*366 R. (on the application of Lebus) v South Cambridgeshire District Council

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
27 August 2002

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Queen's Bench Division (Administrative Court)

(Sullivan J.):

August 27, 2002 [1]

H1 *Environmental Impact Assessment—requirement for EIA—whether "screening opinion" given—requirement of a formal opinion—approach to consideration of potential impacts on the environment—whether mitigating measures to be taken into account at screening opinion stage or to be considered as part of the EIA*

H2. The claimant ("L") was a resident near to the site of a proposed egg production facility in the area of the defendant ("SC"). Planning permission had originally been sought for a unit 200m from the nearest dwelling and, following refusal of that application, a revised application was submitted with the unit 375m from the nearest dwelling. The unit was to house 12,000 free-range chickens, which meant that it was not within Sch.1 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293), but was more than 500m², so that it fell for consideration within Sch.2 . The application generated considerable opposition amongst local residents, concerned about environmental impacts. On April 18, 2000, L's solicitors wrote to SC contending that an Environmental Impact Assessment was required. A response was made by way of a letter dated April 26, 2000, which stated the position regarding Schs 1 and 2 , and the factors into account when considering whether Sch.2 development required an EIA. The letter stated that:

> "The Council did not wish to be drawn into requesting an Environmental Statement purely to get information it should rightfully expect anyway. It was considered all the above points could be covered in sufficient detail without formally requesting an Environmental Statement."

H3. SC's Planning Committee deferred its decision and required legal advice to be sought to verify that an EIA would not be required under the 1999 Regulations.

H4. SC then produced a "screening table" which set out the various impacts which could be expected from the development, level of geographical importance, whether they were adverse or beneficial, their nature, and their significance. SC stated that

the screening table had been produced to record the earlier decision that an EIA was not required. It was placed in the planning file, but was not placed before the Planning Committee. When the matter came before the Planning Committee again, the Planning Officer stated that a screening process had been carried out and the relevant documentation provided, and that he could confirm that the relevant factors had been taken into account, with the result that an EIA would not be required. ***367**

H5. L issued proceedings for judicial review, contending that SC had acted unlawfully. SC's Planning Committee then considered a report which set out the history of the matter and contained a statement that:

> "Whilst the existence of potential adverse impact in some respects was appreciated, it was concluded that in every respect such impact would be insignificant given proper planning conditions and management enforceable under s.106 of the Town and Country Planning Act 1990 . It was not considered necessary to produce the Screening Summary Table to Committee but merely to report the outcome of the decision."

H6. Following negotiations about the s.106 agreement, planning permission for the development was granted in January 2002. At the judicial review hearing L contended that SC had acted unlawfully in a number of ways. First, L contended, the letter on its face advanced an inadmissible reason for not requiring an EIA; that SC would receive the relevant information without formally requesting an Environmental Statement—an unlawful approach in the light of the reasoning in *Berkeley v Secretary of State for the Environment* . Secondly, the issue of whether a screening opinion was actually given for the purpose of the Regulations was raised. As well as contending that it had acted lawfully, SC submitted that relief should be refused in any event on the grounds that it was the resolution to grant permission and the permission itself which had been challenged, rather than the screening opinion. ***368**

H7. Held, :

H8. (1) Taken at face value, the letter of April 26 did not say that a view had been taken that the proposed development would not have significant effects upon the environment and, in essence, said that it was not necessary for a formal Environmental Statement to be required because the information would be provided anyway.

H9. (2) Whilst the question of whether the proposed development was EIA development or not was considered, there was no publicly available formal record of the conclusion in writing, so that there was no screening opinion in terms of the Regulations at all. The applicant was simply told informally that an Environmental Statement would not be required. No conclusion was expressed in the "screening table" and a paper chase consisting of the letter of April 26, 2000, the screening table and reports to the Planning Committee could not comprise a "composite" screening opinion.

H10. (3) There was a further error of law in the way in which the matter had been approached; the consideration of the significance of potential impacts in the context of anticipated planning conditions and obligations. The question was not asked whether the development as described in the application would have significant environmental effects, but rather whether the development as described and subject to certain mitigation measures would have significant environmental effects. A description of the mitigation measures was required in an Environmental Statement by virtue of Sch.4 to the Regulations. Whilst it might well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive was that the potentially significant

impacts of a development were described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public was engaged in the process of assessing the efficacy of any mitigation measures. It was not appropriate for a person charged with making a screening opinion to start from the premise that, although there may be significant impacts, these could be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case was to require an Environmental Statement setting out the significant impacts and the measures which it was said would reduce their significance. (*British Telecommunications Plc v Gloucester City Council* referred to).

H11. (4) Relief would not be refused as L had been clear from the outset that the argument was that an EIA was required; the situation was very different from that set out in *R. (on the application of Malster) v Ipswich Borough Council* .

H12 Legislation referred to:

Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293), reg.7, Schs 1–3
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293), regs 2, 5(4), 5(5), 7(1), 7(20) and Sch.4

H13 Cases referred to:

Berkeley v Secretary of State for the Environment [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2000] 3 All E.R. 897; [2001] Env. L.R. 16; (2001) 81 P. & C.R. 35; [2001] 2 C.M.L.R. 38
British Telecommunications Plc v Gloucester City Council [2001] EWHC 1001 (Admin); [2002] Env. L.R. DG10
R. (on the application of Malster) v Ipswich Borough Council [2001] EWHC 711 (Admin); [2002] Env. L.R. DG7

H14 Representation

Mr R. Harwood , instructed by Richard Buxton , for the claimant.
Mr J. Findlay , instructed by South Cambridgeshire District Council Legal Department, for the respondent. ***369**

Judgment

Sullivan J.:

1. This application for judicial review is concerned with the grant of planning permissions on January 8 and January 24, 2002 for the erection of an egg production unit and the stationing of a mobile home for an agricultural worker on land off Newton Road, Whittlesford in Cambridgeshire. It is unnecessary to consider the latter permission because it is accepted on behalf of the Council that the planning permission for the stationing of a mobile home relies upon the planning permission for the erection of the egg production unit. I should add that the recipient of the planning permissions, although notified of these proceedings, has not played any part in them. It is common ground that the egg production unit is very substantial. It is proposed to house 12,000 free range chickens in a building whose footprint is 1,180m². The claimants live near to the proposed development.

2. Given the lateness of the hour, I do not propose to set out the lengthy background in anything other than the briefest outline. In 1999 the Planning Committee of the defendant Council had refused planning permission for an egg production unit and mobile home in the vicinity of the present proposal. The refusal notice stated that there would be an adverse impact on the amenity of adjoining houses, harm to an Area of Best Landscape and harm to the Green Belt.

3. The applications for planning permission, which have resulted in the planning permissions under challenge, were submitted in February 2000 and the location of the egg production unit was moved from 200m to 375m from the nearest dwelling in Newton Road. The applications for permission generated considerable local opposition, many representations were made against the scheme by local residents. They argued that there would be a number of environmental impacts and environmental consultants on their behalf contended that an environmental impact assessment ought to be carried out.

4. On April 18, 2000 the claimants' then solicitors wrote to the Council contending that an EIA was required. The letter said that an EIA was mandatory under the Town and Country Planning (Environment Impact Assessment) Regulations 1999 ("the Regulations"). The solicitors contended that any attempt by the District Council to grant planning permission without first considering a properly detailed EIA would be contrary to the 1999 Regulations and therefore unlawful. The letter went on to say:

> "We suggest that, without an EIA and without a definitive, site specific noise study, the Council cannot possibly satisfy itself that this development will not give rise to unacceptable impacts on human health and amenity".

5. The response to that letter came in a letter dated April 26 written by Mr Grainger, on behalf of Mr Hussell, the planning director. The letter pointed out, correctly, that if the proposed egg production unit were to house more than 60,000 hens it would be considered under Sch.1 of the Regulations and an EIA would be mandatory. In this case the unit would house 12,000 birds, however ***370** the building is more than 500m² and that exceeds the threshold set out in Sch.2 of the Regulations.

> "The Council does not consider an Environmental Assessment mandatory for Sch.2 development but rather consideration has to be given to each proposal on whether it would have significant effects on the environment by virtue of factors such as its location, impact, nature and size. I would be pleased to learn if the Council has misdirected itself on this point. When considering the need for an Environmental Assessment the above factors as well as issues such as:
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> Airborne pollution;
> Dirty water and litter disposal;
> Ecology;
> Highways and access; and
> Landscape
>
> were taken into account. The Council did not wish to be drawn into requesting an Environmental Statement purely to get information it should rightfully expect anyway. It was considered all the above points could be covered in sufficient detail without formally requesting an Environmental Statement."

6. The matter went to Committee on July 5. The report contained a lengthy discussion of the Chief Environmental Health Officer's views, including his advice as to the need for an environmental impact analysis.

> "After discussions with ADAS and Planning Officers, I would confirm that the scale of the application does not meet the guidance criteria laid down under the Town and Country (Environmental Impact Assessment England and Wales) Regulations 1999, Sch.2 . Despite various issued raised by the protesters, I do not consider it necessary to change this view. This has already been brought to the attention of some of the residents in writing by the Planning Director."

7. It seems that this was a reference to the letter of April 26. The members were not happy and the item was deferred so that:

> "… formal legal advice be sought to verify that an Environmental Impact Assessment will not be required for the egg production unit under The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ."

8. The Planning Director wrote a memorandum to the Council's principal legal officer dated July 10, 2000 which said in part: ***371**

> "I attach a copy of the applications and a letter dated April 26 from Paul Grainger which explains why it is considered an Environmental Impact Assessment for the proposed egg production unit would not be mandatory."

9. Pausing there, the letter of April 26 has to be considered against the background of a conversation between the Planning Director and a local councillor, Councillor Quinlan. Mr Hussell wrote a memorandum about that meeting on April 5 to Messrs Grainger and Rush. That memorandum said, in part:

> "I explained [to Councillor Quinlan] that Paul Grainger and David Rush had taken a view on these matters [that is matters of pollution and the like] and were of the opinion, and remain of the opinion, that this falls outside the scope of the regulations."

10. The first point made by Mr Harwood, on behalf of the claimants, is that on its face the letter dated April 26 advances an inadmissible reason for not requiring an environmental impact assessment. On its face, the letter does not say that the proposed development would not have significant affects on the environment, rather it says that the Council does not want to be drawn into that matter because it is going to receive the information in sufficient detail without formally requesting

an environmental statement. He submits that this is an inadmissible approach in the light of the decision of the House of Lords in the case of *Berkeley* .

11. Mr Findlay submits that that is not the correct interpretation of the letter. The claimants' then solicitors, writing on April 18, understood that a decision had been made that an EIA was not going to be required, and were asking for the matter to be reconsidered. Against that background the letter was explaining why this was unnecessary: that it would not be right to ask for an environmental statement purely to get information that the Council could rightfully expect in any event. It is said that the solicitors were writing with this knowledge because the Planning Director had explained to Councillor Quinlan, who was in touch with the local objectors, that a view had been taken by Messrs Grainger and Rush.

12. I am unable to accept Mr Findlay's submissions. It seems to me that taking the letter at face value, it states perfectly correctly that environmental assessment is not mandatory for Sch.2 development. Each proposal has to be individually considered so as to decide whether or not it would have significant effects on the environment; so far so good. The letter is also perfectly correct in identifying certain factors that should be considered, including such matters as airborne pollution, ecology, highways and access and so forth.

13. However, what the letter significantly, in my judgment, does not say is that a view has been taken that the proposed development will not have significant effects on the environment. In essence, the Council is saying in this letter of April 26: 'It is not necessary for us to require a formal environmental statement. We are going to be able to get the information in sufficient detail in any event without requiring such a formal document'.

14. That was the position, therefore, as at the stage of the memorandum to the Council's principal legal officer. The Council's principal legal officer gave ***372** advice in terms of what the Regulations required which is not, and indeed could not be, criticised. There was also correspondence from the claimants' new solicitor, Richard Buxton, which made the point in terms that it was not enough for the Council to say that it would be able to obtain all the information by other means; that did not justify not requiring a formal environmental statement.

15. At some stage at or round the receipt of advice from the Council's legal officer a summary screening table was produced which set out the various impacts that could be expected to result from the development, giving their geographical level of importance: international, national, regional, district or local. Three of the impacts were said to be of regional importance, the remainder were local; saying whether the impact was adverse or beneficial; giving the nature of the impact, most of them were said to be "long-term reversible"; and also under a column headed "significance" it was said that each of these impacts was minor.

16. The explanation for the production of this document is provided in the first witness statement of Mr Hussell the Council's Planning Director. He says that he has delegated power to make Reg.7 screening decisions on behalf of the Council. Because the application had been submitted without an environmental statement, it was necessary for the Council to make a screening decision in accordance with Reg.7 to decide whether the proposed development was Sch.1 development or Sch.2 development, and if it was Sch.2 development, whether it was likely to have significant effects on the environment.

17. He says that in order to help him make the delegated screening decision under Reg.7 he consulted Messrs Grainger and Rush. There was a meeting in his office in early March 2000, prior to the memorandum dated April 5, 2000. As to the first issue, about which there is no dispute, the answer was quite obvious: the proposal is Sch.2 and not Sch.1 development.

18. His witness statement then says that with the assistance of Messrs Grainger and Rush he considered the second issue as to the potential significant effects of the development by reference to the criteria set out in paras (1) and (2) of Sch.3 to the Regulations. He identifies the criteria that he considered to be particularly relevant to this application. It is, I think, fair to say that those criteria are not those specifically listed in the letter of April 26.

19. Mr Hussell continues that having considered all the relevant criteria and discussed the matter with Messrs Grainger and Rush, he concluded that the potential impact of the development in each instance was not significant and therefore he did not consider it necessary to seek an environmental impact assessment. He then disputes the interpretation placed by the claimants on the letter of April 26, and says this about the screening summary table:

> "In July 2000, a Screening Summary Table … was drawn up which faithfully and accurately recorded the screening decision I made earlier. In short, whilst I and my senior officers appreciated the existence of potential adverse impact in some respects, we agreed that in every respect such impact would be insignificant given proper planning conditions and management enforceable under s.106. As far as I am aware, this document ***373*** was never before the Committee when it took its decision. This Table was compiled for the purpose of creating a file record and there was no reason to place it before the Committee."

20. There is some dispute as to when the screening summary was placed on the planning file. The claimants, who regularly inspected the file, so far as they were able to do so, because on certain occasions it was not available for inspection because it was being used by the planning officers, say that the document did not appear on the file until September 2000. According to Mr Hussell's recollection the summary table was added to the file in July 2000. At all events, it is clear that the screening summary was placed not in the planning register but in the planning officer's working file. A further statement from Mr Hussell explains that the Council keep, in addition to the register, other files including the officer's working file. The officer's working file includes everything contained in the register plus a great deal else besides, including the officer's notes and legal advice, material which the Council would not normally be required to make publicly available. He explains that the screening table was placed in the working file, given that the working file was being constantly accessed in the case of this particular development by those who were opposed to it.

21. The matter then went to Committee again on September 6. The report to that Committee set out in full the advice of the Head of Legal Services. That advice had concluded:

> "You should document your decision by reference to the relevant criteria in order to demonstrate that you have complied with the regulations in accordance with your delegated authority."

22. The Planning Officer added:

> "A screening process was carried out and the relevant documentation has been provided."

23. Mr Findlay has confirmed, on behalf of the Council, that the relevant documentation referred to there was the screening summary table.

24. Under "Planning Comments", the planning officer said:

> "The Planning Department has delegated powers to determine whether an Environment Impact Assessment ("EIA") would be required … I can confirm that all the relevant factors were taken into account when the application was received and as a result that an EIA would not be required. Documentation to this effect has been provided."

25. Proceedings for judicial review were then instituted and in due course permission to apply for judicial review was granted by Maurice Kay J. The matter then went back to Committee in June 2001. The report said, *inter alia* : ***374**

> "A screening decision was made in early March 2000. As to the first issue, it was decided that it [the development] was Sch.2 Development as the flock size was below the minimum stipulated for Sch.1 … As to the second issue, consideration was made as to the potential significant effects of the development by reference to the criteria set out in paras 1 and 2 of Sch.3 of the Regulations, with regard to the characteristics of the development … and its location. The criteria considered to be particularly relevant to the application were:
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> The size of the development.
> The production of waste.
> Likely pollution and nuisances …
> Environmental sensitivity of the geographical area affected.
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> In addition, consideration was given to the potential impact on local people.
>
> Having considered all the relevant criteria it was concluded that the potential impact of the development in each instance was not significant and therefore, it was not considered necessary to seek an Environmental Impact Assessment Statement. The previous refusal of planning permission was taken into account as well as the differences between that proposal and the current one.
>
> In July 2000 a Screening Summary Table was placed on the planning file. This document faithfully and accurately recorded the screening decision made in March 2000.
>
> Whilst the existence of potential adverse impact in some respects was appreciated, it was concluded that in every respect such impact would be insignificant given proper planning conditions and management enforceable under s.106 of the Town and Country Planning Act 1990 . It was not considered necessary to produce the Screening Summary Table to Committee but merely to report the outcome of the decision.
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> In the Report to Committee dated September 6, 2000 the following conclusion was made:

> 'I consider that through the implementation of pollution control measures and appropriate management techniques the egg production unit will not cause an unacceptable level of environmental pollution or have an adverse impact upon the health of the community or the local residents.'

"

26. With hindsight and to be absolutely precise, the word "significant" or "material" should have been inserted before the word "adverse". This is the impression the Planning Director had meant to convey from the report read as a whole.

27. Although not strictly within the regulations, the screening decision has been reviewed in the light of the revised plan to consider whether there is any reason to change any of the conclusions reached as to the potential impact of the development. The review took the form of re-considering the Screening Summary Table referred to above … and also considering the potential impact on local people as a whole or individually. There was no reason to change our view and **375* therefore the basis of the screening decision stands in relation to the amended application."

28. Following negotiations about the s.106 Agreement, the planning permissions were granted in January of this year as mentioned above.

29. It is convenient at this stage to turn to the Regulations to see what should have happened in respect of the application for the egg production unit. As I have indicated, there is no dispute that it is a Sch.2 development. An EIA is not automatically required in the case of Sch.2 development, as it is in the case of Sch.1 development. Reg.2 provides that:

> "'EIA 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 of factors such as its nature, size or location."

30. By reg.7(1) :

> "Where it appears to the relevant planning authority that—

> (a) an application for planning permission which is before them for determination is a Sch.1 application or Sch.2 application; and
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> (b) the development in question has not been the subject of a screening opinion or screening direction; and
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> (c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations.
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> Paragraphs (3) and (4) of reg.5 shall apply as if the receipt or lodging of the application were a request made under reg.5(1)."

31. Pausing there, it is not in dispute that all of the requirements in reg.7(1)(a), (b) and (c) were met by this particular application for planning permission. Thus paras (3) and (4) of reg.4 apply.

32. Paragraphs (4) and (5) of reg.5 provide that:

> "(4) An authority shall adopt a screening opinion within three weeks beginning with the date of receipt of a request made pursuant to para.(1) or such longer period as may be agreed in writing with the person making the request.
>
> (5) An authority which adopts a screening opinion pursuant to para.(4) shall forthwith send a copy to the person who made the request."

33. Regulation 5 enables a person who is minded to carry out development to request the relevant planning authority to adopt a screening opinion.

34. Regulation 7 ensures that if no such request is made and the application before the Council is for Sch.1 or Sch.2 development and there has been no environmental statement, then the planning authority considers the matter as though it had been requested by the applicant for permission to adopt a screening opinion. ***376**

35. A screening opinion is defined in reg.2 :

> "'Screening opinion' means a written statement of the opinion of the relevant planning authority as to whether development is EIA development."

36. Clearly the authority may delegate the forming of that opinion to an appropriate officer. So, on the facts in the present case, there should have been a written statement by Mr Hussell setting out his opinion as to whether the proposed development was or was not EIA development. A copy of the written statement should have been sent to the applicant for planning permission and by virtue of reg.20 :

> "(1) Where particulars of a planning application are placed on Pt 1 of the register, the relevant planning authority shall take steps to secure that there is also placed on that Part a copy of any relevant—
>
> (a) screening opinion;"

37. The first question for consideration, therefore, is whether there is any document which can sensibly be described as a screening opinion for the purpose of the Regulations. I accept Mr Findlay's submission that Mr Hussell considered, with the assistance of Messrs Grainger and Rush, whether or not the proposed development was EIA development. But the fact remains that he did not record his conclusion in writing. This is not a case of a document which is capable of being a screening opinion not being placed upon the planning register due to some error. There simply is no screening opinion in terms of the Regulations at all. Such documentation as there is, that is to say the summary screening table, was not placed in the register; it was placed in the planning file, it does not matter whether in July or September. And, it is accepted by Mr Findlay, on behalf of the Council, that the applicant for planning permission was not given a copy of the screening opinion, no doubt for the simple reason that there was none. The applicant for planning permission was simply told informally that an environmental statement would not be required.

38. It has been submitted on behalf of the Council that the summary table amounts to a screening opinion. In my judgment, it is nothing of the kind. It is no doubt a convenient checklist that had to be gone through in order to reach the necessary statutory opinion. But the necessary statutory opinion as to whether the development is or is not EIA development is nowhere expressed in that document. I do not accept that it is appropriate to engage in a paperchase by way of looking at the letter of April 26, the screening summary and various reports to Committee, in order to assemble documents which collectively might be said to be a composite screening opinion.

39. There is, in my judgment, a further difficulty. While it is true that the Council is not obliged to give reasons for a screening opinion to the effect that development is not EIA development, if reasons are given it is permissible for the court to examine those reasons to see whether or not they disclose any error of law. In the present case, so far as reasons have been provided, they disclose two errors of law. The first I have already mentioned. The letter of April 26 proceeds ***377*** from the impermissible premise that it is unnecessary to obtain a formal environmental statement if the information will be received in sufficient detail as part and parcel of the material one might expect with an application. The second error is this: I have referred to para.15 of Mr Hussell's first witness statement where he says:

> "In short, whilst I and my senior officers appreciated the existence of potential adverse impact in some respects, we agreed that in every respect such impact would be insignificant given proper planning conditions and management enforceable under s.106 ."

40. That approach was echoed in the report placed before members in June 2001. In the report it was acknowledged that, with hindsight, and to be absolutely precise, the word significant or material should have been inserted before the word adverse and that was the impression the Planning Director had meant to convey. Thus the conclusion should have been expressed thus: "I consider that through the implementation of pollution control measures and appropriate management techniques, the egg production unit will not cause an unacceptable level of environmental pollution or have a significant or material adverse impact on the health of the community or the local residents."

41. Thus, it is plain that in so far as the statutory question was addressed, it was addressed upon the basis that planning conditions would be imposed and management obligations would be enforceable under s.106 . The question was not asked whether the development as described in the application would have significant environmental effects, but rather whether the development as described in the application subject to certain mitigation measures would have significant environmental effects.

42. In *BT Plc and Bloomsbury Land Investments v Gloucester City Council [2000] EWHC 1001 (Admin), dated November 26, 2001* , Elias J. had to consider an argument to the effect that the Council had considered the effect on the archeology of a proposal subject to a mitigation strategy. He said this in para.73:

> "I confess to having had some difficulty initially with this point. There is no doubt that it is for the planning authority to decide in the first instance whether or not there are likely to be significant effects on the environment such as to warrant an environmental statement. Can they conclude that there would be significant effects, save for the fact that they have required (or at least will require) the developer to take mitigating steps whose effect to render such effects insignificant? In my judgment they cannot. Paragraph 3 of Sch.2, which sets out the information required (and in turn reflects Art.5 of the Directive read with Appendix IV) requires amongst other things that there is a description of the measures envisaged to 'avoid, reduce and if possible remedy' adverse effects. The purpose is surely to enable public discussion to take place about whether the measures will be successful, or perhaps whether more effective measures can be taken than those proposed to ameliorate the anticipated harm. In my opinion, therefore, the question ***378** whether or not there are likely to be significant environmental effects should be approached by asking whether these would be likely to result, absent some specific measures being taken to ameliorate or reduce them. If they would, the environmental statement is required and the mitigating measures must be identified in it."

43. He then went on to conclude on the facts of that case that there would be potentially highly significant effects on archeology unless specific measures were proposed to eliminate them.

44. Elias J. was dealing with the provisions of the 1988 Regulations, but comparable provisions are to be found in Sch.4 to the 1999 Regulations. Sch.4 sets out the information that must be included in environmental statements. This includes:

> "A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment."

45. Whilst each case will no doubt turn upon its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.

46. It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance.

47. On behalf of the defendants, Mr Findlay argues that in the *BT* case very specific archeological measures had been put forward. In the present case no such details had been put forward as at March 2000 when the screening opinion decision was made. All that Mr Hussell was doing was assuming that the proposal would be reasonably well managed. He did not have the list of very detailed conditions and extensive s.106 Obligations that are now before the court.

48. In his second witness statement Mr Hussell says:

> "Further, I assessed the impact of the proposal as a whole without taking into account any specific mitigating measures that went beyond what I thought was part and parcel of the proposal."

49. That second witness statement is dated March 20, 2002; some two years after the event. I prefer to rely on the way it is put in his first witness statement on February 22, 2001, a little under a year after the decision is said to have been taken in March 2000. He, together with Messrs Grainger and Rush, concluded ***379** that the potential impact of the development would be insignificant given proper planning conditions and management enforceable under s.106 .

50. It must have been obvious that with a proposal of this kind there would need to be a number of non-standard planning conditions and enforceable obligations under s.106 . It is precisely those sort of controls which should have been identified in a publicly-accessible way in an environmental statement prepared under the Regulations.

51. Thus the underlying approach adopted by Mr Hussell was in error. In so far as one can discern the Council's reasoning, it was erroneous on the two grounds set out above: it was no answer to the need for an EIA to say the information would be

supplied in some form in any event, and it was not right to approach the matter on the basis that the significant adverse effects could be rendered insignificant if suitable conditions were imposed. The proper approach was to say that potentially this is a development which has significant adverse environmental implications: what are the measures which should be included in order to reduce or offset those adverse effects?

52. For these reasons, I am satisfied that the Council's approach to the Regulations was fundamentally flawed. I appreciate that there is a distinction with the *Berkeley* case in that in that case no consideration at all had been given at the relevant time to a screening opinion.

53. In the present case I accept that consideration was given as to whether or not this proposal was an EIA development, but there was a complete failure to appreciate that this consideration had to be carried out and recorded and made publicly available in a formal manner in accordance with the Regulations. There is simply no written statement of Mr Hussell's opinion as to whether this development is an EIA development, save in so far as one finds references to that effect in the reports to Committee. But they merely record an earlier decision. They do not invite the Committee to take the decision. Thus, there has been a complete failure to comply with the requirements of reg.7 , and this is not simply a case where there has been a screening opinion, and whether due to some inadvertence there has been a failure to place it on the register in accordance with reg.20 . The Council has simply failed to recognise that the screening decisions cannot be taken informally.

54. Notwithstanding these submissions, Mr Findlay has invited me, effectively, to refuse relief on the basis that all that has been challenged in these proceedings is initially the resolution to grant planning permission and now the grants of permission. There have been no separate challenges to the screening decisions. He submits that the applicants were well aware that a screening decision had been taken, at least by April or June 2000. In that context he relies upon certain observations of mine in the decision of *R. (on the application of Malster) v Ipswich Borough Council and Ipswich TFC [2001] EWHC 711 (Admin)* (see para.99). In that case I had said:

> "It is not appropriate to wait until after planning permission has been granted, when it is too late to remedy the omission, and then complain that the screening opinion, which has been on the public register for some months, ****380*** was erroneous. Each case will of course depend on its own particular facts, but, as a general rule, where there is a discrete challenge to a screening opinion, it should, in my judgment, be made promptly so that any error, if there is one, can be remedied before the planning application is considered by the local planning authority."

55. The facts in the present case are very far indeed from those in *Malster* . It is plain that almost from the outset of the correspondence in this matter solicitors on behalf of the claimants were making it perfectly clear to the Council that they considered that for various reasons there should be an environmental impact assessment under the Regulations. They have been consistently making that point and saying that if there was not such an assessment then the grant of planning permission would be invalid. The Council has reconsidered the matter on a number of occasions but, in my judgment, it has failed to address the initial underlying errors. It must also be remembered that *Malster* was an application for permission to apply for judicial review, so the question of delay in applying was a live issue; no such issue arises in the present case. Permission has been granted to the applicant to apply for judicial review. Thus, I do not think it would be right to refuse relief on the ground of delay. In truth, the claimants have been saying for a very long time that the Council's approach under the Regulations was in error: the lack of a proper screening opinion is but one aspect of that complaint.

56. For the sake of completeness, I should mention that Mr Harwood, on behalf of the claimants, had a number of other criticisms of the Council's decision-making process. I have not heard his submissions about those matters. They can be considered by the Council when and if these applications for planning permission are reconsidered. I should make it clear that this case had been put down for one day. In the depths of the long Vacation there is simply insufficient time to explore in depth all the other issues that are raised in the submissions. On these relatively narrow grounds this application for judicial review must be allowed.

Commentary

C1. These two cases (*R. (on the application of Lebus) v South Cambridgeshire District Council* and *R. (on the application of Goodman) v London Borough of Lewisham*) raise some interesting issues regarding the operation of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293), and of the "screening opinion" provisions of those Regulations in particular. The two cases also seem to take very different approaches to the relevant obligations imposed on planning authorities.

C2. In the *Lebus* case, the fundamental criticism of the planning authority's decision making process, and which was upheld by the court, was that it had not made a publicly available formal record of its screening opinion. It appeared that an opinion had been reached, but without a formal statement as to this. The suggestion was that by looking at the correspondence and other documents which were available together, a "composite" picture could be put together which ***381** clearly showed that a "negative" screening opinion had been reached. Of course, this echoed the submissions made as to a "composite" type environmental statement in *Berkeley v Secretary of State for the Environment* , which were clearly rejected in that case. So a consistent approach appears to have been taken between the formal nature of the obligations regarding environmental statements and of those regarding screening opinions. A second criticism made was the suggestion that one of the factors taken into account in deciding (without sufficient formality) that an environmental statement would not be required had been that the relevant information was to be provided anyway. Not surprisingly, given the views expressed in *Berkeley* as to the need for the public to be involved in a formal assessment process, this criticism was also accepted by the court.

C3. What was perhaps a more interesting aspect of the decision was, however, the finding that, whilst it might well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive was that the potentially significant impacts of a development were described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Accordingly, the court considered that it was not appropriate for a person charged with making a screening opinion to start from the premise that, although there may be significant impacts, these could be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case was to require an Environmental Statement setting out the significant impacts and the measures which it was said would reduce their significance. This approach appears to be in accordance with the philosophy underpinning the *Berkeley* decision. However, it does not appear to coincide with another case. In *R. v St Edmundsbury Borough Council Ex p. Walton ([1999] Env. L.R. 879)* where the ***382** submission that mitigation measures could not be taken into account when deciding whether or not a development was likely to have significant effects on the environment was rejected by Hooper J., with the proviso that the decision-maker must be "careful" at this early stage. The *Walton* case preceded the House of Lords decision in *Berkeley* and so that aspect of the decision might be viewed as having been made in a context of taking a less formal approach to compliance with the EIA obligations (as adopted by the Court of Appeal in *Berkeley*). It also appears from very recent cases such as the Court of Appeal decsion in *Smith v SSETR ([2003] EWCA Civ 262)* , that the approach in *Lebus* is broadly the one which will be followed.

C4. It might be thought that a more relaxed approach was followed in the *Goodman* case. Here reference to the 1988 rather than the 1999 regulations (the latter having been in force more than two years at the time of the decision) was considered "unfortunate", and an error of reference rather than an error of law. Thus the key remaining issues were whether the planning

authority's approach to determining whether the proposed development fell within any of the Sch.2 categories was compliant with general public law principles, and whether the decision that it did not was taken by an officer with delegated powers. The second of these issues had also fallen for consideration in the *Walton* case, where the submission that a decision of the type in question could be classed as a "procedural" one, so that it was appropriate (and lawful) for an officer to reach without formal delegation, was rejected, there being no doubt that the decision was an "important" one. In the *Goodman* case there was no doubt that the officer who had signed the letter containing the decision not to seek an EIA was not one of those listed to exercise the relevant powers of the Council. Sir Richard Tucker was also in no doubt that the decision was an "important" one (and did not require reference to the case law to reach that finding. He found that the signature on the letter containing the decision was also 'unfortunate' in that it had resulted in the criticism made. However, he then looked at the process by which the decision was reached and, looking at the Council's witness statements, was satisfied that the decision was reached with sufficient involvement or supervision by those officers with delegated powers. He then concluded that the fact that the letter was signed by one who did not have such powers did not mean that the decision was not taken at the appropriate level by persons with delegated authority.

C5. Thus the two decisions appear to take different approaches to the degree of formality required in making screening opinions, albeit with regard to different aspects of that process.

Footnotes

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

