Case No: C/2001/9009

Neutral Citation Number: [2001] EWCA Civ 1766
IN THE SUPREME COURT OF JUDICATURE
ON APPEAL FROM QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
(JACKSON J)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 23rd November 2001

B e f o r e :

LORD JUSTICE BROOKE
LORD JUSTICE LATHAM
and
MR JUSTICE BURTON

- -

R

ON THE APPLICATION OF DIANE BARKER — Appellant

-v-

LONDON BOROUGH OF BROMLEY — Respondent

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Robert McCracken & Mr James Pereira (instructed by Messrs Richard Buxton, Cambridge for the Appellant)
Mr Timothy Straker QC & Mr James Strachan (instructed by London Borough of Bromley for the Respondent)

- -

Judgment
As Approved by the Court

LORD JUSTICE LATHAM:

1. The respondent is the owner of Crystal Palace Park and the planning authority for the area in which it is situated. It became the owner pursuant to the Local Government Reorganisation (Property etc) Order 1986. The Bromley London Borough (Crystal Palace) Act 1990 empowered the respondent, amongst other things, to lease land known as the green land and the pink land, which formed part of the Park for the purposes of a hotel, restaurant, shops, licensed premises, leisure facilities, entertainment facilities or other associated uses. These facilities could only be provided on the green land and not more than 50% of the total area of the pink land could be covered with buildings. The principal building to be constructed in any development of the pink land was to be constructed in a style which would reflect the architectural style of the original Crystal Palace.

2. In 1997 London & Regional Properties Ltd ("L&R") applied for "the development of leisure and recreational facilities, car park deck and associated ramps and surface car parking" on the pink land. In March 1998, the respondent resolved to grant outline planning permission for the L&R application, subject to conditions. This decision was challenged by, amongst others, the Crystal Palace Campaign. Their application for judicial review was eventually dismissed by the Court of Appeal in December 1998. The grounds of the challenge related to the architectural style of the proposed building and to the car parking arrangements. A petition to the House of Lords for leave to appeal was dismissed in June 1999.

3. Meanwhile, the respondent had considered and approved the matters reserved by the outline planning permission in May 1999. The appellant, a single mother who lived in a road affected by the access proposals, and who used the Park for recreational purposes for herself and her child, made application for permission to apply for judicial review on the 16th June 1999. Her grounds included a challenge to the decision to grant outline planning consent. Permission was granted on paper by Lightman J in July 1999. The respondent, in response, applied to set aside the grant of permission to apply. On the 17th April 2000, Jackson J set aside permission to apply in so far as it related to the grant of outline planning permission and dismissed the application for judicial review in respect of the remainder. He refused permission to appeal. On the 6th February 2001 Dyson LJ, after an oral hearing, granted permission to appeal, essentially limited to the argument that the respondent was required by Directive 85/57/EEC (the Directive) to consider the need for an Environmental Assessment (EA) at the time that it considered the reserved matters. There is no dispute that the respondent did not require an EA to be obtained at that stage, and that it was advised by its officers that there was no such requirement as a matter of law.

4. Although the ambit of the appeal is therefore limited, it raises an important question as to whether or not the Directive has been properly implemented in domestic law. The respondent submits that the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the 1988 Regulations") which are the relevant regulations, fully implemented the Directive. On a proper construction of these regulations, in the context of domestic planning law, an EA is only required, if appropriate, when consideration is being given to the grant of planning permission, in this case the outline planning permission. The appellant submits that the planning process is a staged process involving both the grant of outline planning permission and the consideration of reserved matters, and that the Directive requires consideration of the need for an EA at both stages.

5. Before coming to the questions of European and domestic planning law which lie at the heart of this appeal, the facts need to be described in more detail, so as to understand the nature of the dispute. The application for outline planning permission was accompanied by a number of plans showing the site, the proposed floor arrangements, and elevations showing the general architectural proposals and cross sections. The floor area of the proposed new buildings was said to be approximately 52,130 square metres. The number of proposed parking spaces was 1,200, and the materials to be used externally for the walls were described as glass and steel. The application was further supported prior to its consideration by the respondent by a large number of technical reports dealing with traffic and highways, the architectural proposals, and other conservation and environmental matters. The respondent itself commissioned a report by Messrs Chris Blandford Associates dated November 1997 on the need for a formal EA. It concluded:

> "Therefore, on balance, in considering the L & R proposal as an urban development project, it is unlikely to require a formal process of EA (Environmental Assessment)."

6. Not surprisingly, the proposal attracted vociferous and widespread opposition. A well organised group, the Crystal Palace Campaign, put forward detailed and reasoned opposition, supported by a petition signed by a significant number of people, including the appellant. The officers' report to the relevant committee of the respondent properly reflected the material submitted both by L & R and the objectors. It also set out the terms of the advice obtained from Chris Blandford Associates. The Committee resolved to approve the application. There is a dispute as TO whether or not the Committee gave proper or adequate consideration to the question of the need for an EA. Suffice it to say that the minutes do not indicate that there was any specific reference to it in the debate, and the resolution approving planning permission did not make specific reference to it either. On the other hand, Mr Macmillan, the Chief Planning Officer of the respondent, said in a statement which is before the court that consideration of the report from Chris Blandford Associates was at least implicit in the decision.

7. The notification of the grant of outline planning permission set out thirty-four conditions upon which that permission was granted. It identified the grant of permission in the following terms:

> "Take notice that the Council of the London Borough of Bromley, in exercise of its powers as local planning authority under the above Act has granted outline planning permission for the development referred to in your application received on 04.04.97.
>
> > The development of leisure and recreational facilities, car park deck and associated ramps and surface car parking at site of the former Crystal Palace, (OUTLINE)"

8. Amongst the conditions were the following:

> "01(i) Details relating to the siting .... design.... appearance .... access .... landscaping shall be submitted to and approved by the Local Planning Authority before any development is commenced .....

03. The details submitted pursuant to condition 01 shall show, inter alia, a building with elevations of predominantly glass and metal and generally according with the illustrative elevations accompanying the application .... in all material respects, reflecting the spirit and architectural style of the original Crystal Palace at Sydenham, and in accordance with the terms of the Bromley London Borough Council (Crystal Palace) Act 1990 and other relevant legislation.....

14 Before any work is commenced details of motor cycle spaces, bicycle stands and no more than 950 car park spaces in total .... shall be submitted to and approved in writing by or on behalf of the Local Planning Authority ...."

9. As I have already related, the objectors, in particular the Crystal Palace Campaign, commenced judicial review proceedings on the limited basis to which I have already referred. The Crystal Palace Campaign was led by, amongst others, an experienced planning lawyer, and instructed experienced planning solicitors and counsel. Those proceedings did not allege that the respondent had failed in any way to take into account, or properly deal with, the need for an EA. The proceedings were unsuccessful.

10. When the matter returned before the Committee for consideration of reserved matters, a number of changes to the original design and specification were proposed. Amongst others, the most significant was the addition of a mezzanine floor which increased the floor space available for retail and leisure use. Further, a different treatment was proposed of the part of the building which was stone as opposed to glass and steel clad. There is a dispute as to the extent to which these changes were significant. The applicant submits that they were; Mr Macmillan in his witness statement asserts that they were not. They were certainly not treated as significant by the Committee when it considered and approved the reserved matters. However there was considerable controversy during the course of the debate as to whether or not an EA was appropriate. The Committee was advised both by Mr Macmillan and by the respondent's legal officer who was present that an EA was not required as a matter of law; and there was before the Committee a letter from Chris Blandford Associates of the 6th May 1999 in which it stated that it remained of the view that an EA was not needed. For the purposes of these proceedings we do not need to resolve the issue as to whether or not the changes proposed were significant because the judge refused to allow a late amendment to the appellant's case in which she sought to raise such points. Her case is that, significant or not, an EA was required by the Directive, and in so far as domestic legislation does not require one, the 1988 Regulations are defective so that the appellant can rely on the direct effect of the Directive.

11. Underlying her complaint in these proceedings is her concern that if the proposed development were to go ahead, no EA would ever have been made although, in her view, the proposals will inevitably have significant environmental effects. If her argument is right, the respondent did not deal adequately with the issue at the time of the grant of outline planning permission. It had not delegated the task of determining whether or not an EA was required to any officer. It could not delegate that task to Chris Blandford Associates. It failed, so far as the minutes and the resolution disclose, to apply its own mind for the need for an EA and come to a clear decision in that regard. It is accepted, however, on her behalf that it is now too late for her to challenge that decision. Even if the decision was flawed, and could have

been the subject of a successful challenge by judicial review had this argument been put forward in time, she is now precluded from making that challenge. That was the part of the original application for permission to apply for judicial review which was revoked by Jackson J; and Dyson LJ did not give permission to appeal against that decision. It follows that the outline planning permission must therefore be treated as valid: *Smith –v- East Elloe RDC* [1959] AC 736.

12. The purpose of the Directive is to require member states to ensure that environmental problems arising from proposed development are fully and properly considered before permission for such development is granted, and to harmonise national laws in this respect. The most significant parts of the preamble are as follows:

> "Whereas the 1973 and 1977 action programmes of the European Communities on the environment, as well as the 1983 action programme, the main outlines of which have been approved by the Council of the European Communities and the representatives of the Governments of the Member States, stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects; where as they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes; whereas to that end they provide for the implementation of procedures to evaluate such effects;
>
> ...
>
> Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of those projects being carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;
>
> ....."

13. The relevant Articles are as follows:

> "Article 2
>
> (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 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.

.....

Article 4

.....

(2) Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 – 10.

Article 5

(1) In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure the developer supplies in an appropriate form the information specified in Annex III in as much as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specified characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) The Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

....."

14. Thereafter Articles 5, 6 and 7 set out the details of the information which is to be contained in an EA. Article 8 of the Directive provides:

"Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.

"Development consent" is defined by Article 1(2) as:

"The decision of the competent authority or authorities which entitles the developer to proceed with the project.""

15. Annex II includes, under the sub-heading "Infrastructure Projects", urban development projects. It is agreed that the proposed development in question is an urban development project.

16. The central issue in this case is whether or not the grant of outline planning permission is "development consent" for the purposes of the Directive. As will be seen when I turn in detail to the domestic statute and regulations, the only provision for an EA in domestic law is at the stage of outline planning permission. It is accepted on behalf of the respondent that if "development consent" for the purposes of the Directive includes consideration of reserved matters, then the Directive will not have been properly implemented in United Kingdom domestic legislation. It is further accepted that the phrase "development consent" must have an autonomous meaning, that is a meaning which is not defined by reference to the legislation of member states, but is to be determined within the context of the Directive itself, so that it can be applied uniformly in all jurisdictions of the European Community.

17. The high point of the appellant's submission is that we should conclude that the issue is not acte claire and should refer the question to the European Court of Justice. In support of this submission, the appellant relies on the fact that the European Commission has taken the first step towards initiating infringement proceedings against the United Kingdom in respect both of the specific development in question, and the question of whether or not the United Kingdom has properly implemented the Directive in relation to outline planning permissions. It has delivered a reasoned opinion to the government raising those issues. There is no doubt, and this has also been accepted by the respondent, that if it were ultimately to be held that "development consent" in the present context includes consideration of reserved matters, the appellant would be entitled to rely on the principle of direct effect to fill the lacuna in domestic legislation. A consideration of the need for an EA would therefore have been required for proper consideration of the reserved matters in the present case, so that the advice given to the committee would have been wrong and the decision accordingly flawed. I approach the answer to this question accepting the description of the purpose of the Directive given by the European Court of Justice in *Aannemersbedriif PK Kraaijeveld BV – v- Gedeputeerde Staten van Zuid-Holland* [1996] ECR 5403 in which the Court said at para 31:

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

18. The Directive leaves the means of implementation in domestic law to the member states. The wording of the Directive makes it clear that member states are entitled either to create a new procedure in order to give effect to the Directive, or to modify existing procedures. The United Kingdom has sought to give effect to the Directive in the 1988 Regulations. These were intended to insert the necessary procedural requirements of the Directive into the United Kingdom's existing planning regimes. These Regulations have to be read with the Town and Country Planning Act 1990 ("the 1990 Act") and the Town and Country Planning (General Development Procedure) Order 1995 ("the 1995 Order"). The 1988 Regulations have now been superseded; but their successors do not make any relevant changes which affect the issues of principle before this court.

19. In view of the way in which the appellant puts her case the question that we have to answer is whether or not the 1988 Regulations do fully and properly implement the Directive in the sense that it is clear that the United Kingdom is entitled to treat a grant of outline planning permission as the relevant "development consent" for the purpose of the Directive. In doing so, it seems to me that it is crucial to bear in mind the speech of Lord Hoffmann in *R -v- North Yorkshire CC ex p Brown* [2000] 1 AC 397. He was there considering a different

planning context to the present, and one to which I shall return; nonetheless he gives helpful guidance to the way in which to determine the ambit of the phrase "development consent" in the context of domestic law and the Directive. At page 404 he said:

> "The purpose of the Directive, as I have said, is to ensure that planning decisions which may affect the environment are made on the basis of full information.
>
> ....
>
> The position would be different if, upon a proper construction of the United Kingdom legislation, the determination of conditions was merely a subsidiary part of a single planning process in which the main decision likely to affect the environment had already been taken. In such a case the environmental impact assessment (if any) would have been made at the earlier stage and no further assessment would be required."

20. At page 405 he said:

> "The principle in this and similar cases seems to me to be clear: the Directive does not apply to decisions which involve merely the detailed regulation of activities for which the principal consent, raising the substantial environmental issues, has already been given."

21. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land. Since 1950, planning legislation has provided for a procedure for granting outline planning permission, leaving matters of detail to be approved on a later occasion. This procedure is now contained in the 1995 Order which, so far as material, provides as follows:

> "3(1) Where an application is made to the local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for the authority's subsequent approval.
>
> (2) Where the authority who are to determine an application for outline planning are of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any reserved matters, they shall within the period of one month beginning with the receipt of the application notify the applicant that they are unable to determine it unless further details are submitted, specifying the further details they require.
>
> .....
>
> (4) An application for approval of reserved matters:
>
> (a) Shall be made in writing to the local planning authority and shall give sufficient information to enable the authority to

identify the outline planning permission in respect of which it is made;

(b) Shall include such particulars and be accompanied by such plans and drawings as are necessary to deal with the matters reserved in the outline planning permission ...."

22. By Article 1(2):

> ""Outline Planning Permission" means a planning permission for the erection of a building which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters;
>
> ....
>
> "Reserved matters" in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application, namely:
>
> (a) Siting,
>
> (b) Design,
>
> (c) External appearance
>
> (d) Means of access
>
> (e) The landscaping of the site."

23. It is important to note that pursuant to Article 8 of the 1995 Order all particulars of the application for outline planning permission have to be advertised and otherwise brought to the attention of the public, so that fully informed consideration can be given to the application. There is no requirement for any publicity in relation to an application for the approval of reserved matters.

24. I now turn to the 1988 Regulations. Regulation 4 provides:

> "(1) This Regulation applies to any Schedule 1 or Schedule 2 application received by the authority with whom it is lodged on or after 15th July 1988 ...
>
> (2) The local planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration and state in their decision that they have done so ...."

25. By Regulation 2, the interpretation regulation, "Schedule 2 Application" means an application for planning permission for the carrying out of development of any description

mentioned in Schedule 2 which will be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. Included in Schedule 2 under "Infrastructure Projects" is "an urban development project". It is common ground that the proposed development is an urban development project. By Regulation 5, a person who is minded to apply for planning permission may ask the planning authority for its opinion as to whether or not any proposed development would amount to a Schedule 2 application. The "environmental information" required for the purposes of Regulation 4(2) is defined by Regulation 2(1) as:

> "the environmental statement prepared by the applicant or appellant ..... any representations made by any body required by these regulations to be invited to make representations or to be consulted and any representations duly made by any other persons about the likely environmental effects of the proposed development ....."

26. An "environmental statement" is by the same Regulation defined as a statement complying with the provisions of Schedule 3 to the Regulations, which sets out in detail the information required, in particular a summary in non-technical language of the information provided. These provisions clearly mirror the requirements of the Directive.

27. There is no doubt that the effect of these legislative provisions is that in domestic law, an EA can only be required where outline planning permission is sought, at the time the application for that permission is under consideration. There is equally no doubt, again in domestic law, that the grant of outline permission gives to the developer a right to develop in accordance with the conditions attached to the permission, and subject to consideration of reserved matters, which cannot be used by a planning authority to frustrate that right. The authority is bound to act in accordance with the principle of development already established by the grant.

28. The right to develop established by the grant of permission is a valuable asset. By s. 75(1) of the 1990 Act it inures "for the benefit of the land and of all persons for the time being interested in it". Further, although a planning authority has power to revoke or modify the grant of a planning permission, s. 107 of the 1990 Act entitles the person interested in the land to compensation if he has incurred expenditure which is thereby rendered aborted, or otherwise sustained loss or damage directly attributable to the revocation or modification of the grant.

29. I return then to the question which we have to determine, namely whether or not the 1988 Regulations, in the light of the legislative structure which I have set out above, can be said to have fully and properly implemented the terms of the Directive in domestic law. The appellant's submission is that the decision in relation to reserved matters, involving, as it does, consideration of siting, design, external appearance, means of access and the landscaping of the site, is capable of requiring a determination of issues which have an environmental effect which fall within the "wide scope" and "broad purpose" of the Directive. It follows, it is submitted, that in so far as the domestic legislation does not require an EA at that stage, it is defective. The appellant accepts that the United Kingdom is entitled to choose the way in which to implement the Directive which is best adapted to domestic planning procedures. But, it is submitted, it cannot sensibly be said that a developer

is entitled to proceed with the project, which is the benefit conferred by "development consent" according to Article 1 of the Directive (see para 14 above), until reserved matters have been approved. It is only then that a proper EA can be produced which will satisfy the purpose of the Directive. It follows, it is said, that it is at least arguable that there is a lacuna in the domestic legislation which this court should fill by giving direct effect to the Directive, and that there is accordingly a proper question for reference to the European Court of Justice.

30. In my judgment, this contention fails to give proper effect to the provisions of the 1988 Regulations. These undoubtedly require an EA, whether for the purpose of outline planning permission or full planning permission, if the application is a Schedule 1 or a Schedule 2 application within the meaning of the Regulations. It follows that in the case of any application capable of being a Schedule 2 application, like the present, the planning authority must decide at that stage whether or not the proposed development would have significant effects on the environment by virtue of factors such as its nature, size or location (see para 25 above). If it decides that it is a Schedule 2 application, it must call for, and the developer must provide, an environmental statement. Whether the permission sought is to be outline or full planning permission the planning authority will need to be given sufficient information as to the nature of the proposed development so as to enable it to make a judgment as to its likely effects on the environment, and sufficient information by way of the environmental statement to determine the extent to which those effects are acceptable, or acceptable only if certain conditions are met. It seems to me inevitable that the result of the requirements of the 1988 Regulations is that developers must provide, and planning authorities must require, sufficient information as to the nature of the proposed development as will enable the authority to make a judgment as to whether or not an EA is required; and if one is required, the developers' environmental statement must include all the matters set out in Schedule 3 to the 1988 Regulations. The first item of specified information in Schedule 3, paragraph 2, is:

> "A description of the development proposed, comprising information about the site and design and size or scale of the development."

31. In two decisions relating to a proposed business park, Sullivan J took the same view. In *R –v- Rochdale MBC ex parte Tew* [1999] 3 PLR 74, he concluded that an environmental statement accompanying an outline application for planning permission which contained no details, so that it did not provide any information about the design and size or scale of the development, did not comply with Schedule 3 to the 1988 Regulation and accordingly planning permission could not be granted.

32. The developers extensively revised the application form to give greater detail and submitted a new environmental statement dealing with the project, together with two other full applications for planning permission relating to the road layout. The planning authority granted permission, subject to numerous conditions. This decision was also challenged. The case ultimately came before Sullivan J again, whose judgment is reported as *R –v- Rochdale MBC ex parte Milne* [2000] 81 P&CR 365. He dismissed the challenge. He held that whilst there was bound to be less certainty in relation to the environmental effects of proposals put forward for outline planning permission than will be the case in proposals for full planning permission, nonetheless the planning authority is entitled to consider whether or not the information that has been provided is sufficient to give it full knowledge of its likely significant effects on the environment, and if so satisfied, it can accept an environmental

statement based upon such an application as a sufficient basis for an EA for the purposes of granting permission. If it is not so satisfied, it can require further material, or refuse the application: see para 95, page 385.

33. In these two judgments, Sullivan J describes in detail and with great clarity the way in which the 1988 Regulations apply in the context of applications for outline planning permission. The premise upon which he bases his judgments is that the 1988 Regulations require the full environmental impact of a proposed development to be capable of being identified at the time the planning authority considers the grant of permission. It may or may not be possible in any given case to define that impact in a purely outline application. If it is not, then clearly permission cannot be granted and the matter must proceed by way of an application for full permission. However, in many cases, sufficient information can be provided within an outline application to enable the planning authority to determine the impact that such a development is capable of producing and to make an EA accordingly. The planning authority has ample powers to require further information by way of detail to enable it to carry out this task; and always has the sanction of refusing permission if the material is not made available.

34. It is to be noted that the argument before Sullivan J proceeded on the basis that the 1988 Regulations had fully and properly implemented the terms of the Directive. In *Berkeley –v- Secretary of State for the Environment* [2000] 3 WLR 420, Lord Bingham said at page 422:

> "It is agreed that Council Directive [85/337/EEC] confers a Community law right exercisable by persons such as the applicant. It is accepted that the Directive was correctly transposed into domestic law by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988."

35. In *R –v- London Borough of Hammersmith & Fulham ex p Trustees of the CPRE (2000)* 81 P&CR 61, Harrison J said at paragraph 30 at page 68:

> "Directive 85/337 was implemented into our National Law by the 1988 Regulation. There is no suggestion that it has not been correctly implemented into the National Law."

36. Mr McCracken, who appears before us on behalf of the appellant, has sought, however, to disturb this consensus in a previous case in which he challenged a decision in relation to reserved matters on the basis that there had been no EA. In that case the applicant was refused permission to apply for judicial review by the single judge, and again on appeal. On each occasion both parties were heard by the court.

37. At first instance where Richard J's judgment is reported as *R –v- London Borough of Hammersmith and Fulham ex parte CPRE* [2000] EnvLR 532, the judge said at page 541:

> "For my part I do not see how community law could confound the entire planning process and enable or require a Local Planning Authority to reopen the principle of the development at the reserved matter stage. To my mind the argument advanced simply does not get off the ground. It seems to me that the effect of the Directive and the

Regulations made to implement it, is to require the question of Environmental Assessment to be considered at the stage of the initial planning decision, in this case the outline consent. It is the outline consent which constitutes development consent, for the purposes of the Directive in implementing provisions:

That view is, to my mind, supported by the decision in the House of Lords in *R –v- The North Yorkshire County Council ex p Brown* [1999] 2 WLR 452 and in particular the passage at the bottom of page 458 in the leading speech of Lord Hoffmann where he says:

> "The principle in this and similar cases seems to me to be clear: the directive does not apply to decisions which involve merely the detailed regulation of activities for which the principal consent raised in the substantial environmental issues, has already been given.""

38. The renewed application before the Court of Appeal is reported as *R –v- London Borough of Hammersmith and Fulham ex parte Trustees of the CPRE* [2000] 81 P&CR 73. The main judgment in the Court of Appeal was given by Singer J who said at paragraph 42 at page 80:

> "Primarily it is said that the Directive definition of "development consent" in Article 1.2 (which I have quoted) implies when effect is given to it in the context of English planning law, that the decision which "entitles the developer to proceed with the project" is not the outline permission but rather than final approval of reserved matters (or perhaps an amalgam of both stages). Thus, the argument runs, the obligation to consider the need for, and indeed to require, an environmental survey arises at (or again at) a reserved matters application stage, and was here disregarded.
>
> I would categorise this submission as unarguable."

39. It is this preponderance of domestic authority, although the last two judgments arose from applications for permission, and not fully argued cases, that has led Mr McCracken on behalf of the appellant to submit that the matter should be referred to the European Court of Justice. He has repeated before us submissions that were made in the *CPRE* case to the effect that it is only when the reserved matters have been agreed that the developer is entitled to proceed with the project, to use the words of the definition of a "development consent" in the Directive. It follows, he submits, that at the very least consideration of reserved matters is a "stage of the consent procedure" for the purposes of Article 5(1)(a) of the Directive to which environmental information may well be relevant; if it could be relevant, there must, he submits, be a requirement for an EA; and the necessary measures should have been put in place in the 1988 Regulations to provide for this eventuality, and they were not.

40. Further, he submits, the legislative scheme which was considered by the House of Lords in *Brown* [see para 19 above] makes it clear that where there has been a decision in principle, followed by consideration of conditions, the consideration of conditions amounts to a stage in the development consent process which requires an EA. Finally, he submits, circumstances

may arise in which the position at the time reserved matters come to be considered presents a different environmental picture from that which was considered to be the case at the time of the grant of outline planning permission. It follows that a failure to make an EA at that stage could mean that the development would proceed without a proper environmental evaluation ever having been made.

41. If these submissions were to cast any doubt on the consensus to which I have referred, there would be substance in Mr McCracken's argument that there should be a reference to the European Court of Justice. But in my view they do not. As to the first of these points, it seems to me that Mr McCracken is seeking to read more into the words of Article 5 than is justified. The reference to "a given stage of the consent procedure" does not indicate that there will necessarily be different stages in the consent procedure at which an EA may be necessary. It is merely a recognition of the fact that member states may consider it appropriate, by reason of their own planning procedures, to divide up the consideration into stages, and that if they do, then the only information that is required is that which is relevant at that particular stage. It does not preclude a member state from determining that there will only be one effective stage in the consent procedure, in which event all the material required must be made available at that stage.

42. The decision in *Brown* to which I said I would return was in the context of old mining permissions which remained extant, but had not been implemented. In order to give effect to the permissions on the one hand, but to enable control to be exercised over their implementation on the other, a statutory scheme was enacted in 1991 whereby such a permission would lapse unless an application was made within a given time limit to the relevant mining planning authority for appropriate conditions to be imposed to control the exercise of the mining rights. Implicit in the scheme was recognition of the fact that no opportunity for consideration of the full environmental effects had been given at the time of the grant of the permission. It followed that the only stage at which those effects could be considered was at the time the conditions were considered. In that context, the House of Lords held that the Directive should have direct effect and should apply to consideration of the conditions; and it was in that context that Lord Hoffmann formulated the issues of principle to which I referred in paragraph 19 above. The only analogy which can be drawn between the procedures in question in that case and those with which we are at present concerned is that we are likewise required to look at the stage in the planning process at which the full environmental effects of the proposed development can be considered. It follows that the case provides no support for the proposition that consideration of reserved matters can be equated to consideration of the conditions for the exercise of mining rights. The opportunity for consideration of the environmental effects of the proposals in an ordinary planning context is expressly given when outline planning permission is considered.

43. Mr McCracken's third argument seems to me to involve consideration of two separate problems. The first is that identified by Sullivan J in *Tew* [see para 29 above] at page 97, where he said:

> "Once outline planning permission has been granted, the principle of the development is established. Even if significant adverse impacts are identified at the reserved matter stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding."

44. Mr McCracken submits that this mischief can only be remedied if the reserved matter stage is to be a relevant stage in the grant of "development consent" so as to protect the public in the way envisaged by the Directive.

45. Whilst acknowledging that there may well be circumstances in which, either because the planning authority realises that it made a mistake in the first instance, or alternatively as a result of changed circumstances, the environmental impact of the development turns out to be significantly greater than originally envisaged, this cannot, it seems to me, affect our answer to the issue in this case. Whilst the fact that reserved matters have been left until a later point in time may give an opportunity to reconsider the environmental effects, that does not mean that a further EA is the necessary or appropriate solution. The planning authority is not powerless. It can revoke or modify the permission, subject to the payment of compensation. If it be the case that full consideration can be given to the environmental issues at the time of the grant of outline planning permission, there can be no difference in principle between the grant of outline planning permission and full permission in this respect. There may well be occasions when after the grant of full permission it is appreciated that either a mistaken assessment has been made or circumstances have changed. Neither event could trigger a requirement for a further EA pursuant to the Directive in those circumstances, whatever other steps the planning authority might seek to take in order to mitigate those environmental effects. It is inevitable that mistakes may sometimes be made by planning authorities in their evaluation of environmental effects; and it is also inevitable that on occasions circumstances will change. But neither of these matters can, for the reasons that I have given, detract from the legal effect of the grant of planning permission whether full or outline; the principle of development has been ces that flow from that.

46. The other problem arises if consideration of reserved matters indicates that the developers are proposing to make changes to the original concept which may affect either the EA which has already been made, or suggest the need for an EA. This situation may arise either where the submission of the proposal at the time of consideration of the reserved matters indicates that a proper evaluation of the environmental effects had not been made at the time of the grant of outline planning permission, or alternatively where what is now proposed is significantly different from that which was the subject matter of the outline planning permission. The first of these possible scenarios would be an illustration of the first problem to which I have already referred. It would show that the planning authority had failed either to make a proper assessment, or alternatively to impose conditions which ensured that the proposal was kept within appropriate bounds. This underlines the need for a planning authority to be astute to ensure that it has sufficient information at the time of the grant of outline planning permission to enable the possible environmental effects to be fully considered. The second scenario would show that the reserved matters had gone outside the bounds of the outline permission already granted, so that the proposals could not be approved, or would have to be amended before approval could be given.

47. I have come to the clear conclusion that none of these arguments justify the conclusion that there is a lacuna in the implementation of the Directive by the 1988 Regulations. These Regulations both entitle and require the planning authority to consider the full environmental effects of the proposed development at the outline planning permission stage; and United Kingdom procedures enable them to do so. It follows that the 1988 Regulations fully and properly implement the Directive. There is no room in those circumstances for the Directive to impose directly any requirement for an EA at the time of consideration of reserved

matters. I do not consider that this is a case in which a reference to the European Court of Justice is either necessary or appropriate. I would dismiss this appeal.

48. I have had an opportunity to read a draft of the judgment of Brooke LJ with which I agree.

MR JUSTICE BURTON:

49. I agree. I would only seek to add the following:

i) It is in my judgment significant that whereas the consideration of outline permission, and the required provision of the EA at that stage, is always a defining and specified moment, reserved matters may subsequently be dealt with piecemeal.

ii) In that context I refer to Article 5(2) of the Directive, which reads as follows:

"The information to be provided by the developer in accordance with paragraph 1 shall include at least:

- a description of the project comprising information on the site, design and size of the project,
- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse affects,
- the date required to identify and assess the main affects which the project is likely to have on the environment,
- a non-technical summary of the information mentioned in indents 1 – 3."

iii) The wording of that paragraph, taken together with that of paragraph 1 of the Article, seems to me to fit much more appropriately into a scheme in which there is only one EA to be provided, rather than a series of them.

iv) The provision of full information at the outline permission stage, in order that the planning authority can then determine whether an EA is or is not required, has two effects. It not only ensures that such a decision is thus taken on an informed basis, but also enables the authority to impose conditions on the permission, dedicated to ensuring so far as possible that the presumptions upon the basis of which an EA has or has not been found necessary will remain.

LORD JUSTICE BROOKE:

50. In November 1997 Chris Blandford Associates ("CBA"), who are consultants in landscape architecture and environmental planning, submitted a report to the London Borough of

Bromley ("Bromley") on the need for an environmental assessment of three development proposals at Crystal Palace. These proposals included the proposal by London and Regional Properties Ltd ("L&R") with which the present appeal is concerned. CBA noted (at para 1.6) that two consultees, the London Borough of Croydon and the London Wildlife Trust, had contended that this development should be subject to a formal process of EA. Its report, which it described as a discussion paper, was said (para 1.11) to provide an analysis of the issues, together with conclusions and recommendations which discussed the need (or not) for a formal process of EA for each of these developments.

51. It reminded Bromley (at para 2.2) that Circular 15/88 had described the EA process in these terms:

> "Formal environmental assessment is essentially a technique for drawing together in a systematic way, expert quantitative analysis and qualitative assessment of a project's environmental effects and presenting the results in a way which enables the importance of the predicted effects, and the scope for modifying or mitigating them, to be properly evaluated by the relevant decision-making body before a decision is given."

It appears to have misinterpreted the words "significant effects on the environment" which appear in the definition of the phrase "Schedule 2 application" in paragraph 2(1) of the 1988 Regulations as meaning "significant adverse effects on the environment".

52. In paragraph 2.6 of its report CBA said that in considering a Schedule 2 project under the 1988 regulations it was essential to ask whether each of the proposed developments could give rise to significant environmental effects. In this respect, it said, it was important to consider not only those aspects of the environment which could be significantly affected, including each of the matters specifically listed in Article 3 of the Directive, but also whether the proposed development was of more than local importance, in a sensitive location, or particularly complex, thereby giving rise to potentially adverse effects. After identifying all the relevant matters in its report, CBA considered, on balance, that the proposed development was unlikely to have significant environmental effects when tested against those criteria.

53. In paragraph 2.7 of its report CBA quoted from paragraph 15 and 16 of Circular 15/88 which gave indicative criteria and thresholds in relation to urban development projects. It left open the question whether the land in question should be treated as metropolitan open land in view of the fact that the Crystal Palace had stood on the site until it was destroyed by fire in 1936. If that building represented the old land use, then paragraph 15 of the circular (which related to the redevelopment of previously developed land) would apply, and the fact that the L&R proposal was not on a very much greater scale than the original Crystal Palace triggered the interpretation that the requirement for EA was unlikely.

54. If on the other hand, the land was to be treated as metropolitan open land then the scale of the proposed development exceeded some of the indicative criteria for an EA mentioned in paragraph 16 of the circular, viz:

i) The site area of the scheme (24 hectares) was more than 5 hectares in an urbanised area;

ii) The proposed development (52,130 square metres) would exceed by five times the threshold of 10,000 square metres for shops, offices or other commercial use.

55. CBA advised (at para 2.54) that it was relevant to consider those threshold "exceedences" in the context of whether they would lead to harm and have potentially significant environmental effects. It added that the size of the proposed development had clearly been so designed to reflect the grandeur of the original Crystal Palace, and its capacity was likely to confer economic benefits through the leisure facilities it would provide. Its scale therefore appeared acceptable, and in CBA's view it should not trigger the need for an EA.

56. The reasons why CBA considered, while stressing that its analysis did not represent a full EA, that the proposed development would not have potentially significant (adverse) effects to the environment in relation to the matters listed in paragraph 2.6 of its report, are set out in paragraphs 2.19 to 2.40. Its main findings were as follows:

i) Bromley had commissioned special reports on traffic, noise and amenity issues "to enable an assessment of significance", and from the information provided it appeared that these effects were not significant so as to trigger a requirement for an EA;

ii) Issues relating to construction dust could be addressed as a potential condition of planning permission;

iii) The site was not designated for its ecological and nature conservation value. There would be some loss of scrub habitat of a type well represented in London, but satisfactory replacement habitat was available in the park. A detailed reptile survey should be undertaken. It was possible to view the potential ecological effects as not being significant;

iv) In the local landscape context, the Ian Ritchie design would clearly enhance the local landscape in comparison to the open, semi-derelict land use at present, and the key statutory consultee, English Heritage, had praised the design in the context of its relationship to the park landscape;

v) Although the position of the proposed development on the ridgeline would place it in a visually prominent position for views from the south, while the potential visual effects from views in the broader landscape were untested, the new development was likely to be visually pleasing and interesting from view points into the site;

vi) Although the proposed development would cause a change in traffic volumes in the locality, and the extent of parking as part of the new development would mean increases in the number of "idling" motor vehicles, so that the level of vehicle exhaust emissions in an already busy traffic network system was likely to increase, it was

unlikely that increases in traffic associated with the proposed development would have significantly adverse additional effects on air quality in the area;

vii) The proposed development should be regarded as of more than local importance because of its prominent position on the ridgeline (on which CBA had already commented favourably);

viii) The proposed development was clearly in a sensitive location being within a conservation area and adjacent to a Grade II historic park, but since English Heritage was clearly of the opinion that the design was in keeping with the locally sensitive, historic landscape, CBA did not consider that the environmental effects would be significant and warrant assessment on that score.

ix) CBA broadly concurred with Bromley's favourable view of the proposed development when it considered whether it was a project with particularly complex and potentially adverse effects vis a vis the source of emissions and potential hazards to man, such that it did not warrant an EA on that score.

57. Before outline planning permission was granted, a 21-page report was prepared for the relevant committee. This was the most comprehensive, and the largest, report ever produced by Bromley's officers on a planning application. It included a summary of CBA's advice (together with the news that a reptile study was being undertaken in accordance with its recommendations), and an analysis of the different issues that had arisen during the long period of public consultation on this application. The report identified seven main issues for members' consideration (the policy context; whether the proposal was an overdevelopment; the traffic issues; heritage issues; nature conservation issues; pollution issues; and compliance with the 1990 local Act). The report's writers concluded that there were insufficient grounds to resist the proposals on the basis of any of these seven criteria, and recommended that outline planning permission should be granted subject to 34 conditions which could adequately deal with the main outstanding issues. The committee accepted this recommendation.

58. It will be very evident that the facts of this case are very different from the facts in *Berkeley v Secretary of State for the Environment* [2000] 3 WLR 420 where the House of Lords quashed the granting of planning permission in circumstances in which the Secretary of State, who had called the application in and ordered an 8-day public inquiry before planning permission was granted, had wholly failed to consider whether there should have been an EA for what was arguably an urban development project.

59. In the present case it is clear from the evidence that at officer level Bromley did consider this question. They then sought expert independent professional advice before they submitted their report, and Mr Macmillan, their chief planning officer, has said that he shared CBA's view. The procedure appears to have been at fault (see para 11 of Latham LJ's judgment) because the members of the development control committee did not themselves formally resolve that they considered that no EA was required, although they might be taken to have concurred with the advice they received when they resolved to grant outline planning permission without calling for an EA or for further advice on that matter.

60. Latham LJ has observed how the original challenge in the courts to this intensely controversial proposal included no complaint that an EA should have been commissioned before planning permission was granted, alternatively that no council in Bromley's shoes could reasonably have taken the view that this development did not have a significant effect on the environment. I agree with him that the absence of any such challenge in due time (and in the *Berkeley* case Lady Berkeley made her challenge within six weeks of the grant of planning permission) means that the outline planning permission must be treated as valid under our law, whatever procedural failings may have accompanied its grant.

61. It may be that before the decision of the House of Lords in the *Berkeley* case a view was taken that there was so much detailed information before Bromley in one form or another (albeit in a form which Lord Hoffmann was to stigmatise as a "paper chase" (see *Berkeley* at p 432E)), that it was considered inappropriate to take the point that the council had not formally resolved that no EA was required, or that the basis on which it had received advice on the point was incorrect as a matter of law.

62. The Directive left it to the member states to decide how to incorporate its effects into their national law. By Article 4 it left it to member states to establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II of the Directive were to be subject to an EA. In the case of projects which had to be subjected to an EA pursuant to Article 4 (ie Annex I projects and such Annex II projects as might be identified through the use of the criteria and/or thresholds referred to in that article) the Directive by Article 5 left it to the member states to identify the "given stage of the consent procedure" at which the Annex III information should be supplied.

63. In *World Wildlife Fund v Autonome Provinz Bozen* [2000] 1 CMLR 149 the European Court of Justice said at para 43 that the Directive conferred a measure of discretion on the member states, and in no way excluded a method of implementation which consisted in the designation, on the basis of an individual examination of a project, of a particular project falling within Annex II as not being subject to the procedure for assessing its environmental effects. It went on to say, on the facts of that case (at para 48):

> "It is for the national court to review whether, on the basis of the individual examination carried out by the competent authority which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment."

Because a challenge was not mounted at the appropriate stage, it is far too late for us to conduct such a review now, and no permission to appeal on this point was given.

64. For the reasons set out in the judgment of Latham LJ, with which I agree, I do not consider that the history of this case discloses any grounds for supposing that Lord Bingham of Cornhill and all the counsel involved in the *Berkeley* case were wrong when they accepted that the Directive was correctly transposed into our domestic law by the 1988 Regulations (see *Berkeley* at p 432H). The Directive did not require member states to reorder their

arrangements for the consideration of planning proposals provided that at a "given stage of the consent procedure", which was to be identified by each member state individually, the processes required by the Directive were put in train. This country selected the outline planning permission stage as the appropriate stage for this purpose.

65. A spate of litigation in recent years has clarified the effect of the regulations which have brought the requirements of the Directive into our national law. In *Berkeley* the House of Lords has made it clear that the processes of the regulations are mandatory: they do not simply provide an optional alternative to the "paper chase". In his judgments in *ex p Tew* and *ex p Milne* Sullivan J has drawn on his immense experience of planning law to explain how the requirements of the regulations must be put into effect so that a full appraisal of the potential environmental effects of a project can be conducted in an orderly manner at the outline permission stage. And this case has given this court an opportunity to make it clear that if a local planning authority, applying the 1988 regulations, judged that an urban development project had significant effects on the environment then it was obliged to require an EA even though it believed those effects to be benign and not adverse.

66. For the sake of completeness, I would add that we have been told by Mr Frank Whiting, who is Bromley's chief property officer, in a statement dated 16th October 2001, that Bromley has now terminated its arrangements with L&R for the proposed development at Crystal Palace, and that these arrangements are now the subject of proceedings, both pending and prospective, in the Chancery Division. Mr Whiting tells us that not only are there no prospects of L&R constructing the development (given the breakdown of its arrangements with Bromley), but also that Bromley currently believes that there are no realistic prospects of any other developer taking on this particular development as permitted by the reserved matters approval, or indeed the outline planning permission, at any stage in the future.

67. If a new developer makes new proposals for the site, the definition of "Schedule 2 development" which is now contained in paragraph 2(1) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 makes it clear that if the area of an urban development project exceeds 0.5 hectares it qualifies as a Schedule 2 development. Schedule 3 to those regulations then makes the screening process introduced by Part II of the new regulations much more transparent, so that some of the confusions which seem to have accompanied the processing of this particular application at the outline planning permission stage should be much less likely to occur in future.

68. For the reasons given by Latham LJ, with which I agree, I agree that this appeal should be dismissed.

Order: Appeal dismissed with costs re section 11, detailed assessment of claimant's costs.

The Secretary of State for Transport Local Government and the Regions do pay the appellant's (Diane Barker's) costs in this action that are directly and solely attributable to dealing with the Secretary of State application dated 23 October 2001 to be subject to detailed assessment it not agreed.

There be no order as to costs between the Secretary of State for Transport Local Government and the Region and the Respondent (London Borough of Bromley)

(order does not form part of the approved judgment)

Case No: C/2001/9009

Neutral Citation Number: [2001] EWCA Civ 1766
IN THE SUPREME COURT OF JUDICATURE
ON APPEAL FROM QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
(JACKSON J)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 23rd November 2001

Before:

LORD JUSTICE BROOKE
LORD JUSTICE LATHAM
and
MR JUSTICE BURTON

R

ON THE APPLICATION OF DIANE BARKER — Appellant

-v-

LONDON BOROUGH OF BROMLEY — Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Robert McCracken & Mr James Pereira (instructed by Messrs Richard Buxton, Cambridge for the Appellant)
Mr Timothy Straker QC & Mr James Strachan (instructed by London Borough of Bromley for the Respondent)

Judgment
As Approved by the Court

LORD JUSTICE LATHAM:

1. The respondent is the owner of Crystal Palace Park and the planning authority for the area in which it is situated. It became the owner pursuant to the Local Government Reorganisation (Property etc) Order 1986. The Bromley London Borough (Crystal Palace) Act 1990 empowered the respondent, amongst other things, to lease land known as the green land and the pink land, which formed part of the Park for the purposes of a hotel, restaurant, shops, licensed premises, leisure facilities, entertainment facilities or other associated uses. These facilities could only be provided on the green land and not more than 50% of the total area of the pink land could be covered with buildings. The principal building to be constructed in any development of the pink land was to be constructed in a style which would reflect the architectural style of the original Crystal Palace.

2. In 1997 London & Regional Properties Ltd ("L&R") applied for "the development of leisure and recreational facilities, car park deck and associated ramps and surface car parking" on the pink land. In March 1998, the respondent resolved to grant outline planning permission for the L&R application, subject to conditions. This decision was challenged by, amongst others, the Crystal Palace Campaign. Their application for judicial review was eventually dismissed by the Court of Appeal in December 1998. The grounds of the challenge related to the architectural style of the proposed building and to the car parking arrangements. A petition to the House of Lords for leave to appeal was dismissed in June 1999.

3. Meanwhile, the respondent had considered and approved the matters reserved by the outline planning permission in May 1999. The appellant, a single mother who lived in a road affected by the access proposals, and who used the Park for recreational purposes for herself and her child, made application for permission to apply for judicial review on the 16th June 1999. Her grounds included a challenge to the decision to grant outline planning consent. Permission was granted on paper by Lightman J in July 1999. The respondent, in response, applied to set aside the grant of permission to apply. On the 17th April 2000, Jackson J set aside permission to apply in so far as it related to the grant of outline planning permission and dismissed the application for judicial review in respect of the remainder. He refused permission to appeal. On the 6th February 2001 Dyson LJ, after an oral hearing, granted permission to appeal, essentially limited to the argument that the respondent was required by Directive 85/57/EEC (the Directive) to consider the need for an Environmental Assessment (EA) at the time that it considered the reserved matters. There is no dispute that the respondent did not require an EA to be obtained at that stage, and that it was advised by its officers that there was no such requirement as a matter of law.

4. Although the ambit of the appeal is therefore limited, it raises an important question as to whether or not the Directive has been properly implemented in domestic law. The respondent submits that the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the 1988 Regulations") which are the relevant regulations, fully implemented the Directive. On a proper construction of these regulations, in the context of domestic planning law, an EA is only required, if appropriate, when consideration is being given to the grant of planning permission, in this case the outline planning permission. The appellant submits that the planning process is a staged process involving both the grant of outline planning permission and the consideration of reserved matters, and that the Directive requires consideration of the need for an EA at both stages.

5. Before coming to the questions of European and domestic planning law which lie at the heart of this appeal, the facts need to be described in more detail, so as to understand the nature of the dispute. The application for outline planning permission was accompanied by a number of plans showing the site, the proposed floor arrangements, and elevations showing the general architectural proposals and cross sections. The floor area of the proposed new buildings was said to be approximately 52,130 square metres. The number of proposed parking spaces was 1,200, and the materials to be used externally for the walls were described as glass and steel. The application was further supported prior to its consideration by the respondent by a large number of technical reports dealing with traffic and highways, the architectural proposals, and other conservation and environmental matters. The respondent itself commissioned a report by Messrs Chris Blandford Associates dated November 1997 on the need for a formal EA. It concluded:

> "Therefore, on balance, in considering the L & R proposal as an urban development project, it is unlikely to require a formal process of EA (Environmental Assessment)."

6. Not surprisingly, the proposal attracted vociferous and widespread opposition. A well organised group, the Crystal Palace Campaign, put forward detailed and reasoned opposition, supported by a petition signed by a significant number of people, including the appellant. The officers' report to the relevant committee of the respondent properly reflected the material submitted both by L & R and the objectors. It also set out the terms of the advice obtained from Chris Blandford Associates. The Committee resolved to approve the application. There is a dispute as TO whether or not the Committee gave proper or adequate consideration to the question of the need for an EA. Suffice it to say that the minutes do not indicate that there was any specific reference to it in the debate, and the resolution approving planning permission did not make specific reference to it either. On the other hand, Mr Macmillan, the Chief Planning Officer of the respondent, said in a statement which is before the court that consideration of the report from Chris Blandford Associates was at least implicit in the decision.

7. The notification of the grant of outline planning permission set out thirty-four conditions upon which that permission was granted. It identified the grant of permission in the following terms:

> "Take notice that the Council of the London Borough of Bromley, in exercise of its powers as local planning authority under the above Act has granted outline planning permission for the development referred to in your application received on 04.04.97.
>
> The development of leisure and recreational facilities, car park deck and associated ramps and surface car parking at site of the former Crystal Palace, (OUTLINE)"

8. Amongst the conditions were the following:

> "01(i) Details relating to the siting .... design.... appearance .... access .... landscaping shall be submitted to and approved by the Local Planning Authority before any development is commenced .....

> 03. The details submitted pursuant to condition 01 shall show, inter alia, a building with elevations of predominantly glass and metal and generally according with the illustrative elevations accompanying the application .... in all material respects, reflecting the spirit and architectural style of the original Crystal Palace at Sydenham, and in accordance with the terms of the Bromley London Borough Council (Crystal Palace) Act 1990 and other relevant legislation.....
>
> 14 Before any work is commenced details of motor cycle spaces, bicycle stands and no more than 950 car park spaces in total .... shall be submitted to and approved in writing by or on behalf of the Local Planning Authority ...."

9. As I have already related, the objectors, in particular the Crystal Palace Campaign, commenced judicial review proceedings on the limited basis to which I have already referred. The Crystal Palace Campaign was led by, amongst others, an experienced planning lawyer, and instructed experienced planning solicitors and counsel. Those proceedings did not allege that the respondent had failed in any way to take into account, or properly deal with, the need for an EA. The proceedings were unsuccessful.

10. When the matter returned before the Committee for consideration of reserved matters, a number of changes to the original design and specification were proposed. Amongst others, the most significant was the addition of a mezzanine floor which increased the floor space available for retail and leisure use. Further, a different treatment was proposed of the part of the building which was stone as opposed to glass and steel clad. There is a dispute as to the extent to which these changes were significant. The applicant submits that they were; Mr Macmillan in his witness statement asserts that they were not. They were certainly not treated as significant by the Committee when it considered and approved the reserved matters. However there was considerable controversy during the course of the debate as to whether or not an EA was appropriate. The Committee was advised both by Mr Macmillan and by the respondent's legal officer who was present that an EA was not required as a matter of law; and there was before the Committee a letter from Chris Blandford Associates of the 6th May 1999 in which it stated that it remained of the view that an EA was not needed. For the purposes of these proceedings we do not need to resolve the issue as to whether or not the changes proposed were significant because the judge refused to allow a late amendment to the appellant's case in which she sought to raise such points. Her case is that, significant or not, an EA was required by the Directive, and in so far as domestic legislation does not require one, the 1988 Regulations are defective so that the appellant can rely on the direct effect of the Directive.

11. Underlying her complaint in these proceedings is her concern that if the proposed development were to go ahead, no EA would ever have been made although, in her view, the proposals will inevitably have significant environmental effects. If her argument is right, the respondent did not deal adequately with the issue at the time of the grant of outline planning permission. It had not delegated the task of determining whether or not an EA was required to any officer. It could not delegate that task to Chris Blandford Associates. It failed, so far as the minutes and the resolution disclose, to apply its own mind for the need for an EA and come to a clear decision in that regard. It is accepted, however, on her behalf that it is now too late for her to challenge that decision. Even if the decision was flawed, and could have

been the subject of a successful challenge by judicial review had this argument been put forward in time, she is now precluded from making that challenge. That was the part of the original application for permission to apply for judicial review which was revoked by Jackson J; and Dyson LJ did not give permission to appeal against that decision. It follows that the outline planning permission must therefore be treated as valid: *Smith –v- East Elloe RDC* [1959] AC 736.

12. The purpose of the Directive is to require member states to ensure that environmental problems arising from proposed development are fully and properly considered before permission for such development is granted, and to harmonise national laws in this respect. The most significant parts of the preamble are as follows:

> "Whereas the 1973 and 1977 action programmes of the European Communities on the environment, as well as the 1983 action programme, the main outlines of which have been approved by the Council of the European Communities and the representatives of the Governments of the Member States, stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects; where as they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes; whereas to that end they provide for the implementation of procedures to evaluate such effects;
>
> ...
>
> Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of those projects being carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;
>
> ....."

13. The relevant Articles are as follows:

> "Article 2
>
> (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 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.

.....

Article 4

.....

(2) Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 – 10.

Article 5

(1) In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure the developer supplies in an appropriate form the information specified in Annex III in as much as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specified characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) The Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

....."

14. Thereafter Articles 5, 6 and 7 set out the details of the information which is to be contained in an EA. Article 8 of the Directive provides:

"Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.

"Development consent" is defined by Article 1(2) as:

"The decision of the competent authority or authorities which entitles the developer to proceed with the project.""

15. Annex II includes, under the sub-heading "Infrastructure Projects", urban development projects. It is agreed that the proposed development in question is an urban development project.

16. The central issue in this case is whether or not the grant of outline planning permission is "development consent" for the purposes of the Directive. As will be seen when I turn in detail to the domestic statute and regulations, the only provision for an EA in domestic law is at the stage of outline planning permission. It is accepted on behalf of the respondent that if "development consent" for the purposes of the Directive includes consideration of reserved matters, then the Directive will not have been properly implemented in United Kingdom domestic legislation. It is further accepted that the phrase "development consent" must have an autonomous meaning, that is a meaning which is not defined by reference to the legislation of member states, but is to be determined within the context of the Directive itself, so that it can be applied uniformly in all jurisdictions of the European Community.

17. The high point of the appellant's submission is that we should conclude that the issue is not acte claire and should refer the question to the European Court of Justice. In support of this submission, the appellant relies on the fact that the European Commission has taken the first step towards initiating infringement proceedings against the United Kingdom in respect both of the specific development in question, and the question of whether or not the United Kingdom has properly implemented the Directive in relation to outline planning permissions. It has delivered a reasoned opinion to the government raising those issues. There is no doubt, and this has also been accepted by the respondent, that if it were ultimately to be held that "development consent" in the present context includes consideration of reserved matters, the appellant would be entitled to rely on the principle of direct effect to fill the lacuna in domestic legislation. A consideration of the need for an EA would therefore have been required for proper consideration of the reserved matters in the present case, so that the advice given to the committee would have been wrong and the decision accordingly flawed. I approach the answer to this question accepting the description of the purpose of the Directive given by the European Court of Justice in *Aannemersbedriif PK Kraaijeveld BV – v- Gedeputeerde Staten van Zuid-Holland* [1996] ECR 5403 in which the Court said at para 31:

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

18. The Directive leaves the means of implementation in domestic law to the member states. The wording of the Directive makes it clear that member states are entitled either to create a new procedure in order to give effect to the Directive, or to modify existing procedures. The United Kingdom has sought to give effect to the Directive in the 1988 Regulations. These were intended to insert the necessary procedural requirements of the Directive into the United Kingdom's existing planning regimes. These Regulations have to be read with the Town and Country Planning Act 1990 ("the 1990 Act") and the Town and Country Planning (General Development Procedure) Order 1995 ("the 1995 Order"). The 1988 Regulations have now been superseded; but their successors do not make any relevant changes which affect the issues of principle before this court.

19. In view of the way in which the appellant puts her case the question that we have to answer is whether or not the 1988 Regulations do fully and properly implement the Directive in the sense that it is clear that the United Kingdom is entitled to treat a grant of outline planning permission as the relevant "development consent" for the purpose of the Directive. In doing so, it seems to me that it is crucial to bear in mind the speech of Lord Hoffmann in *R -v- North Yorkshire CC ex p Brown* [2000] 1 AC 397. He was there considering a different

planning context to the present, and one to which I shall return; nonetheless he gives helpful guidance to the way in which to determine the ambit of the phrase "development consent" in the context of domestic law and the Directive. At page 404 he said:

> "The purpose of the Directive, as I have said, is to ensure that planning decisions which may affect the environment are made on the basis of full information.
>
> ....
>
> The position would be different if, upon a proper construction of the United Kingdom legislation, the determination of conditions was merely a subsidiary part of a single planning process in which the main decision likely to affect the environment had already been taken. In such a case the environmental impact assessment (if any) would have been made at the earlier stage and no further assessment would be required."

20. At page 405 he said:

> "The principle in this and similar cases seems to me to be clear: the Directive does not apply to decisions which involve merely the detailed regulation of activities for which the principal consent, raising the substantial environmental issues, has already been given."

21. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land. Since 1950, planning legislation has provided for a procedure for granting outline planning permission, leaving matters of detail to be approved on a later occasion. This procedure is now contained in the 1995 Order which, so far as material, provides as follows:

> "3(1) Where an application is made to the local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for the authority's subsequent approval.
>
> (2) Where the authority who are to determine an application for outline planning are of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any reserved matters, they shall within the period of one month beginning with the receipt of the application notify the applicant that they are unable to determine it unless further details are submitted, specifying the further details they require.
>
> .....
>
> (4) An application for approval of reserved matters:
>
> (a) Shall be made in writing to the local planning authority and shall give sufficient information to enable the authority to

identify the outline planning permission in respect of which it is made;

(b) Shall include such particulars and be accompanied by such plans and drawings as are necessary to deal with the matters reserved in the outline planning permission ...."

22. By Article 1(2):

> ""Outline Planning Permission" means a planning permission for the erection of a building which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters;
>
> ....
>
> "Reserved matters" in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application, namely:
>
> (a) Siting,
>
> (b) Design,
>
> (c) External appearance
>
> (d) Means of access
>
> (e) The landscaping of the site."

23. It is important to note that pursuant to Article 8 of the 1995 Order all particulars of the application for outline planning permission have to be advertised and otherwise brought to the attention of the public, so that fully informed consideration can be given to the application. There is no requirement for any publicity in relation to an application for the approval of reserved matters.

24. I now turn to the 1988 Regulations. Regulation 4 provides:

> "(1) This Regulation applies to any Schedule 1 or Schedule 2 application received by the authority with whom it is lodged on or after 15th July 1988 ...
>
> (2) The local planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration and state in their decision that they have done so ...."

25. By Regulation 2, the interpretation regulation, "Schedule 2 Application" means an application for planning permission for the carrying out of development of any description

mentioned in Schedule 2 which will be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. Included in Schedule 2 under "Infrastructure Projects" is "an urban development project". It is common ground that the proposed development is an urban development project. By Regulation 5, a person who is minded to apply for planning permission may ask the planning authority for its opinion as to whether or not any proposed development would amount to a Schedule 2 application. The "environmental information" required for the purposes of Regulation 4(2) is defined by Regulation 2(1) as:

> "the environmental statement prepared by the applicant or appellant ..... any representations made by any body required by these regulations to be invited to make representations or to be consulted and any representations duly made by any other persons about the likely environmental effects of the proposed development ....."

26. An "environmental statement" is by the same Regulation defined as a statement complying with the provisions of Schedule 3 to the Regulations, which sets out in detail the information required, in particular a summary in non-technical language of the information provided. These provisions clearly mirror the requirements of the Directive.

27. There is no doubt that the effect of these legislative provisions is that in domestic law, an EA can only be required where outline planning permission is sought, at the time the application for that permission is under consideration. There is equally no doubt, again in domestic law, that the grant of outline permission gives to the developer a right to develop in accordance with the conditions attached to the permission, and subject to consideration of reserved matters, which cannot be used by a planning authority to frustrate that right. The authority is bound to act in accordance with the principle of development already established by the grant.

28. The right to develop established by the grant of permission is a valuable asset. By s. 75(1) of the 1990 Act it inures "for the benefit of the land and of all persons for the time being interested in it". Further, although a planning authority has power to revoke or modify the grant of a planning permission, s. 107 of the 1990 Act entitles the person interested in the land to compensation if he has incurred expenditure which is thereby rendered aborted, or otherwise sustained loss or damage directly attributable to the revocation or modification of the grant.

29. I return then to the question which we have to determine, namely whether or not the 1988 Regulations, in the light of the legislative structure which I have set out above, can be said to have fully and properly implemented the terms of the Directive in domestic law. The appellant's submission is that the decision in relation to reserved matters, involving, as it does, consideration of siting, design, external appearance, means of access and the landscaping of the site, is capable of requiring a determination of issues which have an environmental effect which fall within the "wide scope" and "broad purpose" of the Directive. It follows, it is submitted, that in so far as the domestic legislation does not require an EA at that stage, it is defective. The appellant accepts that the United Kingdom is entitled to choose the way in which to implement the Directive which is best adapted to domestic planning procedures. But, it is submitted, it cannot sensibly be said that a developer

is entitled to proceed with the project, which is the benefit conferred by "development consent" according to Article 1 of the Directive (see para 14 above), until reserved matters have been approved. It is only then that a proper EA can be produced which will satisfy the purpose of the Directive. It follows, it is said, that it is at least arguable that there is a lacuna in the domestic legislation which this court should fill by giving direct effect to the Directive, and that there is accordingly a proper question for reference to the European Court of Justice.

30. In my judgment, this contention fails to give proper effect to the provisions of the 1988 Regulations. These undoubtedly require an EA, whether for the purpose of outline planning permission or full planning permission, if the application is a Schedule 1 or a Schedule 2 application within the meaning of the Regulations. It follows that in the case of any application capable of being a Schedule 2 application, like the present, the planning authority must decide at that stage whether or not the proposed development would have significant effects on the environment by virtue of factors such as its nature, size or location (see para 25 above). If it decides that it is a Schedule 2 application, it must call for, and the developer must provide, an environmental statement. Whether the permission sought is to be outline or full planning permission the planning authority will need to be given sufficient information as to the nature of the proposed development so as to enable it to make a judgment as to its likely effects on the environment, and sufficient information by way of the environmental statement to determine the extent to which those effects are acceptable, or acceptable only if certain conditions are met. It seems to me inevitable that the result of the requirements of the 1988 Regulations is that developers must provide, and planning authorities must require, sufficient information as to the nature of the proposed development as will enable the authority to make a judgment as to whether or not an EA is required; and if one is required, the developers' environmental statement must include all the matters set out in Schedule 3 to the 1988 Regulations. The first item of specified information in Schedule 3, paragraph 2, is:

> "A description of the development proposed, comprising information about the site and design and size or scale of the development."

31. In two decisions relating to a proposed business park, Sullivan J took the same view. In *R –v- Rochdale MBC ex parte Tew* [1999] 3 PLR 74, he concluded that an environmental statement accompanying an outline application for planning permission which contained no details, so that it did not provide any information about the design and size or scale of the development, did not comply with Schedule 3 to the 1988 Regulation and accordingly planning permission could not be granted.

32. The developers extensively revised the application form to give greater detail and submitted a new environmental statement dealing with the project, together with two other full applications for planning permission relating to the road layout. The planning authority granted permission, subject to numerous conditions. This decision was also challenged. The case ultimately came before Sullivan J again, whose judgment is reported as *R –v- Rochdale MBC ex parte Milne* [2000] 81 P&CR 365. He dismissed the challenge. He held that whilst there was bound to be less certainty in relation to the environmental effects of proposals put forward for outline planning permission than will be the case in proposals for full planning permission, nonetheless the planning authority is entitled to consider whether or not the information that has been provided is sufficient to give it full knowledge of its likely significant effects on the environment, and if so satisfied, it can accept an environmental

statement based upon such an application as a sufficient basis for an EA for the purposes of granting permission. If it is not so satisfied, it can require further material, or refuse the application: see para 95, page 385.

33. In these two judgments, Sullivan J describes in detail and with great clarity the way in which the 1988 Regulations apply in the context of applications for outline planning permission. The premise upon which he bases his judgments is that the 1988 Regulations require the full environmental impact of a proposed development to be capable of being identified at the time the planning authority considers the grant of permission. It may or may not be possible in any given case to define that impact in a purely outline application. If it is not, then clearly permission cannot be granted and the matter must proceed by way of an application for full permission. However, in many cases, sufficient information can be provided within an outline application to enable the planning authority to determine the impact that such a development is capable of producing and to make an EA accordingly. The planning authority has ample powers to require further information by way of detail to enable it to carry out this task; and always has the sanction of refusing permission if the material is not made available.

34. It is to be noted that the argument before Sullivan J proceeded on the basis that the 1988 Regulations had fully and properly implemented the terms of the Directive. In *Berkeley –v- Secretary of State for the Environment* [2000] 3 WLR 420, Lord Bingham said at page 422:

> "It is agreed that Council Directive [85/337/EEC] confers a Community law right exercisable by persons such as the applicant. It is accepted that the Directive was correctly transposed into domestic law by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988."

35. In *R –v- London Borough of Hammersmith & Fulham ex p Trustees of the CPRE (2000)* 81 P&CR 61, Harrison J said at paragraph 30 at page 68:

> "Directive 85/337 was implemented into our National Law by the 1988 Regulation. There is no suggestion that it has not been correctly implemented into the National Law."

36. Mr McCracken, who appears before us on behalf of the appellant, has sought, however, to disturb this consensus in a previous case in which he challenged a decision in relation to reserved matters on the basis that there had been no EA. In that case the applicant was refused permission to apply for judicial review by the single judge, and again on appeal. On each occasion both parties were heard by the court.

37. At first instance where Richard J's judgment is reported as *R –v- London Borough of Hammersmith and Fulham ex parte CPRE* [2000] EnvLR 532, the judge said at page 541:

> "For my part I do not see how community law could confound the entire planning process and enable or require a Local Planning Authority to reopen the principle of the development at the reserved matter stage. To my mind the argument advanced simply does not get off the ground. It seems to me that the effect of the Directive and the

Regulations made to implement it, is to require the question of Environmental Assessment to be considered at the stage of the initial planning decision, in this case the outline consent. It is the outline consent which constitutes development consent, for the purposes of the Directive in implementing provisions:

That view is, to my mind, supported by the decision in the House of Lords in *R –v- The North Yorkshire County Council ex p Brown* [1999] 2 WLR 452 and in particular the passage at the bottom of page 458 in the leading speech of Lord Hoffmann where he says:

> "The principle in this and similar cases seems to me to be clear: the directive does not apply to decisions which involve merely the detailed regulation of activities for which the principal consent raised in the substantial environmental issues, has already been given.""

38. The renewed application before the Court of Appeal is reported as *R –v- London Borough of Hammersmith and Fulham ex parte Trustees of the CPRE* [2000] 81 P&CR 73. The main judgment in the Court of Appeal was given by Singer J who said at paragraph 42 at page 80:

> "Primarily it is said that the Directive definition of "development consent" in Article 1.2 (which I have quoted) implies when effect is given to it in the context of English planning law, that the decision which "entitles the developer to proceed with the project" is not the outline permission but rather than final approval of reserved matters (or perhaps an amalgam of both stages). Thus, the argument runs, the obligation to consider the need for, and indeed to require, an environmental survey arises at (or again at) a reserved matters application stage, and was here disregarded.
>
> I would categorise this submission as unarguable."

39. It is this preponderance of domestic authority, although the last two judgments arose from applications for permission, and not fully argued cases, that has led Mr McCracken on behalf of the appellant to submit that the matter should be referred to the European Court of Justice. He has repeated before us submissions that were made in the *CPRE* case to the effect that it is only when the reserved matters have been agreed that the developer is entitled to proceed with the project, to use the words of the definition of a "development consent" in the Directive. It follows, he submits, that at the very least consideration of reserved matters is a "stage of the consent procedure" for the purposes of Article 5(1)(a) of the Directive to which environmental information may well be relevant; if it could be relevant, there must, he submits, be a requirement for an EA; and the necessary measures should have been put in place in the 1988 Regulations to provide for this eventuality, and they were not.

40. Further, he submits, the legislative scheme which was considered by the House of Lords in *Brown* [see para 19 above] makes it clear that where there has been a decision in principle, followed by consideration of conditions, the consideration of conditions amounts to a stage in the development consent process which requires an EA. Finally, he submits, circumstances

may arise in which the position at the time reserved matters come to be considered presents a different environmental picture from that which was considered to be the case at the time of the grant of outline planning permission. It follows that a failure to make an EA at that stage could mean that the development would proceed without a proper environmental evaluation ever having been made.

41. If these submissions were to cast any doubt on the consensus to which I have referred, there would be substance in Mr McCracken's argument that there should be a reference to the European Court of Justice. But in my view they do not. As to the first of these points, it seems to me that Mr McCracken is seeking to read more into the words of Article 5 than is justified. The reference to "a given stage of the consent procedure" does not indicate that there will necessarily be different stages in the consent procedure at which an EA may be necessary. It is merely a recognition of the fact that member states may consider it appropriate, by reason of their own planning procedures, to divide up the consideration into stages, and that if they do, then the only information that is required is that which is relevant at that particular stage. It does not preclude a member state from determining that there will only be one effective stage in the consent procedure, in which event all the material required must be made available at that stage.

42. The decision in *Brown* to which I said I would return was in the context of old mining permissions which remained extant, but had not been implemented. In order to give effect to the permissions on the one hand, but to enable control to be exercised over their implementation on the other, a statutory scheme was enacted in 1991 whereby such a permission would lapse unless an application was made within a given time limit to the relevant mining planning authority for appropriate conditions to be imposed to control the exercise of the mining rights. Implicit in the scheme was recognition of the fact that no opportunity for consideration of the full environmental effects had been given at the time of the grant of the permission. It followed that the only stage at which those effects could be considered was at the time the conditions were considered. In that context, the House of Lords held that the Directive should have direct effect and should apply to consideration of the conditions; and it was in that context that Lord Hoffmann formulated the issues of principle to which I referred in paragraph 19 above. The only analogy which can be drawn between the procedures in question in that case and those with which we are at present concerned is that we are likewise required to look at the stage in the planning process at which the full environmental effects of the proposed development can be considered. It follows that the case provides no support for the proposition that consideration of reserved matters can be equated to consideration of the conditions for the exercise of mining rights. The opportunity for consideration of the environmental effects of the proposals in an ordinary planning context is expressly given when outline planning permission is considered.

43. Mr McCracken's third argument seems to me to involve consideration of two separate problems. The first is that identified by Sullivan J in *Tew* [see para 29 above] at page 97, where he said:

> "Once outline planning permission has been granted, the principle of the development is established. Even if significant adverse impacts are identified at the reserved matter stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding."

44. Mr McCracken submits that this mischief can only be remedied if the reserved matter stage is to be a relevant stage in the grant of "development consent" so as to protect the public in the way envisaged by the Directive.

45. Whilst acknowledging that there may well be circumstances in which, either because the planning authority realises that it made a mistake in the first instance, or alternatively as a result of changed circumstances, the environmental impact of the development turns out to be significantly greater than originally envisaged, this cannot, it seems to me, affect our answer to the issue in this case. Whilst the fact that reserved matters have been left until a later point in time may give an opportunity to reconsider the environmental effects, that does not mean that a further EA is the necessary or appropriate solution. The planning authority is not powerless. It can revoke or modify the permission, subject to the payment of compensation. If it be the case that full consideration can be given to the environmental issues at the time of the grant of outline planning permission, there can be no difference in principle between the grant of outline planning permission and full permission in this respect. There may well be occasions when after the grant of full permission it is appreciated that either a mistaken assessment has been made or circumstances have changed. Neither event could trigger a requirement for a further EA pursuant to the Directive in those circumstances, whatever other steps the planning authority might seek to take in order to mitigate those environmental effects. It is inevitable that mistakes may sometimes be made by planning authorities in their evaluation of environmental effects; and it is also inevitable that on occasions circumstances will change. But neither of these matters can, for the reasons that I have given, detract from the legal effect of the grant of planning permission whether full or outline; the principle of development has been ces that flow from that.

46. The other problem arises if consideration of reserved matters indicates that the developers are proposing to make changes to the original concept which may affect either the EA which has already been made, or suggest the need for an EA. This situation may arise either where the submission of the proposal at the time of consideration of the reserved matters indicates that a proper evaluation of the environmental effects had not been made at the time of the grant of outline planning permission, or alternatively where what is now proposed is significantly different from that which was the subject matter of the outline planning permission. The first of these possible scenarios would be an illustration of the first problem to which I have already referred. It would show that the planning authority had failed either to make a proper assessment, or alternatively to impose conditions which ensured that the proposal was kept within appropriate bounds. This underlines the need for a planning authority to be astute to ensure that it has sufficient information at the time of the grant of outline planning permission to enable the possible environmental effects to be fully considered. The second scenario would show that the reserved matters had gone outside the bounds of the outline permission already granted, so that the proposals could not be approved, or would have to be amended before approval could be given.

47. I have come to the clear conclusion that none of these arguments justify the conclusion that there is a lacuna in the implementation of the Directive by the 1988 Regulations. These Regulations both entitle and require the planning authority to consider the full environmental effects of the proposed development at the outline planning permission stage; and United Kingdom procedures enable them to do so. It follows that the 1988 Regulations fully and properly implement the Directive. There is no room in those circumstances for the Directive to impose directly any requirement for an EA at the time of consideration of reserved

matters. I do not consider that this is a case in which a reference to the European Court of Justice is either necessary or appropriate. I would dismiss this appeal.

48. I have had an opportunity to read a draft of the judgment of Brooke LJ with which I agree.

MR JUSTICE BURTON:

49. I agree. I would only seek to add the following:

i) It is in my judgment significant that whereas the consideration of outline permission, and the required provision of the EA at that stage, is always a defining and specified moment, reserved matters may subsequently be dealt with piecemeal.

ii) In that context I refer to Article 5(2) of the Directive, which reads as follows:

"The information to be provided by the developer in accordance with paragraph 1 shall include at least:

- a description of the project comprising information on the site, design and size of the project,
- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse affects,
- the date required to identify and assess the main affects which the project is likely to have on the environment,
- a non-technical summary of the information mentioned in indents 1 – 3."

iii) The wording of that paragraph, taken together with that of paragraph 1 of the Article, seems to me to fit much more appropriately into a scheme in which there is only one EA to be provided, rather than a series of them.

iv) The provision of full information at the outline permission stage, in order that the planning authority can then determine whether an EA is or is not required, has two effects. It not only ensures that such a decision is thus taken on an informed basis, but also enables the authority to impose conditions on the permission, dedicated to ensuring so far as possible that the presumptions upon the basis of which an EA has or has not been found necessary will remain.

LORD JUSTICE BROOKE:

50. In November 1997 Chris Blandford Associates ("CBA"), who are consultants in landscape architecture and environmental planning, submitted a report to the London Borough of

Bromley ("Bromley") on the need for an environmental assessment of three development proposals at Crystal Palace. These proposals included the proposal by London and Regional Properties Ltd ("L&R") with which the present appeal is concerned. CBA noted (at para 1.6) that two consultees, the London Borough of Croydon and the London Wildlife Trust, had contended that this development should be subject to a formal process of EA. Its report, which it described as a discussion paper, was said (para 1.11) to provide an analysis of the issues, together with conclusions and recommendations which discussed the need (or not) for a formal process of EA for each of these developments.

51. It reminded Bromley (at para 2.2) that Circular 15/88 had described the EA process in these terms:

> "Formal environmental assessment is essentially a technique for drawing together in a systematic way, expert quantitative analysis and qualitative assessment of a project's environmental effects and presenting the results in a way which enables the importance of the predicted effects, and the scope for modifying or mitigating them, to be properly evaluated by the relevant decision-making body before a decision is given."

It appears to have misinterpreted the words "significant effects on the environment" which appear in the definition of the phrase "Schedule 2 application" in paragraph 2(1) of the 1988 Regulations as meaning "significant adverse effects on the environment".

52. In paragraph 2.6 of its report CBA said that in considering a Schedule 2 project under the 1988 regulations it was essential to ask whether each of the proposed developments could give rise to significant environmental effects. In this respect, it said, it was important to consider not only those aspects of the environment which could be significantly affected, including each of the matters specifically listed in Article 3 of the Directive, but also whether the proposed development was of more than local importance, in a sensitive location, or particularly complex, thereby giving rise to potentially adverse effects. After identifying all the relevant matters in its report, CBA considered, on balance, that the proposed development was unlikely to have significant environmental effects when tested against those criteria.

53. In paragraph 2.7 of its report CBA quoted from paragraph 15 and 16 of Circular 15/88 which gave indicative criteria and thresholds in relation to urban development projects. It left open the question whether the land in question should be treated as metropolitan open land in view of the fact that the Crystal Palace had stood on the site until it was destroyed by fire in 1936. If that building represented the old land use, then paragraph 15 of the circular (which related to the redevelopment of previously developed land) would apply, and the fact that the L&R proposal was not on a very much greater scale than the original Crystal Palace triggered the interpretation that the requirement for EA was unlikely.

54. If on the other hand, the land was to be treated as metropolitan open land then the scale of the proposed development exceeded some of the indicative criteria for an EA mentioned in paragraph 16 of the circular, viz:

i) The site area of the scheme (24 hectares) was more than 5 hectares in an urbanised area;

ii) The proposed development (52,130 square metres) would exceed by five times the threshold of 10,000 square metres for shops, offices or other commercial use.

55. CBA advised (at para 2.54) that it was relevant to consider those threshold "exceedences" in the context of whether they would lead to harm and have potentially significant environmental effects. It added that the size of the proposed development had clearly been so designed to reflect the grandeur of the original Crystal Palace, and its capacity was likely to confer economic benefits through the leisure facilities it would provide. Its scale therefore appeared acceptable, and in CBA's view it should not trigger the need for an EA.

56. The reasons why CBA considered, while stressing that its analysis did not represent a full EA, that the proposed development would not have potentially significant (adverse) effects to the environment in relation to the matters listed in paragraph 2.6 of its report, are set out in paragraphs 2.19 to 2.40. Its main findings were as follows:

i) Bromley had commissioned special reports on traffic, noise and amenity issues "to enable an assessment of significance", and from the information provided it appeared that these effects were not significant so as to trigger a requirement for an EA;

ii) Issues relating to construction dust could be addressed as a potential condition of planning permission;

iii) The site was not designated for its ecological and nature conservation value. There would be some loss of scrub habitat of a type well represented in London, but satisfactory replacement habitat was available in the park. A detailed reptile survey should be undertaken. It was possible to view the potential ecological effects as not being significant;

iv) In the local landscape context, the Ian Ritchie design would clearly enhance the local landscape in comparison to the open, semi-derelict land use at present, and the key statutory consultee, English Heritage, had praised the design in the context of its relationship to the park landscape;

v) Although the position of the proposed development on the ridgeline would place it in a visually prominent position for views from the south, while the potential visual effects from views in the broader landscape were untested, the new development was likely to be visually pleasing and interesting from view points into the site;

vi) Although the proposed development would cause a change in traffic volumes in the locality, and the extent of parking as part of the new development would mean increases in the number of "idling" motor vehicles, so that the level of vehicle exhaust emissions in an already busy traffic network system was likely to increase, it was

unlikely that increases in traffic associated with the proposed development would have significantly adverse additional effects on air quality in the area;

vii) The proposed development should be regarded as of more than local importance because of its prominent position on the ridgeline (on which CBA had already commented favourably);

viii) The proposed development was clearly in a sensitive location being within a conservation area and adjacent to a Grade II historic park, but since English Heritage was clearly of the opinion that the design was in keeping with the locally sensitive, historic landscape, CBA did not consider that the environmental effects would be significant and warrant assessment on that score.

ix) CBA broadly concurred with Bromley's favourable view of the proposed development when it considered whether it was a project with particularly complex and potentially adverse effects vis a vis the source of emissions and potential hazards to man, such that it did not warrant an EA on that score.

57. Before outline planning permission was granted, a 21-page report was prepared for the relevant committee. This was the most comprehensive, and the largest, report ever produced by Bromley's officers on a planning application. It included a summary of CBA's advice (together with the news that a reptile study was being undertaken in accordance with its recommendations), and an analysis of the different issues that had arisen during the long period of public consultation on this application. The report identified seven main issues for members' consideration (the policy context; whether the proposal was an overdevelopment; the traffic issues; heritage issues; nature conservation issues; pollution issues; and compliance with the 1990 local Act). The report's writers concluded that there were insufficient grounds to resist the proposals on the basis of any of these seven criteria, and recommended that outline planning permission should be granted subject to 34 conditions which could adequately deal with the main outstanding issues. The committee accepted this recommendation.

58. It will be very evident that the facts of this case are very different from the facts in *Berkeley v Secretary of State for the Environment* [2000] 3 WLR 420 where the House of Lords quashed the granting of planning permission in circumstances in which the Secretary of State, who had called the application in and ordered an 8-day public inquiry before planning permission was granted, had wholly failed to consider whether there should have been an EA for what was arguably an urban development project.

59. In the present case it is clear from the evidence that at officer level Bromley did consider this question. They then sought expert independent professional advice before they submitted their report, and Mr Macmillan, their chief planning officer, has said that he shared CBA's view. The procedure appears to have been at fault (see para 11 of Latham LJ's judgment) because the members of the development control committee did not themselves formally resolve that they considered that no EA was required, although they might be taken to have concurred with the advice they received when they resolved to grant outline planning permission without calling for an EA or for further advice on that matter.

60. Latham LJ has observed how the original challenge in the courts to this intensely controversial proposal included no complaint that an EA should have been commissioned before planning permission was granted, alternatively that no council in Bromley's shoes could reasonably have taken the view that this development did not have a significant effect on the environment. I agree with him that the absence of any such challenge in due time (and in the *Berkeley* case Lady Berkeley made her challenge within six weeks of the grant of planning permission) means that the outline planning permission must be treated as valid under our law, whatever procedural failings may have accompanied its grant.

61. It may be that before the decision of the House of Lords in the *Berkeley* case a view was taken that there was so much detailed information before Bromley in one form or another (albeit in a form which Lord Hoffmann was to stigmatise as a "paper chase" (see *Berkeley* at p 432E)), that it was considered inappropriate to take the point that the council had not formally resolved that no EA was required, or that the basis on which it had received advice on the point was incorrect as a matter of law.

62. The Directive left it to the member states to decide how to incorporate its effects into their national law. By Article 4 it left it to member states to establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II of the Directive were to be subject to an EA. In the case of projects which had to be subjected to an EA pursuant to Article 4 (ie Annex I projects and such Annex II projects as might be identified through the use of the criteria and/or thresholds referred to in that article) the Directive by Article 5 left it to the member states to identify the "given stage of the consent procedure" at which the Annex III information should be supplied.

63. In *World Wildlife Fund v Autonome Provinz Bozen* [2000] 1 CMLR 149 the European Court of Justice said at para 43 that the Directive conferred a measure of discretion on the member states, and in no way excluded a method of implementation which consisted in the designation, on the basis of an individual examination of a project, of a particular project falling within Annex II as not being subject to the procedure for assessing its environmental effects. It went on to say, on the facts of that case (at para 48):

> "It is for the national court to review whether, on the basis of the individual examination carried out by the competent authority which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment."

Because a challenge was not mounted at the appropriate stage, it is far too late for us to conduct such a review now, and no permission to appeal on this point was given.

64. For the reasons set out in the judgment of Latham LJ, with which I agree, I do not consider that the history of this case discloses any grounds for supposing that Lord Bingham of Cornhill and all the counsel involved in the *Berkeley* case were wrong when they accepted that the Directive was correctly transposed into our domestic law by the 1988 Regulations (see *Berkeley* at p 432H). The Directive did not require member states to reorder their

arrangements for the consideration of planning proposals provided that at a "given stage of the consent procedure", which was to be identified by each member state individually, the processes required by the Directive were put in train. This country selected the outline planning permission stage as the appropriate stage for this purpose.

65. A spate of litigation in recent years has clarified the effect of the regulations which have brought the requirements of the Directive into our national law. In *Berkeley* the House of Lords has made it clear that the processes of the regulations are mandatory: they do not simply provide an optional alternative to the "paper chase". In his judgments in *ex p Tew* and *ex p Milne* Sullivan J has drawn on his immense experience of planning law to explain how the requirements of the regulations must be put into effect so that a full appraisal of the potential environmental effects of a project can be conducted in an orderly manner at the outline permission stage. And this case has given this court an opportunity to make it clear that if a local planning authority, applying the 1988 regulations, judged that an urban development project had significant effects on the environment then it was obliged to require an EA even though it believed those effects to be benign and not adverse.

66. For the sake of completeness, I would add that we have been told by Mr Frank Whiting, who is Bromley's chief property officer, in a statement dated 16th October 2001, that Bromley has now terminated its arrangements with L&R for the proposed development at Crystal Palace, and that these arrangements are now the subject of proceedings, both pending and prospective, in the Chancery Division. Mr Whiting tells us that not only are there no prospects of L&R constructing the development (given the breakdown of its arrangements with Bromley), but also that Bromley currently believes that there are no realistic prospects of any other developer taking on this particular development as permitted by the reserved matters approval, or indeed the outline planning permission, at any stage in the future.

67. If a new developer makes new proposals for the site, the definition of "Schedule 2 development" which is now contained in paragraph 2(1) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 makes it clear that if the area of an urban development project exceeds 0.5 hectares it qualifies as a Schedule 2 development. Schedule 3 to those regulations then makes the screening process introduced by Part II of the new regulations much more transparent, so that some of the confusions which seem to have accompanied the processing of this particular application at the outline planning permission stage should be much less likely to occur in future.

68. For the reasons given by Latham LJ, with which I agree, I agree that this appeal should be dismissed.

Order: Appeal dismissed with costs re section 11, detailed assessment of claimant's costs.

The Secretary of State for Transport Local Government and the Regions do pay the appellant's (Diane Barker's) costs in this action that are directly and solely attributable to dealing with the Secretary of State application dated 23 October 2001 to be subject to detailed assessment it not agreed.

There be no order as to costs between the Secretary of State for Transport Local Government and the Region and the Respondent (London Borough of Bromley)

(order does not form part of the approved judgment)