Neutral Citation Number: [2013] EWCA Civ 228
Case No: C1/2012/1141

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
HIS HONOUR JUDGE WAKSMAN QC
(sitting as a High Court Judge)
[2012] EWHC 1102 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL
19/04/2013

B e f o r e :

LORD JUSTICE PILL
LORD JUSTICE DAVIS
and
MR JUSTICE WARREN

Between:

Barbara Burridge	**Appellant**
- and -	
Breckland District Council	**Respondent**
- and -	
Greenshoots Energy Ltd	**Interested Party**

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

Justine Thornton and Zack Simons (instructed by Richard Buxton) for the Appellant
John Hobson QC and Ned Helme (instructed by Michael Horn, Solicitor to Breckland District Council) for the Respondent
Alex Goodman (instructed by Metcalfe Copeman and Pettefar) for the Interested Party

Hearing date : 15 January 2013

HTML VERSION OF JUDGMENT

Lord Justice Pill :

1. This is an appeal against a decision of His Honour Judge Waksman QC, sitting as a High Court Judge, on 26 April 2012. The judge refused the application of Ms Barbara Burridge ("the appellant") to quash by judicial review two planning permissions granted by Breckland District Council ("the council") on 9 November 2011. The judge granted permission to apply for judicial review but refused the application. Permission to appeal to this court was granted by Sir David Keene, on a consideration of the papers.

The Facts

2. The planning permissions were granted, subject to conditions, to Greenshoots Energy Ltd ("Greenshoots") for a biomass renewable energy plant, near Kenninghall, Norfolk (application 1372) and for a combined heat and power plant on nearby land at Crown Milling, Heath Road, Kenninghall (application 0445). The planning officer's report to the council's development control committee ("the committee") on 0445 stated that the plant would be fuelled by biogas produced by the renewable energy plant proposed on land off Garboldisham Road, Kenninghall (1372). The proposal in 0445 included provision for an underground gas pipeline to carry the fuel between the two sites. The report on 1372 referred to an amendment to the scheme for the plant submitted earlier under the same number. It was stated that the application "has been amended to omit the proposed combined heat and power plant and relocate it at Crown Milling, an animal feed mill and poultry hatchery approximately 1.1km to the east." It was submitted, without dissent, that the amendment was intended to have the environmental advantage of moving a part of the installation farther away from the village of Kenninghall.

3. The two reports were cross-referenced to each other. In each case, it was recommended that planning permission be granted, subject to conditions. The applications were considered and approved by the committee on the same day, 31 October 2011.

4. The appellant lives about 260 metres away from the proposed renewable energy plant. Her standing to bring the claim is not challenged. Her claim is that the permissions should be quashed for failure to submit the applications considered on 31 October 2011 to a screening opinion under the Town & Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 Regulations"), since replaced in England.

5. A screening opinion was issued with respect to the un-amended application 1372. It was dated 25 March 2011 and noted that "the application site is located within an area of generally open countryside approximately 0.9km to the south-west of the village of Kenninghall. The site extends to some 2.7 hectares". The proposed development was

considered to fall within schedule 2 of the 1999 Regulations, paragraph 3(a): "Industrial Installations for the Production of Electricity, Steam and Hot Water".

6. This was the conclusion of the screening opinion:

> "The scale and nature of the proposed development, and the character of the surrounding area, are such that it is considered that the proposed development would not be likely to result in significant effects on the environment.
>
> It is considered that the main environmental effects of the proposal would relate to: i) its effects on the character and appearance of the rural landscape, and ii) its impact of local amenity due to noise and odour emissions. It is considered that any such effects would not extend beyond the local area and would not be complex in nature. No sensitive areas would be affected by the proposed development.
>
> It is considered that the proposed development would not have significant effects on the environment. Accordingly, this screening opinion finds that the proposal does not constitute EIA Development and that Environmental Impact Assessment is not required in this instance."

The appellant's case is that a further screening opinion should have been adopted before the two applications were placed before the committee on 31 October 2011.

The statutory scheme

7. Council Directive 85/337, as amended, provides at article 1(1):

> "This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

Article 1(2) provides, in so far as is material:

> "For the purposes of this Directive:
>
> 'project' means:
>
> - The execution of construction works or of other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

8. Article 2 provides, in so far as is material:

> "1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.
>
> 2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into

other procedures or into procedures to be established to comply with the aims of this Directive."

9. Article 4 provides:

> "1. Subject to Article 2 (3), [not relevant in this case] projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.
>
> 2. Subject to Article 2 (3), for projects listed in Annex II, the Member States shall determine through:
>
> (a) a case-by-case examination,
>
> or
>
> (b) thresholds or criteria set by the Member State
>
> whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.
>
> Member States may decide to apply both procedures referred to in (a) and (b).
>
> 3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.
>
> 4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public."

10. The selection criteria contemplated in article 4(3) are set out in Annex III under the headings "Characteristics of Projects", "Location of Projects" and "Characteristics of the Potential Impact". "Characteristics of Projects" must be considered "having regard in particular" to matters which include "the size of the project" and "the cumulation with other projects".

11. Annex II specifies projects subject to article 4(2) and these include:

> "3. Energy industry
>
> (a) Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I);
>
> (b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I)."

12. The Directive is transposed into domestic law by the 1999 Regulations. It is not suggested that they do not do so effectively but they need to be read in the light of the Directive. The procedure has been to integrate environmental impact assessment ("EIA") into existing procedures for consent to projects, as contemplated in article 2(2) of the Directive.

13. The Regulations need not be set out comprehensively for present purposes. Planning permission is not to be granted for EIA development unless the authority granting it has first taken an environmental statement into consideration. EIA development means, in so far as is material, schedule 2 development likely to have significant

effects on the environment by virtue of factors such as its nature, size or location. Schedule 2 to the 1999 Regulations reflects Annex II in the Directive and includes the same provisions for the energy industry as those in Annex II.

14. Schedule 2 sets out "applicable thresholds and criteria for the purposes of classifying development as schedule 2 development" (paragraph 2), as permitted by article 4(2) of the Directive. Whether the appropriate threshold is crossed is obviously an important consideration when a local planning authority is considering a planning application. Under the energy industry heading for "industrial installations for the production of electricity" etc, it is stated that development is to be classified as schedule 2 development if "the area of the development exceeds 0.5 hectare". Under industrial installations for "carrying gas" etc, the threshold is that "the area of the works exceeds 1 hectare."

15. Under paragraph 1 of schedule 2, "area of the works" in the schedule includes:

> "any area occupied by apparatus, equipment, machinery, materials, plant, spoil heaps or other facilities or stores required for construction or installation."

16. Regulation 4(5) provides:

> "Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development."

Schedule 3 provides the selection criteria in Annex III of the Directive, already summarised.

17. Regulations 4 to 6 appear under the heading "Screening". In regulation 2, the interpretation regulation, "screening opinion" is stated to mean "a written statement of the opinion of the relevant planning authority as to whether development is EIA development."

18. Regulation 4(1) and (2) provides for the adoption by the local planning authority of a screening opinion to the effect that the development is EIA development. The regulation also empowers the Secretary of State, as a planning authority, to issue a direction which "shall determine for the purpose of these Regulations whether development is or is not EIA development" (regulation 4(3)). The Secretary of State may make a screening direction "irrespective of whether he has received a request to do so" (regulation 4(7)) but there is no duty on him to do so. Regulation 4(6) provides:

> "Where -
>
> (a) a local planning authority adopt a screening opinion; or
>
> (b) the Secretary of State makes a screening direction under these Regulations;
>
> to the effect that development is EIA development -

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

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

Under regulation 4(8), the local planning authority may ask the Secretary of State to make a screening direction.

19. Regulation 7(1) of the 1999 Regulations is central to the case. It provides:

> "Where it appears to the relevant planning authority that -
>
> (a) an application which is before them for determination is a Schedule 1 application or Schedule 2 application; and
>
> (b) the development in question –
>
> (i) has not been the subject of a screening opinion or screening direction; or
>
> (ii) in the case of a subsequent application, was the subject of a screening opinion or direction before planning permission was granted to the effect that it is not EIA development; and
>
> (c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations.
>
> Paragraphs (3) and (4) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1)."

20. Regulation 5 specifies the procedure to be followed when the person minded to carry out the development requests the planning authority to adopt a screening opinion. Greenshoots did not make such a request with respect to the relevant applications.

21. The procedure normally to be followed is not in dispute between the appellant and the council. When a planning application is received, environmental considerations must be taken into account by the local planning authority. The council acknowledges that "screening" is inherent in the requirements. That involves a judgment, first, as to whether the proposed development is EIA development. That involves reference to the appropriate part of schedule 2. A decision has to be taken, first, as to whether the development is schedule 2 development and, secondly, if it is, whether it is EIA development, as defined. The opinion, at the second stage, must be expressed in writing.

22. It is alleged that it was the first of those questions which either was not addressed or was addressed erroneously in this case. Before granting the planning permissions on 9 November 2011, the council had erred in failing to decide that schedule 2 development was involved. It is submitted that it was involved and that the council should have proceeded to the second stage and should have adopted a screening opinion which was required to be in writing. That there is a distinction between the

"screening" stage and the subsequent "scoping" stage, dealing with the scope of an EIA, is clear from the cases to which reference will be made.

23. In seeking to justify the decisions of the council, Mr Hobson QC submitted that no further screening opinion was required prior to submitting the two planning applications to the committee and the committee granting permission.

The judgment below

24. In a carefully reasoned judgment, the judge found, and it is not in issue, that the developments applied for were "functionally inter-dependent" but, having regard to their relative geographical positions, also held that they were not part of the same substantial development (paragraph 27).

25. The functional interdependence is obvious. The industrial installation proposed could not operate without the plant at Crown Milling and the pipe carrying fuel between the two sites.

26. The judge found that, given the area of the development involved in 0445, and the applicable threshold in schedule 2 to the Regulations, the need for a screening opinion was "simply not engaged" with respect to that application (paragraph 15). That raises a separate question as to the area involved in the pipeline proposal. I will consider that point separately and for the present, assume the judge's finding is correct.

27. The judge also found that a screening opinion had been issued when the two parts of the project were on the same site and their separation for the purposes of the amended application did not require a further screening opinion. Combined consideration of the two applications would not have led to a different screening opinion from that reached on the original 1372 (paragraph 30).

Submissions and authorities

28. On behalf of the respondent, Mr Hobson submitted that regulation 7(1)(a) is unambiguous in its reference to *an* application for planning permission. It was not for the committee to consider the overall project because the duty under regulation 7(1) was to consider "an application which is before them". For present purposes, each of the applications was to be considered separately. One, in an earlier larger form, had been subject of a screening opinion (1372) and the other (0445) was not a schedule 2 development. Thus, while it was not disputed that an obligation arose to consider whether a screening opinion was necessary, a decision that planning permission could be granted without one was lawful.

29. Reliance was placed on the decision of Simon Brown J in *R v Swale BC ex parte Royal Society for the Protection of Birds* [1991] 1 PLR 6. Simon Brown J stated, at page 16:

> "The question whether the development is of a category described in either schedule must be answered strictly in relation to the development applied for, not any development contemplated beyond that. But the further question arising in respect of a Schedule 2 development, the question whether it 'would

> be likely to have significant effects on the environment by virtue of factors such as its nature, size or location' should, in my judgment, be answered rather differently. The proposal should not then be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover, developers could otherwise defeat the object of the regulations by piecemeal development proposals."

30. In *R (on the application of Candlish) v Hastings BC* [2006] Env LR 13, Davis J stated, at paragraph 61:

> "It is plain that the 1999 Regulations are geared to the actual application for development consent. That that is a legitimate approach for a Member State to adopt seems to me to be indicated by the definition of 'development consent' and the references thereafter to such consent in the amended Directive. It also accords with the observations of the Advocate –General in paragraphs 67-69 of his Opinion in *Naturschutz*. In my view there is no justification for treating the word 'development', as used repeatedly in the 1999 Regulations, as though it means 'project' of some wider kind: and the Regulations are clear that the relevant assessment is to be made by reference to the application for planning permission. Indeed were it otherwise, there could be difficulties in any given case in assessing just what 'project' might be involved or, even if there was some wider project in mind, just what form it might take."

31. No further screening opinion was required, it was submitted on behalf of the respondent; a screening opinion had been issued with respect to the original 1372 when it was submitted in a larger form. As to 0445, even with the pipeline, it did not meet the threshold for consideration for EIA.

32. On behalf of the appellant, Miss Thornton submitted that regulation 7 must be read in the light of the use of the word "project" in article 1(2) of the Directive. The two applications for permission were two parts of the same project, neither of which could operate without the other. They were considered, as was sensible, by the committee on the same day and based on planning officer's reports which were cross-referenced to each other and plainly treated the two applications as forming part of a single project. As the judge recognised, the proposed developments were "functionally inter-dependent". They should have been treated as a single project or application when a decision was taken as to whether it was EIA development. Considered together, they crossed the schedule 2 threshold and a screening opinion was required.

33. To treat them as a single project (or application or development) for the purposes of deciding whether a screening opinion was required was not inconsistent with authority. The council could not avoid its obligations under the Directive and Regulations by purporting to treat the two applications as independent of each other.

34. The court was referred to cases in the Court of Justice of the European Union ("CJEU") on the Directive, decided since *Swale BC* and *Candlish*, and to other

domestic decisions. In *Ecologistas en Acción v Ayuntamiento de Madrid* [2009] PTSR 458, the CJEU had to consider whether works for the refurbishment and improvement of the Madrid urban ring road could be separated from each other on the ground that some of them were not covered by the Directive. It was stated, at paragraph 28, that the Court has stated on numerous occasions that the scope of the Directive was very wide and it would be "contrary to the very purpose of the amended Directive to allow any urban road project to fall outside its scope solely on the ground that the Directive does not expressly mention among the projects listed in Annexes I and II those concerning that kind of road."

35. The Court added, at paragraph 44:

> "Lastly, as the Court has already noted with regard to Directive 85/337, the purpose of the amended Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended Directive see, as regards Directive 85/337, *Commission of the European Communities v Ireland* (Case C-392/96) [1999] ECR 1-5901, para 76 and *Abraham v Région wallonne* (Case C-2/07), 28 February 2008, para 27."

36. In *Umweltanwalt von Kärnten v Kärntner Landesregierung* [2010] Env LR 15, a transboundary project to construct an electricity power line was to comprise 7.4 kilometres in Austria and 41 kilometres in Italy. The Austrian element was lower than the 15 kilometre threshold set for power lines in Austrian law. The court held that the Directive required an overall assessment of the effects of projects on the environment irrespective of a transboundary nature. Its purpose could not be circumvented by splitting a project in order to avoid assessment of its cumulative effect.

37. In *Bowen-West v Secretary of State* [2012] Env LR 22, the question arose whether an environmental statement was required to treat intended future and further proposals as part of the cumulative effects of the existing development proposal. Laws LJ, with whom Tomlinson LJ and Kitchin LJ agreed, stated that the relevant "project" for the purposes of the Directive and Regulations was not the whole prospective scheme up to 2026 and could only be the proposal presented. The inspector's conclusion that it was "a stand alone proposal which can be and is being considered on its own merits" was correct. Laws LJ, at paragraph 32, also acknowledged the clear distinction between the scope of an EIA to be undertaken where an environmental statement admittedly falls to be made and the question whether an EIA is required at all. He described the second question as the "screening" question and the first as the "scoping" question. The present case is of course concerned with the screening question.

38. The screening question was considered by the CJEU in R (*Mellor) v Secretary of State* [2010] PTSR 880. The questions posed related primarily to whether reasons for a screening opinion deciding not to carry out an EIA must be stated, whereas the present case turns on the failure to adopt a screening opinion at all. However, the Court did consider the screening process more generally:

> "57. It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.
>
> 58. Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.
>
> 59. In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request." (authority cited)

It is not disputed that the appellant had requested a further screening opinion in this case.

39. The decision in *Mellor* was considered in this court in *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, also concerned mainly with the screening opinion itself. The remedy available when a screening opinion was flawed was also in issue. Lord Justice Moore-Bick, with whom Jackson LJ agreed, stated, at paragraph 31:

> ". . . I do not think that course is properly open to us. The difficulty, as it seems to me, is that the adoption of a screening opinion, if one is required, is part of a process that leads eventually to the grant or refusal of planning permission. If any step in that process is legally flawed, the process as a whole is flawed and the grant of permission must be quashed. Accordingly, I think that there is no alternative but to grant the claimants the relief they seek."

Discussion

40. What emerges (*Mellor*, *Bateman*) is that the screening obligation is a discrete and important part in the planning procedure adopted under the Directive. It cannot be overlooked and it may require more than one planning application to be considered as a part of a relevant project. I do not consider that either the decision in *Swale BC* or that in *Candlish* supports the council's position in the present case. When considering, in *Swale BC*, whether the development met the appropriate threshold, Simon Brown J stated that it must be considered "strictly in relation to the development applied for" but that was by way of contrast with "any development contemplated beyond that". A similar question as to linked further proposals arose in *Bowen*-West. In *Swale BC*,

Simon Brown J expressly contrasted the situation in that case with one in which a proposal could not be considered in isolation "if in reality it is properly to be regarded as an integral part of an inevitably more substantial development."

41. The present situation comes into that category. The two proposed developments were functionally interdependent and can only be regarded as an "integral part" of the same development. They cannot be treated otherwise than as a single project or development and were actually considered by the committee on the same day and on the basis of cross-referenced reports. The geographical separation of something over 1km does not, in my judgment, defeat that, particularly given the link provided by the pipeline. Not only was 0445 inevitably part of a more substantial development (*Swale BC*), it was considered by the committee at the same time as 1372.

42. In *Candlish* too, a different situation was being considered. The case was concerned with projects "of some wider kind". The proposal at 0445 was not a possible or projected proposal of a wider kind; it was integral to and functionally interrelated with an application being considered at the same time. The "wider project", even if it could be so categorised, was not merely "in mind" as Davis J put it, it was before the committee at the same time.

43. It is clear that obligations under the Directive and Regulations cannot be circumvented by "the splitting of projects" or the failure to take into account the "cumulative effect of several projects" (*Ecologistas*) and also that the obligations cannot be defeated by "piecemeal development proposals" (*Swale BC*). I accept that the planning history in this case does not suggest any attempt deliberately to manipulate the system, and that is not alleged, but the effect of the sequence of events on the council's duties must still be considered.

44. The present appeal does not turn on it but I add that the powers of the Secretary of State under regulation 4 do not in my view lessen the duties of the local planning authority under the Directive and Regulations. The local planning authority may request the Secretary of State to give a direction, as has now happened, but the presence of the power available to the Secretary of State under regulation 4(7) does not in my view impose a duty on the Secretary of State to monitor the performance by local planning authorities of their duties under the Regulations or reduce the extent of those duties.

Conclusions

45. It is necessary to keep in mind the word "project" in the Directive when considering Regulations intended and expected to implement the Directive. The cases, both in the CJEU and domestic, do not permit its avoidance by including parts of a project or development in different planning applications.

46. Considered with the word "project" in the Directive, the presence of the expression "an" application in regulation 7(1)(a) did not require or permit the two applications before the committee on 31 October to be considered separately for the purposes of the Directive and Regulations. It was a single project and the applications comprised, in the language of regulation 7(1)(b), the "development in question". It was necessary to take the applications into account together when deciding whether a screening

opinion was necessary. The council cannot, in my judgment, rely on the expression "an" application, in regulation 7, to avoid the screening obligation arising under the Directive and Regulations by dividing a project between more than one application, with one or both applications remaining below the schedule 3 threshold. Albeit in two applications, it was a single project and a single development which crossed the schedule 2 threshold.

47. The EIA procedure is fundamental to the consideration of planning applications in the United Kingdom and the screening stage is an important and a discrete part of the procedure. The applications before the council on 31 October were significantly different from 1372 which had been before the council earlier in a different form. They now involved two sites, over a kilometre apart, connected by a pipeline. Whether it was environmentally better or worse is not for the court to decide; the council should in my judgment have addressed its environmental responsibilities and that required, as a first stage, adopting a screening opinion. Treated as a whole, the project crossed the applicable threshold in schedule 2.

48. The court cannot speculate as to what environmental considerations would arise from a separation of the two parts of the project and the insertion of a pipeline to link them though I acknowledge that, save for the intervention of the Secretary of State, to which I will refer, no fresh environmental considerations have been brought to the attention of the court. The environmental impact question is required to be addressed by the council by adopting a screening opinion. That being an essential stage in the process, I do not consider it is open to the court to make a judgment of its own based on the contents of the planning officer's reports.

49. There remains the issue whether the court should nevertheless uphold the planning consents on the ground that, had a further screening opinion been adopted, it would have been to the same effect as the earlier opinion. On that issue, a further factor needs to be considered, that is reliance by the council on the statement of Mr Moys dated 18 April 2012, first produced on the day of the hearing before the judge. Mr Moys is a principal planner employed by Capita Symonds, who operate the council's planning and building control service on the council's behalf. At that late stage, he claimed that he had given consideration to whether further screening was necessary before the two applications were considered and concluded that it was not. Had he produced the written opinion required by the Regulations, it would have concluded that neither the amended application 1372, nor application 0445, nor a combination of the two, could have constituted EIA development.

50. The judge found, at paragraph 32, that there is no reason to doubt that statement, and, at paragraph 34, that it was incumbent on a claimant to give a reason or reasons as to why the outcome might have been different. The judge did not hear oral evidence and this court is in as good a position to assess the situation as was the judge. The judge added, at paragraph 35, that it was not arguable that a further screening opinion would have come to a different result and that "any failing on the part of the council in this regard may also be disregarded".

51. *Mellor* and *Bateman* underline the importance of the screening opinion as a part of the planning process. A planning authority is required to consider whether an EIA was necessary. Two stages are involved, as stated in paragraph 21 above. The result of that

consideration should, in my judgment, be expressed formally to achieve the object stated by the CJEU in *Mellor*, at paragraph 57. I am not prepared to accept the belated statement of Mr Moys as meeting that obligation. Retrospective statements such as this are rightly deplored by the courts *(R (Wall) v Brighton and Hove City Council* [2004] EWHC 2582; [2005] 1 P & CR 566). The required opinion as to whether the development was or was not EIA development could conveniently have been expressed in the officer's report to committee. Committee members were simply not informed or advised on this issue.

52. The planning officer's approach to the applications at the time was the one still maintained by the council in this appeal, that the two applications should be considered separately, an approach I consider erroneous. I am not prepared to hold that the council's obligations are satisfied by a statement made months after the event as to the state of mind, unexpressed at the time, of the officer on a question he did address at the time. It does not end there because the members of the committee making the decision were not even alerted to the issue whether the threshold was crossed and the report was defective in that respect. It is at the time of decision that members need information and guidance.

53. A further consideration relied on by the appellant was that application 0445 considered independently, crossed the threshold in schedule 2, paragraph 3 (ground 2). By way of provision for laying the pipeline, the application for permission included a strip of land 10 metres wide over the length of the proposed pipeline. If that area is taken into account, the 1 hectare threshold is crossed. The area of the works stated in schedule 2 is defined as including any area occupied by apparatus etc required for construction (paragraphs 14 and 15 above). It was submitted on behalf of the appellant that the entire 10 metre area should be taken into account. It had been found appropriate by the developers to include a strip of that width to take account of the pipe laying procedure and it must be included for the purposes of the schedule.

54. The judge did not accept that submission. He found, at paragraph 15, that the 10 metre width was specified "to demarcate room for manoeuvre as to the precise route under the fields which the pipe was permitted to take. Once completed those boundaries would be irrelevant. And the pipe-laying work would itself not span 10m across the pipe's route."

55. The submission is made that, whatever precise route is taken, the final land take would not amount to 10 metres. However, the schedule does introduce the concept of "the area of the works" and there is no evidence one way or the other in relation to the judge's conclusion that it would not itself span 10 metres. The report to committee did say that "the proposed pipeline corridor has also been widened slightly to provide some flexibility to negotiate unforeseen obstacles" but it appears that no information was supplied, or consideration given, to the area of works required to lay the pipeline.

56. In my judgment, the area of the works is a relevant consideration in deciding whether the threshold is crossed. I do, however, see the potential unreality in converting a wide corridor specified in a planning application by way of caution as coming necessarily within the "area of the works". Further information should have been supplied by the developer, and, if not, requested by the council, so that consideration would have been given to what area came within the definition "area of the works". I

do not propose to make a ruling on this issue, having found that, even without that area, the screening procedure was unlawful. However, the failure of the council to address this aspect of the planning application, that is, the area of the required works, is a further indication of its failure to address the obligation to decide whether the schedule 2 threshold was crossed.

57. Of course, I see the force of an argument that a public project should not be held up by the need for a screening opinion when, it is submitted, it may be unlikely that such an opinion would differ from that expressed on the original 1372 considered alone. The changes in the project were, however, on the face of it significant ones and I refer below to the stance of the Secretary of State. Moreover, because the planning officer applied the wrong test, the committee members, who made the relevant decision, were not given the opportunity to consider the applications on the correct basis which was that they were dealing with a development that crossed the schedule 2 threshold.

58. I do not consider, when an important and formal procedure has been laid down in the Directive and the Regulations, that the local planning authority may be permitted to ignore it. I bear in mind the approach of Moore-Bick LJ in *Bateman*.

59. A further factor in this case is that the interested party, sensibly in my view, has made two new planning applications in all material respects identical to the two applications before the court. The council, also sensibly in my view, has sought a screening direction from the Secretary of State pursuant to regulation 4(8)(b) of the 2011 Regulations in relation to the further planning applications. On 10 December 2012, the Secretary of State gave screening directions applying to the two new applications. In deciding whether to make a direction, the Secretary of State is not bound by the thresholds in the Regulations.

60. The Secretary of State's directions were requested by the council and given after the decisions complained of and after the hearing before the judge. A dispute has arisen as to the circumstances. The situation is an unusual one and I consider it important in the interests of transparency and public administration that the facts are set out, whatever the impact on the outcome of the case. The parties have helpfully provided further information.

61. The council requested screening directions under regulation 4(8)(b) of the 2011 Regulations, which had replaced the 1999 Regulations, by letter dated 8 October 2012. It stated:

> "Screening Directions are requested in respect of four planning applications for development near the village of Kenninghall, as listed below:
>
> i. Proposed renewable energy plant: 3PL/2012/0737/F
>
> ii. Proposed CHP plant: 3PL/2012/0738/F
>
> iii. Proposed poultry hatchery extension: 3PL/2011/1100/F
>
> iv. Proposed feed bins: 3PL/2012/0156/F
>
> Copies of the planning applications are attached to this letter. Full details of all associated documents, including plans, supporting documents and relevant correspondence can be viewed via the Council's website . . ."

It was stated that application iv. had been withdrawn. Reference was made to other proposals for development nearby, a proposed solar farm and a proposed poultry farm.

62. The letter continued:

> "By way of further background to these requests, I can advise as follows. The planning applications referred to above are causing major concern to many residents in the local community, and there has been a ground swell of criticism of the Screening Opinions adopted by the Council. Judicial review proceedings are on-going in respect of two related planning permissions granted by the Council in November 2011 for the proposed renewable energy plant and CHP Plant. Whilst the claim has been dismissed in the High Court, leave has been granted for this matter to be heard in the Court of Appeal. In the light of these particular circumstances, the further independent scrutiny of the proposals that Screening Directions would provide would be welcomed by the Council. It is hoped that this will enable the applications to proceed to determination with the confidence of the local community."

The motive is, with respect, admirable. At the same time, in response to an objector, the council by Mr Moys stated that applications 737 and 738 were "essentially the same" as had been approved by the council in November 2011 for 1372 and 0445. At that time, as before this court, the council was erroneously claiming that, for EIA purposes, each of the proposals could be considered independently. In his statement served on the day of the hearing before the judge, on which the council relies, Mr Moys did not think it necessary to mention the hatchery application which was by then already before the council.

63. Directions were given by the Secretary of State, on each of the applications, by letter of 10 December 2012. The letters were in very similar terms to each other. In relation to 737 (1372), it was stated:

> "The applicant's own design and access statement accepts that 'The proposal is not a stand alone project'. The Secretary of State also accepts that the renewable energy plant cannot be treated as a separate proposal to that of the related combined heat and power unit and hatchery extension, the subjects of separate planning applications and EIA screening requests. The Secretary of State is satisfied that none of these applications can proceed without the other. In his opinion, the potential for cumulative environmental impacts, from all the related developments in the vicinity are such as to suggest that significant effects are likely. EIA is therefore required.
>
> Accordingly, in exercise of the powers conferred on him by regulation 6(4) of the 2011 Regulations, the Secretary of State hereby directs that the proposed development described in your request and the documents submitted with it, is 'EIA development' within the meaning of the 2011 Regulations. This letter constitutes the statement required by regulation 4(7)(a)."

The direction in 738 (0445) was in the same terms, with the necessary change in nomenclature.

64. The council has not, and has stated that it will not, challenge the directions by way of Judicial Review. On the basis that, as found by the court, and in effect by the Secretary of State, that 1372 (now 737) and 0445 (now 738) should be considered together for screening purposes, the council's claim is that the Secretary of State so directed only because of the addition of the hatchery proposal, a proposal not hitherto a feature of submissions, or mentioned by Mr Moys in his statement to the judge. It was before the council when he made his statement. It is submitted that, but for the hatchery application, the directions on 737 and 738 would not have been given. That appears to me to be an unlikely determining factor and the direction should be treated on the basis that they would have been given on a consideration of 737 (1372) and 738 (0445) in combination in any event. I accept that the court should not and cannot determine that question but it is sufficient in my view to say that there is a very real possibility that the directions would have been given without the addition of the hatchery proposal which has been belatedly introduced into the case.

65. If, contrary to that view, it was a significant factor in this case and, while the good faith of the interested party has not been challenged, if the later hatchery application is to be linked with those under challenge, it is the very kind of "piecemeal development proposal" stated by Simon Brown J in *Swale*, at page 16, to be unacceptable. All three should be reconsidered, and reconsidered together, by the council. In any event, there are subsisting directions from the Secretary of State that two applications "essentially the same" as those approved by the council in November 2011 are EIA developments.

66. The Secretary of State, as principal planning authority, having adopted the stance he has, an argument that permissions granted in the manner they were should stand has much less merit. I regard that opinion of the Secretary of State, expressed when exercising his power under regulation 4(3), at the council's request, as a further reason why, having found an unlawful procedure, the court should quash the planning permissions 1372 and 0445. I am more than uncomfortable about allowing planning permissions to stand when, on essentially the same applications by the interested party, and at the invitation of the council, the Secretary of State has directed that EIA is required.

67. Local authorities should be conscious of well-established environmental procedures and the need to address them and deal with them. If they do so conscientiously, which in some contexts may be a less than arduous exercise, litigation is unlikely. It does not serve the wider public interest, in my judgment, in the light of the failures in the present case, to decline to exercise the discretion to quash. I have borne in mind that the full rigours of *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 need not necessarily be applied *(R (Edwards) v Environment Agency* [2008] Env LR 34).

68. I do not doubt the inconvenience caused to the interested party, which has acted in good faith throughout, but I find no ground for refusing relief on the ground of delay.

69. In all the circumstances, it is in my judgment appropriate to allow the appeal and quash the two planning permissions.

Lord Justice Davis :

70. As is so often the case with proceedings for judicial review, and particularly those relating to planning and environmental matters, this appeal has been all about process. That is not intended of itself to be a criticism. Bad process can lead to bad decisions. But some aspects (although by no means all aspects) of the present appeal did seem to me to some extent to justify Mr Hobson's lament that the process here was being treated by the appellant, and those supporting her, as something of an obstacle race for the council.

71. The facts and the relevant parts of the Directive and Regulations are set out in the judgment of Pill LJ and I do not repeat them.

72. Four points in my view do call for notice at the outset:

    i) A very detailed screening opinion, for the purpose of the 1999 Regulations, was adopted and issued by the council on 25th March 2011, by reference to the original 1372 planning application. No criticism was then, or is now, made of its reasoned conclusion that the development proposed under that application would not be likely to result in significant effects on the environment and that an EIA was not required.

    ii) The appellant has not herself given any substantive reason why the outcome decided on by the council on 31st October 2011 might have been different had only a further formal screening opinion been produced. No hitherto unidentified adverse environmental impact is alleged to emerge out of the combined environmental effects of the two applications, 1372 (as amended) and 0445, if taken together. I am not saying that the appellant was legally obliged to: but it is at least a point of comment all the same.

    iii) It was accepted before the judge below, and as he records, that the amended 1372 application (which excluded the CHP plant) did not of itself call for a further screening opinion. It was also accepted before us that, subject to the point about the area of the proposed pipeline as raised in ground 2, application 0445 would not of itself have constituted schedule 2 development: and so would not of itself have called for a screening opinion by reason of Regulations 7(1) and 5(4).

    iv) No one can suggest, or does suggest, that the interested party here was in any way trying to manipulate the system.

73. Some parts of the original written grounds of appeal might suggest a claim based on direct reliance on the Directive itself. If so, that is not tenable. For one thing, that is not the way the case was put before the judge below. For another, the 1999 Regulations properly implement the requirements of the Directive. Miss Thornton on this appeal was right so to proceed. It is also by now well established that the Directive does not of itself require a case by case examination to assess whether there would be significant effects of a project on the environment: thresholds and criteria may properly be set (provided they do not provide a general exemption for certain projects from EIA). Accordingly the case is to be decided by reference to the 1999 Regulations, properly interpreted; and an interpretation which has regard to the underlying purpose of the Directive is obviously appropriate.

First ground

74. Against that short background I turn to the first ground advanced by the appellant, to the effect that the planning applications 1372 (as amended) and 0445 are to be regarded as one "project", constituting an EIA development calling for a screening opinion.

75. In the case of *Swale* Simon Brown J stated that whether the development is a Schedule 1 or a Schedule 2 development is to be decided "strictly in relation to the development applied for, not any development contemplated beyond that". In *Candlish* I expressly agreed with that. (It is also, I would suggest, consistent with the conclusions of Laws LJ, with whose judgment Tomlinson LJ and Kitchin LJ agreed, in the subsequent case of *Bowen-West* at paragraphs 23 to 26 of his judgment). But Simon Brown J went on to emphasise that where a development *is* a Schedule 2 development, then the proposal is not to be looked at in isolation. That, in my view, plainly accords with the selection criteria contained in Schedule 3, as applied by Regulation 4(5), which specifies "cumulation with other development" as one matter available at that stage to be taken into account.

76. The question is whether, on a proper interpretation of the 1999 Regulations, planning application 0445 is to be taken with application 1372 (as amended) so as to be "an application before [the planning authority] for determination as a Schedule 2 application".

77. Miss Thornton made clear, on enquiry by the court in the course of argument, that for the purposes of this appeal she was not saying that *Swale* and *Candlish* were wrongly decided on this issue. Her submission was that those cases are distinguishable.

78. I agree with her that those cases can be distinguished. For the reasons I sought to give in *Candlish*, if I may be permitted to say so, I think there are strong grounds for not requiring planning authorities to look behind the particular application for development before them (or, in the words of *Swale*, to look for "any development contemplated beyond that"). There are, as it seems to me, formidable objections in requiring a planning authority to have regard to some possible further development in contemplation, but not yet specified, or effectively in point of practice obliging a planning authority to consider all such applications on a case by case basis: when the 1999 Regulations are plainly designed to contrary effect. But the present case is different. Here, revised application 1372 and application 0445 were *specifically* linked. Not only, as the judge inevitably found, were the two applications "functionally interdependent": they were also, in my view, and with all respect to the judge, to be regarded as part of the same substantial development.

79. I understand the point Mr Hobson and Mr Goodman sought to make on the wording of Regulation 7(1)(a) and its reference to "an application". But in such circumstances as the present, in my view, and giving an appropriately purposive approach to the interpretation of Regulation 7, there was here one overall development which was properly to be regarded as a Schedule 2 development for which application was being made. It is, I think, too narrow an approach to the interpretation of Regulation 7 – or to the statements of Simon Brown J in *Swale* and of myself in *Candlish* – to hold otherwise. In the particular circumstances here I consider that the two planning applications were to be taken together for the purposes of Regulation 7. This accords with the whole background; with the fact that application 0445 was on its face

expressly linked to application 1372; with the fact that the two Reports on the two applications were cross-referenced one to the other and were submitted to, and were "before", the Planning Committee for consideration on the same date; and the fact that the two applications were in fact the subject of decisions issued on the same date. All that accords with the reality – viz that the one could not and would not sensibly be implemented without the other. Nor (unlike *Candlish* and *Bowen-West*) was this a case of one specified planning development before the planning authority with another unspecified and unfinalised planning development in the contemplated background. The two applications were thus required to be considered together: they related to one specific (and specified) integrated development. That is then the "development in question" for the purposes of Regulation 7(1)(b).

80. That still leaves open, in other cases, the question of cumulative development which is not (unlike the present case) the subject of concurrent linked applications actually before a planning authority. This is potentially a problem. It may not necessarily be a problem where the existing planning application is, on any view, for Schedule 2 development: because cumulation can then be taken into account under Schedule 3. But what if it is not? This is the kind of situation the decision of the Court of Justice in *Ecologistas* had in mind. Clearly it would not be acceptable if the intended application of the EIA regime and the underlying purpose of the Directive could be deliberately circumvented by the calculated making of separate or staggered successive applications which are not ostensibly, if taken on their own, within the ambit of Schedule 2. The point does not, however, arise for decision here; and in the circumstances of this particular case, I would accept Miss Thornton's arguments on the first ground advanced.

Second ground

81. As for her second ground, however, I was not impressed by her arguments. It is true that the pipeline corridor – and that is what it was – specified in application 0445 was shown as 10 metres in width on the plan and so, for its stated length of 1.1 km, could notionally exceed 1 hectare in area and so be within paragraph 3(b) of Schedule 2. But that width as shown on the application plan was clearly for illustrative purposes. As the judge pointed out, the pipe itself would have a diameter of just 20 cms. It is not to be conceived that the pipe, and the ancillary works involved in laying it (part of the "area of works", as defined, for the purposes of Schedule 2), would actually require an area of 10 metres along its whole projected length of around 1.1 km, thereby totalling one hectare or more. As the judge held, the red lines on the plan in the planning application were there to "demarcate room for manoeuvre". In such circumstances he was justified, in my opinion, in holding that the pipeline area of works did not come within paragraph 3(b) of Schedule 2. It would, in my view, be productive of wholly unreal technicality to conclude otherwise.

82. It is, I think, also important to note that the pipeline aspect was addressed in the report relating to application 0445 before the Planning Committee on 31st October 2011. The relevant part of the report in this regard was stated to be "in response to queries raised about the environmental impact of the pipeline". It was noted that the "corridor" had been widened to 10 metres "to provide some flexibility to negotiate unforeseen obstacles". It was also, I observe, recorded that it would pass through arable land of low ecological value: it thus plainly by implication, in my view, had been assessed as

not being land in a "sensitive area". That indicates that the question of environmental assessment with regard to the pipeline had been addressed. This was in fact confirmed by Mr Moys in his subsequent witness statement.

Third ground

83. It is on the final ground that – and differing, with great respect, from Pill LJ on this point – I consider that this appeal ultimately must fail.

84. The judge found that there was no reason to doubt Mr Moys' witness statement. Mr Moys was the individual case officer to whom consideration of such matter had been delegated. He had drafted the original screening opinion. He in terms stated that, at the time, he gave consideration as to whether further screening was necessary in the light of the amended 1372 application and submission of the 0445 application. He concluded that further formal screening was not necessary. He was of the opinion – wholly rational – that the replacement of the CHP plant by smaller equipment on the 1372 application site and the relocation of the CHP plant to the nearby 0445 application industrial site (as opposed to the previous rural site identified in the original 1372 application) could "not reasonably be expected to result in any increased or different environmental impacts…beyond those considered in the original Screening Opinion". He was of the same view with regard to the pipeline. He had considered that the development under the 0445 application was not Schedule 2 development on account of its small scale. He stated that had he produced a formal screening opinion at the time it would have concluded that neither application, nor a combination of both, would have constituted EIA development.

85. I agree that, in the judicial review context, the court must always be very wary of after the event rationalisation. But in the present case this evidence accords with the actualities of the situation. I do not think it right to say that because the council had, in point of form, treated the applications as two separate applications, it will have been permitted thereby to "ignore" the procedure laid down in the 1999 Regulations. Indeed, the whole point of Mr Moys' statement – which the judge accepted – was not that he had "ignored" the procedure but that he had had regard to it. He did address again the question of EIA. His view was at the time that there could and would have been no different EIA outcome simply because the original planning application had been revised in the way it was under the two (separate) applications. That was the footing on which the council proceeded. In my view that was a realistic appraisal of the position on the part of the judge: and he was entitled to accept Mr Moys' statement. Further, as noted above, the laying of the pipe was, as the report of 31st October 2011 for application 0445 shows, expressly considered in terms of environmental impact and was assessed to have none. As to the minor modification to the 1372 application occasioned by the resiting of the CHP plant and as to the actual siting of the CHP plant in the more industrial area contemplated by the 0445 application they can not realistically, for environmental impact purposes, of themselves be described as at all significant or to have given rise to any realistic possibility of a different view from that set out in the original screening opinion dated 25th March 2011.

86. The judge thus found that, if (contrary to his opinion) a further screening opinion was necessary, and if it was the council's duty to obtain one: "it is clear that the council

complied with it, because it did give such consideration. Mr Moys says so and there is no reason for me not to accept that". The judge went on to find expressly, in paragraph 32 of his judgment, that this was not a case of retrospective justification. I myself see no reason to interfere with those findings, which I consider were properly open to the judge in the circumstances of this case.

87. It may also be noted that under the 1999 Regulations – the 2011 Regulations may be different – the council was not required to give a further reasoned written screening opinion at the time to explain its view that an EIA was not called for. Pill LJ notes that the required opinion could conveniently have been expressed in the officer's reports to the committee. No doubt it could have been. But it was not, under the 1999 Rules, an absolute requirement that it had to be. This is, I think, consistent with the decision of the Court of Justice in *Mellor* at paragraph 61:

> "61. In the light of the foregoing, the answer to the first question is that article 4 of Directive 85/337 must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that Directive to an EIA, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made."

88. It is true that that authority requires that, if an interested party so requests, the planning authority must thereafter communicate with him the reasons for the determination, so that he knows the basis on which he may appeal. In the present case the judge expressly found in paragraph 36 of his judgment – and it is not challenged – that the points made by Mr Moys in his witness statement were made in substance by the council in its letter of 19th January 2012 (which letter is also itself to be set in the context of the first screening opinion and the two reports to the council) before these proceedings were commenced.

89. Pill LJ cites the observations of Moore-Bick LJ in the *Bateman* case to the effect that the adoption of a screening opinion, if one is required, is part of a process that leads eventually to the grant or refusal of planning permission and "if any step in the process is legally flawed, the process as a whole is flawed and the grant of permission must be quashed". While the sentiment in general terms is easy to understand and accept, I do not think the passage should be read in absolute terms: a legal flaw in the process (if there is one) in my view may, but not necessarily "must", lead to the grant of permission being quashed. I also note that in the same case Mummery LJ (while dissenting on the facts as to whether sufficient reasons were given) said this at paragraph 40:

> "In my judgment, the decision not to have an EIA is a significantly different kind of decision from a refusal or grant of planning permission. The reasons for a preliminary administrative decision whether or not to have an EIA do not have to satisfy the same standards of information and reasoning as would apply to a substantive decision on a planning application. The degree of "grappling" is different, more provisional and less exacting. What matters with

a decision of this character is that the reasons for it that were made available to the claimants suffice to satisfy the criteria in the passage cited from *Mellor*."

90. We did hear brief argument on the subsequent decision of the Secretary of State with regard to the two further applications, linked, as I gather, to two additional entirely fresh matters, subsequently lodged by the interested party. The position was by no means clear on those: and I do not think that the subsequent decision of the Secretary of State (whatever its potential implications for any future proposed development) should be permitted to impact on what, in my view, was a proper outcome for applications 1372 (as amended) and 0445 as decided by the council by its decisions issued on 9th November 2011.

91. For completeness, I would add that given my views set out above I would therefore not have been minded to interfere with the judge's further conclusion set out in paragraph 35 of his judgment. This was to the effect that had any further screening opinion been called for, it was not arguable that it would have come to any different result here and any failing on the part of the council in this regard may also be disregarded. The judge had regard to the principles of *Berkeley v Secretary of State for the Environment* in so concluding. It will be gathered that I can, for myself, see no reason to depart from the judge's conclusion on that, given the circumstances of this case.

Conclusion

92. Accordingly, and notwithstanding Miss Thornton's very able presentation, I would uphold the judge's conclusions on the second and third grounds. I would for my part dismiss the appeal.

Postscript

93. After the court had circulated its judgments in draft to the parties, Miss Thornton put in written submissions suggesting that Warren J, in his draft judgment, may have factually misunderstood the position as to whether there were materials which controverted Mr Moys' witness statement. In this regard, she relied, again, on the decisions of the Secretary of State contained in the two letters of 10 December 2012, which of course post-dated Mr Moys' statement, as well as placing reliance on what Pill LJ had said on these in his then draft judgment, in particular his observations as now contained in paragraph 66. This led to further written submissions from the parties and further materials being provided, including – but not limited to – the letter of 8 October 2012 and the response of the council (dated 3 August 2012) to an objector as referred to in paragraphs 61 and 62 of the judgment of Pill LJ.

94. All this does not cause me to change my substantive judgment or my overall opinion of the matter.

i) First, the point was initially raised on the basis of an asserted misunderstanding on the part of Warren J. It had not occurred to me that there had been any misunderstanding on his part, on an objective reading of his then draft judgment; but more importantly Warren J has confirmed there was none. That being so, I would, for myself, be disinclined to entertain on the part of the appellant further materials, and

expanded and new arguments, over and above those advanced at the hearing before this court.

ii) Second, even having considered such written submissions and materials as have been provided, I would see no sufficient reason to depart from what I have said in paragraph 90 above. In my view the position regarding the Secretary of State's decisions was and remains not clear. The two direction letters of 10 December 2012 previously produced at the hearing before this court relate to planning applications apparently corresponding to the two applications 1372 and 0445. But there were also, as the court had been told at the hearing, decisions of the Secretary of State of that same date on two other planning applications relating to the hatchery extension and to the installation of a solar unit, which last installation we gather relates to a site of some size. (This court has not itself seen these four further planning applications.) In the letters of 10 December 2012 it was stated that, in the Secretary of State's opinion, the "potential for cumulative environmental impacts from all the related developments in the vicinity" were such as to suggest that significant effects were likely. Miss Thornton, in her most recent written reply argument, now also seeks to say that a planning application for the hatchery extension had in fact been lodged with the council in October 2011 and was extant at the time of Mr Moys' witness statement, although it was not referred to by him in his witness statement. She further seeks to argue that the decision letters of the Secretary of State of 10 December 2012 relating to the planning applications corresponding to 1372 and 0445 did not include reference to the solar installation unit and thus that, so she says, the solar installation unit had not formed part of the consideration of the "cumulative environmental impacts from all the related developments in the vicinity". Mr Hobson and Mr Goodman strongly disputed that in their own further materials and written observations which they have since supplied. Certainly in the Secretary of State's direction letter of 10 December 2012 relating to the solar installation unit – as since provided to the court – the Secretary of State makes clear that that application has been considered in combination with the applications for the combined heat and power unit, renewable energy plant and hatchery extension (described in that letter as "related development proposals"). In such circumstances these new aspects would, to my mind, have needed yet further argument and, potentially, yet further evidence on issues not developed by the appellant before us at the hearing.

iii) The position on these aspects thus – to me – remains unclear, even leaving aside any other points (and the council and interested party have indicated a number of them) querying the basis on which the Secretary of State actually reached these decisions as recorded on the face of the letters. At all events, I think that none of this further material of itself requires displacement of what, in my view, was the judge's entitlement in the circumstances of this particular case: namely to rely as he did on Mr Moys' witness statement of 18 April 2012 and the preceding letter of 19 January 2012.

Mr Justice Warren :

95. I have had the advantage of reading the judgments of Pill LJ and Davis LJ in draft including the postscript to the judgment of Davis LJ. I gratefully adopt Pill LJ's recital of the facts and the relevant EU and domestic legislation.

The first ground of appeal

96. The first ground of appeal is that the Judge failed to understand and consider the project in front of him. On this ground of appeal, I agree with the decision and reasoning of Pill LJ. There was, as he says, a single project and a single development. For the reasons given below, once it is recognised that there is a single development for the purposes of the 1999 Regulations, the planning authority is required to carry out a screening exercise by reference to that development. It is not right to treat separate components of that development separately simply because they happen to be subject to separate applications for planning permission.

97. The central issue in relation to the first ground of appeal is, as I see it, whether Regulation 7(1)(a) applies in the circumstances of the present case. If it does not, then there was no need for a screening opinion in relation to application 1372 or application 0445. In contrast, if it does apply to either of those applications or to the combination of them, such an opinion was necessary.

98. The 1999 Regulations implement the Directive so that their interpretation must have regard, as Davis LJ puts it, to the underlying purpose of the Directive. I would put it in slightly stronger language: the 1999 Regulations should, if possible, be interpreted as implementing all of the mandatory requirements of the Directive although perhaps little, if anything, turns on this difference of language. As Arden LJ put it in *HMRC v IDT Card Services* [2006] STC 1252 at paragraph [79] when explaining the *Marleasing* principle (see C-106/89 *Marleasing* [1990] ECR I-4135):

> "The Court of Justice has held that the national court's obligation is to interpret domestic legislation, so far as possible, in the light of the wording and the purpose of a directive in order to achieve the result pursued by the directive and thereby comply with Community obligations….. It is sometimes also referred to as the principle of conforming interpretation."

99. Since there is, in the present case, a single project falling within the scope of the Directive and a single development for the purposes of the 1999 Regulations, those Regulations should be construed, if possible, as imposing on the Council an obligation to carry out a screening exercise and to adopt a screening opinion in relation to the development.

100. In my judgment, the 1999 Regulations can readily be construed in that way. There are (at least) two possible routes to that result. One route is to construe Regulation 7(1)(a) as applying separately to each application; the other is to construe Regulation 7(1)(a) as applying to the applications taken together.

101. As to the first route, the single development which has been identified is, taken as a whole, "Schedule 2 development". A "Schedule 2 application" is defined as including "an application for planning permission for Schedule 2 development". Under this first route, an application "for" Schedule 2 development is to be construed as including an application "in relation to" Schedule 2 development, so that each of application 1372 and application 0445 taken separately is "an application for planning permission for [*ie* in relation to] Schedule 2 development".

102. As to the second route, application 1372 and application 0445 taken together are to be seen as "an application for planning permission for Schedule 2

development". The two applications were before the planning authority for determination and can properly be seen as a single application when considering whether the 1999 Regulations were engaged.

103. I emphasise that, whichever route is adopted, it is because there is a single development that the 1999 Regulations apply. The facts of the present case establish beyond doubt that there is a single development; and the entire development was before the planning authority by reason of the combination of application 1372 and application 0445. I do not decide (although it may be correct) that wherever there is a single "project" for the purposes of the Directive there is also a single "development" for the purposes of the 1999 Regulations; it may be that, on the facts of a particular case, there could be an issue as to whether the single project is also a single development. However, if there is a single development, then the 1999 Regulations should apply even if that development is subject to separate planning applications. In contrast, if there is not a single development even though there is a single project, then consideration will need to be given to the extent to which a conforming construction can be adopted in accordance with the *Marleasing* principle and to the extent to which Regulation 4(8) is capable of providing a solution. That is not the present case and I say no more about it.

104. Given that the present case is concerned with a single development and that the entirety of that development was before the planning authority, I do not consider that my conclusion is inconsistent with, or cuts across, the decisions and reasoning in *Swale* or *Candlish*. I agree with the reasons given by Davis LJ for distinguishing those decisions.

The second ground of appeal

105. The second ground of appeal is that the Judge erred in his interpretation of the EIA threshold for industrial installations for carrying gas. Although it is not strictly necessary to decide this issue in the light of the unanimous decision of this Court on the first ground of appeal, Davis LJ has dealt with the issue in his judgment. I agree with everything which he says. I would dismiss this ground of appeal.

The third ground of appeal

106. The third ground of appeal is that the Judge erred in attaching too much weight to the statement by Mr Moys that he undertook an informal screening assessment of both applications. I agree with the conclusion and reasoning of Davis LJ on this ground of appeal and I also agree with what he says in the postscript to his judgment. In particular, I confirm that I had not factually misunderstood the position as to whether there were materials which controverted Mr Moys' witness statement. I do not consider that my draft judgment could sensibly have been read as demonstrating a misunderstanding but I have made a minor amendment to eliminate any possible doubt. It is with great respect that I differ from Pill LJ and, because I do so, I add a short judgment of my own.

107. The evidence which was relied on before the Judge by the Council was the short witness statement from Mr Moys which Pill LJ has described. Mr Moys' evidence was that, on receipt of the two separate applications, he gave consideration

to whether further screening was necessary. The critical passages of his evidence were as follows:

> "5. ……I can confirm that I gave consideration to whether further screening was necessary. I concluded that further formal screening was not necessary. In this context, I was of the opinion that the proposed removal of the CHP plant and its replacement by small-scale equipment could not reasonably be expected to result in any increased or different environmental impacts. Similarly, I considered that the proposal to relocate the CHP Plant from its originally proposed site in a relatively quiet and isolated rural location to a nearby site within a substantial complex of buildings used as commercial feed mill could not reasonably be expected to result in additional or increased environmental effects beyond those considered in the original Screening Opinion. Due to their scale and nature, I considered that neither the proposed new underground pipeline nor the new equipment adjacent to the AD plant would result in any significant effects. In addition, I considered that the development proposed under [application 0445] was not Schedule 2 development on account of its small scale.
>
> 6. Had I produced a formal written Screening Opinion at the time on behalf of the Council (or indeed subsequently) it would have concluded that neither [application 1372] in its amended form, nor [application 0445] nor indeed a combination of the two could have constituted EIA Development. "

108. From paragraph 5, it can be seen that Mr Moys addressed three aspects of the revised proposals. First, he addressed the amended 1372 application and concluded that the amendments had no increase in the environmental impact of the original application 1372. Secondly, he addressed the relocation of the CHP plant and concluded that the environmental impact of the CHP plant would not result in increased environmental impact as compared with the location of the CHP plant under the original application 1372. Thirdly, he addressed the pipeline and the small additional equipment needed on the site of application 1372 and concluded that they would not have any significant environmental effects. He thus considered all of the aspects of the overall development which he would have needed to address had he decided to give a further screening opinion in relation to it.

109. Had he actually decided to give a further screening opinion, he would have been entitled to rely on his previous work, that is to say his previous screening exercise and the earlier screening opinion, in forming an opinion in relation to the revised proposals. He could not be required to repeat the work which he had already carried out. His evidence was that he did not consider that further screening was necessary; that is to say, to put it in my own words, that he considered that he already had enough information to reach a conclusion without the need for further investigations. That was a view which he was perfectly entitled to take; he was not under any duty to carry out further screening or to consult further with local residents or others if he considered that he had enough material on which to base his opinion. It follows that, had he actually produced the further screening opinion in relation to the combination of the applications which he says, in paragraph 6, that he would have produced, it could not have been open to attack on the footing that he had failed properly to carry out the screening necessary for him to be able to express his opinion.

110. The Judge accepted Mr Moys' evidence, expressly finding (as Davis LJ notes) that this was not a case of retrospective justification. Like Davis LJ, I see no reason to interfere with that finding. Accordingly, on the facts as found, Mr Moys did all that was necessary in order for him to give a screening opinion in relation to the overall development and reached conclusions which were consistent only with the opinion that the development was not EIA development. What he said in paragraph 6 followed inevitably from his factual evidence in paragraph 5.

111. How do the 1999 Regulations apply given these findings of fact? It is clear that the overall development comprised in the amended application 1372 and application 0445 cannot sensibly be viewed as the same development as that comprised in the original application 1372. It was significantly different in that the CHP plant was to be sited at an entirely different location and the pipeline and additional equipment on the original site were additional features. In the light of the conclusion that the relevant Schedule 2 development for the purposes of the 1999 Regulations is the overall development, it was necessary for the council to comply with the 1999 Regulations in relation to that development.

112. Such compliance required the Council to consider the environmental aspects of the proposed development (which is not to say that it had to carry out a full EIA) and to adopt a screening opinion, that is to say, it had to decide whether the development was likely to have significant effects on the environment and thus amount to EIA development (in which case, a full EIA would have to be carried out before planning permission was granted). These requirements arose as the result of Regulations 5(4) and 7(1): in the present case, Regulation 7(1) applied so that Regulation 5(4) was treated as applying, and Regulation 5(4) then required the Council to adopt a screening opinion within three weeks beginning with the date of receipt of the application for planning permission or such longer period as may be agreed in writing with the applicant.

113. Since Mr Moys did not produce a further screening opinion, that is to say a written statement that the development was, or was not, EIA development, and since the Council took no other steps in relation to the 1999 Regulations, there was a failure to comply with the letter of the 1999 Regulations; the Council was thereby in breach of its obligations. This failure, I note, had nothing to do with an absence of reasons: rather it was a failure to provide a written statement as required by the 1999 Regulations at all.

114. What, then, is the impact of this failure to comply with the 1999 Regulations? In addressing that question, it is to be noted that there is nothing in the 1999 Regulations which expressly states that a planning authority is not to grant planning permission in relation to Schedule 2 development which is not EIA development without having first adopted a screening opinion: contrast the position in relation to Schedule 2 development which is EIA development, in which case Regulation 3(2) provides that a planning authority must not grant planning permission unless it has taken environmental information (as defined) into consideration.

115. Of course, a planning authority cannot know whether or not a particular Schedule 2 development is likely to have significant effects on the environment (and thus constitutes EIA development) without carrying out some investigations. That is

the purpose of the screening exercise and the adoption of a screening opinion, each of which is thus an important part of the planning process.

116. It can, therefore, be suggested that a failure to comply with the screening requirements amounts to a fatal flaw in the process leading to the grant of planning permission so that the permission granted is thus vitiated and should be quashed. That may be correct as a general rule. But, so it seems to me, it must be possible to allow for cases, call them exceptional cases if you will, where a failure to comply strictly with the requirements of the 1999 Regulations in relation to screening should not result in the invalidity of a grant of planning permission for the development in question. Whether such a grant is vitiated will all depend on the facts of the particular case.

117. In the present case, the important factors are these. First, there was a full screening opinion in relation to the original application 1372 about which no complaint has been, or could be, made. Secondly, Mr Moys, taking into account all of the features of the revised proposals, saw no need for further screening, concluding that the development (whether assessed by reference to its individual elements or by reference to the overall development) would not have significant effects on the environment. That development was not, on the basis of Mr Moys' views, EIA development. There was, on these facts, an effective screening of the revised proposals and the relevant person (Mr Moys) charged with discharging the responsibilities of the Council had validly formed the opinion that that development would not have significant effects on the environment. The only conclusion which he could have reached was that the development was not EIA development. His failure was not to reduce that opinion into writing.

118. In my judgment, the existence of the original screening opinion coupled with the way in which Mr Moys subsequently addressed the revised proposals and the changes (if any) on the environmental aspects of the revisions and the conclusions which he reached bring the case within the exceptional category which I have described. The failure to produce a written statement expressing those conclusions should not, I consider, vitiate the planning permission actually granted. I would only add that the Judge was not presented (and nor have we been presented subject to paragraph 120 below) with any material to suggest that, contrary to Mr Moys' opinion, the development would be likely to have significant effects on the environment. I accept that the appellant is under no obligation to produce material in support of such a suggestion; but if such material existed and had it been presented to the Judge, it would have been a factor which I would have considered it right to take into account in deciding whether the failure to produce a screening opinion should effectively be waived. It may have led me to a conclusion different from that which I have in fact reached.

119. I associate myself with, and do not think that I can usefully add to, what Davis LJ says in the paragraph of his judgment dealing with *Bateman* and *Mellor.*

120. I also agree with what Davis LJ says in his judgment and postscript about the decision of the Secretary of State with regard to the two further applications which he mentions. I would add that, on the face of the letters from the Secretary of State, it is

by no means clear to me that the explanations for the decision would withstand close scrutiny.

121. Accordingly, I would dismiss the third ground of appeal.

Conclusion

122. In my view, the appellant succeeds on the first ground of appeal but fails on the second and third grounds. The result is that I would dismiss the appeal.
