Case No: C1/2009/2304

Neutral Citation Number: [2010] EWCA Civ 523
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Owen
[2009] EWHC 2519 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2010

Before :

LORD JUSTICE JACOB
LORD JUSTICE SULLIVAN
and
SIR MARK WALLER

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

Between :

	The Queen **On the application of** **Thomas Gordon Brown**	**Claimant**
	- and -	
	Carlisle City Council	**Defendant**
	-and-	
	Stobart Air Limited	Interested Party

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(Transcript of the Handed Down Judgment of
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Gregory Jones & Jeremy Pike (instructed by **Dickinson Dees LLP**) for the **Claimant**
Timothy Mould QC & James Pereira (instructed by **The Assistant Director (Governance) Carlisle City Council**) for the **Defendant**
Peter Village QC & James Strachan (instructed by **Macfarlanes LLP**) for the **Interested Party**

Hearing dates : Wednesday, 21st April 2010

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Judgment Lord Justice Sullivan:

Introduction

1. This is an appeal against the Order dated 16th October 2009 of Owen J refusing the Claimant's application for permission to apply for judicial review of a planning permission dated 12th March 2009 granted by the Defendant to the Interested Party. On consideration of the Notice of Appeal I granted permission to apply for judicial review and directed that the substantive application should be determined by this Court.

2. The Notice of Approval dated 12th March 2009 granted permission for the following development at Carlisle Lake District Airport:

> "*Erection Of A Freight Storage And Distribution Facility Including Chilled Cross Dock Facility (Use Class B8) With Associated Offices (Use Class B1), Gatehouse/Office/Canteen/Staff Welfare Facilities, Landscaping, New Vehicular Access, Car And Lorry Parking And Other Infrastructure Works.* "

3. The "Summary of Reasons for the Decision" contained in the Notice of Approval was as follows:

> *"The City Council considers that the proposed development of the Freight Distribution Centre and its associated administrative offices, chilled cross-dock and ancillary buildings, whilst not in itself in accord with the provisions of Policy EC22 of the adopted Carlisle District Local Plan 2001-2016, would be integral to securing and facilitating essential investment in upgrading the aviation infrastructure at Carlisle Airport. The Council considers that the associated investment is necessary to both safeguard the Airport and to enable it to provide a vital economic stimulus to the local economy through the potential attraction of passenger and air freight services, better access to raw materials, services, suppliers and customer markets for businesses in Cumbria, South-West Scotland and the Borders and to encourage potential tourist growth.*
>
> *The attainment of an operational, modern Airport suitable for regional air services is fully in accord with the objectives of national planning guidance, the North West of England Plan: Regional Spatial Strategy to 2021, the Regional Economic Strategy, Sub-Regional Planning Policy aspirations and the provisions of adopted Local Plan Policy DP3. The potential environmental impacts arising from the development proposals have been assessed within the accompanying Environmental Statement, and related documents that support the application including a Flood Risk*

Assessment, Transport Assessment, Economic Impact Statement and Design and Access Statement. In its overall scrutiny of the planning merits of the proposals the Council has subjected those supporting submissions to detailed scrutiny, including full assessment by specialist Consultants, prior to determining that the application, with appropriate safeguards including linkage to a S106 Agreement, is acceptable. The Council is satisfied that the achievement of the renewal of the principal runway and the provisions of passenger terminal facilities can be delivered through the mechanism of the S106 Agreement and that by providing those facilities, the development as a whole can be regarded as policy compliant.

In reaching that conclusion the Council is also mindful that the S106 Agreement makes proper provision for replacement of habitat lost from the County Wildlife Site to the proposed development, that the applicants will provide appropriate public transport to serve the development, and that they will ensure through the provision of a Noise Insulation Scheme that suitable protection from increased noise associated with overnight lorry movements is provided to receptive bedroom windows of properties on either side of the route that these vehicles will take to and from Junction 44 and the application site.

In granting this planning permission, the City Council has taken into account all relevant environmental information (including the supporting Environmental Statement) within the meaning of Regulation 3(2) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999."

4. The Notice of Approval set out the relevant Development Plan policies, and included "Advisory Notes" which gave more details of the Section 106 Agreement referred to in the Summary Reasons:

"1. The planning permission is linked to a Section 106 Agreement which

covers the following matters:

- *A specification and programme for the implementation of the upgrade to the main runway (07-25) to achieve a PCN [Pavement Classification Number] value that will facilitate restoration of commercial passenger services and has a life of about 20 years;*

- *The programme for the provision of passenger terminal facilities commensurate with a small regional airport, allowing for all essential requirements for check-in, arrival/departure, baggage handling, security, and general administration and the requirement that the Terminal will remain open*

for not less than 10 years provided it is commercially viable to do so."

Other matters covered by the Section 106 Agreement included:

- *Implementation of an Airport Surface Access Strategy (ASAS); and*
- *affirming the operation of the Carlisle Airport Forum."*

Factual Background

5. The factual background is set out in some detail in paragraphs 3-12 of the Judgment of Owen J [2009] EWHC 2519 (Admin). The Interested Party submitted two applications for the site. The first application in October 2007 sought permission for works to the Airport including the replacement and realignment of the main runway, and the construction of a new passenger terminal, offices and hangars ("the airport development"), and for the construction of a Freight Storage and Distribution Facility ("the Freight Distribution Centre"). The first application was accompanied by an Environmental Statement pursuant to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations"). That Environmental Statement dealt with the likely significant effects on the environment of the proposed development, both the airport development and the Freight Distribution Centre. Following the Secretary of State's decision on 18th June 2008 to call in the first application, it was withdrawn by the Interested Party in July 2008.

6. The Interested Party then submitted a second application for planning permission on 14th October 2008. The application was considered by the Defendant's Planning Committee at a meeting on 19th December 2008. The Planning Officer prepared a lengthy and detailed Report for that meeting ("the Report"). The Report (para 5.2) described the second application as:

> "*[A] much more "scaled-down" application omitting the intended re-aligned runway and related aprons and taxiways, the proposed new Terminal facilities, new air traffic control tower, Instrument Landing System and other navigational aids including approach lighting. The applicants have indicated that they intend, instead, to repair/resurface rather than replace the existing main runway (07-25) and are likely to utilise part of an existing recently constructed building, sited close to the original core of 1940's buildings adjacent to the northern boundary, as a passenger Terminal. The applicants rely on carrying out those works under the "Permitted Development" rights that apply to relevant airport operators under the Town and Country Planning (General Permitted Development) Order 1995."*

The proposed Freight Distribution Centre was smaller in scale than that proposed in the first application, although it contained a larger element of office floor space (Report, para 5.3).

7. The second application was accompanied by an Environmental Statement. On this occasion, the Environmental Statement dealt only with the likely significant effects on the environment of the Freight Distribution Centre proposed in the application. It did not address the environmental effects of the revised airport works.

8. In addition to considering the planning merits of the proposed Freight Distribution Centre, the Report dealt at some length with the benefits that would accrue from the airport being restored to operational use. The conclusions of two studies by consultants, EKOS with input from Avia Solutions, and Alan Stratford Associates ("ASA") a specialist aviation consultancy instructed by the Defendant, are set out in detail in paragraphs 5.65 - 5.84 and 5.133 - 5.160 of the Report. A report from the Defendant's Head of Economy Tourism and Property assessing the economic benefits of developing the airport was appended to the Report.

9. One of the most significant issues considered in the Report was the extent to which the proposed development was, or was not, compliant with the relevant policies in the Development Plan. The Report said this in paragraph 5.162:

> "*5.162 In relation to the issue of compliance with Policy EC22, the improvements to the Airport, which could be secured, would accord with the development plan. It is open to debate whether the development as a whole would accord with the development plan as a whole. It is probably more appropriate to regard the development for which planning permission is sought as not in accordance with the development plan as a whole but to regard the development as financially enabling development for improvements to the airport which would be a considerable benefit and which could override harm. In this regard, the Economic Benefits have to be weighed against the possible harm arising from the policy tension with Policy EC22, especially when these are matched with the regeneration opportunities the application brings to Carlisle Airport, as proffered through a Section 106 Agreement."*

10. Having referred to the proposed Heads of Terms for the intended Section 106 Agreement, Circular 05/2005 on the use of Planning Obligations, The Town and Country Planning (Development Plans and Consultations) (Departures) Directions 1999 ("the Departures Direction"), and an Opinion from Leading Counsel, the Report's conclusions in paragraphs 5.170 - 5.172 were as follows:

> *" 5.170 In evaluating the application proposals, and the provisions that the Heads of Terms contain, it is open to Members to come to a view that, with a combination of*

appropriate planning conditions and S106 obligations, the proposals in their entirety would be "in accordance" with the Development Plan. The situation differs from that of the previous application in that the Council has commitments to matters that the applicant had not previously committed to deliver e.g. public transport, replacement for habitat loss, specification for the runway works.

5.171 Essentially, therefore, whilst the application has been properly advertised as a "Departure" (since there was throughout much of the period since the application was lodged insufficient detail attached to the Heads of Terms that had been promulgated) it is open to Members to take the view that, with the provision of the matters identified in para 5.163, the Heads of Terms, as now firmed up and fleshed out by the applicants, is:

- *sufficient to secure the City Council's support for the development; and*

- *achieve "accordance" of the proposal, in planning terms, with the Development Plan.*

In short if it is accepted that, by linkage with the intended S106 Agreement, approval of the development will be the facilitator of the Airport investment and thus might realise its potential economic benefits (which are widely supported by key stakeholders, Agencies, Authorities and the business community) the application would become policy compliant in its full sense and would not require to be referred to the Secretary of State.

5.172 Consequently, and in conclusion, if Members are satisfied that:

a) The associated planning conditions that are recommended will deliver an acceptable development as proposed; which

b) Coupled with the related obligations under S106 that the applicants will commit to as part of the development will lead to the delivery of a fully operational, modern Airport, potentially yield the restoration of passenger services, lead to an expansion of the area's wider connectivity and give Cumbria better access to markets, suppliers and services, all the economic benefits flowing from these fully justify support for the proposals the Committee may resolve to grant planning permission, subject to the prior attainment of the S106 Agreement."

11. The Committee resolved to give authority to the Head of Planning and

Housing Services to issue an approval for the proposed development

subject to the completion of a Section 106 Agreement, the key points

of which were to include (inter alia):

- *"A specification and programme for the implementation of the upgrade to the main runway (07-25) to achieve a PCN value that will facilitate restoration of commercial passenger services and has a life of about 20 years;*

- *The programme for the provision of passenger terminal facilities commensurate with a small regional airport, allowing for all essential requirements for check-in, arrival/departure, baggage handling, security, and general administration and the requirement that the Terminal will remain open for not less than 10 years provided it is commercially viable to do so."*

12. The Interested Party's obligations are set out in clause 4 of the Section 106 Agreement dated 11th March 2009. The relevant provisions are contained in clause 4.2 under the sub-heading "Runway/Terminal"

"4.2.1 Unless otherwise approved in writing by the Council not to commence works to construct the Building until a construction programme in respect of the Works has been submitted to and approved in writing by the Council PROVIDED THAT the requirements of the CAA and TRANSEC shall be paramount in all circumstances.

4.2.2 Unless otherwise approved in writing by the Council not to commence works to construct the Building until the Council has been consulted in respect of the details (including size location and associated car parking) of the Terminal PROVIDED THAT for the avoidance of any doubt nothing contained within this Deed shall prevent the Owner from submitting a planning application to the Council for the use of a passenger terminal building in excess of five hundred (500) square metres (as originally constructed and/or used).

4.2.3 Unless otherwise approved in writing by the Council not to Occupy the Development until the Works have commenced in accordance with the construction programme approved pursuant to sub-Clause 4.2.1 of this Deed.

4.2.4 To Substantially Complete the Works in accordance with:-

4.2.4.1 the construction programme approved pursuant to sub-Clause 4.2.1 of this Deed;

4.2.4.2 the requirements of the CAA and/or TRANSEC (as the case may be); and

4.2.4.3 a PCN value/specification of no less that thirty one (31) insofar as the Works comprise repair/renewal of the Runway.

4.2.5 Following Substantial Completion of the Works to maintain:-

4.2.5.1 the Runway at a PCN value/specification of no less than thirty one (31) or such other PCN value/specification as may be approved by the CAA having regard to the heaviest Public Transport Category operating at the Airport from time to time; and

4.2.5.2 any apron and/or taxiway which directly serves the Runway at a PCN value/specification which is reasonably commensurate with the PCN value/specification of the Runway (from time to time) and complies with the requirements of the CAA

For so long as the Terminal is in Operation

4.2.6 To use reasonable endeavours to keep open the Terminal (or such other terminal facility for the processing of passengers as the Council is consulted upon by the Owner from time to time) for a period of no less than 10 (ten) years from the date of Substantial Completion of the Terminal PROVIDED THAT (in the Owner's reasonable opinion) it is commercially viable to do so having regard to (among other things) the likely level of passenger throughput of the Terminal from time to time."

The "Building" is the Freight Storage and Distribution Facility; the "Works" are the works to repair/renew the existing main runway at the airport, and to substantially complete the Terminal; and the "Terminal" is the proposed air transport passenger terminal facility with a floor space of no less than 400 square metres (see Clause 1.1 of the Agreement).

The EIA Regulations

13. The EIA Regulations give effect to Council Directive 85/337 EEC (as amended) on the effect of certain public and private projects on the environment ("the Directive"). Article 1(2) of the Directive states that for the purposes of the 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."

14. The European Court of Justice has said that

> *"The wording of the Directive indicates that it has a wide scope and a broad purpose*"

see para 31 of Case C – 72/95 Kraaijeveld and Others, and para 46 of Case C – 227/01 Commission v Spain.

15. There is no dispute that regulation 3(2) of the EIA Regulations applied not merely to the first, but also to the second planning application in issue in these proceedings:

> *" (2) The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."*

"Environmental information" is defined in regulation 2(1) as meaning, inter alia the "environmental statement" and any representations made in response thereto; and "environmental statement" means a statement:

> *"(a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but*
>
> *(b) that includes at least the information referred to in Part II of Schedule 4;"*

16. Schedule 4 sets out the "Information for inclusion in Environmental Statements". The information in Part I of Schedule 4 includes:

> *"4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary,* ***cumulative****, short, medium, and long-term, permanent and temporary, positive and negative effects of the development, resulting from;*

(a) the existence of the development;....."(emphasis added).

The Claimant's EIA Challenge

17. The Claimant's principal ground of challenge was that in granting planning permission the Defendant had failed to comply with regulation 3(2) of the EIA Regulations because the Environmental Statement which accompanied the second application did not address the environmental effects of "the Works" as defined in the Section 106 Agreement: to repair/renew the existing main runway and to substantially complete a terminal building of not less than 400 square metres ("the airport works").

18. On behalf of the Claimant, Mr Jones submitted that the development for which planning permission was sought, the Freight Distribution Centre, was part of a wider project for the purposes of the Directive. That project included the airport works. Further, or in the alternative, he submitted that the description in the Environmental Statement of the likely significant effects of the development on the environment should have covered the effects of the airport works because they were part of the "cumulative effects" of the development for which permission was sought.

The EIA Challenge – discussion

19. The Defendant and the Interested Party submitted that it was legitimate and reasonable not to treat the airport works as part of the cumulative effects of the Freight Distribution Centre because there was no, or no significant functional link between the airport works and the Freight Distribution Centre. In paragraph 5.58 of the Report the Planning Officer advised the Committee that:

> *"5.58 In short, the argument is that it is essentially a financial (rather than a functional or operational) imperative for the Freight Warehouse and Distribution Centre to be developed at this site but, by doing so, the applicants maintain that this will deliver the only realistic capital stream to enable the investment that is required to upgrade the Airport infrastructure and allow it to survive, let alone grow."*

20. It is far from certain that there will be no functional link between the upgraded airport facilities and the Freight Distribution Centre. The Interested Party's Chairman's Statement to Shareholders dated 12th May 2009 in support of the company's acquisition of the airport explained the benefits of the proposed Freight Distribution Centre and continued:

> *"The Board also believes that the acquisition of Carlisle Airport, although not the*

primary purpose, offers the Group the opportunity to provide air freight solutions as well as the potential to develop passenger aviation. The experienced airport management team available to the Group following the recent acquisition of Southend Airport would take management responsibility for this. In addition, the Board believes that the acquisition of Carlisle Airport would further strengthen the Group's position as a multimodal logistics provider, given its existing operations in road and rail and its planned water based operations at Weston Port."

21. No authority was cited for the proposition that the connection between two developments must be an operational or functional one for the environmental effects of one of the developments to be part of the cumulative effects of the other. The answer to the question – what are the cumulative effects of a particular development – will be a question of fact in each case. There may be a cumulative effect notwithstanding the absence of a functional link. I have set out the Committee's Summary Reasons for granting planning permission and the relevant passages in the Report (paras 3 and 10 above). It is plain that the Committee did not consider the planning merits of the Freight Distribution Centre in isolation without regard to any of its cumulative effects. Considered in isolation the Freight Distribution Centre was not in accordance with the Development Plan. The "development as a whole" was (rightly or wrongly, see paras 22 and 23 below) regarded by the Committee as "policy compliant" only because one of the cumulative effects of the development would be the "delivery" of the airport works through the mechanism of the Section 106 Agreement. The Section 106 Agreement did not permit the airport works, nor did it compel the Interested Party to carry them out, but it did ensure that the Freight Distribution Centre could not lawfully be developed (built and occupied) in isolation, it could be developed only if its cumulative effects included the carrying out of the airport works.

22. When Mr Mould QC was asked to explain the apparent change in position between the Planning Officer's advice in paragraph 5.162 of the report – that the development for which permission was being sought was not in accordance with the Development Plan, but would enable improvements to the airport which would be a considerable benefit which could override the harm resulting from that conflict with policy (para. 9 above) – and the advice in paragraph 5.171 of the Report – that if members accepted that by linkage with the intended Section 106 Agreement approval of the development would be the facilitator of the Airport investment "the application would become policy compliant in its full sense and would not require to be referred to the Secretary of State" (para. 10 above), he replied that in paragraph 5.162 the Planning Officer had set out his own view, whereas in paragraph 5.172 he had recognised that it was open to members to form a different view: that if they were satisfied that the terms of the Section 106 Agreement would provide a sufficient degree of commitment on the part of the Interested Party to bring forward a scheme of works for the rejuvenation of the airport, then the commitment to facilitate these works would be sufficient to make the application for planning permission compliant with the Development Plan.

23. Whether or not this was an adequate justification for the Committee's conclusion that the proposed development did comply with the Development Plan, it is difficult to see how the Interested Party's commitment in the Section 106 Agreement to bring forward the airport works could on the one hand have been sufficient to ensure that, as the Committee said in the Summary Reasons for granting permission, "the development as a whole" could be regarded as policy compliant for the purposes of the Development Plan; but on the other hand have been insufficient to ensure that the bringing forward of the airport works would be part of the cumulative effects of the development for the purposes of the EIA Regulations.

24. In support of their submissions both the Defendant and the Interested Party relied on the decision in *R (Davies) v Secretary of State for Communities and Local Government [2008] EWHC 2223 (Admin)*. However, that case is clearly distinguishable because the evidence before the Inspector had established that the Heysham to M6 Link Road (for which there had been an Environmental Statement) was justified in its own right and would be constructed whether or not a proposed Park and Ride Scheme, which was the subject of a separate application, was permitted. There was no Section 106 Agreement preventing the construction and use of the link road until the Park and Ride Scheme had been commenced.

25. There is a further difference between the *Davies* case and the present case. In *Davies* the Inspector in his report to the Secretary of State expressly considered whether the Park and Ride Scheme was "an integral part" of an overall scheme which comprised both the Link Road and the Park and Ride Scheme. He concluded that it was not an integral part of such a scheme, and there was no irrationality challenge to that conclusion. In the present case there is no evidence that after the second application was submitted either the Planning Officer or the Committee ever addressed their minds to the question: given our insistence upon a legally binding commitment to the airport works in order to ensure that this application is policy compliant, should the Environmental Statement consider the environmental effects of those works as part of the cumulative effects of the development for which permission is being sought? Had the Committee considered that question an affirmative answer would have been the only rational response.

26. When asked whether there was any evidence that this question had been considered by the Defendant Mr Mould referred to a letter dated 6 January 2008 from the Defendant's Head of Planning and Housing Services. That letter answered a number of questions which had been raised by the Claimant's Solicitors, but it does not suggest that the question was even considered, much less that it was answered, after the application was submitted. There is, however, some evidence that the issue was raised by the Defendant prior to the submission of the second planning application. A note of a meeting with the Interested Party on 4 September 2008 records one of the Defendant's Solicitors saying that:

> "*Environmental Assessment was required particularly when*

taking into account the cumulative impact of development

Haulage. Still considered that the development of a haulage depot and warehouse at the airport was a departure to the development plan, particularly in view of the inspectors report into objections to the Local Plan on the airport policies.

Conclusion from Counsel was that it would be better to re-submit a whole application and it was likely to be called in anyway because of the comment from the Government Office last time that it was of more than local significance."

27. The response of the Interested Party's Solicitor was that a repeat application was "out of the question it would be called in and they would run out of time." The Defendant was told that the new application would be significantly different from the earlier application. After recording discussion of a number of matters, the note says that:

> "*Following discussion it was agreed that an environmental assessment would be submitted as part of the application"*

Although the issue had been flagged up by the Defendant prior to the application, it was not addressed in the Interested Party's Environmental Statement, and for whatever reason the Defendant thereafter failed to consider the implications for the purposes of regulation 3(2) of the EIA Regulations of its insistence on a Section 106 Agreement which would ensure that the freight distribution centre could lawfully be developed only if it was developed in conjunction with the airport works.

28. Mr Village QC submitted that it was unnecessary to include information as to the environmental effects of the airport works in the Environmental Statement because these works were "inchoate". In the absence of sufficient detail of the airport works it was not reasonable (see the definition of environmental statement in reg 2(1), para. 15 above) to require an assessment of their environmental effect as one of the cumulative effects of the development. He referred to the provisions of the agreement which require substantial completion of a terminal building with a floor space of no less than 400 square metres, while leaving open the possibility of a planning application for a terminal with a floor space in excess of 500 square metres (para. 12 above).

29. This submission is not well founded for two reasons. First, there is no evidence that this was the basis on which the Defendant considered whether the environmental effects of the airport works should be assessed as part of the cumulative effects of the development and concluded that they should not. Second, any lack of detail about the airport works was not such as to prevent the Defendant from assessing, with the assistance of advice from EKOS and ASA,

the economic, transportation and tourism advantages of securing their implementation through the mechanism of the proposed Section 106 Agreement. Thus, EKOS was able to assess the market potential for both commercial passenger and air cargo operations (Report, paras. 5.65 – 5.75), and ASA was able to describe what was likely to be provided by way of passenger terminal facilities and to provide a specification for the repair/renewal of the existing main runway (Report, paras. 5.141 – 5.150). ASA was also able to advise by reference to the likely number of Air Traffic Movements (ATMs) on the "safety issues" arising out of the use of the new facilities at the airport (Report, para. 5.152).

30. Mr Village submitted that the assessments by EKOS and ASA were based on the "minimum case": the airport works required by the Section 106 Agreement and no more. On a fair reading of the Report that submission puts the cart before the horse: it was the earlier assessments by EKOS and ASA that informed the content of the Section 106 Agreement. To the extent that they described a minimum, rather than, as would appear from the report, the likely case in respect of the airport works, there is no reason why this could not have been reflected in any assessment of the environmental effects of those works as part of the cumulative effects of the development.

31. For these reasons there is no doubt, in my judgment, that the grant of planning permission was unlawful because there was a failure to comply with regulation 3(2) of the EIA Regulations. In the light of this conclusion it is unnecessary to consider the further basis on which Mr Jones advanced the Claimant's EIA challenge: that there was also a breach of the Directive because the project for the purposes of the Directive included the airport works.

EIA – Discretion

32. Owen J considered that the EIA challenge was arguable (para. 27, judgment), but he refused to grant permission to apply for judicial review because he was satisfied that the court would exercise its discretion to refuse to grant relief even if it was satisfied that the decision to grant permission was flawed (para. 30 judgment). Owen J concluded that "no purpose would …. be served by permitting the claimant to pursue his claim on this ground" for two reasons:-

(1) If the airport works were likely to have a significant environmental effect an environmental statement assessing their cumulative effects, which would include the effects of the Freight Distribution Centre would be required.

(2) The Environmental Statement which accompanied the first planning application had not identified any adverse environmental effects, and since the airport works required by the

Section 106 Agreement were much reduced by comparison with those in the first application there was no prospect of a different outcome if the Respondent was required to reconsider the second application.

33. When deciding how to exercise the court's discretion Owen J did not refer to the decision of the House of Lords in *Berkeley v. Secretary of State for the Environment* (2001) 2 AC 603. Whether or not the grant of permission was also in breach of the Directive, there was a breach of regulation 3(2), and

> "It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires…" per Lord Hoffmann at page 616 F-G.

34. Mr Village invited us to uphold Owen J's exercise of the Court's discretion on the basis of both reasons (1) and (2) (above). Mr Mould did not rely on reason (2). In my judgment, he was right not to do so for the following reasons. The second application was, as the Interested Party's solicitor had told the Defendant it would be (para 27 above), significantly different from the first application. The airport works were different and reduced in scale, and although the Freight Distribution Centre was reduced in scale it contained a larger amount of office floor space (para 6 above). The first application was considered by the Defendant to be a departure from the development plan, the second application was not.

35. Even if the two applications had not been materially different, the fact remains that the Defendant did not consider the "environmental information" which had been provided in respect of the first application when it came to consider the second application. Owen J referred to the fact that the Environmental Statement accompanying the first application had not identified any environmental effects (para 29 judgment), but the obligation under regulation 3(2) is to take into account the "environmental information", which includes not merely the Environmental Statement but, most importantly, any representations made in response thereto: see regulation 2(1), and *Berkeley* at pp 615D-616D. The totality of the information in respect of the first application had persuaded the Defendant that it was a departure from the development plan and the Secretary of State that it should be called in.

36. Both the Defendant and the Interested Party submitted that Owen J's reason (1) for not quashing the permission was sound. They submitted that the environmental effects of the Freight Distribution Centre would inevitably be

considered as part of the cumulative effects of the airport works. The section 106 agreement ensured that the former could not proceed unless the latter were commenced, and the latter could not commence if they involved development until the requisite planning permission was available, either for permitted development under the Town and Country Planning (General Permitted Development) Order 1995 (the GDPO), or following an application for permission. Even if the Interested Party proposed to carry out the airport works as permitted development, the EIA Regulations would still apply so as to ensure that the works did not proceed without an Environmental Statement if the Defendant considered that they would be likely to have a significant environmental effect: see articles 3(10) and (11) of the GPDO.

37. The confident assertion before this Court that there will be consideration of the cumulative environmental effects of both the Freight Distribution Centre and the airport works sits uneasily with the Defendant's deliberately non-committal responses in its letter dated 6th January 2009. In answer to the question whether the airport works would require planning consent the Head of Planning and Housing Services replied:

> "*Paragraph 5.2 of the Committee Report states:*
>
> *"The applicants rely on carrying out these works under the "Permitted Development" rights..*
>
> *It does not state that the Council accepts this position. Furthermore, nor have we come to a view as to whether, in the event that the works are permitted development, an EIA will be required thus requiring a formal application for planning permission."*

38. It will be noted that the section 106 agreement does not prevent the commencement of the Freight Distribution Centre until a planning permission has been obtained (see para 12 above). Mr Village submitted that if it involved development this was inherent in the obligation to submit and obtain the Defendant's written approval of a construction programme. It may well be the case that for commercial reasons the Interested Party would be unlikely to submit such a programme until it had the requisite planning permission, and the Defendant might well be unwilling to approve such a programme unless it was satisfied that the requisite permission was available. The fact remains that the construction of the Freight Distribution Centre is not tied to a permission for the airport works. The occupation of the Freight Distribution Centre is effectively tied to such a permission because the airport works could not lawfully be commenced without a planning permission, either an express permission or one granted under the GPDO.

39. Mr Jones submitted that there was a fundamental objection to the course which commended itself to Owen J. The underlying purpose of the Directive is that the environmental effects of a development, including any cumulative effects, are considered at the earliest possible stage in the decision making process: see *R (Barker) v. London Borough of Bromley* [2006] UK HL 52 (2007) 1AC 470 per Lord Hope at para 22. If a decision is taken to permit a development on the basis that any cumulative environmental effects of carrying it out will be considered at some future stage there is the danger that the developer will have obtained a "foot in the door". Even if the later assessment of the cumulative effects might otherwise lead to a conclusion that those effects were unacceptable, the local planning authority would be committed to the development for which permission had been obtained, and that commitment would be a relevant factor in deciding whether cumulative environmental effects which might have been regarded as unacceptable if they had been considered at the outset, must be accepted at the later stage given the prior commitment.

40. In the present case, the section 106 agreement leaves open the possibility of a completed but unoccupied Freight Distribution Centre. That possibility might well be an unlikely outcome for commercial reasons, but the fact that permission had been granted for the Freight Distribution Centre would be a relevant factor when deciding whether the cumulative environmental effects of the airport works, including the effects of the Freight Distribution Centre, were such as to justify a refusal of permission. Since the object of both the Directive and the Regulations is to ensure that any cumulative environmental effects are considered before any decision is taken as to whether permission should be granted, an assurance that they will be assessed at a later stage when a decision is taken as to whether further development should be permitted will not, save perhaps in very exceptional circumstances, be a sufficient justification for declining to quash a permission granted in breach of regulation 3(2) and/or the Directive.

41. There are no exceptional circumstances in the present case. We were told by Mr Village that works to implement the planning permission dated 12th March 2009 have not been commenced, and no construction programme in respect of the airport works has been submitted. In these circumstances, there is no good reason why the permission should not be quashed.

42. Mr Village told us that if we concluded, contrary to his submissions, that the grant of permission was unlawful, the Interested Party was prepared to give an undertaking to the Court, to be incorporated into a section 106 planning obligation so as to bind the land, that it would not commence development of the Freight Distribution Centre until screening of both it and the airport works had been undertaken by the Defendant under the EIA Regulations. It is difficult

to see what purpose would be served by the court's acceptance of such an undertaking that would not equally well be served by the quashing of the permission. A planning permission is a public document. Third party rights, e.g. the rights of agricultural tenants on the land, may be affected by the existence, or otherwise of a planning permission. There would have to be some very good reason to persuade the court that acceptance of an undertaking that an unlawful permission would not be implemented, or would be implemented only on certain terms, would be a more appropriate course than a decision to quash an unlawful permission. No such reason has been identified in this case. It follows that the EIA challenge to the permission succeeds and the permission must be quashed.

The Claimant's other grounds

43. In these circumstances it is unnecessary to consider in any great detail the other grounds on which the Claimant challenged the grant of permission. In ground 3 it was contended that the Report did not accurately convey the advice that the Defendant had obtained from leading counsel (Mr Richard Humphreys QC) as to whether the second application was, like the first application, a "departure application" for the purposes of the Departures Direction. There is force in this criticism of the Report. Paragraph 5.162 of the Report (para 9 above) in effect summarised the conclusions in leading counsel's very careful advice. The Defendant's explanation for the change in position between the advice given to the Committee in paragraphs 5.162 and 5.171 of the Report (para 22 above) is not satisfactory. There is no indication in the Report that paragraph 5.162 reflected both leading counsel's advice and the planning officer's own professional judgment, whereas paragraph 5.171 did not. It is unnecessary to consider whether the Committee would have been significantly misled by this defect in the Report because the Defendant's response to this criticism was to emphasise the extent to which the commitments in the section 106 agreement had been "firmed up" since leading counsel's advice, which had been based upon earlier Heads of Terms. That response served only to underline the significance of the commitment in the section 106 agreement, thus reinforcing the claimant's EIA challenge.

44. In ground 2 the Claimant submitted that a distinction should be drawn between a section 106 agreement and the imposition of conditions on a permission for the purposes of article 2(2) of the Departures Direction which states that an application need not be referred to the Secretary as a departure if the local planning authority:

> "*impose such conditions on the permission as will ensure, in their opinion, that if the development is carried out in accordance with these conditions it will be in accordance with the development*

plan."

Since Mr Jones fairly conceded that the Court would be unlikely to quash the permission on this ground alone it is unnecessary to decide whether the reference to the imposition of conditions in article 2(2) includes obligations imposed under section 106. What matters for present purposes is the Defendant's response in its Skeleton Argument to this ground of challenge. It contended that:

> "*a planning obligation can have a similar effect to a planning condition in making development comply with the development plan.*"

If a permission is subject to a condition which requires certain works to be carried out, the environmental effects of those works will be part of the cumulative effects of the development which has been permitted. The fact that a permission is granted subject to the completion of a section 106 agreement which requires those works to be carried out is a difference of form, not substance for the purposes of the EIA Regulations.

45. The complaint in ground 4 of the challenge – that the Defendant failed to give any reasons for its decision not to refer the application to the Secretary of State – is academic because it is clear that the Secretary of State, in response to representations from the Claimant's Solicitor, carefully considered whether to call in the second application and decided not to do so. In these circumstances it is unnecessary to consider whether there was any duty to give reasons for such a decision, and if there was, whether sufficient reasons were given.

46. Ground 5 of the challenge, in which the Claimant submitted in the alternative that the section 106 agreement, properly construed, did not secure the carrying out of the airport works, provoked the intended response from the Defendant and the Interested Party: that the section 106 agreement

did secure the airport works. In doing so, it ensured that the environmental effects of those works were part of the cumulative environmental effects of the Freight Distribution Centre (see above).

Conclusion

47. I would allow the appeal and quash the planning permission dated 12th March 2009.

48. Sir Mark Waller

I agree.

49. Lord Justice Jacob

I also agree.