitting decisions to be taken "in principle" on relevant projects, but only after a comprehensive assessment of them.

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

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

and the mitigation measures proposed.

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

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

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

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

74. Under “Mitigation of impacts” the environmental statement

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

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

75. Under “Building design and materials” we find in paragraph 6.59:

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

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

77. Finally, in respect of mitigation measures, Mr Howell points to the

Outline Ecology Management Plan which formed part of the environmental statement. It contains a table which summarises, "Key management proposals" under three headings: "Objective", "Outline management prescription" and "Timetable". By way of example, the first objective is:

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

78. The prescription is:

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

79. Timescales are given for both surveys.

80. It is submitted that paragraph 2(d) of Schedule 3 to the assessment regulations requires a description of mitigation measures. The 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 QC on behalf of the Council, the first respondent, and Mr Ash QC 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 12th June 2000 paragraphs 24 and 39 to 41 (unreported) and Jackson J in R v. London Borough of Bromley ex parte Baker 3rd April 2000 paragraph 105 (unreported).

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

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

84. The directive does not require environmental assessment of every industrial estate, or urban development project, only those "where Member States consider that their characteristics ... require" assessment. In general terms, it is likely that assessment will be required for substantial projects of this kind. The test adopted in the assessment regulations is whether such a project "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location", see the definition of Schedule 2 application in regulation 2(1).

85. Save in an old style Soviet command economy, such as would not

have been in the contemplation in the framers of the directive, a substantial industrial estate development project is bound to be demand-led to a greater or a lesser degree. The second respondent's evidence explains in some detail why this is so in the case of Kingsway Business Park. Mr Ward, a Director of Wilson Bowden explains:

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

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

87. At pages 96 G to 97 H 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 89 C 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 97 C that projects such as industrial estate developments and urban development projects have been placed “in a legal straitjacket” by the assessment regulations, in transposing the requirements of the directive into domestic law. The Directive did not envisage that the “straitjacket” would be drawn so tightly as to suffocate such projects.

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

93. In my judgment, integrating environmental assessment into the domestic procedure for seeking outline planning permission, which acknowledges this need for flexibility for some kinds of building projects, is not contrary to the objectives of the Directive. There is no analogy between the procedure for obtaining outline planning permission, with certain matters reserved for detailed approval, and the procedure which was in issue in Bozen. In that case, not only was there no environmental assessment, the legislative act which authorised the project was generalised in the extreme, amounting to little more than a proposed programme, which was subject to preliminary feasibility assessments, see paragraphs 5, 71 and 79 of the Advocate General’s opinion in that case. The European Court was also concerned with proposed “modifications to development projects”. If such modifications have not been subjected to environmental assessment, the court’s conclusion that they should be “when by reason of their nature, size or

location they were likely to have significant effects on the environment" (see paragraphs 40 and 49) is readily understandable. Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed, it is not accurate to equate the approval of reserved matters with "modifications" to the project. The project, as it evolves with the benefit of approvals of reserved matters, remains the same as the project which was assessed.

94. Much stress has been laid on the words: "In full knowledge of the project's likely significant impact on the environment..." in directive 97/11, see page 89 H. 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 87 E to 88 C. 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 99 C 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 429 H to 43O A 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 judgement in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; "environmental

information" which has been provided pursuant to the assessment regulations.

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

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

111. I do not accept the Applicant's argument based on regulations 2 and 3 of the applications regulations, see page 80 D 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 98 A 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.

138. MISS COLQUHOUN: Yes, my Lord. As perhaps the court will have been told, Mr Straker I am afraid had to disappear and does apologise for not being able to be here throughout your judgment.

139. MR JUSTICE SULLIVAN: Yes, Miss Colquhoun.

140. MISS COLQUHOUN: He would also like me to thank you for giving this judgment before the end of term. He is extremely grateful for that.

141. MR JUSTICE SULLIVAN: That is very kind of him.

142. MISS COLQUHOUN: My Lord, of course we would like to apply for costs in this matter, but I understand that the Applicant is legally aided.

143. MR JUSTICE SULLIVAN: Yes.

144. MISS COLQUHOUN: And therefore would ask that the costs be awarded on the appropriate basis. I understand there is certain wording that the associate would have. Forgive me for not knowing it, my Lord.

145. MR JUSTICE SULLIVAN: I do not know it either.

146. MISS COLQUHOUN: I am very grateful.

147. MR JUSTICE SULLIVAN: You are asking for the appropriate order I think?

148. MISS COLQUHOUN: Yes, I am my Lord.

149. MR JUSTICE SULLIVAN: I will not ask you what that is, do not worry. What do you want to say about that for starters, Miss Markus?

150. MISS MARKUS: I cannot resist the general thrust of that application. I think it might be helpful to say the wording is something like the Applicant pays the costs of the respondent but it is postponed until an application is made, or something along those lines.

151. MR JUSTICE SULLIVAN: We will possibly leave it to the Associate, who will in due course make the appropriate legal aid order, so the Applicant is to pay the first respondents costs, subject to the usual legal aid order, yes.

152. MR JUSTICE SULLIVAN: Second respondents, are you making a pitch?

153. MR GREATOREX: Yes, my Lord, I am, to ask for costs in this case. I make the submission on the ground it is an appropriate case for the exercise of your discretion. In my submission, all three of the criteria set down by the House of Lords in the **Bolton** case are met here in that there was a difficult question of principle. Secondly -- and this is perhaps the most obvious of the three points -- the scale of the development and the importance of the

outcome is exceptional in this case. Your Lordship is well aware of the size of the matter and the approach to development.

154. The third point follows on from that in that it is an unusual case again, for the reasons that I have just mentioned: the size of the project and the fact that urban developers are obviously a private public the NWDA is a public body in discharging its public duties in this case.

155. MR JUSTICE SULLIVAN: I think those would be absolutely marvellous arguments if the Applicant was not on legal aid, but since the Applicant is on legal aid effectively it is pretty much an empty gesture, is it not? that is the problem I think.

156. MR GREATOREX: If you think it is an appropriate case to exercise your discretion and award costs then it would be the same order as you have just suggested: the first respondent's legal aid costs and it goes to that.

157. MR JUSTICE SULLIVAN: Thank you very much. I have to say were this not a legal aid case then the second respondent may well have quite a good case for asking for costs in the unusual circumstances, but since it is they do not -- no disrespect to the able submissions put forward.

158. Any more for any more?

159. MISS MARKUS: My Lord, I wish to make an application for permission to appeal.

160. MR JUSTICE SULLIVAN: Yes.

161. MISS MARKUS: My Lord, obviously I do not want to rehearse the arguments that were so ably put by Mr Howell last week and summarised in detail by your Lordship today, but just to summarise the main points of appeal which, in my submission, are points of general importance, your Lordship will be aware, and I do not have new order 52 in front of me, but the grounds for grant of permission are these: that the court considers that the grounds have

a likely prospect of success, or effectively they are very general points of importance.

162. MR JUSTICE SULLIVAN: Are the words “a reasonable possible prospect of success”.

163. MR GREATOREX: A real prospect.

164. MR JUSTICE SULLIVAN: Real prospect or other compelling reasons.

165. MISS MARKUS: Other compelling reason. My Lord, I would submit other compelling reason includes cases which raise grounds of appeal which raise points of general importance.

166. MR JUSTICE SULLIVAN: Yes.

167. MISS MARKUS: My Lord, there are essentially I think five, possibly six points -- I will recount them when I get to the end of my submission -- that raise points of general importance as a result of which there is a compelling reason to grant permission to appeal. The first point is in relation to ground 1 of the application. The question of whether it is possible to grant outline planning permission to a project to which the environmental impact assessment regulations apply.

168. My Lord, I do not want to rehearse the arguments in support of that, but your Lordship has been through the main issues, but could I just outline two particular features of this, of this ground: first of all, an outline planning permission application, and permission itself clearly does not describe any or all of siting, design, external appearance, means of access or landscaping, and the submission is basically that failing to describe any of those matters would breach the requirements of the regulations --

169. MR JUSTICE SULLIVAN: Yes, I have those.

170. MISS MARKUS: You have that point?

171. MR JUSTICE SULLIVAN: Yes.

172. MISS MARKUS: And secondly, that any reserved matters are matters that could have a significant effect on the environment, and there is a real question here as to how one interprets the word “significant” effect on the environment, and that was a point that was raised by your Lordship in your own judgment. At one point, for instance, your Lordship talks about the fact that what is significant in respect of a neighbour, who is concerned about the effects of landscaping, may not be significant in the context of the regulations of the whole of the development, and my Lord there is a point of importance, significant point of importance there.

173. That really links to the second ground of appeal that I would propose in this case, which is the proper test to be applied as to what can be left undefined in an outline application consistently with the Directive and in the 1998 or 1999 regulations.

174. My Lord, Mr Howell, paraphrasing what he said -- of course I was not here -- I think what he was saying is that you cannot leave out anything which might be capable of having a significant effect on the environment, and that is a test that is consistent with your Lordship’s judgment in **Tew**, the first case.

175. My Lord, my submission is that that raises a point of general importance, the proper test to be applied.

176. The third question is who is to judge whether a future development is likely to have a significant effect on the environment. As your Lordship found, there is the authority proposed submitted on behalf of the Applicant that it was for the court. Again, that is a point of general importance.

177. The fourth set of grounds relate to what was I think described certainly in the skeleton argument on behalf of the NWDA as coming under the grounds of Wednesbury unreasonableness but raises significant points in that context. The question is whether the conclusion of the authorities that the

design of the buildings will not have a significant effect on the environment, or could not have a significant effect on the environment, is a reasonable one, and that raises points of principle, general points, because the Applicant says that where you have a development of this scale it will always be necessary to know about the design and the visual appearance.

178. My Lord, this question also raises another point of principle which is really what does design mean in the context of the environmental assessment regulations? What does it cover about which information needs to be provided? Plot T that your Lordship referred to is a good example, and the Applicant's submission on this was that it cannot reasonably be said that a building of this size could not have a significant effect upon the environment, and that the design is not a critical consideration in that respect.

179. My Lord, design is included in the environmental assessment regulations because it is clearly capable of having a significant effect on the environment. In addition, under this ground it is raised the question whether adopting the worst case scenario in respect of any of these matters constitutes a proper approach, and your Lordship has obviously referred to the submissions that were put by Mr Howell in that respect.

180. My Lord, again, in all of these submissions, is the question of what is the implicit judgment; what is the judgment as to what counts as significant? That is a point of importance as to effectively the threshold at which the regulations bite.

181. My Lord, the fifth and penultimate ground of appeal that I request permission in respect of relates to the question of mitigation measures, and the point in this is what constitutes a description for the purpose of the regulations of mitigation measures, and Mr Howell said last week that the proposed mitigation measures really were questions of aspiration rather than actual measures. The Applicant's position is really that the bottom line is that the authority must know that the aspirations and objectives are achievable,

and while that does not mean that every tiny detail, no matter how important, has to be dealt with, sufficient has to be provided to know that.

182. The final point relates to ground 2, which your Lordship dealt with first. The point in this, again, without rehearsing the submissions of the Applicant, is whether it is possible for an authority to consent to a project that does not comply with any of the UDP criteria, or at least noting what your Lordship said about the number of UDP criteria and number of conflicting interests that are involved in considering any matters such as this. At least, is it possible lawfully to consent to a project which does not comply with a criterion or criteria which are so critical within the plan, treated critically by the inspector and said in the plan to be strictly applied?

183. My Lord, those are the six points on which my submission lies.

184. MR JUSTICE SULLIVAN: There are six. I do not need to trouble you, thank you very much.

185. Acknowledging, as I do, the possibility of error, I think that since this is the second time that I have had an opportunity to look at this matter and I have had the opportunity to prepare a reasonably comprehensive judgment, I do not think that there is a real prospect of success for an appeal, even though I accept the case does give rise to a number of interesting questions of principle. So on that basis I refuse permission to appeal.