R. V. LONDON BOROUGH OF BROMLEY & ANOTHER, EX PARTE DIANA BARKER

QUEEN'S BENCH DIVISION

(Jackson J.): April 3, 2000

Environmental assessment—European Directive 85/337—outline planning permission—reserved matters—relationship to planning permission—delay—procedure—status of ministerial statements—status of Government White Papers

The council became the owner of Crystal Palace Park on April 1, 1986 and was the planning authority for the area. The London Borough (Crystal Palace) Act 1990 ("the 1990 Act") provided that any development of a specified area of land, within which the original Crystal Palace had stood, consequent upon the provisions of the Act had to reflect the architectural style of the original Crystal Palace. The council undertook during the committee stage of the bill to require, as planning authority, that the building should contain a predominance of glass and metal or similar materials and that the building should reflect the spirit of the original Crystal Palace. In March 1994 the council adopted the Unitary Development Plan ("UDP") for its area which identified the specified area and provided for possible future uses for hotel, leisure and associated facilities to meet a growing demand and to improve the amenity of the Park. LRP was selected as preferred developer and two months later the applicant moved into her home at close to that part of the Park identified in the 1990 Act and in the UDP. On March 27, 1997 LRP applied for outline planning permission under the Town and Country Planning Act 1990 for leisure and recreational facilities including a cinema and roof-top parking. On March 24, 1998 the development control sub-committee of the council resolved to grant conditional outline planning permission. On May 5, 1998 the Crystal Palace Campaign ("CPC"), a local opposition group, applied for permission to apply for judicial review of the decision of the council, seeking an order of certiorari and a declaration that the construction of the building in accordance with the planning permission would be contrary to the 1990 Act on the basis that the development did not reflect the architectural style of the original Palace and because of inadequate parking provision. Leave was granted by the Court of Appeal in respect of the contended breach of the 1990 Act but the substantive application was dismissed by the Court of Appeal on December 21, 1998. Petitions to the House for leave to appeal to the House of Lords were unsuccessful.

Following the application to the council for approval of reserved matters

under the outline grant of planning permission, a further third party objector, RWG, petitioned the mayor of Bromley on April 26, 1999. The applicant was amongst several thousand signatories to the petition. The matter of obtaining an environmental assessment was raised at the meeting of the council's development control committee on May 6, 1999. The committee were advised by officers that a formal environmental assessment under Schedule 2 to the European Directive 85/337 was not required, being a matter which could not be reopened following the outline grant. The committee resolved to approve the application for reserved matters. On June 16, 1999 the applicant sought permission to apply to move for judicial review seeking orders of certiorari to quash the council's decisions to grant the outline permission on March 24, 1998 and to approve the application for reserved matters on May 6, 1999, and a declaration that that the Council's decisions were unlawful.

The material contentions of the applicant were that the council had failed to require or consider requiring an environmental assessment in accordance with the requirements imposed upon the council by Directive 85/337 EEC in respect of the outline planning permission as an urban development project; that the council had misdirected itself in deciding it had no power to require the environmental assessment; that the council had failed to have regard a ministerial statement and to the government's White Paper on Transport; and that the approval of reserved matters was unlawful being predicated upon an unlawful outline planning permission.

The issues for the court were:

(a) whether the applicant's permission to apply for judicial review should be set aside; and

(b) whether the applicant was entitled to the substantive relief sought.

Held: permission to apply for judicial review would be partially set aside; permission to apply would be limited to three specific grounds within the Form 86A; no permission would be granted in respect of whether the outline grant was unlawful or invalid. On the substantive hearing, the application for judicial review was dismissed.

1. In respect of issue (a) a notice of application for permission to apply for judicial review is a free-standing document which should be capable of comprehension without the need for lengthy oral examination, particularly where permission is sought on the papers: Where judicial review proceedings raise an issue of delay it should be clearly identified in the notice of application for permission. The applicant's challenge of May 6, 1999 to a decision March 26, 1998 was grossly out of time and no extension of time would be granted: The issue of delay had not been properly dealt with in the notice of application. So the application would be set aside in

respect of the attack on the outline grant of planning permission as 15 months had elapsed between the grant and the application to the court for permission. There was a special need for expedition in respect of the judicial review of planning decisions and there was no justification for extending time under Part 1 of the CPR nor fundamental principles of E.C. jurisprudence to cause the court to overlook the long delay; that the LRP would suffer significant prejudice and that, in view of the earlier judicial review proceedings, the court should not, save in exceptional circumstances, allow successive judicial review proceedings to challenge the same decision on different grounds, as this drains court time and causes respondents to incur additional costs.

2. In respect of issue (b) if an application for outline planning permission is a Schedule 2 application then the environmental assessment should be carried out prior to the grant of permission. An application cannot retrospectively become a Schedule 2 application at the time of consideration of a reserved matters application. If an environmental assessment in respect of an urban development project must be carried out, then it must be done prior to the grant of outline permission. The question of whether an environmental assessment is or is not required does not arise after a grant of outline planning permission and a planning authority must proceed on the basis that no such assessment is required following a grant. The council's decision to approve reserved matters in the absence of an environmental assessment was not unlawful. The council did not fail to require or consider to require an environmental assessment. It would not have been proper for the council to reduce the size of the development within the outline planning permission by reason of a ministerial statement which was not a significant change to government policy but was primarily a clarification of policy. The Government White Paper on Transport, although containing occasional references to planning matters, did not constitute planning policy guidance.

Cases referred to:

- *Fitzgerald v. Williams* [1996] Q.B. 657.
- *Kingsway Investment Limited v. Kent County Council* [1971] A.C. 72.
- *R. v. Ceredigion County Council, ex parte McKeown* [1998] 2 P.L.R. 1.
- *R. v. Criminal Injuries Compensation Board, ex parte A.* [1999] 2 A.C. 330.
- *R. v. Durham County Council, ex parte Huddlestone, The Times*, March 15, 2000.
- *R. v. Elmbridge Borough Council, ex parte Health Care Corporation* [1991] 3 P.L.R. 63.

- *R. v. Jockey Club Licensing Committee, ex parte Wright* [1991] C.O.D. 306.
- *R. v. London Borough of Hammersmith and Fulham, ex parte CPRE* (QB, unreported).
- *R. v. Newbury District Council and Newbury and District Agricultural Society, ex parte Chievely Parish Council* [1991] 1 B.L.C.R. 51.
- *R. v. North Yorkshire County Council, ex parte Brown* (HL(E)) [2000] A.C. 397.
- *R. v. Rochdale MBC, ex parte Tew* [2000] Env.L.R. 1.
- *R. v. Lloyds of London, ex parte Briggs* [1992] 5 Admin.L.R. 698.

Robert McCracken and *James Pereira* for the applicant.
Gregory Stone Q.C. and *James Strachan* for the first respondent.
Matthew Horton Q.C. and *Christopher Boyle* for the second respondent.

JACKSON J.: This judgment is in 12 parts, namely:

Part 1. Introduction

These judicial review proceedings relate to a proposed development at Crystal Palace Park in South London. The applicant is a single parent with a young daughter, who lives very close to the development site. She is understandably concerned about the adverse effects of the development upon herself and her daughter. The first respondent is the owner of Crystal Palace Park and also the planning authority for the area. The second respondent is the developer.

In these proceedings the applicant seeks to attack two decisions made by the first respondent: first, a decision of March 24, 1998 to grant outline planning permission for the construction of leisure and recreational facilities in Crystal Palace Park; secondly, a decision of May 6, 1999 to approve detailed proposals submitted by the second respondent pursuant to the "reserved matters" procedure.

This litigation has a tortuous history. As a result, two issues are now before the court: first, whether the applicant's permission to apply for judicial review should be set aside; secondly, whether the applicant is entitled to the substantive relief which she seeks.

Part 2. The facts

In 1851 the Great Exhibition of the Works of Industry of All Nations was held in London. It was attended by some six million people. The Exhibition Hall, which stood in Hyde Park, was designed by Sir Joseph Paxton. The design made extensive use of metal and glass, and it was at the forefront of modern technology in the mid-19th century. The Exhibition Hall was dubbed "Crystal Palace" by the press and this name passed into common parlance.

After the conclusion of the Great Exhibition, Crystal Palace was dismantled. It was re-erected in an enlarged form on an area of parkland at Sydenham in South London. The re-erection was again designed and supervised by Sir Joseph Paxton. The building retained its name, Crystal Palace, and indeed that name was also given to the park in which it was re-erected. The park slopes downwards from east to west. Paxton's building stood at the top of the slope, which is at the eastern end of the park. Unfortunately, in 1936 Crystal Palace was destroyed by fire.

The ownership of Crystal Palace Park has changed a number of times over the years. On April 1, 1986 the London Borough of Bromley, the first respondent, became the owner of the park. Since that date the first respondent has been both the owner of Crystal Palace Park and also the planning authority for the area in which it is situated. In June 1990 Parliament passed the Bromley London Borough (Crystal Palace) Act 1990. Section 3(1) of that Act provides:

> "... the council may, for the purpose of or in connection with the provision of an hotel, restaurant, shops, licensed premises, leisure facilities, entertainment facilities or other associated uses on such terms and conditions as may be agreed—
>
> (a) lease all or any of the relevant land for a term not exceeding 125 years;
>
> (b) grant easements, rights, privileges or licences as may be required—
>
> (i) for the provision of underground services; and
>
> (ii) for the emergency services; in respect of land within the Crystal Palace and Park."

Section 4 of the Act provided:

> "The principal building to be constructed in any development of the pink land consequent upon the provisions of this Act shall reflect the architectural style of the original Crystal Palace."

The "pink land" referred to in section 4 of the Act is the area at the top of the park, where the original Crystal Palace designed by Paxton had stood between 1854 and 1936.

Section 4 of the 1990 Act is broadly similar to an undertaking which the first respondent gave to Parliament during the Committee Stage of the Bill. That undertaking reads as follows:

> "If a building is constructed in the implementation of the Bill, the council as Planning Authority shall require that the building should contain a predominance of glass and metal or similar materials and that the building should reflect the spirit of the original Crystal Palace."

In March 1994 the first respondent's unitary development plan was adopted. That unitary development plan contained the following provision in respect of Crystal Palace Park:

> "Crystal Palace Park ... Possible Future Uses ... Hotel, leisure centre & associated facilities ... Justification ... To provide appropriate hotel and leisure facilities to meet growing demand and to improve the park's amenities."

The part of the park referred to was identified on a plan annexed to the unitary development plan. That was the top part of the park, the area where Paxton's building had stood.

A number of developers expressed interest in carrying out the development on Crystal Palace Park, referred to in the unitary development plan. One of these was London and Regional Properties Limited, which is the second respondent in these proceedings. On July 25, 1996 the first respondent selected the second respondent as the preferred developer.

Two months later, on September 21, 1996, Ms Diane Barker (the applicant) moved to her present home, which is Flat D, 8 Anerley Hill, London SE19. Anerley Hill is a road which runs along the southern side of Crystal Palace Park. The applicant's home is towards the top of Anerley Hill and thus is close to that part of the park which was earmarked for the possible new development in section 4 of the 1990 Act and in the unitary development plan.

Quite soon after arriving at 8 Anerley Hill, the applicant gave birth to her daughter, Alexandra. The applicant states in her first statement (and I accept) that the applicant and her daughter have made much use of Crystal Palace Park in all seasons. Alexandra enjoys playing there.

On March 27, 1997, the second respondent submitted an application for outline planning permission to the first respondent. The second respondent's proposal was for the development of leisure and recreational facilities. The application was accompanied by a site plan and illustrative floor plans and elevations. The scheme was for a 20-screen cinema, large leisure areas, restaurants, cafes and extensive car parking, mainly at roof level.

The second respondent's planning application was duly advertised in the local press. Notices describing the planning application were placed in the vicinity of the proposed development site. The matter was discussed at numerous public meetings. Letters about the planning application were sent to local residents. Whether one of those letters was delivered to the applicant's address is in issue between the parties. It is not necessary to resolve that issue. I am satisfied that the applicant must have seen notices about the proposed development during her regular excursions into the park.

Opposition to the proposed development was rapidly mobilised. In May 1997 the applicant and many other local residents signed a petition expressing their opposition to the scheme. In due course a group of eco-warriors established a camp on the site of the proposed development. They remained there for a period of 11 months and expressed vociferous opposition to the respondents' plans. Another, more orderly, opposition group was known as the Crystal Palace Campaign. This was chaired by Mr Philip Kolvin, a local resident and also a practising member of the Bar.

Whilst the opposition groups were campaigning in their various ways against the proposed development, the second respondent was gathering material to support its planning application. This material included the following:

1. "A Movement Masterplan" prepared in 1997 by Messrs Alan Baxter and Associates.
2. "A Transport Impact Assessment" prepared in April 1997 by the Graham Group.
3. A document entitled "A Crystal Palace Traffic Model" prepared by Messrs W. S. Atkins.
4. A document entitled "Anerley Hill Access Arrangements" prepared by Messrs W. S. P. Grahams.
5. A document entitled "Anerley Hill Access" dated January 1998 prepared by the Dennis Wilson Partnership.
6. "Highway Authority summary" prepared in July 1997 by the London Borough of Bromley.
7. "Planning Statement" dated July 1997 prepared by Messrs Jones Lang Wootton.
8. A document entitled "Architect's Design Philosophy" dated September 1997 and prepared by Messrs Ian Ritchie, who are and were a well-known firm of architects, who designed, amongst other things, the glazed pyramid above the Louvre in Paris.
9. A document entitled "Heritage Advice", a letter dated May 8, 1997 prepared by English Heritage.
10. "Architectural Advice" dated May 22, 1997 from the Royal Fine Arts Commission.
11. "Conservation Statement" dated June 1997 prepared by the London Borough of Bromley.
12. "Cinema Impact Statement" dated July 1997 prepared by Messrs Jones Lang Wootton.
13. A report on acoustics dated July 1997 prepared by the Sharps Redmore Partnership.
14. A report on air quality dated March 1998 prepared by Atkins Wootton Jeffreys; and

15. A report prepared by Messrs Chris Blandford Associates comprising environmental assessment advice.

A meeting of the first respondent's development control committee was fixed for March 24, 1998 in order to consider the planning application. In preparation for that meeting, officers of the first respondent prepared a report for the assistance of the committee. That report summarised the relevant facts and outlined the nature of the opposition to the proposed development. In relation to environmental considerations, that report quoted the views of Chris Blandford Associates, including the following passages:

> "The proposed development on the site of the old Crystal Palace is unlikely to have significant environmental effects when tested against the criteria (in the Regulations).
>
> ...
>
> Therefore, on balance, in considering the London and Regional proposal as an urban development project, it is unlikely to require a formal process of Environmental Assessment".

On March 24, 1998, the development control committee met and resolved to grant outline planning permission to the second respondent, subject to a number of conditions. Outline planning permission was formally granted on March 26, 1998. The conditions attached to the outline planning permission included 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. (ii) Application for approval of the details referred to in paragraph (i) above must be made not later than the expiration of three years beginning with the date of decision notice.
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> ...
>
> 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 [Drawing No. PE4201 received 12.06.97] 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.
>
> 04 Unless otherwise agreed in writing by, or on behalf of, the Local Planning Authority, the details submitted pursuant to condition 01 shall show, *inter alia*, vehicular and pedestrian access to the site from both Crystal Palace Parade and Anerley Hill. Such

details, which shall include any necessary traffic signals, pedestrian crossing points and a tunnel within the site serving the Anerley Hill access, shall generally accord with the illustrative plans [in particular 213/SK/100] and shall be completed before any part of the development is first occupied or open to the public.

05 The details submitted pursuant to condition 01 shall show, *inter alia*, means of pedestrian access to the southern part of the application site, and the approved access shall be provided before any part of the development hereby permitted is open to the public and be permanently available thereafter to the satisfaction of the Local Planning Authority.

...

14 Before any work is commenced details of motorcycle spaces, bicycle stands and no more than 950 car park spaces in total and sufficient turning space shall be submitted to and approved in writing by or on behalf of the Local Planning Authority and such provision shall be completed before the commencement of the use of the land or building hereby permitted and shall thereafter be kept available for such use. No development whether permitted by the Town and Country Planning (General Permitted Development) Order 1995 (or any Order amending, revoking and re-enacting this Order) or not, shall be carried out on the land indicated or in such a position as to preclude vehicular access to the said land. At no time shall more than 950 car parking spaces be provided on site."

On May 5, 1998 a group of members of the Crystal Palace Campaign commenced judicial review proceedings in this court. They sought an order of certiorari to quash the decision of the London Borough of Bromley's development control committee dated March 24, 1998 to grant planning permission for a cinema and leisure development at the site of the former Crystal Palace. The Crystal Palace Campaign also sought a declaration that construction of the building in accordance with the planning permission would be contrary to section 4 of the 1990 Act.

Mr Kolvin took the lead in these proceedings and his name appears first on the notice of application. The Crystal Palace Campaign's notice of application was amended on three occasions. It took a number of points, but only two were seriously pursued. The first point was that the proposed development did not comply with section 4 of the 1990 Act and the proposed development did not reflect the architectural style of the original Crystal Palace, as designed by Paxton. The second point was that the proposed development made inadequate provision for car parking.

Crystal Palace Campaign's application for leave to apply for judicial review was dealt with at an oral hearing on July 27, 1998. Crystal Palace Campaign were represented by leading counsel. Sullivan J., who heard the application, concluded that both of Crystal Palace Campaign's grounds were doomed to fail and he refused leave. Crystal Palace Campaign appealed to the Court of Appeal. On September 2, 1998 the Court of Appeal refused leave to apply for judicial review save on one ground, relating to section 4 of the Bromley London Borough Council (Crystal Palace) Act 1990. It reserved the substantive hearing to itself in the first instance. On December 21, 1998, the Court of Appeal dismissed the substantive application for judicial review. The House of Lords was petitioned for leave to appeal against the substantive decision of the Court of Appeal. The prospects of success for this petition were bleak. By a letter dated June 14, 1999, the House of Lords refused leave to appeal. On any realistic view of the manner, Crystal Palace Campaign's challenge to the outline planning permission came to an end on December 21, 1998, when the Court of Appeal gave its decision.

The second respondent asserts in affidavit evidence, which I accept, that from December 21 onwards it took the view that the outline planning permission could be relied upon. Since that date and in reliance on the outline planning permission the second respondent has incurred costs in relation to the development in the region of £1 million.

In early 1999 all parties turned their attention to the reserved matters. By the "reserved matters", I mean those matters which had been reserved for later approval by the terms of the outline planning permission. In January 1999, the second respondent submitted to the first respondent its plans and proposals in respect of most of the reserved matters. Mr Kolvin corresponded with the first respondent on behalf of the Crystal Palace Campaign. He and his colleagues submitted detailed and well-prepared written representations as to why approval of the reserved matters should be withheld.

Other local groups also forcefully stated their objections. One of these groups was the Ridge Wildlife Group, who presented a petition to the mayor of Bromley on April 26, 1999, urging the first respondent to drop its development plans. The petition was signed by 13,619 people, one of whom was the applicant.

Three days later, on April 29, 1999, officers of the first respondent finalised their report to members in relation to the approval of reserved matters. This report included the following advice:

> "Members will be aware that where an adopted development plan contains relevant policies, section 54A of the Act requires that a planning application be determined in accordance with the

plan, unless material considerations indicate otherwise. This approach to decision-making applies equally to the consideration of details pursuant to an outline permission.

All material considerations relevant to the outline application were referred in the March 1998 report and taken into account by Members at that time. Matters of principle were considered at the outline stage. This current application deals with some of the reserved matters and certain of the details pursuant to conditions. It is not open to Members to 'revisit' the principle of the development when determining this application. Members can only deal with the details as submitted".

On the evening of May 6, 1999 the development control committee met and considered the second respondent's proposals in respect of the reserved matters. The meeting was a public one. Members of the public were invited to express their views. The meeting was tape recorded and the transcript runs to some 99 pages. This was inevitably an occasion for vigorous debate. Mr Kolvin on behalf of the Crystal Palace Campaign made a powerful speech opposing the approval of the reserved matters. This speech appears at pages 35 to 39 of the transcript. The question of obtaining an environmental assessment was discussed during the meeting. Mr Stuart Macmillan, the first respondent's chief planning officer, advised the meeting that environmental aspects of the development were considered at the time of outline planning permission. At that stage, the development control committee had decided, on the basis of professional advice, that a formal environmental assessment was not required. This matter could not be reopened at the stage of approving reserved matters (see pages 44 and 57 of the transcript). Mr Walter Million, the borough secretary, gave similar advice to the meeting. He said that the committee could, if it wished, obtain an informal environmental assessment but he added this comment:

"... in my view you cannot use that as a justification for refusing to deal with the details tonight on their planning merits".

(See pages 58 and 70 of the transcript.)

Finally, at the end of a thorough and lively debate, the development control committee unanimously resolved to approve the second respondent's proposals in respect of reserved matters.

Part 3. The history of the present proceedings

On June 16, 1999 the applicant commenced the present proceedings. In her notice of application the applicant sought permission to apply for an

order of certiorari, quashing the first respondent's decision of May 6, 1999 to approve the reserved matters.

Since the form of the applicant's notice of application has generated some hours of debate at the present hearing, I will read out the material parts:

> "Judgment, order, decision or other proceeding in respect of which relief is sought and the date thereof.
>
> The decision on May 6, 1999 of the London Borough of Bromley ('the council') (by its Development Control Committee) ('the committee'), in respect of outline permission (9700858) for 'leisure and recreational facilities' and car parking at the Crystal Palace Metropolitan Open Space, to approve a scheme (99/00155/DETMAJ) of reserved matters including an 18 screen multiplex cinema with 4,800 seats and 950 space car park."

Then there is under the heading "Relief Sought":

> "(1) An order of certiorari quashing the above decision ('the decision').
>
> (2) A declaration that the decision was unlawful by reason of the council's
>
> (i) failure, at all or properly, to consider the requirements imposed on it by the environmental assessment Directive 85/337/EEC ('the EA Directive');
>
> (ii) and/or misdirection of itself in law in deciding that it had no power to require environmental assessment in accordance with the requirements of the Directive ('EA').
>
> (3) Further or alternatively a declaration that the decision was unlawful by reason of the council's failure to have regard to:
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> (a) the Government's Planning Minister's policy statement to Parliament of 11 February 1999 to the effect that
>
> (i) out of centre leisure development should be required to demonstrate need;
>
> (ii) that the demonstration of demand was not sufficient to demonstrate need;
>
> (iii) and that out of centre leisure should normally be refused in the absence of demonstration of need;
>
> (b) other changes in material circumstances since those considered in the traffic analysis used for the grant of outline consent relevant to environmental effects
>
> (i) the Government's policy against dispersed loca-

tions for major travel generating leisure developments set out in its White Paper on Transport (Command 3590);

(ii) alterations to the composition of uses proposed.

(4) Alternatively a declaration that reserved matters could not lawfully be approved because the outline consent itself was unlawful by reason of failure

(i) to apply the law relating to outline consents as it may hereafter be held to have been declared by the Court of Appeal on 23 July 1998 in *ex p. Chievely* and by Sullivan J., in relation to outline consents and environmental assessment, on May 7, 1999 in *R. v. Rochdale, ex parte Tew* et al.; and

(ii) thereby and otherwise properly to consider whether or not to require environmental assessment in accordance with 85/337/EEC."

The section which follows is headed "Grounds". It comprises 18 pages of detailed argument. It includes the following passages:

"14.5.2.1 Alternatively if it is held that the Court of Appeal in *ex p. Chievely* were correct in declaring (which is not accepted) that no control can be exercised over the scale of development through reserved matters, then the original decision to grant outline consent was unlawful by reason of the failure of Bromley to realise that they could not control scale through the reserved matters ...

14.5.2.2 Further and alternatively the outline consent was unlawful by reason of the failure of Bromley to direct itself on the law governing the relationship of outline consents to environmental assessment as declared by Sullivan J. in *R. v. Rochdale, ex parte Tew* et al. CO/370/98. The description of the development was not, on his approach, sufficiently precise to permit of a proper decision as to whether it would be likely to have significant environmental effects.

...

15.7 Insofar as some of the above alternative grounds are based upon the unlawfulness of the outline consent it is submitted that it would be inconsistent:

(i) with the overriding objective of the Civil Procedure Rules (especially 1.1(1)(a))

(ii) with the fundamental principles of European Community jurisprudence (see 9.1–9.4.1 and 14.2.1–14.2.2.4 above)

> to expect a lay citizen of modest means to be able to anticipate decisions of the Supreme Court involving the Court of Appeal and to hold that such grounds cannot be entertained because of delay.
>
> 15.8 The challenge is made within 6 weeks of the decision. The Applicant has pressed for the minutes of the decision to approve reserved matters. The Respondent has failed to supply even a draft of them."

In support of her notice of application the applicant lodged a witness statement dated June 15, 1999. In that statement the applicant said that her flat was very close to the proposed access point leading from Anerley Hill into the new development. She expresed concern about the effects of traffic upon herself and her daughter. She expressed concern about the loss of amenity, which would be caused by a major development in the park opposite her home.

The applicant's solicitor, Mr Richard Buxton, also lodged a witness statement in support of the applicant's application. The statement was made by Ms Susan Ring, an associate of Richard Buxton who had conduct of the matter. Ms Ring stated that she had inspected the council's planning files on June 8, 1999. She said that none of the documents on file referred to a decision having been taken about whether an environmental assessment was required.

Ms Ring also produced as an exhibit to her statement a number of documents relating to the outline planning permission of March 1998 and the approval of reserved matters in May 1999.

On June 24, 1999 the first respondent's chief legal officer, Ms Beryl Cook, wrote to the Crown Office. At this stage she was aware of the proceedings, but had not seen the applicant's notice of application. In her letter Ms Cook wrote as follows:

> "You should be aware that the grant of outline planning permission for the same development was also the subject of challenge by the Crystal Palace Campaign and after hearings in the High Court and Court of Appeal, a petition to the House of Lords by the Campaign has recently been rejected. The leave application in the earlier set of proceedings was dealt with by means of an oral hearing at which the council appeared. A request for expedition of the hearing was also granted following representations by the developer and supported by the council. I understand that a similar application is again to be made by the developer and I would confirm the council's endorsement of this action. The need to avoid delay is, of course, of even more

importance than it was before the last set of proceedings were commenced.

In view of the past history to the matter, it is also of considerable importance that the council is given the opportunity to fully appraise the court of the background to the application and that therefore a hearing is arranged in respect of the application.

Whilst the council will of course develop the argument at any hearing the court should perhaps be aware at this stage that no 'letter before action' relating to all the grounds in the application was sent to the council, neither has there been any attempt to comply with the spirit of the pre-action protocols in an attempt to avoid proceedings.

I accordingly look forward to hearing from you with an expedited hearing date."

This letter was copied to the applicant's solicitor.

On July 5, 1999 the applicant's solicitor wrote to the Crown Office as follows:

"We consider that for the purposes of showing an arguable case for the grant of permission, the application is quite clear as it stands, and it is not necessary for this to be referred to an oral hearing. While the earlier litigation may be interesting background, it does not affect the merits of this application.

We have investigated the possibility of an oral hearing, of probably the same sort of length that would be required here, in another case involving a big development, and have been advised by you that it would be virtually impossible to have anything on this term. From a purely practical point of view the appropriate way forward therefore seems to be to ask a judge to consider the matter on paper as soon as possible."

Upon receiving a copy of this letter, Ms Cook sent a letter to the Crown Office, also dated July 5, 1999, in the following terms:

"I have been faxed a copy of Richard Buxton's letter of July 5, 1999. I would like to make the council's position clear, namely that it does not concede any of the points raised in the Form 86A and still feels that this matter can best be dealt with by an oral hearing. The Council views the earlier litigation as being of more than interesting background consisting as it does of a High Court decision and two Court of Appeal decisions on the same site as this application; and indeed will wish to refer to it during any hearing. Whilst we are keen for this matter to be heard as soon as

practicable this does not override the consideration that the court should hear detailed argument before reaching a decision as to whether or not permission should be granted".

In the event, no oral hearing was fixed. The application for permission was dealt with upon consideration of the documents. On July 8, 1999 Lightman J. granted to the applicant permission to apply for judicial review.

The first respondent took the view that permission ought not to have been granted and that Lightman J. had been misled by the material placed before him. By an undated application, which was probably made in early August 1999, the first respondent applied to the court to set aside in whole or in part the order of Lightman J. granting permission. The grounds of that application were summarised under three headings as follows:

"1. In making her application for permission to apply for judicial review, the applicant failed adequately to draw to the attention of the learned judge that the application was out of time in relation to one of the decisions under challenge, namely the grant of outline planning permission dated March 26, 1998.

2. The applicant failed to apply for an extension of time to apply for judicial review in relation to the outline permission and failed adequately or at all to explain her reasons for the delay. In this respect she failed in her duty of utmost good faith and on full and frank disclosure. She also failed to draw to the learned judge's attention the previous unsuccessful application for judicial review made by the Crystal Palace Campaign.

3. The applicant failed in her duty of full and frank disclosure and utmost good faith as to the extent of her knowledge of the grant of outline planning permission. The applicant similarly failed to explain the relationship, if any, with the Crystal Palace Campaign, which had already unsuccessfully sought to challenge the outline permission."

Following the lodging of this application, the second respondent was joined as a party to the proceedings. The second respondent indicated its support for the first respondent's application to set aside.

The application to set aside was listed for hearing before Sullivan J. on November 29, 1999 with an estimated length of half a day to one day. That time estimate was manifestly insufficient and I do not know how it came to be given. In the circumstances, Sullivan J. adjourned the application to set aside, to be heard by the judge dealing with the substantive application for judicial review.

Accordingly, the application to set aside and the substantive judicial review proceedings were all brought before me at a hearing last week which started on Tuesday, March 28, and concluded on Friday, March 31. The application to set aside was argued on Tuesday and Wednesday. At the end of that argument I stated my decision on the matter, leaving the reasons to be set out in the judgment at the end of the hearing. The substantive application for judicial review was argued on Thursday and Friday.

I now give a single judgment dealing both with the application to set aside and with the substantive judicial review proceedings.

Part 4. The duty upon a party seeking permission to apply for judicial review

Most applications for permission are dealt with on an *ex parte* basis. Accordingly, the applicant is under a duty to place the material facts before the court and to identify clearly the issues which arise.

In *R. v. Jockey Club Licensing Committee, ex parte Wright* [1991] C.O.D. 306, Potts J. set aside an order granting leave to move for judicial review, because the applicant had failed to disclose material facts in his application. In *R. v. Elmbridge Borough Council, ex parte Health Care Corporation Limited* [1991] 3 P.L.R. 63, Popplewell J. described the normal procedure which is followed, where delay is likely to be an issue in judicial review proceedings. At page 68 of the report, Popplewell J. said this:

> "What happens is that if there is a delay, either within the three months or over the three months, the applicant sets out in detail in his Form 86A that he is guilty of delay and he will also in his affidavit set out the reasons for it. That brings the matter clearly to the notice of the respondent and to the court. The court then, on an application for leave or where leave has been granted, will consider the question of delay."

Subject to one qualification (namely, that the question of delay must now be dealt with at the permission stage), I agree with this passage. It is my experience also that where judicial review proceedings raise an issue of delay, this is clearly identified in the notice of application for permission.

In *R. v. Lloyds of London, ex parte Briggs* [1992] 5 Admin.L.R. 698 Leggatt L.J., delivering the judgment of the Divisional Court, said this at page 707:

> "Where an extension of time is necessary in which to apply for judicial review, there plainly is an obligation on counsel to apply for it. It is not enough that the Judge should have been shown a document that bore a date which, had he been alerted to the question of time limits, he would have realized rendered the document, and so attempts to challenge it, out of time."

In *Fitzgerald v. Williams* [1996] Q.B. 657 the Master of the Rolls, with whom Waite L.J. and Otton L.J. agreed, said this at pages 667 to 668:

> "In seeking *ex parte* relief an applicant must disclose to the judge any fact known to him which might affect the judge's decision whether to grant relief or what relief to grant. It is no answer for an applicant who falls down on his duty to show that his breach of duty was committed in good faith and inadvertently, or to show that the relief would have been granted even had he complied with his duty. The courts have traditionally insisted on strict compliance with this rule, as affording essential protection to an absent defendant, and as applications for *ex parte* relief have multiplied so the importance of complying with this duty has grown."

In *R. v. Criminal Injuries Compensation Board, ex parte A* [1999] 2 W.L.R. 274 the applicant commenced judicial review proceedings 10 months after the decision complained of. Carnwath J. granted permission to the applicant to apply for judicial review, suggesting that the question of delay might be raised later. The House of Lords, however, held that the effect Carnwath J. giving permission was to extend time under Ord. 53, rule 4. That extension of time could not be reopened at the substantive hearing. It could only be challenged on an application to set aside the permission.

In my judgment, the decision in *ex parte A* has two important consequences which are relevant to the present case:

> (1) If the application is made outside the time permitted by Ord. 53, rule 4, it is essential that all matters relevant to the question of extending time are set out clearly and fairly in the notice of application for permission. This is because the court is being asked to decide on an *ex parte* basis an important question which cannot be reconsidered at the substantive hearing.
>
> (2) If the judge, on an *ex parte* basis, extends time under Ord. 53, rule 4 either expressly or by implication, and if he erred in doing so, that is a good ground for setting aside the permission. It is quite wrong that the respondent should be deprived of a defence based upon Ord. 53, rule 4 without having an opportunity to be heard.

Part 5. Did the applicant deal properly with the question of delay in her notice of application for permission?

The applicant seeks in these proceedings to attack two decisions: first, the grant of outline planning permission on March 26, 1998; and secondly, the approval of reserved matters on May 6, 1999.

The applicant issued her proceedings on June 16, 1999. That was 41 days after the decision of May 6, 1999 and some 15 months after the decision of March 26, 1998.

Order 53, rule 4 of the Rules of the Supreme Court, which has been preserved by Schedule 1 to the Civil Procedure Rules 1998, provides as follows:

> "An application for permission to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

Accordingly, it can be seen that the applicant's challenge to the decision of May 6, 1999 was made within time. Her challenge to the decision of March 26, 1998 was made grossly out of time.

The notice of application does not deal with the question of delay and extension of time adequately. I say this for five reasons:

(1) In the section on page 1 where the applicant identifies the decision under attack, only the decision May 6, 1999 is mentioned.

(2) The attack on the grant of outline planning permission dated March 26, 1998 is introduced in a low-key manner in paragraph 4 of the section headed "Relief".

(3) There is no application for a one-year extension of time pursuant to Order 53, rule 4 in respect of the challenge to the grant of outline planning permission.

(4) The grounds upon which a one-year extension of time is said to be justified are not apparent from the notice of application.

(5) Paragraph 15.8 of the notice of application (which is quoted in Part 3 of this judgment) is unsatisfactory. It glosses over the fact that the challenge to the grant of outline planning permission is grossly late.

In relation to the fourth of those five reasons, it is necessary to give some elaboration. The applicant relies on paragraph 15.7 of her notice of application (which is set out in Part 3 above) as containing the justification for an extension of time. I must confess that when I read paragraph 15.7 of the notice of application I simply did not understand the point which was being made. It became clear in the course of the hearing that neither of the respondents' counsel understood that paragraph either. When Mr McCracken for the applicant came to make his oral submissions in response to the application to set aside, he explained to all of us what paragraph 15.7 meant. The phrase in that paragraph "decisions of the Supreme Court involving the Court of Appeal" is a reference to *R. v. Newbury District Council and Newbury and District Agricultural Society, ex parte Chievely Parish Council* [1991] 1 P.L.C.R. 51 and *R. v. Rochdale M.B.C., ex*

parte Tew [2000] Env.L.R. 1. The effect of these decisions is set out in the notice of application five pages earlier at paragraphs 14.5.2.1 and 14.5.2.2 (quoted in Part 3 of this judgment). These two cases, it is argued, break new ground. They provide for the first time a legal basis upon which the grant of outline planning permission could be challenged. Accordingly, time should be extended for the challenge to the grant of outline planning permission.

In my judgment paragraph 15.7 of the notice of application was deficient. It did not identify the judicial decisions referred to. It contained no cross-reference to paragraphs 14.5.2.1 and 14.5.2.2. It contained no assertion that prior to *ex parte Tew* and *ex parte Chievely* there was no foundation or less foundation for the attack upon the grant of outline planning permission.

A notice of application for permission is a free-standing document. It should be capable of comprehension without the need for lengthy oral explanation. This is all the more important in a case like the present, where the applicant is insistent that the question of permission should be considered on the papers.

For all these reasons my answer to the question posed in Part 5 of this judgment is "no".

Part 6. The respondents' further criticisms of the applicant's notice of application for permission

These further criticisms are set out in the second half of ground 2 and in ground 3 of the respondents' notice of application (which was quoted in Part 3 of this judgment).

The first matter is the applicant's failure to draw attention to the previous judicial review proceedings. I do not need to go into this complaint, since the first respondent's letter dated June 24, 1999 drew attention to those proceedings. I think it probable that that letter was before Lightman J.

The second complaint is that the applicant failed to disclose the extent of her knowledge of the grant of outline planning permission. I reject this complaint. The applicant, like all interested local residents, must have been aware of the outline planning permission at about the time it was granted. She accepted that this was so in the course of the hearing last week. Paragraph 10 of the applicant's statement dated June 15, 1999, about which complaint is made, does not say otherwise. The point which the applicant was making in paragraph 10 was this. At the time outline planning permission was granted, the applicant did not appreciate that there would be access to the development off Anerley Hill, in the vicinity of her home.

I accept the applicant's evidence that she personally first became of

aware of this matter in March 1999 (see paragraph 2 of her third witness statement).

The first respondent's third complaint is that the applicant failed to explain her relationship with the Crystal Palace Campaign, which had brought the previous unsuccessful judicial review proceedings. In answer to this complaint, the applicant lodged a witness statement dated October 7, 1999 which said as follows in paragraph 5:

> "I am not now nor have I ever been a member of an organisation called, or with a similar name to, the Crystal Palace Campaign Group. I have had no involvement with the Crystal Palace Campaign's previous legal proceedings, either by myself or proxy."

There has been no application to cross-examine the applicant upon her statement. The respondent's counsel did, however, invite me to be suspicious of the applicant's evidence by reason of certain newspaper articles and other contemporaneous material. I have considered all the evidence relied upon by the respondents, but nevertheless I accept the applicant's evidence in the passage quoted above.

It can be seen from the factual summary in Part 2 of this judgment that prior to May 1999 the applicant's involvement in resisting the development was limited. In May 1997 she signed a petition opposing the outline planning application. In April 1999 the applicant signed the petition which the Ridge Wildlife Group presented to the mayor of Bromley. I am not at all surprised that the applicant, who lived immediately opposite the proposed development, thought it right to sign these two petitions. This fact does not cause me to doubt her evidence that she was not involved in the Crystal Palace Campaign.

For all the above reasons, I reject the complaints which are made in the second half of ground 2 and in ground 3 of the respondent's notice of application.

Part 7. Decision on the first respondent's application to set aside the permission

For the reasons set out in Part 5 of this judgment, I have concluded that the applicant did not deal properly with the question of delay in her notice of application for permission to apply for judicial review.

If the applicant had dealt with the question of delay properly, I consider that Lightman J. would probably have refused the applicant permission to challenge the grant of outline planning permission. I reach this conclusion for five reasons:

(1) The application for permission was made nearly 15 months after the decision to grant outline planning permission.

(2) It is a long-established principle that there is a special need for

expedition in respect of judicial review proceedings which challenge a planning decision. See, for example, the judgment of Laws J. (as he then was) in *R. v. Ceredigion County Council, ex parte McKeown* [1998] 2 P.L.R. 1 at pages 2 to 3.

(3) The justification for extending time as set out in paragraph 15.7 of the notice of application and as explained orally by Mr McCracken is not a good one. The attack which the applicant seeks to mount upon the outline planning permission does not seem to me to be inspired by, or to be dependent upon, the decisions in *ex parte Chievely* or *ex parte Tew.* Furthermore, in so far as the applicant relies upon Part 1 of the Civil Procedure Rules 1998 and the "fundamental principles of European Community jurisprudence", none of this, in my view, should cause the court to overlook the applicant's long delay in commencing these proceedings.

(4) If the attack upon the outline planning permission proceeds, the second respondent will suffer significant prejudice. As set out in Part 2 above, the second respondent has incurred substantial expenditure in reliance on the outline planning permission.

(5) There has already been one set of judicial review proceedings challenging the grant of outline planning permission. In my view, the court should not, save in exceptional circumstances, allow successive judicial review proceedings to challenge the same decision upon different grounds. One consequence of the applicant's delay in the present case is that the opportunity has been lost to list Ms Barker's application for judicial review at the same time as Crystal Palace Campaign's application. If successive judicial review proceedings are allowed, the drain upon court time is increased and the respondents incur additional costs.

I must now consider whether, in the exercise of my discretion, I should set aside the permission granted by Lightman J.

For the five reasons set out above, it seems to me quite inappropriate to extend time pursuant to Order 53, rule 4 of the Rules of the Supreme Court. However, the grant of planning permission by Lightman J., unless set aside, has the effect of granting such an extension of time (see the House of Lords decision in *ex parte A*, which is discussed in Part 4 of this judgment).

I therefore come to the conclusion, in the exercise of my discretion, that the permission granted by Lightman J. should be set aside, in so far as it enables the applicant to attack the grant of outline planning permission.

Part 8. The relationship between the grant of outline planning permission and the approval of reserved matters

The first topic which I must address in the substantive judicial review proceedings is the relationship between the grant of outline planning permission and the approval of reserved matters.

Section 57 of the Town and Country Planning Act 1990 provides that planning permission is required for the carrying out of any development of land. It is often inappropriate for full details of a development to be worked out at a time when it is uncertain whether planning permission will be granted. Accordingly, since 1950 there has existed 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 Town and Country Planning (General Development Procedure) Order 1995. Article 3(1) of that order provides as follows:

> "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."

Article 4 of the order provides:

> "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 what 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 ..."

Article 1(1) of the order contains of the following definitions:

> "... '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) landscaping of the site ..."

Once outline permission has been granted, the developer has established his entitlement in principle to carry out the proposed development. That entitlement is not affected by subsequent changes in Government

policy or by subsequent ministerial statements. The developer is entitled to expect that he will be able to secure approval for a reasonable detailed scheme, which is in line with the outline planning permission.

Part 9. At what stage in the planning process may an environmental statement be required?

European Directive 85/337 requires that an environmental assessment must be carried out before certain types of building projects are undertaken. Article 2 of the Directive provides:

> "(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 ..."

Article 1(2) of the Directive defines "development consent" as follows:

> "... 'development consent' means:
> the decision of the competent authority or authorities which entitles the developer to proceed with the project ..."

Article 4(2) of Directive provides:

> "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 to 10."

It is common ground that the building project in the present case, being an urban development project, falls with the classes listed in Annex II to the Directive.

The statutory provisions which give effect to the Directive in this country and which were applicable at the time of the second respondent's planning application are the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. Regulation 2(1) of the 1988 Regulations provides:

"In these Regulations, unless the contrary appears—

...

'Schedule 2 application' means, subject to paragraph (2), an application for planning permission (other than an application made pursuant to section [73] or section [63]) for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location ..." A B

It is common ground that the development in this case, being an urban development project, is of a description mentioned in Schedule 2 to the 1988 Regulations. Accordingly, if the development would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location, then the second respondent's planning application would have been a C

"Schedule 2 application."

On the other hand, if the development would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location, then the second respondent's planning application would not have been a D

"Schedule 2 application."

Regulation 9.1 of the 1988 Regulations provides, in effect, that if a Schedule 2 application is made, the person seeking planning permission must submit an environmental statement. In brief summary, an environmental statement is a document which describes the proposed development and provides information about the environmental effects in an orderly and comprehensible form. Regulation 4(2) of the 1988 Regulations prohibits a planning authority from granting planning permission in respect of a Schedule 2 application, unless "they have first taken the environmental information into consideration [and state in their decision that they have done so]." E

Upon a fair reading of the 1988 Regulations, it seems to me that the question of environmental assessment arises at the time when planning permission is granted and during the period leading up to that event. In cases where there is an outline planning permission, followed by approval of reserved matters, the stage at which an environmental assessment may be required is the stage of outline planning permission. If an application for outline planning permission is a Schedule 2 application, then the environmental assessment is carried out before the outline planning permission is granted. If the application is not a Schedule 2 application, it cannot retrospectively become one at the stage of approval of reserved matters. F G

If the 1988 Regulations are interpreted in this way, there does not appear to me to be any conflict with the provisions of the European Directive. As stated above, Article 2(2) of the European Directive expressly permits Member States to integrate environmental impact assessments into their existing planning procedures. That is precisely what Parliament has done by enacting the 1988 Regulations.

I am not alone in the view which I take of these statutory povisions. In *R. v. Rochdale M.B.C., ex parte Tew* [2000] Env.L.R. 1 at page 29 Sullivan J. said this:

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

In *R. v. London Borough of Hammersmith and Fulham, ex parte CPRE* (QB, unreported, October 26, 1999) the applicant sought in a number of ways to prevent an urban development project from proceeding. The applicant's first contention was that the grant of outline planning permission was invalid, because the question of environmental assessment had not been properly considered at that stage. The applicant's second contention was that the absence of an environmental assessment prepared at the proper time prevent the council from approving the reserved matters. The applicant's third contention is not relevant for present purposes. Richards J. refused the applicant permission to pursue its first contention, on the ground that proceedings were started out of time. Richards J. refused the applicant permission to pursue its first contention, on the ground that proceedings were started out of time. Richards J. refused the applicant permission to pursue its second contention, because at the stage of reserved matters approval it was too late to say that an environmental assessment must be obtained; by then, the principle of the development had been established.

The applicant in *ex parte CPRE* appealed. On December 21, 1999 the Court of Appeal upheld the decision of Richards J. The substantive judgment was given by Singer J., with whom May L.J. and Swinton Thomas L.J. agreed. At paragraphs 55 to 62 of his judgment, as it appears in transcript form, Singer J. said this:

> "The reserved matters approval: the Environmental Survey Argument.
>
> 55. CPRE repeated and developed before us the proposition

that the local authority was not lawfully entitled to proceed to consider the approval of reserved matters in the absence of an environmental survey.

56. 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 context of English planning law, that the decision which 'entitles the developer to proceed with the project' is not the outline permission, but rather the 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) the reserved matters application stage, and was here disregarded.

57. I categorise this submission as unarguable.

58. In my view the precondition of the development is the outline planning permission stage, without which it is a non-starter. That there are conditions subsequent which (if not resolved) may preclude the project does not have the effect of promoting the approval of reserved matters (if granted) to the status of entitling (that is to say, activating and enabling) decision.

59. I reach that conclusion not least in reliance upon the reasoning to like effect necessarily inherent in the speech in *R. v. North Yorkshire County Council, ex parte Brown* [1999] 2 W.L.R. 452 from page 455 of Lord Hoffmann.

60. There (in the context of a dispute concerning a distinctly different planning regime) he considered the meaning of the concept 'development consent' in the Directive. He draws a distinction (at page 458) between decisions which do, and those which do not, 'involve merely the detailed regulation of activities for which the principal consent, raising the substantial environmental issues, has already been given'. I would categorise the outline permission as the principal consent, and reserved matters as mere detailed regulation.

61. Furthermore, the wording of the 1988 Regulations seems to me to militate against the position adopted by CPRE. For it would be necessary to construe the 'application for planning permission' (which must be either a 'Schedule 1 application' or a 'Schedule 2 application', as defined by Regulation 2(2), before any question of the need for an environmental survey can arise) as extending to the decision at reserved matters stage, but as excluding the prerequisite application for outline permission. If this were so, the requirement for an environmental survey could not arise or be imposed at the earlier, but only at the later, stage.

Such an outcome would, as Richards J. observed, turn our planning system on its head and would (I would add) produce total uncertainty and manifest absurdity. (It would also put paid, as May L.J. in the course of argument in this case observed, to the inherent though unexplicit complaint that the local authority should not here have granted outline approval without an environmental survey. But that is by-the-by.)

62. Upon that basis there is no room for CPRE's claim that the local authority should and could not proceed to approve reserved matters without considering whether under the 1988 Regulations an environmental survey was required. That being so, I take the same view as did Laws J. (as he then was) in *Greenpeace* [1998] Env.L.R. 415 at 424, were he said: '... a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late.... It [the strict discipline imposed by the court] is marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage.' "

Mr McCracken submits that this passage in the judgment of Singer J. is wrong and, accordingly, that I should not follow it (see paragraph 14.1.1 of his revised skeleton argument). Alternatively, he invites me to refer a number of questions to the European Court of Justice, as formulated at the end of his skeleton argument.

The first of the two courses urged by Mr McCracken simply is not open to this court. The passage which I have quoted from the judgment of Singer J. forms part of the *ratio* of the Court of Appeal's decision. Swinton Thomas L.J. and May L.J. agreed with it. Therefore it is binding upon this court. Furthermore, it accords with the view which I have formed as to the correct interpretation of the 1988 Regulations.

Mr McCracken places reliance on the House of Lords decision in *R. v. North Yorkshire County Council, ex parte Brown* [1999] 2 W.L.R. 452 and the Court of Appeal's decision in *R. v. Durham County Council, ex parte Huddlestone* (CA, unreported, March 8, 2000). I have carefully considered those two decisions, both of which relate to the registration of dormant

planning permissions to extract minerals. They are in no way inconsistent with the reasoning of the Court of Appeal in *ex parte CPRE*.

In relation to urban development projects, it seems to me that the 1988 Regulations have fully transposed into English law the requirements of the European Directive. Accordingly, I decline to refer to the European Court of Justice the questions which Mr McCracken proposes.

For all the above reasons, my answer to the question posed in Part 9 of this judgment is as follows. In relation to an urban development project, the question whether an environmental assessment is required falls to be determined at the stage of outline planning permission. If the answer to that question is "yes", then the assessment must be carried out before outline planning permission is granted. At the stage of reserved matter approval, however, the question of requiring an environmental assessment does not arise. Either such an assessment already exists, or alternatively the planning authority must proceed upon the basis that no such assessment is required.

Part 10. The first ground of challenge to the first respondent's decision of May 6, 1999

The first ground of challenge is succinctly summarised in the applicant's notice of application as follows:

> "... the decision was unlawful by reason of the council's
>
> (i) failure, at all or properly, to consider the requirements imposed on it by the environmental assessment Directive 85/337/EEC ...;
>
> (ii) and/or misdirection of itself in law in deciding that it had no power to require environmental assessment in accordance with the requirements of the Directive ..."

For the reasons set out in Part 9 of this judgment, I do not consider that the first respondent's decision was unlawful on either of these grounds. The first respondent was correct in its conclusion that the question whether an environmental assessment was required did not arise at that stage. That short proposition of law is a complete answer to this ground of challenge.

Nevertheless, I should refer to a topic which has been argued at some length in relation to this issue. That is the importance of the matters which, in March 1998, were reserved for later determination. Mr McCracken submits that the outline planning permission was very general in its nature and major decisions fell to be made at the stage of reserved matters approval. Mr Stone Q.C. for the first respondent and Mr Horton Q.C. for the second respondent both submit the opposite.

All counsel have taken me, in some detail, through the conditions attached to the outline planning permission and the subsequent proposals

which were approved on May 6, 1999. I have been shown some, but not all, of the drawings. Since this aspect of the case is not crucial to the outcome, I will state my conclusions quite shortly:

(1) The outline planning permission defined the permitted development to a substantial extent. It determined the approximate size and the general design of the development. Furthermore, it permitted the access off Anerley Hill, a matter which is of particular concern to the applicant. In my opinion, the matters which were left to be resolved at the reserved matters stage can properly be characterised as matters of detail.

(2) The detailed proposals which the first respondent approved on May 6, 1999 accorded very closely with the scheme which was approved at outline planning permission stage. Such changes as were made could fairly be characterised as minor.

It should be noted that the conclusions which I have reached upon this aspect of the case accord very closely with the submissions of the applicants in the previous judicial review proceedings. In paragraph 22 of their re-re-amended notice of application, the Crystal Palace Campaign said this:

> "Although the application was for outline permission only, this was on the basis of illustrative drawings as to floor plans and elevation as well as the uses in the scheme. The detailed design would be worked up after outline permission but it was virtually inconceivable that the overall design and appearance would alter, because of the parameters of the planning permission itself."

Accordingly, for the reasons stated above, I reject the applicant's challenge to the decision of May 6, 1999, based upon the failure to require or to consider requiring an environmental statement.

Part 11. The second ground of challenge to the first respondent's decision of May 6, 1999

The second ground of challenge is that in approving the reserved matters the first respondent failed to have regard to (1) the Parliamentary statement made on February 11, 1999 by Mr Richard Caborn, who was Minister for the Regions, Regeneration and Planning, and (2) the Government White Paper on Transport (Command 3590) which was published in July 1998.

It will be noted that both the ministerial statement and the Government White Paper came into existence during the period between outline planning permission and the approval of reserved matters.

Mr Caborn's ministerial statement included the following passages:

"Our policy on town centres, including retail and leisure development, is set out in Planning Policy Guidance note 6: Town Centres and Retail Development (PPG 6). This aims to sustain and enhance the vitality and viability of our existing town centres by focusing new investment, particularly for retail and leisure uses within city, town and district centres. This statement is intended to add to and clarify the guidance in PPG 6 in the light of a number of issues raised in recent litigation which concern the interpretation of PPG 6 and Government policy.

PPG 6 advises local planning authorities to adopt a positive, plan-led approach to handling planning applications involving new retail and leisure developments. It advises them, in preparing planning strategies and policies, to consider the need for new retail and leisure developments in the plan area over the lifetime of the plan. Having established that such need exists, local planning authorities should then adopt a sequential approach (as explained in PPG 6) to identify suitable sites. If there is no need for further developments, there will be no requirement to identify additional sites.

Proposals for new retail and leisure development which accord with an up-to-date plan strategy or are proposed on sites within an existing centre, should not be required to demonstrate that they satisfy the test of need because this should have been taken into account in the development plan.

However, proposals which would be located at an edge-of-centre or out-of-centre location and which: 'are not in accordance with an up-to-date development plan strategy; or' are in accordance with the development plan but that plan is out of date, is inconsistent with national planning policy guidance, or otherwise fails to establish adequately the need for new retail and leisure development and other development to which PPG 6 applies, should be required to demonstrate both the need for additional facilities and that a sequential approach has been applied in selecting the location or the site."

The Government White Paper on Transport included the following passages upon which the applicant relies:

"4.158 Our overall approach to planning is aimed at containing the dispersal of development so reducing the need to travel and improving access to jobs, leisure and services. We want to

promote regional strategies for planning that are integrated and sustainable and we want these to provide the context for local transport plans and development plans.

...

4.163 We will update existing guidance on locations for major growth and travel generating uses, with an increased emphasis on accessibility to jobs, leisure and services by foot, bicycle and public transport. This will include the promotion of major development within public transport corridors and other areas where good public transport exists or can be provided. We have research in hand to provide practical advice for local authorities so that their proposals for growth along public transport corridors are brought forward in ways that support sustainable development.

...

5.51 This White Paper signals a new direction for transport in which everyone must play a part if we are to succeed. Many of the changes can start immediately, and, as we have illustrated in the examples of good practice, much can be achieved without the need for legislation. Over the longer term, new sources of funding will provide a further impetus to these reforms."

I now come to the crucial question, which is this: should the first respondent have specifically had regard to the ministerial statement and/or the White Paper on Transport when considering the reserved matters on May 6, 1999?

Approaching this question initially as one of principle, my answer is "no". Following the grant of outline planning permission, the second respondent was entitled to expect that it would be able to secure approval for a reasonable detailed scheme, which was in line with the outline planning permission. Any changes in Government policy after March 1998 would not constitute a good reason to detract from that which was approved in the outline planning permission. It would not be proper for the first respondent to use the reserved matters procedure, in effect, to vary the planning permission previously granted. See Part 8 of this judgment and also the speech of Morris L. in *Kingsway Investment Limited v. Kent County Council* [1971] A.C. 72 at 96.

I turn now from the question of principle to a more detailed consideration of the alleged changes in Government policy. I deal first with the Parliamentary statement. Mr Caborn's Parliamentary statement did not mark a significant change in policy at all. It was primarily clarification. Indeed, Mr Caborn himself appears not to have thought that his Parliamentary statement impacted on the development at Crystal Palace.

In a letter to Miss Tessa Jowell M.P. dated May 1, 1999 Mr Caborn wrote as follows:

> "As you know, we looked at the proposals for the site of the former Crystal Palace at the outline planning stage in 1997. After careful consideration, we decided not to intervene. Bromley then granted outline planning permission on March 26, 1998. Now that the principle of the development has been established, the Borough are considering the details of the scheme, the 'reserved matters', together with new applications for associated works.
>
> It would be very unusual to intervene now that this stage in the planning process has been reached. Nonetheless we have looked at the matters now before Bromley. We have found them to be in line with the outline permission for the scheme and concluded that all the strategic issues have already been taken into account."

The phrase in that letter "strategic issues" is a reference to the various Government policies to which the local authority ought to have regard.

The next point to note about the Parliamentary statement is this. Proposals for new retail and leisure development, which accord with an up-to-date plan strategy, fall outside the ambit of the statement (see paragraphs 3 and 4 of the Parliamentary statement). In the case of Crystal Palace, the proposed development accorded with the unitary development plan (see Part 2 of this judgment). Accordingly, the Parliamentary statement was not germane to the debate about reserved matters, which was held on May 6, 1999.

In my judgment, it would not have been proper for the first respondent at the reserved matters stage to reduce the size of the development referred in the outline planning permission, by reason of Mr Caborn's ministerial statement. Nor did that statement provide any justification for reducing the number of car park spaces (namely 950) referred to in condition 14 of the outline planning permission.

I turn now to the Government White Paper on Transport. Two general points need to be made about this White Paper. First, although the White Paper contains occasional references to planning matters, it did not constitute planning policy guidance. Secondly, a major change of transport policy had occurred in 1994. The White Paper built upon this. In paragraph 4.160 of the White Paper, the following was stated:

> "The publication of PPG 13 (the planning policy guidance note on Transport) in England in 1994 was a major step towards planning land uses and transport together. It aimed to reduce the need to travel, especially by car, and to encourage means of travel which are more environmentally friendly."

I have read and reread the passages in the White Paper upon which the applicant relies. To my mind, there is nothing in those passages which made it inappropriate to approve the provision of 950 car parking spaces in the Crystal Palace development. Furthermore, this White Paper contains nothing to suggest that the development as a whole would be reduced in size.

Accordingly, I reject the applicant's challenge to the decision of May 6, 1999 based upon the ministerial statement and the White Paper.

Part 12. Conclusion

In relation to the first respondent's application to set aside, for the reasons set out in Parts 2 to 7 of this judgment, I make the following order:

1. The permission granted by Lightman J. to apply for judicial review be set aside.

2. The applicant be permitted to apply for judicial review to the following limited extent. The applicant is permitted to apply for the first three items of relief sought in her Form 86A. The applicant is not permitted to apply for the fourth item of relief sought in her Form 86A.

3. For the avoidance of doubt, the applicant is not permitted to advance at the substantive hearing any argument to the effect that the outline planning permission granted by the first respondent to the second respondent on March 26, 1998 is unlawful or invalid.

This is the order which I indicated that I would make halfway through the hearing, after the conclusion of argument in relation to the application to set aside.

In relation to the substantive judicial review proceedings, the applicant's application must be dismissed for the reasons set out in Parts 2, 3, 8, 9, 10 and 11 of this judgment. Accordingly, the applicant's claim for judicial review is dismissed.

Solicitors—Richard Buxton, Cambridge; London Borough of Bromley Legal Services; Lawrence Graham.
Reporter—Christiaan Zwart.

COMMENTARY

In his clear and structured judgment, Jackson J. deals with important points of judicial review practice and environmental impact assessment.

As extension of time cannot be considered at the substantive hearing, an application to set aside permission on the grounds of delay can be made even if it is heard at the same time as the substantive hearing. The court also emphasised that delay and any justification for it should be fully explained in the Form 86A.

The handling of applications for permission by consideration on the papers merits examination in the light of this case. A putative respondent will often wish to make representations on the merits of the application for permission or on the mode by which the application is determined. Those representations ought to be placed before the judge considering the application for permission. Jackson J. considered that the council's letter of June 24, 1999 was probably before Lightman J. when he considered the application. Greater certainty can be introduced if the form upon which the judge makes his order details any documents considered beyond the application for permission bundle.

The council's representations at this stage appear to have been handicapped by their not having seen the Form 86A. They did not make the delay point in their letters and may have been unaware that the outline planning permission was under challenge until permission had been granted and the application for judicial review served.

Although the consideration on the papers did not address all the issues subsequently raised, the judgment suggests that an oral hearing of the application for permission would not have taken place until four months or more after the application was made. Those hearings are frequently lengthy and expensive, with the evidence necessary for trial usually being produced by the respondents. None of this is satisfactory. A better procedure for judicial review would be to require the application for permission to be served on the interested persons. Written representations could then be made within a tight (say seven day) period. The application for permission would then be considered on the papers. Rather than referring the application for permission to an oral hearing, permission ought to be granted to avoid the risk of two substantial hearings having to take place. If permission is refused on the papers, a short oral hearing for permission should be allowed.

Jackson J. followed the Court of Appeal in *ex parte CPRE* in holding that the environmental impact assessment should only be considered on the application for outline planning permission rather than on reserved matters. As the approximate size and general design of the scheme was set by conditions on the outline permission, this may have been a permission which could lawfully have been subject to environmental impact assessment at the outline stage were one to have been required (*cf. ex parte Tew*).

Commentary by—Richard Harwood.