*517 R. (on the application of Roskilly) v Cornwall Council

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
18 December 2015

Report Citation
[2015] EWHC 3711 (Admin)
[2016] Env. L.R. 21

Queen's Bench Division

Dove J

18 December 2015

Environmental impact assessments; Planning permission; Quarries; Screening directions;

H1 *Town and Country Planning—environmental assessment—Town and Country Planning (Environmental Impact Assessment) Regulations 2011—planning authority adopting "negative" screening opinion and granting permission for development—Secretary of State subsequently issuing screening direction that proposals constituting "environmental impact assessment development"—whether screening direction binding and determinative—whether permission accordingly in breach of Regulations—whether appropriate to extend time limit for bringing claim*

H2. The claimant (R) was a resident and owner of an organic farm and business operating near to a site of proposed development connected with a quarry operation. A successful application had been made for review of the planning conditions attached to the quarry pursuant to s.94 and Sch.14 of the Environment Act 1995 . The application for further development to facilitate the revival of operations was then made, and objected to by R. The defendant (C) adopted a "negative" screening opinion under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 , stating that there were not likely to be significant environmental effects such as to warrant the preparation of an environmental impact assessment. R then sought a screening direction from the Secretary of State (S). C resolved to grant planning permission and, two months later, S then published a screening direction stating that the proposed development was "environmental impact assessment development" within the meaning of the 2011 Regulations . R then sought judicial review on two grounds, the first being that the planning permission had been unlawful as a result of reg.3(4) because the screening direction was, by virtue of the Regulations, binding and determinative and so a planning permission had been granted for environmental impact development which had not been accompanied by an environmental impact assessment as required by the 2011 Regulations . As well as contesting the substantive grounds, C argued that the claim had been brought 11 weeks after the grant of permission and so five weeks out of time.

H3. **Held** , in allowing the claim:

H4. (1) The prohibition contained in reg.3(4) was a matter for determination by the court on the basis of the material available at the time when the court came to *518 consider that question. In the present case that material included an unchallenged decision by S to issue a direction that the development was "environmental impact assessment development", which was conclusive under the 2011 Regulations . The Regulations did not suggest that the issue, and S's jurisdiction

under reg.4(3) to direct that the development was environmental impact assessment development, came to an end on the grant of planning permission. Although there was no requirement in the Regulations that a local authority had to wait to determine the application until S had concluded considering an application for a screening direction, in granting a permission local authorities had to take the risk that S would subsequently determine that the development was environmental impact assessment development, thereby imperilling their decision by contamination with illegality. There was no warrant for the inclusion of such a deprivation S's jurisdiction when the clear requirements of the Directive contained in art.2(1) were considered. Such an interpretation would preclude the opportunity for the full consideration of the process set out in both the Directive and the 2011 Regulations whereby a determination was to be definitively reached by an application to S as to whether or not a project was in truth environmental impact assessment development.

H5. (2) Although a period of five-weeks delay was superficially of some significance, it had been a vital ingredient of that challenge to know the outcome of S' decision on the screening direction. Whilst it might be said that proceedings could have been issued earlier without knowledge of S' decision these would have been speculative proceedings incurring costs on all sides in respect of an inchoate legal argument. Accordingly, it was appropriate to extend time as there were clear and sensible reasons for the delay in waiting for the decision and awaiting that had not been undue.

H6. (3) In those circumstances the decision would have to be remade and there was no necessity to consider the other ground.

H7 Cases referred to:

R. (on the application of Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 114

H8 Legislation referred to:

Environment Act 1995 s.94 and Sch.14
Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184)
The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI. 2011/1824) regs 2 – 7 , and Schs 1 – 3
Directive 2011/92 on the effects of public and private projects on the environment arts 2 & 4 – 10 (Codified EIA)
Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595)

H9 Representation

Mr J. Pugh-Smith , instructed by Stephens Scown LLP, appeared on behalf of the claimant.
Mr P. Shaderavian and Mr J. Parker , instructed by the solicitor to Cornwall Council, appeared on behalf of the defendant.
Mr M. Fry , instructed by DLA Piper UK LLP, appeared on behalf of the first interested party. ***519***

Approved Judgment

Dove J:

Introduction

1. Dean Quarry covers an area of approximately 44ha on the coast of The Lizard peninsular in Cornwall. Whilst at present it is dormant it has for over 100 years been a source of the mineral gabbro which is an exceedingly hard igneous rock used for a variety of purposes. The interested party are the owners of Dean Quarry and the defendant is the mineral planning

authority for the area within which it lies. The claimant is both a nearby resident and also the proprietor of an organic farm and business which operates nearby.

The facts

2. On 11 December 2009 Cemex UK Materials Ltd made an application for the review of the planning conditions attaching to Dean's Quarry pursuant to s.94 and sch.14 of the Environment Act 1995 . The process which the 1995 Act authorised was the review of old mineral planning consents so as to make them subject to modern conditions and thereby properly controlled. These permissions are commonly referred to as a "ROMP". The ROMP in respect of Dean's Quarry was supported by an environmental statement examining the various environmental implications arising from the working of the site to win gabbro. Following consideration by the defendant a ROMP permission was granted by the defendant on 13 January 2012.

3. On 1 December 2014 the defendant received a planning application from the interested party for development at Dean's Quarry which was described as follows:

> "Erection of a reception building, fuel storage area, fencing, office and amenity area, processing plant, explosives store and vehicle parking area to support the reopening of Dean Quarry."

4. What was comprised in the application, as will be evident from the description of development, was a number of individual buildings and facilities all to provide infrastructure for the operation of the quarry and assist in meeting regulatory requirements. Whilst it was submitted orally at the hearing by Mr Fry who appeared on behalf of the interested party, on instructions, that the quarry could operate without the need for any of the facilities which were comprised in the application it is inescapable that there was a clear functional link between this application and the revival of the quarry operation and that the proposal to reopen the quarry under the control and regulation of the new conditions imposed in the ROMP permission were interconnected. That conclusion can be derived not simply from the description of the development itself but also from the committee report which was ultimately prepared on the application which, as part of the officer's analysis, described the development as being "to support the reopening of Dean Quarry" adopting the language of the description of the development itself. Moreover, in a letter dated 12 February 2015 the environmental consultants acting for the interested party, following a meeting with the Council, agreed to an extension of time for the determination of the application and advised the Council in the following terms: ***520**

> "Dean Quarry will shortly be re-opening and the development proposed within the current application is considered essential in order to allow such operations to be undertaken in a safe and diligent manner."

5. On 17 July 2014 Tidal Lagoon Swansea Bay PLC applied to the Marine Management Organisation for a screening and scoping opinion in relation to a proposal to construct a loading area and breakwater on the coast adjacent to Dean Quarry. The purpose of this facility was to enable the loading of mineral won from the quarry onto vessels so as to be transported to South Wales in order to construct seawalls for a tidal energy generating project. It had been agreed that the Marine Management Organisation would be the lead authority and regulator in respect of this proposed development, albeit that the proposal

would give rise to a shared regulatory responsibility between the defendant and the Marine Management Organisation. On 13 October 2014 the Marine Management Organisation concluded that an environmental impact assessment was required in relation to the proposal and endorsed the scoping of the environmental impact assessment which had been set out in the application.

6. On 26 March 2015 the claimant acting through her solicitors registered objections to the interested party's planning application with the defendant. For the purposes of these proceedings two elements of those objections are of particular moment. Firstly the objections drew attention to the fact that the development proposed was within the Area of Outstanding Natural Beauty ("AONB") and that as a result it was proposed in a sensitive area for the purposes of the Town and Country Planning (Environmental impact assessment) Regulations 2011 . As a consequence it amounted to a Sch.2 development for the purposes of those regulations and therefore had to be screened in order to see whether or not it required an environmental impact assessment. The approach to how the screening exercise should be undertaken was underpinned by the following observation on behalf of the claimant:

> "Without this application there would be 'no serviceable buildings' and no infrastructure or facilities 'required' for winning and working and HSE legislation. The application is effectively a brand new permission for a new quarry being **major development** in an Area of Outstanding Natural Beauty (AONB)."

7. Against this background the objections drew attention to a significant number of environmental concerns derived from the operation of the quarry which, it was contended, would be caused by the development under consideration. The objections also drew attention to the fact that the development was, as set out above, "major development" for the purposes of para.116 of the National Planning Policy Framework ("the Framework") and in accordance with that policy would require exceptional circumstances in order to justify it. The objection contended that there were no exceptional circumstances justifying the project taken as a whole.

8. On 27 March 2015 the defendant adopted a screening opinion in relation to the development. The screening opinion concluded that as the development was in a sensitive area it was Sch.2 development. The screening opinion then scrutinised the question as to whether or not it might have significant environmental effects by examining the effect on the environment of the various elements that were proposed in the form of the reception building, fuel store, explosive store and vehicle parking area. The screening opinion considered the question of cumulation ***521** with other development and noted "the development would be wholly within the boundary of the existing quarry which is surrounded on three sides by agricultural land and to the south east by the sea". Having looked at the various types of impact that the four elements of the development might give rise to the screening opinion concluded that there were not likely to be significant environmental effects such as to warrant the preparation of an environmental impact assessment.

9. Very shortly after the objections were lodged and the screening opinion adopted, on 7 April 2015 the application was placed before the defendant's West Sub Area Planning Committee ("the committee") for determination. Officers had prepared a report advising on the application and recommending that it should be approved. Within the committee report a number of consultations were reported including that of Natural England. Amongst the matters upon which Natural England provided views included the question of the impact on the AONB. From the information available to them they were unable to advise on the potential significance of those impacts but advised the Council to seek the advice of the Cornwall AONB partnership. The defendant did this and the advice of the Cornwall AONB unit was included in the committee report as follows:

> "The Cornwall AONB Partnership would like to take this opportunity to express its disappointment on not being consulted by Cornwall Council on the screening opinion and not being invited by the Council to provide advice at pre-application discussion stage, since clearly the proposal for the jetty and break water will be a major application within the AONB. The Cornwall AONB Partnership reserve judgment on the jetty proposals until we are receipt of a full application and supporting information but based on the information we have seen within the screening opinion for the jetty, we have deep concerns with regards to the size and scale of this proposal within the protected landscape. Obviously the buildings are required for the reworking of the quarry under the current permission. However, whilst the Partnership appreciates that the jetty and breakwater do not form part of this current application, it would also seem likely that the major development of the jetty and breakwater are also required in order to make the reworking viable. We would request that Cornwall Council seeks clarity and evidence from the applicant on the viability of the reworking on the quarry if the jetty and breakwater do not come forward. We feel that given the size and scale of the overall development within probably one of the most sensitive and protected areas in the country, requiring this information would not be unreasonable. This viability clearly has a bearing on the need for the plant and ancillary buildings which form part of the application currently in front of the Council. Our concern is, that if the jetty and breakwater are not successful, therefore making the whole scheme unviable, then the buildings would become redundant, which would be in direct conflict with the direction of the Act to conserve and enhance the AONB and in conflict with the policy outlined in Appendix 1. We would therefore advise Cornwall Council to effectively attach robust conditions which tie the ancillary buildings and plant to the planning conditions associated with [the ROMP permission] and to seek information from the applicant on the breakwater and jetty. Ideally we would like to see Cornwall Council defer a decision on this application until the associated major application has been determined in line with 191 of the NPPF." ***522**

10. The officer's analysis in terms of the principle of development included the following observation:

> "54. Concerns have been raised in the representations received that this planning application is related to or a precursor for a larger scale proposal at the quarry which involves the removal of stone via sea barge potentially to other project(s) in the UK. While a proposal for that type of development has been announced by the quarry Company, and discussions and presentations given to officers of the Council as well as the local Councils and surrounding communities, such a scheme is not included in this planning application. Were such a proposal to be submitted it would require a full and separate consideration and determination. The proposed development detailed in this report relates to ancillary developments mainly to replace dilapidated infrastructure in the quarry in connection with re opening of mining operations to which historical mineral planning permission already exists."

11. The report turned firstly to the question of the landscape and visual impact upon the AONB. The discussion commenced by noting that the AONB Management Plan acknowledged that active quarrying operations existed within the AONB controlled by updated planning conditions as a consequence of obtaining ROMP permissions. The parameters for discussion in relation to landscape and visual impact were set as follows:

> "58. The quarry is a recognised part of the AONB and there is an existing planning permission for quarrying operations at Dean. The issue to be addressed here is whether the buildings and structures proposed can be provided without having an unacceptable impact on the AONB."

12. The report went on to consider each of the elements of the application and its impact upon landscape and visual amenity. In the report the officers gave consideration to the observations of the AONB Management Team and reached conclusions in the following terms:

> "66. The AONB Management Team have objected to this application however, their comments predominately relate to the proposal for a jetty and breakwater at the site which although there have been discussions between the LPA and the applicant, no formal planning application has been submitted. Furthermore, contrary to the AONB team comments, the AONB team were fully involved with the screening opinion for the jetty and breakwater and pre-application discussions. Although their comments have been taken into account for this application, this is only with reference to the specifics of the current proposal.
>
> 67. Overall, it is considered that some of the proposed developments would not be visible to anyone outside of the quarry boundary and some would benefit from an appropriate colour scheme. The fence has been reduced to what is considered to be absolutely necessary so that the landscape and visual impact is limited to those areas where the safety of the public is paramount. It is therefore considered that the proposed development is acceptable in respect of landscape and visual impact and the potential impact on the AONB subject to appropriate conditions."

13. Shortly after the publication of the officer's report, and prior to the committee meeting, on 7 April 2015 the claimant's solicitors wrote to the National Planning ***523*** Casework Unit in the light of the screening opinion which had been adopted on 28th March urgently requesting a screening direction from the Secretary of State in relation to the proposed development. The basis for this application was described in the correspondence as follows:

> "In brief, this application is intertwined with Schedule 1 development (quarrying permission) and is **required** for the quarry to re-open and commence new operations. The Applicant is intending to submit future applications for a breakwater and new loading bay facilities (full details are contained in appendix 2). The development cannot be salami sliced and must be considered holistically.
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> Our client seeks and determinative screening direction for the following reasons:—
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> i) We do not believe the Council have considered the application carefully or properly given the short timescale in which the screening opinion was produced; within one day of our request dated 28th March 2015. It was clearly undertaken in response to our request and made in haste.

> ii) We are concerned that the reasoning for determination by the Council is not sound (see below). The relevant tests have not been correctly applied. The Council have not considered the effect of the proposed development in the context of the existing permissions, contrary to the ENVIRONMENTAL IMPACT ASSESSMENT regs and Directive. An application cannot be considered in isolation if it is an integral part of a more substantial development. The application is not a standalone application and should not be looked at in isolation. But for this application the quarry cannot operate or comply with the HSE ACOP / Quarry Regulations.
>
> iii) Cumulative effect with ROMP."

14. The letter went on to criticise the fact that the screening opinion had focused upon the four elements of the development proposed in isolation and had not looked at all at the environmental implications of the reopening of the quarry.

15. On 7 April 2015, as set out above, the planning committee met to consider the application. The minutes of the planning committee recording the manner in which the item was introduced to the committee observed as follows:

> "It was further noted that the objector's solicitor had submitted an environmental impact assessment request to the Secretary of State."

16. Following a discussion of the merits of the application it was resolved to approve the development. Planning permission was then issued on 8 April 2015.

17. On 7 April 2015 an officer of the Secretary of State acknowledged receipt of the request for a screening direction. On 29 April 2015 the officer wrote again indicating that responses were still awaited from statutory parties before the screening direction could be issued. The claimant's solicitors chased the matter on 11 May 2015 and it was confirmed that the responses from the statutory agencies had arrived and active consideration was being given to the decision. The officer again wrote to the claimant's solicitors on 2 June 2015 indicating that the issuing of the screening direction had been delayed by the need to obtain legal advice. On 9 June 2015 the Secretary of State published his screening direction and it was in the following terms: ***524**

> "In the opinion of the Secretary of State and having taken into account the selection criteria in Schedule 3 of the 2011 Regulations , the proposal would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.
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> In reaching this decision, the Secretary of State has considered carefully the issues raised including the potential impact of the proposal on the Cornwall AONB and the likelihood of impacts on the Coverack to Porthoustock SSSI, the nearby Lizard Special Area of Conservation and the Manacles Marine Conservation Zone. In view of the location of the site and the potential for impacts on the SSSI, and the nature of the proposals which include a 179,000 litre fuel store and an explosives store, albeit on the eastern boundary of the east quarry, the Secretary of State

has had regard to the views of Natural England. They conclude that the proposed development could have significant impacts on the designated sites referred to above. The Secretary of State has no reason to disagree with this assessment and considers that the risk of significant harm is such as to justify ENVIRONMENTAL IMPACT ASSESSMENT.

With regard to potential impacts on nearby heritage assets, notably the Trebarveth Settlements Sites Scheduled Monument, the Secretary of State has also had regard to the views of Historic England. They consider that the proposed development is close to the eastern edge of the extensive settlement and field systems remains of the Trebarveth Scheduled Monument. As such, they conclude that there is the potential for harm through the setting and other associated uses such as dust and vibration, particularly through increased transport usage. The Secretary agrees with this conclusion and considers that there is the potential for the harm to be significant.

The Secretary of State has given consideration to the view that has been expressed that the applicant is intending to submit further applications for the quarry to re-open and commence operations. He has had further regard to the suggestion that the related elements of the overall development, namely the breakwater and jetties, have already been deemed ENVIRONMENTAL IMPACT ASSESSMENT development. However, in his view, the Secretary of State has to assess the potential for significant impacts on the proposals before him and there is no certainty that an environmental statement submitted with any future planning application will contain the up to date information to cover the concerns expressed above. Having had due regard to the evidence and the views of the statutory and other parties on these issues and the acceptance that the proposal site is within a sensitive area, the Secretary of State concludes that, on balance, the proposal before him is likely to have significant effects of the environment. Accordingly, in exercise of the powers conferred on him by regulation 4(3) of the 2011 Regulations the Secretary of State hereby directs that the proposed development is ' **ENVIRONMENTAL IMPACT ASSESSMENT development'** within the meaning of the 2011 Regulations . This letter constitutes the statement required by regulation 4(7) ."

18. Following the receipt of the screening direction the claimant's solicitors wrote a Pre-Action Protocol letter on 12 June 2015. This letter was met with a request for an extension of time from the defendant dated 17 June 2015 and then a further request on 19 June 2015 to delay their response until 23 June 2015. Ultimately this ***525*** claim for Judicial Review was lodged on 1 July 2015 after it became clear that the defendant did not accept the contentions made in the Pre-Action Protocol letter.

Grounds

19. Against this factual background Mr Pugh-Smith on behalf of the claimant advances two grounds of challenge which are in brief as follows. By Ground 1 he submits that the planning permission which has been issued is unlawful as a result of reg.3(4) of the Town and Country Planning (Environmental impact assessment) Regulations 2011 ("The 2011 Regulations"). This is on the basis that the Secretary of State's screening direction is, by virtue of the Regulations, binding and determinative and leads to the conclusion that a planning permission has been granted by the defendant for environmental impact development which has not been accompanied by environmental information in the form of an environmental impact assessment which is required by the 2011 Regulations . Alternatively he submits that the defendant acted unreasonably in the *Wednesbury* sense by proceeding to grant permission without waiting to see whether or not the Secretary of State was going to positively screen the proposed development.

20. Ground 2 is the contention that by virtue of para.116 of the National Planning Policy Framework the development which was proposed was "major" development in the AONB and therefore subject to a strict policy which required the

demonstration of exceptional circumstances before it could be permitted. He contended that within the committee report the defendant's officers had simply failed to ever examine whether or not the development was major development and therefore this amounted to a misdirection of the members, a misinterpretation of the policy in the National Planning Policy Framework and thus an error of law.

21. Since for the reasons which I shall set out below I am satisfied that the decision to grant planning permission should be quashed on the basis of Ground 1, I have concluded that there is no necessity for me to deal with the arguments in relation to Ground 2.

The Law

22. The domestic law in relation to the requirements for certain developments to be accompanied by environmental impact assessments is derived from Directive 2011/92/EU as amended by Directive 2014/52/EU . The recitals to the Directive provide in particular as follows:

> "(7) Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

23. This objective is covered by in particular art.(1) as follows:

> "2
>
> (1) Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are ***526** made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4 ."

24. art.4 provides as follows:

> "4

> (2) Subject to Article 2(4) , for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10 . Member States shall make that determination though:
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> (a) a case-by-case examination;
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> or
>
> (b) thresholds or criteria set by the Member State.
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> Member States may decide to apply both procedures referred to in points (a) and (b).”

25. The assessment in accordance with art.5 to art.10 is an environmental impact assessment incorporating the provision of environmental information so as to provide publicly an appropriate level of environmental evidence and assessment of the effects which the project may have.

26. As set out above the expression of the Directive in domestic law is contained within the 2011 Regulations . A distinction is drawn within the 2011 Regulations , mirroring the Directive, between development within Sch.1 (when an Environmental impact assessment is mandatory), and development within Sch.2 for which a screening decision is required to determine whether the development is environmental impact assessment. The pertinent parts of reg.2 which deal with these issues in terms of the definitions provide as follows:

> “2
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> (1) In these Regulations — …
>
> > ‘“ENVIRONMENTAL IMPACT ASSESSMENT development” means development which is either –
> >
> > (a) Schedule 1 development;
> >
> > or
> >
> > (b) Schedule 2 development likely to have significant effects on the environment by virtue or factors such as its nature, size or location…
> >
> > “ Schedule 2 development” means development, other than exempt development, of a description mentioned in column 1 of the table in Schedule 2 where –
> >
> > (a) any part of that development is to be carried out in a sensitive area;
> >
> > or

> (b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development;…
>
> "Sensitive area" means any of the following — …
>
> (f) an area of outstanding natural beauty designated as such by an order made by Natural England under section 82(1) (areas of outstanding natural beauty) of the Rights and Way Act 2000 .'" ***527**

27. The prohibition on granting planning permission for development which is environmental impact assessment development without consideration of environmental information is contained within reg.3(4) as follows:

> "3
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> (4) the relevant planning authority or the Secretary of State or an Inspector shall not grant planning permission or subsequent consent pursuant to an application to which this Regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."

28. Provisions in relation to the screening of development to see whether or not it is environmental impact development are contained within reg.4 . Regulation 4 also governs provision by the Secretary of State of a screening direction and the circumstances when the Secretary of State's jurisdiction arises. It provides as follows so far as relevant:

> "4
>
> (1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is ENVIRONMENTAL IMPACT ASSESSMENT development.
>
> (1) The events referred to in paragraph (1) are –
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> (a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or
>
> (b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is ENVIRONMENTAL IMPACT ASSESSMENT development.

> A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not ENVIRONMENTAL IMPACT ASSESSMENT development…
>
> (8) The Secretary of State may make a screening direction either –
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> (a) Of the Secretary of State's own volition; or
>
> (b) If requested to do so in writing by any person."

29. Regulation 5 enables a person minded to carry out development to request that the relevant planning authority adopt a screening opinion in respect of a proposed development. If the authority fails to adopt a screening opinion within the three week period prescribed by reg.5(5) , or makes a positive screening opinion requiring an Environmental impact assessment, then reg.5(7) provides the person with the opportunity to request a screening direction from the Secretary of State. Screening directions pursuant to reg.5(7) are governed by reg.6 . The Secretary of State's screening direction is conclusive as provided for by reg.4(3) above. reg.7 covers the situation where a planning authority has received an application which falls within Sch.1 or Sch.2 and for which a screening opinion or direction has not been adopted, nor has the application been accompanied by an environmental impact assessment: in those circumstances the local planning authority is required to treat the application as in effect a request for a screening opinion which must be adopted within the three week timescale contemplated by reg.5(5) .

30. It is now well established on the authorities that once a screening opinion has been adopted, it can only be challenged in the courts on the various well known ***528** public law strands of the *Wednesbury* test: see *Evans v Secretary of State for Communities and Local Government [2013] EWCA Civ 114* .

Conclusions

31. The essential elements of the claimant's case have been set out above. The competing submissions were as follows. As identified above on behalf of the claimant Mr Pugh-Smith submits that in the light of the Secretary of State's conclusive determination pursuant to reg.4(3) of the 2011 Regulations that the development for which the defendants have granted planning permission is Environmental impact assessment development the grant of consent must be unlawful pursuant to reg.3(4) because it was not accompanied by environmental information. Furthermore he submits that it was irrational for the defendant to proceed to grant planning permission without awaiting the outcome of the Secretary of State's screening direction process before crystallising the resolution which had been reached in the discussion before members and granting planning permission the day after the committee proceedings.

32. In response Mr Shadaravian, who appears on behalf of the defendant, and Mr Fry who appears for the interested party, contend that the grant of permission was, at the time when it was made, lawful. They submit that at the time of granting permission the development was the subject of a lawful and unchallenged screening opinion produced by the defendant concluding that the development was not ENVIRONMENTAL IMPACT ASSESSMENT development and therefore the provisions of reg.3(4) cannot bite on the consent. They submitted in particular that the language of reg.4(1) and 4(2) made clear that in terms of timing the adoption of a screening opinion in relation to a proposed development was the event determining whether or not it was Environmental impact assessment development, and thus at the point in time when the application was granted there was a screening opinion which had not been challenged and which did not require the provision of environmental information. Mr Shadaravian submitted that to adopt the claimant's approach would be in effect to read into the 2011 Regulations a requirement which was not present, preventing the planning authority from determining an application before a request for a screening direction from the Secretary of State had been resolved.

33. Two further submissions were made on behalf of the defendant and the interested party in relation to the context of this case. Firstly, it was noted that accompanying the request to the Secretary of State for a screening direction was a request by the claimant that the Secretary of State direct, pursuant to art.25 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (which was the law operative at the time when permission was granted albeit that it has now been replaced, with effect from 15 April 2015, by art.31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015), requiring the local planning authority to not determine the interested party's planning application for such period as the Secretary of State might specify. The defendant draws attention to the fact that the Secretary of State did not make an art.25 direction, and therefore did not provide any embargo on them proceeding to determine the application before a screening direction had been concluded. It was submitted that the provisions of the 2011 Regulations should be read in the context of this power under the 2010 Regulations such that, in the absence of the ***529** Secretary of State exercising his discretion to make such a direction, the 2011 Regulations should not be read so as to preclude a lawful grant of consent.

34. The second point raised by the defendant and the interested party is the question of delay. They both draw attention to the fact that this claim was brought 11 weeks after the grant of planning permission and therefore five weeks out of time. It is submitted that there was no basis upon which it could be said that the application had been made promptly and time should not be extended to enable the application to be made. On behalf of the claimant it is contended that it was not until the positive screening direction was received from the Secretary of State that the claimant had all of the necessary ammunition in order to bring her claim. It was not therefore inappropriate to wait the outcome of that process before commencing proceedings, and as soon as the positive screening direction was received the claimant had acted with all due expedition to ensure the claim was issued.

35. The starting point for considering these two competing submissions must be the elements of the factual matrix which are not subject to legal challenge. Firstly, it is beyond argument that the ROMP permission is the subject of a legally valid permission which followed the consideration of appropriate environmental information in the form of an environmental impact assessment which supported the ROMP application. Whilst that demonstrates that there is already in the public domain (albeit quite properly not before the court) a wealth of environmental information about the potential operation of Dean Quarry that does not, nor could it properly be contended that it provides, an answer to the need to screen the development which was proposed in the application under challenge. That is because, by virtue of the definition of Sch.2 development which has been set out above, since the application was within a sensitive area, a screening decision was required by the 2011 Regulations .

36. Secondly, although the defendant and the interested party were critical of the decision which the Secretary of State made in making the screening direction, neither of them have taken any steps to challenge the lawfulness of that decision. There is no application before the court for judicial review of that decision and it follows that its merits are not before me. It remains a legally valid decision and a key part of the factual circumstances pertaining to the issues which I have to resolve. Whilst it was mooted at the hearing that the Secretary of State might be asked whether he wished to make submissions to the court, I have concluded that such is unnecessary in circumstances where, as I have indicated, there is no challenge raised to the legality of the Secretary of State's decision.

37. The question which therefore arises is whether the prohibition of grant of permission for environmental impact assessment development contained within reg.3(4) applies in circumstances where a development has been negatively screened by a planning authority, but is the subject of a screening direction by the Secretary of State at a time when planning permission is granted. Is it rendered unlawful by the issuing of that positive screening direction after the consent has been issued? I am satisfied that it is rendered unlawful by the subsequent issuing of the Secretary of State's positive screening direction.

38. My reasons for reaching this conclusion are as follows. Firstly, the prohibition contained in reg.3(4) is a matter for determination by the court on the basis of the material available at the time when the court comes to consider that question. In this case the material before the court includes an unchallenged decision of the Secretary of State to issue a direction that the development is environmental impact *530 assessment development which is pursuant to the 2011 Regulations conclusive. Secondly, and allied to this, the 2011 Regulations do not suggest that the question of consideration of whether or not a development is environmental impact assessment development by the Secretary of State, and the Secretary of State's jurisdiction under reg.4(3) to direct that the development is environmental impact assessment development, comes to an end on the grant of planning permission. This in my view is a clear answer to Mr Shadaravian's point as to interpolating into the Regulations a requirement that the local authority must wait to determine the application until the Secretary of State has concluded considering an application for a screening direction. He is right to observe that there is no such stipulation in the Regulations. However, whilst the local authority are not precluded from granting permission, what they do in granting permission is take the risk that the Secretary of State will subsequently determine in the light of the application for a screening direction before him that the development is environmental impact assessment development thereby imperilling their decision by contamination with illegality. Thirdly, there is no warrant for the inclusion of such a deprivation of the Secretary of State's jurisdiction upon the grant of planning permission when the clear requirements of the Directive contained in art.2(1) is considered. The terms of art.2(1) set out above are a further important reason why the approach to the Regulations does not permit of an interpretation which in effect deprives the Secretary of State of jurisdiction to make a screening direction by the granting of planning permission for environmental impact assessment development. Such an interpretation would preclude the opportunity for the full consideration of the process set out in both the Directive and the 2011 Regulations whereby a determination is to be definitively reached by an application to the Secretary of State as to whether or not a project is in truth environmental impact assessment development.

39. The effect of the claimant's submissions is in my judgment clearly consistent with the requirements of the Directive and the overall structure of the decision making process set out in the 2011 Regulations . Either as a result of the receipt of a Sch.2 application, or in response to a request for a screening opinion from a person minded to carry out Sch.2 development, the relevant planning authority will adopt a screening opinion. If that opinion is negative then it is open to any person pursuant to reg.4(8)(b) to seek the Secretary of State's screening direction. The decision of the Secretary of State is conclusive as to whether or not the development is environmental impact assessment development. If the Secretary of State concludes in considering an application for a screening direction that the development is environmental impact assessment development then that is a conclusive determination that environmental impact assessment is required, and pursuant to reg.3(4) permission cannot be granted until the environmental information contained in an Environmental impact assessment has been taken into account by the planning authority. If the planning authority chooses to grant consent and prior to the resolution of a direction requested of the Secretary of State then they run the risk that if that direction is positive they will have granted a planning consent which is infected with illegality. It follows from this analysis that, were it necessary to do so, I would also have been minded to conclude that no reasonable planning authority, knowing at the time when they formed a resolution to grant planning permission that there was an outstanding request of the Secretary of State *531 to make a determination on a screening direction, would proceed to grant planning permission without knowing the outcome of that screening direction process.

40. This point in my view effectively also deals with the submissions raised by the defendant and the interested party in relation to the application under art.25 of the 2010 Regulations . The Secretary of State in receipt of an application for a screening direction and knowing that the relevant planning authority was aware of the application would have every reason to expect that the planning authority would await the outcome of the screening direction before proceeding to formally grant planning permission. In the light of that sensible administrative expectation and there would be no warrant for the Secretary of State to take the step of issuing an art.25 (or now art.31) direction. The Secretary of State could reasonably anticipate without the need for issuing such a direction that the planning authority acting sensibly would not proceed to determine the application before knowing whether or not the Secretary of State regarded it as environmental impact assessment development. I therefore do not perceive the existence of the art.25 direction power as a justification for concluding that the 2011 Regulations should be construed as in effect entitling the defendant to have issued a permission compliant which was subsequent to the consent identified as being environmental impact assessment development. Of course, there will come a time after the grant of planning permission when no screening direction has been requested when that consent is immune for Judicial Review as a

result of the passage of time and therefore no purpose could be served by seeking a screening direction from the Secretary of State.

41. I turn, finally, to the question of delay. Particular considerations are relevant in my view to the issue of delay in this case. It is important to observe that the claimant requested that the defendant adopt a screening opinion in relation to the development whilst it was still the subject of consideration by them. The screening opinion which the defendant adopted was, as has been set out above, made very shortly after the receipt of that request. Again, shortly after the adoption of the defendant's screening opinion, the claimant sought a screening direction from the Secretary of State. It was hard on the heels of that screening direction being sought that the defendant granted permission without awaiting the outcome of that process. Thus in the early and formative stages of the basis upon which I have concluded that the decision was unlawful the claimant engaged promptly with the processes envisaged by the 2011 Regulations . I accept that superficially a period of five weeks delay is of some significance. However, bearing in mind the essential nature of the challenge which the claimant has brought it was a vital ingredient of that challenge to know the outcome of the Secretary of State's decision on the screening direction. Whilst it could be said that proceedings could have been issued earlier without knowledge of the Secretary of State's decision these would have been speculative proceedings incurring costs on all sides in respect of an inchoate legal argument. Only at the point in time when the Secretary of State's decision was known did the claimant have any prospect of making out Ground 1. Thus in the particular circumstances of this case I am satisfied that it is appropriate to extend time in that there are clear and sensible reasons for the delay in waiting for the Secretary of State's decision and that awaiting that decision was not undue. Thus I do not regard there as having been undue delay in this case and consider that in so far as the proceedings were brought outside the six week period there was good reason for doing so. The claimant is entitled to submit that, furthermore, no prejudice has ***532** been contended for by the defendant or the interested party and in the circumstances, firstly, I am satisfied that it would be appropriate to extend time so as to enable these proceedings to be considered and, secondly, that the question of delay in this case is not such as to justify depriving the claimant of relief.

42. In the light of all of the matters which I have set out above I am satisfied that the defendant's decision should be quashed on the basis of the matters raised under Ground 1. In those circumstances the decision will have to be remade and there is no necessity for me to go on to consider the submissions raised under Ground 2. ***533**

