*731 R. (on the application of Cooperative Group Ltd) v Northumberland CC

No Substantial Judicial Treatment

Court
Queen's Bench Division District Registry (Manchester)

Judgment Date
12 March 2010

Report Citation
[2010] EWHC 373 (Admin)
[2010] Env. L.R. 40

Queen's Bench Division (Administrative Court)

H.H. Judge Pelling QC :

March 12, 2010

Development; Environmental impact assessments; Planning permission; Screening opinions;

H1 *Environmental assessment—judicial review—"negative screening opinion" issued—whether sufficient information on which to base opinion—whether application made "promptly" within time limits*

H2. The claimant (C) objected to the grant of outline planning permission for the relocation of the United Services Club, and mixed retail office and residential development of the site, on the basis that it was in breach of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 . The grounds for the claim were that a "negative" screening opinion had been issued with insufficient information and that the defendant planning authority (N) had acted irrationally in issuing it. N denied that it had acted irrationally and also alleged that C had been guilty of impermissible delay in bringing the application, despite being within three months. The proposed development was within Sch.2 to the Regulations, so that N had been required to consider whether there were likely to be significant effects on the environment by virtue of factors such as its nature, size or location. The sole substantive issue was whether N had sufficient information available to it before issuing the screening opinion. That information comprised a five-page letter from the developer which included statements as to the possible effects on the environment, as well as a description of the site, proposed development and its purpose. Those statements included one that the "main issues … will be fully addressed in the planning application". As the application had been made within the three-month period, the issue was whether it had nevertheless been brought "promptly". No actual prejudice was alleged to have resulted, but the delay was argued to have been detrimental to the principles of good administration on the basis that C had been aware of the decision and should have acted much more quickly.

H3. **Held,** in granting the application:

H4. (1) The letter illustrated that particular potential environmental issues had been identified without any description of the effects of the proposed development on them. Instead, assurances had been provided that issues which arose would be addressed on a future occasion. This was objectionable for a number of reasons: first, it failed to describe possible environmental effects other than in the most *732 general and superficial of terms; secondly, it appeared to proceed on the basis that significant information as to the environmental effects of the development would be provided in the future; and

thirdly, it appeared to contemplate at least impliedly that prospective remedial measures were available that would address all possible effects without, for the most part, identifying those measures. N had not had available to it, and had not been supplied with, sufficient information by the date when the negative opinion was adopted to make an informed judgement as to whether the development was likely to have a significant impact on the environment. The letter had been in large part no more than an assertion that in the opinion of the developer and its consultants an EIA was not warranted, coupled with a series of promises of work to be done in the future. That was exactly the impermissible approach identified in R. (on the application of Lebus) v South Cambridgeshire DC .

H5. (2) There was no evidence that the commencement of the proceedings 12 weeks after the issue of the decision notice had been detrimental to the principles of good administration, with no adverse effects identified to have resulted. Accordingly, the planning permission would be quashed.

H6 Cases referred to:

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2001] Env. L.R. 16
Friends of Basildon Golf Course v Basildon DC [2009] EWHC 66 (Admin); [2010] Env. L.R. 1
Gillespie v First Secretary of State [2003] EWCA Civ 400; [2003] Env. L.R. 30
R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1) [2002] UKHL 23; [2002] 1 W.L.R. 1593; [2003] Env. L.R. 6
R. (on the application of Jones) v Mansfield DC [2003] EWCA Civ 1408; [2004] Env. L.R. 21
R. (on the application of Lebus) v South Cambridgeshire DC [2002] EWHC 2009 (Admin); [2003] Env. L.R. 17
R. (on the application of Lichfield Securities Ltd) v Lichfield DC [2001] EWCA Civ 304
R. (on the application of Mortell) v Oldham MBC [2007] EWHC 1526 (Admin); [2007] J.P.L. 1679
Younger Homes (Northern) Ltd v First Secretary of State [2003] EWHC 3058 (Admin); [2004] J.P.L. 950

H7 Legislation referred to:

Directive 85/337 (EIA)
Civil Procedure Rules (SI 1998/3132) r.54.5
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations (SI 1999/293) regs 2 , 4, 5 and Schs 1–3

Representation

Mr S. White , (instructed by Halliwells LLP), appeared on behalf of the claimant.
Mr A. Evans , (instructed by Northumberland CC), appeared on behalf of the defendant. ***733***

JUDGMENT

H.H. Judge Pelling QC:

Introduction

1. This is the substantive hearing of the claimant's claim for judicial review of the decision of Tynedale DC, issued on February 6, 2009, to grant full planning permission for a mixed retail office and residential development at land off Front Street and Station Road, Prudhoe in Northumberland and outline permission for further residential development and

relocation of the United Services Club (the scheme). The defendant is the successor authority to Tynedale DC and for convenience I refer to both as "the defendant".

2. The claimant contends that the scheme was one to which the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (the Regulations) applied and that an Environmental Impact Assessment ought to have been required before the grant of planning permission was considered. On August 10, 2006, a request was made to the defendant by W.A. Fairhurst & Partners (Fairhursts), the consultants acting for the developer, the Northumberland Estates, for a negative "screening opinion" pursuant to reg.5 of the Regulations (the Fairhurst letter). On September 15, 2006, the defendant issued a screening opinion which concluded that:

> "The proposed development for which planning permission will be sought is not EIA development and an Environmental Impact Assessment would not be required for the proposed development."

The claimant contends that the defendant had insufficient information available to it to reach that conclusion and that in those circumstances, the defendant acted irrationally in the public law sense in issuing its negative screening opinion.

3. The defendant denies that it has acted irrationally as alleged but in any event contends that the claimant has been guilty of impermissible delay in bringing this application, even though it was brought within three months of the date of issue of the decision notice granting planning permission, and that the application should be dismissed on that basis irrespective of the substantive merits.

4. The application for permission came before H.H. Judge Gilbart QC on paper on June 1, 2010 and was refused. However permission to bring these proceedings was granted by H.H. Judge Waksman QC following a renewal hearing that took place on September 21, 2009.

Legal framework

5. The Regulations implement Directive 85/337 of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment. By reg.4(1) , the Regulations apply inter alia to any " Schedule 2 application", which is defined by reg.2(1) as meaning:

> "… an application for planning permission … for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location." ***734**

Regulation 4(2) of the Regulations provides:

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

6. It is common ground that the development in this case is of a description mentioned in Sch.2 , namely that it is an urban development project the area of development of which exceeds 0.5 hectare and that it is not exempt development. Regulation 4 therefore applies to it if, but only if, it "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location"—see reg.2(1) . Whether it would be likely to have such effects is a matter for decision by the local planning authority, taking into account such of the criteria identified in Sch.3 as are relevant to the development —see reg.4(5) . Any such decision is amenable to judicial review but only on *Wednesbury* grounds—see (amongst others) *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603* at 610 G-H and 614G-615A; *R. (on the application of Jones) v Mansfield DC [2003] EWCA Civ 1408* at [39]; Younger Homes (Northern) Ltd v First Secretary of State [2003] EWHC 3058 (Admin) at [59] and (most recently) *Friends of Basildon Golf Course v Basildon DC [2009] EWHC 66 (Admin)* at [23].

7. Schedule 3 to the Regulations sets out the following criteria that must be taken into account if relevant:

"1. Characteristics of development

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

(a) the size of the development;
(b) the cumulation with other development;
(c) the use of natural resources;
(d) the production of waste;
(e) pollution and nuisances;
(f) the risk of accidents, having regard in particular to substances or technologies used.

2. Location of development

The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to—

(a) the existing land use;
(b) the relative abundance, quality and regenerative capacity of natural resources in the area;
(c) the absorption capacity of the natural environment, paying particular attention to the following areas—

…

(vii) densely populated areas;
(viii) landscapes of historical, cultural or archaeological significance.

3. Characteristics of the potential impact

The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to— ***735**

(a) the extent of the impact (geographical area and size of the affected population);
(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;
(d) the probability of the impact;
(e) the duration, frequency and reversibility of the impact."

In considering whether there are likely to be significant effects on the environment, it is necessary to consider the environmental impact of the construction process—see *Gillespie v First Secretary of State [2003] Env. L.R. 30* per Pill L.J. at [39] and *R. (on the application of Mortell) v Oldham MBC [2007] J.P.L. 1679* per Sir Michael Harrison at [38].

8. By reg.5(1) , a person who is minded to apply for planning permission may ask the local planning authority to state in writing whether in their opinion the proposed development would be within a description mentioned in Sch.1 or Sch.2 and, if so, (a) within which such description and (b) if it falls within a description in Sch.2 , whether its likely effects would be such that reg.4 would apply. By reg.5(2) , such a request must be accompanied by, inter alia, (a) a plan sufficient to identify the land and (b) a brief description of the nature and purpose of the proposed development and of its possible effects on the environment. By reg.5(3) the authority shall, if they consider that they have not been provided with sufficient information to give an opinion on the questions raised, notify the person making the request of the particular points on which they require further information. Regulation 5(4) provides that the authority shall respond to a request within three weeks or such longer period as may be agreed in writing with the person making the request.

8. In order to adopt a negative screening opinion—that is an opinion that reg.4 will not apply even though a proposed development falls within a description within Sch.2 —the LPA must have sufficient information about the project to be able to make an informed judgment as to whether it is likely to have a significant impact on the environment—see *R. (on the application of Jones) v Mansfield DC [2003] EWCA Civ 1408* per Dyson L.J. at [39]. Whether there is sufficient information will depend on the particular circumstances. There may be uncertainties that make it impossible to conclude that there is no likelihood of significant environmental effect but in other cases there may be sufficient albeit incomplete information that enables a decision to be made as to the likelihood of significant environmental effect—see Younger Homes (Northern) Ltd v First Secretary of State [2003] EWHC 3058 (Admin) per Ouseley J. at [60]. It is not permissible to decide to adopt a negative screening opinion on the basis that information as to environmental effects will be provided in the future—see R. (on the application of Lebus) v South Cambridgeshire DC [2003] Env. L.R. 17 per Sullivan J. at [13] and [39] and Younger Homes per Ouseley J. at [34]. Where prospective remedial measures have been proposed for a scheme that but for such measures would have significant environmental impact then if the nature, effectiveness and availability of the proposed remedial measures are plainly established and uncontroversial that may justify the adoption of a negative screening opinion but otherwise an EIA will have to be conducted—see *Gillespie* (above) per Laws L.J. at [46].

9. Government advice has been provided to LPAs in the form of Circular 2/99 (the Circular). Whilst not binding, it is designed to provide assistance to LPA officials on how to implement the Regulations. At para.9 the purpose of an EIA is identified ***736*** as being "… a means of drawing together, in a systematic way, an assessment of a project's likely significant environmental effects. This helps to ensure that the importance of predicted effects, and the scope for reducing them, are properly understood by the public and the relevant competent authority before it makes its decision". Paragraphs 32 and 34 of the Circular identify the question that has to be answered in relation to Sch.2 development as being "Would this particular development be likely to have significant effects on the environment?". Paragraph 56 advises that this question is concerned with the broad significance of the likely environmental effects of the proposal. Paragraph 20 of the Circular emphasises the need to take into account the relevant criteria set out in Sch.3 of the Regulations in determining this question. Annex A to the Circular contains a list of criteria and thresholds which indicate the type of case in which EIA is more likely to be required. However, para.44 of the Circular and the opening paragraphs of Annex A emphasise that merely because a particular development does not meet a particular threshold does not mean that EIA is not required. Rather the question has to be answered by reference to the particular form of development, and the particular location. Thus whilst the defendant not unnaturally relies on the fact that the development falls short of the thresholds set out in para.A19, that is not of itself determinative.

10. Paragraph 55 of the Circular refers to the ability of a developer to request a screening opinion under reg.5 and emphasises that the "… request should include … a brief description of the nature and purpose of the proposal *and its possible environmental effects* …" [emphasis supplied]. Paragraph 56 suggests that that the developer should normally be able to supply sufficient information about the development to enable the LPA to give a ruling but emphasises that in the event that the developer does not provide the necessary information, reg.5(3) entitles the LPA to ask the developer to provide it.

The parties' respective cases

11. Originally two grounds of review were relied on by the claimant being (a) that there was insufficient information available to the defendant to enable it to adopt a negative screening opinion and (b) that it was irrational of the claimant to adopt the negative screening opinion. However, since it was common ground that whether the development would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location is a matter for decision by the local planning authority, which is reviewable only on irrationality grounds, it was accepted that there was really only one ground on which the claimant could found its claim namely an assertion that it was irrational for the defendant to have arrived at the decision to adopt the negative screening opinion on the information that was available to it down to the date that the decision was taken. It was submitted that in reality the only information available to the defendant was that set out in the Fairhurst letter referred to above and on analysis that letter manifestly failed to set out the minimum information necessary before a negative opinion could be adopted.

12. The defendant's case was that the Fairhurst letter was a "… comprehensive pre-application letter …" that was "… comprehensive and professionally prepared and correctly submitted for the Council's consideration …". In addition the defendant maintains that the decision was taken by the defendant's then most senior planning officials Ms Patricia Jewell —at the time the defendant's Head of ***737** Development Control—and Ms Helen Winter—then the defendant's Director of Planning—and that both officers had extensive experience of handling complex planning applications and EIA screening procedures in relation to such applications. Both were familiar with the local area. Both were well acquainted with the proposal through their involvement in the pre-application processes which each considered to be well advanced by the time the screening opinion was adopted. The defendant relies on witness statements from each of the officers concerned (neither of whom are now employed by the defendant) in support of its case that sufficient information was available to the defendant to enable it to adopt a negative screening opinion.

Discussion

13. The application for the adoption by the defendant of a negative screening opinion was commenced with the Fairhurst letter dated August 10, 2006 and ended with the adoption of the negative opinion on September 15, 2006. Thus the question that has to be addressed when considering the sufficiency of information available to the defendant is whether the defendant had available to it sufficient information in the period down to the September 15, 2006. There are three sources for discerning the information available to the defendant—each of the witness statements and the Fairhurst letter.

14. In my judgement the logical place to start is the Fairhurst letter not least because it is the developer who is the primary source of information not merely concerning the nature and purpose of the proposed development but also and crucially its possible environmental effects. It is then appropriate to ask what further information was available to the defendant above and beyond what was supplied by Fairhursts and then ask whether the totality of the information available to the defendant down to September 15, 2006 was sufficient in the circumstances.

15. The Fairhurst letter runs to some five pages. It contained a brief description of the site, proposed development and its purpose. Although this description is short, this is not the subject of criticism by the claimant and in my judgement could not be. The witness statements of Ms Jewell and Ms Winter establish that the scope and purpose of the development had

been the subject of extensive pre-application meetings and discussions between the defendant's planning department, Ms Jewell and Ms Winter on the one side and the developers and their consultants on the other for a significant period prior to August 10, 2006. The possible effects on the environment were turned to at the end of p.2 of the Fairhurst letter. The letter concludes at p.6 as follows:

> "We … consider that the proposed development is unlikely to give rise to any significant environmental impacts. The main issues surrounding traffic, surface and foul drainage, retail impact, ecology, noise and dust *will be fully addressed in the planning application* . [Emphasis supplied]
>
> As a result … it is [Fairhursts'] firm understanding that this proposal, by virtue of factors such as nature, size and location, will not result in any significant environmental effect on criteria contained within Schedule 2 of the 1999 Regulations to a degree that would warrant a full [EIA]. It is therefore considered that an [EIA] is not required to be submitted with a planning application for this scheme."
> ***738**

16. The portion of the letter I have underlined illustrates the problem that in my judgement permeates much of the letter—particular potential environmental issues are identified without any description of the effects of the proposed development on the environment by reference to those issues. Instead, for the most part, Fairhursts provide assurances that the issues that arise will be addressed on a future occasion. This is objectionable at least potentially on a number of different levels. First, it fails to describe possible environmental effects other than in the most general and superficial of terms. Secondly, it appears to proceed on the basis that significant information as to the environmental effects of the development will be provided in the future—an approach that is impermissible following Lebus (above). Finally it appears to contemplate at least impliedly that prospective remedial measures are available that will address all possible effects without, for the most part, identifying those measures. A particular example of this concerns traffic—see the following paragraph. However the remedies proposed are addressed so superficially that, absent other material available to the defendant (and it is noteworthy that none is referred to in the Fairhurst letter), it is very difficult to see how it could be said that the nature, effectiveness and availability of the proposed remedial measures were plainly established and uncontroversial. Indeed, it is difficult to see how that could be so unless and until the effects on the environment caused by the particular issues being addressed had been described.

17. In para.13 of her statement, Ms Winter says:

> "By the time the screening opinion was issued on 15.09.2006, the scheme was well advanced and the key impacts had been considered. It was in this context that I judged that the development would not be likely to have any significant environmental impacts and that an EIA was not required in this case."

However, as will become apparent, that is not what the Fairhurst letter suggests. Indeed the material to which I refer below suggests that the scheme was an evolving concept and that the evolution of the scheme had not been completed and was clearly understood not to have been completed by the time the defendant adopted the negative screening opinion. In relation to the Lebus point, Ms Winter says in para.14 of her statement:

> "In making this judgment, I did not rely in any way on the fact that later information was to be submitted. I was fully satisfied that the environmental impacts were unlikely to be significant …"

Given the contents of the Fairhurst letter and the paucity of detail as to what other information was available, this is a somewhat surprising comment to make. However, assuming it to be correct then it follows that the Fairhurst letter is to be read as if all references to further material to be obtained in the future are to be ignored. If this approach is adopted then there is very little information contained in that letter on which a decision could rationally be based as will become apparent when I consider the detail further below.

18. The impression given by the limited material that the defendant has produced is that the developer was driving the environmental issues. The defendant relies on some minutes dated April 28, 2006 as showing that "… a great deal of pre-application work had been carried out on all aspects of the proposed development …"—see para.14 of Ms Jewell's statement. The minutes referred to ***739*** were in fact prepared by the developer—see the letter of May 3, 2006 [349]. Paragraph 19 of the minutes says:

> "We need to provide a scoping letter on the EIA. CB advised that in any case we will do archaeology and ecology and acoustic and traffic reports but did not think an EIA would be required."

The "we" refers to the developer and "CB" is a representative of the developer and the signatory of the May 3 letter. The paragraph does not suggest that as at the date of the meeting to which the minutes relate, the local authority had the information necessary to enable it make an informed decision as to whether to give a negative screening opinion although it is clear that even at that date the developer considered one ought to be adopted.

19. In relation to traffic the Fairhurst letter says that accessibility "… of the development by pedestrians and cyclists will be considered. Key origins and destinations … will be identified and accessibility of such facilities for new residents and new employees will be examined. Existing pedestrian and cycle facilities in the local area will be identified and a strategy developed for linking new facilities associated with the development to existing facilities. … Public transport provision in the vicinity of the development will be considered … The accessibility of public transport services from the development itself will be examined in terms of walk routes and distances to the nearest bus stops. Access arrangements for vehicles to the development along with details of the parking provision to be provided within the development will also be considered. AutoTrack analysis will be carried out to ensure the access junctions and internal read network can accommodate servicing, emergency and everyday vehicles. Producing a Green travel Plan is also a top priority …" Although it is nowhere explicitly stated, the implication is that the further information would be provided when the planning application was submitted. In my judgement, taken alone, this part of the letter illustrates each of the three problems that I have identified in [17] of this judgment.

20. It was submitted on behalf of the defendant that in relation to traffic at least the Fairhurst letter could not be read in isolation. It was submitted that a perusal of exhibit 1 to Ms Jewell's statement shows that a large body of work had already been done in relation to traffic. The document referred to appears to have come into existence sometime in January 2006. However this document cannot be regarded as anything other than very preliminary in nature. Indeed, counsel for the defendant was constrained to accept that the work reflected in the document had not been "worked up" as he put it. However it is submitted by the defendant that this document shows that the defendant was aware of the issues relating to traffic. To my mind the essentially preliminary nature of the January document is illustrated by a number of subsequent communications. Thus on August 8, 2006 (that is seven days before the Fairhurst letter was sent) Fairhursts wrote to Ms Jewell [387] requesting a meeting with Ms Jewell in order to discuss and finalise matters relevant to traffic impact as well as final layout, details of design and any other additional requirements in relation to the scheme. Thus as at that date there was no agreement between the developer and the defendant as to the critical issues on which the environmental effect of traffic generated by the scheme

(and any remedy for such impact) would depend. This appears still not to have been resolved by November 8, 2006 (some six weeks after the negative screening opinion had been adopted—see ***740*** paras 3.4 and 4.5 of the Consultation Report prepared by Fairhursts signed on that date.

21. The January document outlines the existence of a problem and the Fairhurst letter proposes that the problems (which could not be identified because the proposals had not been finalised at that stage) would be addressed by future proposals. If Ms Winter is correct in what she says in para.14 of her witness statement, the relevant part of which is set out above, then in my judgement on the material I have seen there was no rational basis for concluding that traffic did not give rise to an environmental problem in the context of an inner city development of the size of this one in the context of the size of town centre in which it was proposed that it should be built. If para.14 of Ms Winter's statement is wrong and regard was had to the promise of future detailed consideration, that approach not only violates the Lebus principle but also suggests proposed remedies which may or may not be effective but cannot on any view be said to be either plainly established or uncontroversial as at the date when the screening opinion was adopted, not least because no proposals are contained in the letter, probably because the nature of the problem had not been fully identified. I do not see how any LPA properly directing itself could have answered the question whether this particular development would be likely to have significant effects on the environment other than positively by reference to traffic impact on the basis of this material. Whilst I fully accept that Ms Jewell and Ms Winter were experienced officials with significant knowledge of the locality and of considering planning applications of this level of magnitude and complexity, I do not see how that enabled them to fill in the missing information which the documentation highlights. In my judgement the uncertainties that existed in relation to the traffic issues as at September 15, 2006 were such as to make it impossible to conclude that there was no likelihood of significant environmental effect resulting from the traffic implications of the development.

22. I return to the Fairhurst letter. The other particular environmental issues identified in the letter were (a) surface and foul drainage, (b) retail impact, (c) archaeology, (d) ecology and (e) noise and dust. In relation to drainage the letter said simply that "potential outlets for foul and surface water from the site will be considered … mitigation measures will then be suggested as appropriate". It is suggested that all drainage would be discharged into the public sewer in agreement with Northumbria water. It was submitted by the defendant that this last point was sufficient for screening purposes. I am not able to agree. The volumes of foul and surface water that would be generated by the development is not estimated or even mentioned. In consequence no mitigation scheme could be or was proposed other than the main sewer solution. However no attempt was made to identify the capacity of the sewerage system or demonstrate its ability to accommodate the extra loads that it was proposed would be imposed upon it at the locality of the scheme. It is not suggested that either Ms Winter or Ms Jewell knew the answer to these points or even investigated it before adopting the negative screening opinion.

23. Retail impact was not addressed at all in the Fairhurst letter other than by saying that a retail impact assessment would be carried out in the future. Although it was submitted on behalf of the defendant that much work had been done in relation to this issue the letter makes clear that this was not being relied on and that the RSS figures supplied by the defendant were not considered robust. ***741***

24. Much the same points emerge in relation to noise. No consideration appears to have been given to the environmental impact of the construction process. Different considerations apply both in relation to archaeology and ecology because in relation to each reference is made to reports that had been commissioned. Given that an LPA is concerned with the likelihood of significant impact when considering a reg.5 application it is possible that a report in combination with the consideration of such a report by an experienced official with local knowledge would be sufficient. However there is no evidence that the archaeology report was ever supplied to the defendant and the Fairhurst letter makes clear that the report had recommended further investigations. It is possible that an official with extensive local knowledge would be able to reach a conclusion that a negative screening opinion could be adopted in relation to archaeological impact on the basis of such information. However, nowhere in the evidence is it explained how that could be so on the particular facts of this case in relation to this site. The purpose of an EIA is to enable an assessment to be made of the significant environmental effects of a particular development and the scope for reducing them. If a free standing report has been commissioned in respect of a particular perceived risk

which fulfils this purpose then that may be sufficient to justify a negative screening opinion being adopted if that is the only issue. However I do not see how that can be so unless the LPA officials have seen the report.

25. In my judgment, the defendant did not have available to it, and was not supplied with, sufficient information down to the date when the negative opinion was adopted to be able to make an informed judgement as to whether the development was likely to have a significant impact on the environment. It might have been possible to come to a different conclusion if the defendant's officials had approached the task in a logically sequenced manner having regard to the Sch.3 considerations, the factors and thresholds set out in the circular and by reference to information known to the defendant that was not set out in the Fairhurst letter in relation to each of the environmental issues identified in the Fairhurst letter and any others not mentioned there and had recorded their detailed conclusions at each stage. However that has not been demonstrated. Far from being a *"… comprehensive pre-application letter …"* the Fairhurst letter is in large part no more than an assertion by Fairhursts that in their opinion an EIA was not warranted coupled with a series of promises of work to be done in the future. This is exactly the impermissible approach identified in Lebus . Whilst I accept that the position has to be looked at in the round and the question whether sufficient information was available to the defendant has to be answered by reference to all the material in evidence and not merely the letter, that does not assist on the facts of this case because even adopting that approach, there was insufficient information that has been demonstrated to be available at the time the decision was taken.

Delay

26. It is common ground that a decision to grant planning permission cannot be challenged by way of judicial review until the decision notice has been issued—see *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1) [2002] 1 W.L.R. 1593* . It is also common ground that this application was brought within the three month period that applies to the bringing of such applications by operation of CPR r.54.5(1)(b) . Thus the issue as to whether or not proceedings ought to have ***742** been made more promptly than that has to be tested by reference to what happened or did not happen in the period between the date the notice was issued—February 6, 2009—and the date when these proceedings were issued—May 5, 2009.

27. It is not alleged that any actual prejudice has been suffered as a result of the failure to commence proceedings nearer to February 2009. What is submitted is that it is detrimental to the interests of good administration to allow the claimant the full three month period since it is to be inferred that the claimant knew of the adoption of the negative screening opinion very shortly after it was adopted. This being so, it is submitted that the claimant should have acted much more quickly than in the event it did.

28. It is submitted that when granting permission H.H. Judge Waksman QC had intended that the question of undue delay could be re-canvassed at the substantive hearing. However nothing to this effect appears in the Order made by Judge Waksman QC. The effect of *R. (on the application of Lichfield Securities Ltd) v Lichfield DC [2001] EWCA Civ 304* is that an express indication from the judge is required. This point was not taken by Mr White and I therefore proceed on the basis that what the defendant says concerning Judge Waksman's intention is correct and the required express indication was given but not recorded in the Order.

29. I am unable to see how the commencement of these proceedings 12 weeks after the issue of the decision notice granting permission is detrimental to good administration. There is no evidence before me that suggests that this is so and the defendant was not able to point to anything other than that the application was commenced very close to the expiry of the three-month period. There is no evidence of delay or inconvenience or uncertainty that has had or will have an adverse effect which could have been avoided by the earlier commencement of these proceedings. I reject the submission that this application should fail on that basis.

Remedy

30. The consequences of quashing the decision to grant planning permission will mean that there will have to be a fresh consideration of the application on its merits as they are at the date when that consideration takes place. I have considered with some care whether it would be appropriate not to take this course on the basis that the outcome is likely to be the same. However, Mr Evans did not seek to argue that this was a correct approach and following *Berkeley v Secretary of State for the Environment* (above) I am satisfied that it would not be the correct approach to take. In those circumstances, I direct that the planning permission granted by the defendant in relation to the scheme be quashed.

Costs

31. It had been agreed between the parties that in the event that the claimant was successful the defendant would pay the claimant £40,000 inclusive of VAT in full and final settlement of the claimant's costs of and incidental to this judicial review application. I make that Order. ***743**

