Case No: CO 4305-01

Neutral Citation Number: [2002] EWHC 1920 Admin
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Combined Courts Centre
The Law Courts
Winchester
Hants SO23 9EL

Wednesday 31 July 2002

Before :

THE HONOURABLE MR JUSTICE TURNER

- -

Between :

BAA Plc	**Claimant**
- and -	
Secretary of State for Transport, Local Government and Regions	**Defendant**

- -

(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 FOOKES & Mr Reuben TAYLOR appeared for the Claimant
Mr Paul NICHOLLS appeared for the Defendant
MR David WOOLLEY QC appeared for the 3rd Defendant

- -

Judgment
As Approved by the Court

Introduction

Mr Justice Turner: This is an application under part 8 of the CPR and section 288 of the Town and Country Planning Act 1990 to quash the decision of the Secretary of State dated 18 September 2001 under which he granted planning permissions for the construction of the Chickenhall Lane Link Road (the Link Road), and in particular that section of it which it was proposed should pass in a cutting immediately to the North of Runway 20 of Southampton International Airport.

History

1. Acting under section 77 of the Act, the Secretary of State called in two planning applications on 10 March 2000. Both related to the construction of the Link Road. The applications were identified as being:

> i) planning application no. 7535/40 and
>
> ii) reserved matters application no. 7535/41, pursuant to the outline planning permission granted … under reference 7535/12. [*Note: all applications will hereafter be identified by their forward slash suffix numbers only eg 7535/12 as …/12*].

2. The reason for the call-in was stated to be

> Because the applications raise issues of more than local importance about the application of recommendations by the International Civil Aviation Organisation (ICAO), the Secretary of State is of the opinion that he ought to decide the applications for himself.

3. The letter of call-in went on to identify matters which appeared to the Secretary of State to be likely to be relevant to his consideration of the applications, namely the effect which the proposed road would have on (a) the ICAO's Recommended Practices for Runway End Safety Areas (RESAs) at the airport (b) the impact which the proposed development would have on the River Itchen candidate Special Area of Conservation (cSAC) and (c) whether any permission should be subject to any and, if so, what conditions.

4. The Inquiry, which began on 5 September 2000 lasted a number of days. The parties to the present proceedings, with the addition of the local planning authority, Eastleigh Borough Council (EBC), appeared at the Inquiry. The applicant for permission was the third defendant who was the developer intending to develop two areas of 'brown land' situated at the Southwest and Northeast corners of the single runway at the airport. The runway is designated '02' in the Northwest to Southeast alignment and '20' in the opposite direction. Linking those two sites with the existing highway

system at various points was the proposed Link Road, the route of which involved a crossing of the Eastleigh-Southampton railway line and circumscribed the northern perimeter of the airport site.

5. The Inspector appointed by the Secretary of State reported on 19 January and, as already noted, the Secretary of State made his decision on 18 September 2001.

6. The planning history of the site is as follows:

> 1. 18 December 1992, grant of outline permission …/12, on the application of Southampton Eastleigh Airport Developments Ltd, in accordance with the applications and plan No 1 for "BUSINESS, INDUSTRIAL AND WAREHOUSE DEVELOPMENT …, associated SHOPS, NEW DISTRIBUTOR ROAD, JUNCTIONS AND ACCESS TO AIRPORT AND DEVELOPMENT AREAS"
>
> There were conditions:
>
> > 1. The development hereby permitted shall be carried out in accordance with the outline application for planning permission, Plan 1 accompanying the outline application and the conditions hereby imposed. All applications for approval of reserved matters pursuant to this outline planning permission shall generally have regard to the Statement of Development Criteria accompanying the outline application.
> >
> > 2. Prior to the commencement of any part of the development, plans and particulars showing the detailed proposals for all of the following aspects of that part of the development (the 'reserved matters'), in accordance with the Development Master Plan, shall be submitted to and approved in writing by the local planning authority;
> >
> > i) Siting
> >
> > ii) Design
> >
> > iv) Means of access
> >
> > 3. Prior to the commencement of any part of the development, plans and particulars showing the detailed proposals … in accordance with the Development Master Plan, shall be submitted to and approved by the local planning authority:

> i) The layout, including the position and width of all roads and footpaths
>
> vi) The provision to be made for street and external lighting.

7. It was, or rather became, common ground between the parties who appeared in the present case that Plan 1 depicted a high level junction between the Link Road and Wide Lane at or close to the point at which the Link Road crossed the railway line. The plan annexed to permission …/40 (bundle p260) depicts the Link Road crossing Wide Lane at high level, the junction between the two roads was at grade. The relevance of this agreement is that it demonstrates that alterations were made to the levels and lay-out between the date of the permission …/12 and the date of the reserved matters application. This means that either the reserved matters application was invalid as it constituted a departure from the outline permission …/12. Alternatively, as the defendants contended, application …/29, although expressed to be a variation of …/12, was in fact and in law a fresh application.

8. The permission also made provision that the development should be commenced before the expiration of ten years from the date of the outline permission. It further provided for application for any reserved matter to be made not later than eight years from the same date. Finally, so far as currently relevant, the permission document also provided that by condition no. 6 that:

> Prior to the submission of any application for approval of reserved matters a Development Master Plan for the whole area the subject matter of this outline permission shall be submitted to and approved in writing by the local planning authority.

9. On 10 April 1996, on the application of the third defendants, a further permission …/29 was granted by EBC which was in the following terms:

> AMENDMENT OF CONDITION NO. 1 OF OUTLINE PERMISSION 7535/12 TO ALLOW WAREHOUSING (B8) AND OFFICES (B1) ON SOUTHERN DEVELOPMENT SITE, IN ACCORDANCE WITH AMENDED STATEMENT CRITERIA.

10. This permission was subject to two conditions, the first of which is immaterial, but the second stated that

> The conditions of planning permission …/12 not hereby amended continue to apply.

11. On 8 July of the same year, the third defendants sent a copy of the amended Development Master Plan to EBC which enclosed a plan of the southern development area alone. Although this Master Plan stated that one for the northern area would be submitted, such was never in fact provided. There is a record that the text of the

Master Plan was accepted by EBC at its meeting dated 27 July of that year. On 14 August EBC referred to two points which had been discussed and agreed between it and the third defendants which included the fact that a Development Master Plan would be submitted for the northern area before submission of any reserved matters application for the site.

12. On 13 November 1998, a further application was submitted, this became …/40. The application was described as an application for Full Permission for New Works/Change of Use as described on the application as 'Construction of Link Road with accesses, bridgeworks, earthworks and associated landscaping and car parking, all as shown on the plans enclosed with it. This plan covered the entire site and was described as

> Chickenhall Link Road, Full Application for Planning Permission. Application site boundary – red. Balance of Scheme – green. It bears the no. AF6111/001.

Descriptively, what this meant was that the southern area was outlined in green, it extended to include the Link Road from the point at which it left the M27 Motorway at its southern end and extended to the point just short of its crossing of the Eastleigh – Southampton railway line. It (the green area) recommenced at the point where the crossing ended before continuing to a roundabout at the southern end of the northern branch of the road, which may yet form part of the eastern by-pass for Eastleigh town. For the remainder of its length, the route of the proposed road was coloured red as also was the actual crossing of the railway and (for the purposes of the present case) two unimportant areas of car parking in the vicinity of that crossing.

13. On the same date a further application was submitted to EBC which related to approval of reserved matters, this gave rise to permission …/41. The reserved matters which it covered were 'means of access' and 'siting'. Importantly, it identified the outline permission as having been …/12 (above).

14. The two applications referred to in the last two paragraphs were those which were called in by the Secretary of State.

The statutory context

15. The starting point is the Town and Country Planning Act 1990. Section 70 provides for the grant of planning permission either unconditionally or subject to conditions following, in the ordinary way, an application for permission under the terms of section 62. Section 72 provides for the conditional grant of planning permission by means of conditions which regulate the development or use of land or requiring the carrying out of works on such land as considered by the planning authority to be expedient. It has to be noticed, in passing, that engineering works carried out on, in or over land are included, unless the context otherwise requires, within the meaning of 'development'; see section 55.

16. Section 73 applies to permissions sought in respect of land which has been the subject of a previous permission. By subsection (2) it is provided that, in such cases, the local planning authority shall grant permission subject to differing conditions or unconditionally, otherwise, if the conditions are to be the same, permission should be refused. The rationale for the differing treatment is that if a permission is sought which is not the same as that originally obtained, other wise than as to conditions, then a fresh permission has to be obtained.

17. The Town and Country (General Development Procedure) Order 1995 makes important provisions as to procedure. Before coming to the substance of the Order, it has to be noted that the interpretation Article provides for the definition of "outline planning permission" on a more restricted basis than the Act. For the purposes of the Article the phrase is to mean "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" means, in an application for such permission 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 escape and (e) landscaping of the site. Note the absence from the definition of outline permission, "works of engineering construction", as they are found in the definition within section 55 of the Act.

18. Article 4 provides as follows:

> 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 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; …

The decision of the Secretary of State

19. The formal decision is to be found at paragraph 14 of the decision letter and is in the following terms

> For the reasons given above, the Secretary of State hereby approves full application …/40 and reserved matters application …/40 [clearly in error for … /41] and grants

> planning permission for the construction of Chickenhall Link Road subject to the following conditions

Of these, it is only necessary to note that …/41 "shall comply with the conditions imposed (on) the grant of outline planning permission" and …/40 plans were required which showed such detailed matters as surface water drains, treatment of existing watercourses and drains, the design of all engineering works as well as detail of the construction of the roads themselves. Provision was also made for landscaping and nature conservation. This last comes into the arena since it was one of the matters which featured in the claimants' submissions to this court. A similar position arose in regard to the findings of the Secretary of State on water and drainage, particularly in connection with the River Itchen cSAC.

20. Under the cross-heading **VALIDITY OF THE RESERVED MATTERS APPLICATION,** the Secretary of State noted that

> The reserved matters application … /41 is made pursuant to outline permission … /12 granted in 1992. However, the Inspector has concluded that the outline permission which has been taken forward is …/29 granted in 1996 following a section 73 application to vary condition 1 of the 1992 permission. Both outline permissions require under condition 6, the approval of a Development Master Plan before the submission of reserved matters applications. The Inspector concludes that condition 6 has been satisfied in respect of permission …/29 by the Council's approval of the DMP in July 1996. The Secretary of State agrees. He notes the Inspector's conclusion that the reserved matters application has been submitted under the wrong outline permission. The Secretary of State agrees that the relationship between the outline permissions and the reserved matters application is a matter which would need to be examined in the courts – if any of the parties were disposed to take matters further – but for the purposes of the present reserved matters application, he considers that as far as he can establish from the Inquiry documents, no parties have been prejudiced as a consequence of the error. He therefore proposes to proceed to determine the application.

21. The Secretary of State then went on to discuss the necessity for there to have been an environmental impact assessment. He concluded that the proposed development, that is …/40, would not be likely to have significant environmental effects by virtue of its nature size or location. As to application …/41, he concluded that since the Regulations of 1988 did not apply to applications for approval in respect of reserved matters, there was no requirement for an environmental statement.

22. The Secretary of State agreed with the Inspector that the main issue for his/their consideration was the effect of the proposed road on the ICAO's Recommended Practice For Runway End Safety Areas (RESAs), the impact of the proposed

development for the River Itchen cSAC and the form of any conditions which should be attached to the permission.

23. What may be regarded as the critical section of the Decision Letter starts at paragraph 9. It reads

> The Secretary of State agrees with the Inspector that a tunnel option, while not meeting the ICAO recommendation for a 240m RESA, would represent a significant improvement over … the situation if the road were provided in a cutting. However, he is aware that consideration of a reserved matters application cannot be used to re-examine the principle of development authorised by an outline permission. In this case, the Secretary of State accepts that the outline permission as subsequently approved, provides for a road to be in a cutting. Therefore he considers that … the road otherwise than in a cutting would go to the heart of the outline permission and be outside the scope of the planning legislation.
>
> 10. The Secretary of State notes the Inspector's reservations about aviation safety (but that is a matter for the CAA). However, the Secretary of State agrees with the Inspector that if the road does not proceed the implications for employment opportunities and the provision for a by-pass for Eastleigh town centre would be serious.

24. The Secretary of State continued by stating that following careful consideration of all the available evidence he accepted the Inspector's conclusions on each of the main issues and that the applications be approved and planning permissions be granted, subject to conditions.

25. The report of the Inspector to which the Secretary of State referred is both detailed and extensive, running to no less than 83 pages and extending to 489 paragraphs. It is unnecessary to rehearse much of the material contained within it. This is not to denigrate the effort and skill displayed. It is a reflection of the limited nature of the judicial process which is now in play under section 288 of the Act of 1990, that is to say receive challenges to the validity of the order as not being within the powers of the Act or that relevant requirements have not been complied with such that the interests of the claimants have been substantially prejudiced thereby. Nevertheless it is appropriate to note that in the section of his report headed **CONCLUSIONS** the Inspector identified the main issues in substantially the same manner as the Secretary of State. He also adverted to procedural matters which required to be addressed, namely

> (a) the validity of the reserved matters application in the context of which is the relevant outline planning permissions; and whether there has been compliance with enabling conditions on whichever is the relevant outline planning permission;

(b) whether the two applications should stand or fall together;

(c) whether an environmental impact assessment should have accompanied the present applications; and

(d) whether the applications are now premature, bearing in mind: that the period for submission of details of reserved matters expires in December 2000; the possible highways implications of the proposed Eastleigh MDA; the likely time scale of the likely development of the N(orthern) B(usiness) P(ark), the MDA and the various stages of the CLLR; and the review of the Local Plan.

26. In his **OVERALL CONCLUSIONS** (paragraph 484 and following) the Inspector records

> 484. The validity of the applications, being a matter of law, I leave for the Secretary of State's decision. If it is decided that the applications are valid, then I have to make clear my strong reservations about the desirability of granting planning permissions. I am particularly concerned about aviation safety if the current schemes are approved. Regardless of whether or not a 240m RESA can be achieved, I consider it would be short-sighted and imprudent in the extreme to construct what would be a major road in a cutting so close to the northern end of the airport runway. The proposed development would create at the northern end of the runway a relationship of major road and runway very similar … to that at the southern end. …
>
> 485. On the other hand, I am very conscious of the fact that there is extant outline planning permission for the development, and that approved drawings show the road in a cutting where it skirts the northern end of the runway. Were it not for the fact of there being extant outline planning permission for the construction of the road in cutting, I would not hesitate to recommend that the applications be refused primarily on the basis of the threat to aviation safety and the potential of undermining of Southampton Airport's sub-regional importance, but also because I believe the road as presently designed is likely to fail to deliver in full the benefits to the local economy and town centre environment which might otherwise be achieved.
>
> 486. However, it is argued by the applicants and the local planning authority that a decision to refuse permissions at this stage would go to the heart of a valid planning permission in respect of which the Council has also raised the matter of compensation. The applicants cannot afford to finance a road in tunnel, and would not proceed with development if

> permission is now refused. There is no prospect, other than from the MDA development which is itself clouded in uncertainty, of funds being forthcoming for a tunnelled road. If the road scheme does not proceed the implications for employment opportunities and the provision of a by-pass for Eastleigh town centre would be serious. Refusal of the applications would, therefore, give rise to serious and complex issues.

The challenges

27. The challenges are that the decision of the Secretary of State was erroneous in the following respects:

> 1. a. the reserved matters' application was invalid as an application under …/29 because it referred to outline permission …/12 and not to that permission
>
> b. prejudice would be suffered by the claimants if the reserved matters were treated as if made under …/29 by either depriving the claimants of the opportunity for consultation on the nature of the road under the outline permission, loss of consideration of the change of circumstances as at the dates of the report and the decision letter [19 January and 18 September 2001] and or alternatively by the different and adverse decision which was made rather than the one which, arguably, would have been made if there had been proper consultation [the inspector's finding at paragraph 484 of the letter, see above]
>
> c. alternatively, the Development Master Plan did not form the heart of the planning permission and did not therefore limit the options available to the Secretary of State.
>
> 2. He treated the conditions in respect of the cSAC as valid and
>
> 3. Concluded that an environmental impact statement was unnecessary.
>
> 4. Introduced into the reasoning of the report and the decision a new factor which concerned the impact of refusing permission would have had on prospects for local employment.

Claimants' – submissions

28. As noted already, outline permission …/12 permitted a new distributor road with junctions and access to the airport and development areas. It also incorporated a Statement of Development Criteria which by paragraph 4.1.2 announced that

> The requirements of the CAA in this respect are set out in their publication 'CAP 168: Licensing of Aerodromes'. All development upon and related to the airport will be planned and executed in compliance with the requirements of CAP 168 and with any revisions to these standards, and in full liaison with the Aerodrome Safeguarding Directorate of the (CAA). The relevant requirements will be confirmed on the Development Master Plan as part of the background for the detailed design.

29. It was recognised in this document that there were constraints necessarily imposed by the CAA, and enforced in the licensing process, on the physical layout and of the surrounding areas. The reasons are self- evident. In the event, and because of the way in which the reserved matters application and the outline application were dealt with, this essential safeguard to the operation of the airport has, by submission at least, been lost. Thus, central to the claimants' case, it was critically important to identify to which of the outline permissions …/12 or …/29 did the reserved matters application relate.

30. The Inspector had found that reserved matters application …/41 had been submitted under outline permission…/12. This finding was endorsed by the Secretary of State. Condition 6 of both permissions required that a Development Master Plan for the whole area of the application was to have been submitted to, and approved by, the LPA. Although a Document described as such was submitted to EBC in July 1996, it was said that it did not identify to which of the applications it related. So much appeared to be common ground between the parties both at the Inquiry and in argument before me. [It should, however be noted that under cover of a letter dated 8 July 1996, the third defendants sent a text of the Development Master Plan which asserts that it is submitted in order to comply with condition 6 of the outline permission …/12].

31. The claimant submitted that it was elementary that for the Secretary of State to make a valid determination there had first to be an effective application. Consequently it was necessary to determine the outline permission to which the reserved matters application related and whether there were any relevant enabling conditions which required to be and had been satisfied.

32. It was pointed out that while the Inspector had found that there had been two outline permissions, it was only …/29 which had been implemented and the reserved matters application had (erroneously) been made under …/12; see paragraphs 433 and 436 of the decision letter. Condition 6 of both outline applications had required the submission of a DMP prior to the application relating to reserved matters. Since it

was only …/29 which had been implemented, it followed that …/12 had never proceeded to the stage at which a DMP had been submitted. It also followed that no DMP had been submitted that showed the requirement for a road which complied with the CAA conditions noted at paragraph 29, above. The Inspector had found that the outline permission …/29, taken with the drawings submitted with the DMP, had not required the road to be in a cutting; decision letter paragraph 479. He had also found that the drawings approved by the LPA on 23 July 1996 had complied with the DMP and permission …/29. In a piece of reasoning, which may appear to be confused, the inspector recorded

> 435 On balance Mr Howell's explanation that the DMP as approved comprised three drawings which were available to the council when it approved the DMP …. is plausible … . The DMP written statement appears to contain the information required by condition 6 (iv) and (v), and the approved plans include layouts of the development areas. BAA's criticism on this point appears to be unfounded. On balance it seems to me that there is a valid outline planning permission for the construction of the CLLR. As the approved drawings indicate the road to be in a cutting … , it also follows that the extant permission is for the road to be in a cutting.
>
> 436 There remains the difficulty, however, that the present reserved matters application is made pursuant to permission …/12, in respect of which no steps have been taken to comply with the enabling conditions. In simple terms it would appear that the reserved matters application has indeed been made pursuant to the wrong outline permission, and it could be argued that it does not, therefore, fall to be considered. Whether this procedural error is fatal to the validity of the reserved matters application is a matter of law. My own view is that a common sense approach should be adopted, and that it is reasonable to treat the application as though it had been made pursuant to outline permission …/29. The alternative scenario, of requiring the applicants to submit a fresh application pursuant to the 1996 outline permission, would appear somewhat pedantic and would cause nothing but needless delay in deciding whether this project can proceed as proposed.

33. The claimants' submission in relation to this passage is that the Inspector and, in his turn, the Secretary of State, simply 'got it wrong'. This was in the respects that:

> i) the reserved matters application, in fact made, was under an outline permission to which it did not relate;
>
> ii) failing to recognise the prejudice to which his decision exposed the applicants in that

a) There was loss of the opportunity to consult interested parties on the road layout under the correct permission;

b) The loss of the consideration of the change or circumstances between 19 January and 18 September, 2001; and

c) The resulting decision which, as the inspector had correctly noted, was adverse to the interests of the applicants.

34. For the reasons already identified above, the Secretary of State had no power to call in application …/12 because condition 6 had never been met under that permission and he should not have done so. To the extent that the application purported to have been made under …/29 the requirements of Article 4(a) of the Town and Country Planning (General Development Procedure) Order 1995 (GDPO) were not met as the application had not given "sufficient information to enable the authority to identify the outline planning permission in respect of which it is made". The application which was made (under …/12) provided insufficient information to enable the LPA to identify it as having been made in relation to …/29. Thus there was a failure to comply with the provisions of the GDPO and the application was of no effect.

35. The alternative basis of challenge was to note that the application for reserved matters cannot, as a matter of law, be amended to relate to an outline application for permission, other than the one in respect of which it had been made, after the time for so doing has elapsed. As a matter of fact, each outline permission had expired by effluxion of time on 18 December 2000 and 19 January 2001 respectively. The point is that the original permissions had been valid for a period of eight years only. As the third defendants had not applied to the Inspector for the reserved matters application to be allocated to permission …/29, there was no warrant for him to have dealt with it as if that had been the position. On the authority of R v. Newbury District Council ex parte Chieveley PC [1999] PLCR 51, it was argued that there was no power for the Secretary of State to act as he had in relation to the reserved matters application. In so holding, the Court of Appeal had given its approval to the contents of paragraph 44 of Circular 11/55 which provides:

> An applicant can choose to submit as part of an outline planning application details of any of these 'reserved matters'. Unless the applicant has indicated that those details are submitted 'for illustrative purposes only' (or otherwise indicated that they are not formally part of the application), the LPA must treat them as part of the development in respect of which the application is being made; the Authority cannot reserve matter by condition for subsequent approval, unless the applicant is willing to amend the application by withdrawing details.

36. It is a necessary consequence of this that it is for the applicant to ensure that his application is in order for, if not, the application will not be upheld as valid.

37. As to prejudice, it was submitted first that by deciding as he had, and without the benefit of submissions from the applicants, they had necessarily suffered the prejudice of any party which had not been heard. It was also submitted, and this may be considered to lie at the heart of this appeal, that it could not be right for the Inspector to have recommended, any more than it was for the Secretary of State to have approved, an application which was not merely defective but more importantly would lead to the absurd and disquieting consequence that the decision negated the avowed purpose of the call in, namely the issue of runway end safety which was of more than local importance because of the recommendations of the ICAO.

38. Closely allied with the point advanced in the preceding paragraph, it was contended that the permission which was granted in fact ignored the statement of development criteria, absent from permission …/29, to the effect that the requirements of CAP 168 should be complied with "in full liaison with the Aerodrome Safeguarding Directorate of the" CAA.

39. A further consequence of the decision was that although an application to extend time under …/12 could have been made, any such application would have meant that all relevant matters would have had to be considered before the extension would have been granted. The case of Pye v. Secretary of State for the Environment and Another [1999] PCLR 28 was cited in support of this proposition. In this case Sullivan J had said

> p45 (W)here, as in the present case, an application is made under section 73 to alter a condition so as to extend the period for submission of reserved matters at a time when the original planning permission is no longer capable of implementation by reason of the effect of section 93(4), because time for submission of reserved matters has expired.
>
> p47 On such an application [to renew an outline planning permission] whilst it was still possible to take into consideration whether there had been a material change in planning circumstances in deciding whether or not to grant planning permission for renewal.

40. Had the reserved matters application been found to be invalid, then an application for renewal at which all relevant considerations could have been considered and addressed would have become necessary. In the result, the applicants had been deprived of the opportunity of putting forward submissions which reflected the changed circumstances since the original permission had been granted, notably the current CAA policy in respect of RESAs.

41. The further submission was made that the evidence did not justify the recommendation of the Inspector and finding by the Secretary of State, that the DMP formed the heart of the outline permission in the light of the fact that the drawings submitted, in purported compliance with it, did not demonstrate a road in a cutting..

42. The manner in which the Inspector and the Secretary of State approached the significance was wrong both in fact and law. The proposition was that as the DMP was not incorporated in the outline permission and could not, therefore, amount to 'approval' of any of the reserved matters. In Heron Ltd v. Manchester Council [1978] 1 WLR 939, at 943 and 944, it was held that approval of reserved matters by a planning authority did not prevent a developer seeking to make a separate, and subsequent, application for approval in respect of those self same matters. But if a developer wants to depart from the outline approved, then he must issue a fresh application for a different permission.

43. Ground 2: The validity of the conditions imposed in respect of the cSAC: These sought to prevent the development from being started until the developer "had provided technical information …in order to inform the measures necessary to mitigate against potential indirect impacts on the … cSAC identified in the findings of the Appropriate Assessment completed by the (LPA) …". and that a method statement to comply with the requirements of that assessment must be agreed by the LPA. There was a further restriction on the development "until the developer has carried out adequate investigation to assess the degree of contamination of the site and to determine its pollution potential". The recommendation by the inspector on these topics is to be found at paragraphs 459 and 460 of his report, in which he concluded that the LPA had made an appropriate assessment of the areas of potential harm and that a fail safe condition which would prevent development should be imposed in the event that the conditions were not met. He also concluded that the potential impact of the proposed development on the cSAC was capable of being protected from the harmful effects of the construction of the CLLR. He had found no basis upon which to refuse planning permission. By the insertion of such a condition, it was submitted that the question whether or not there would be harm to the cSAC would be deferred. This was impermissible as a permission which is subject to a condition subsequent is invalid; see R v. Cornwall County Council ex p Hardy [2001] JPL 786.

44. The submission was that it was not permissible for the Inspector, or the Secretary of State, to grant a permission which required steps to be undertaken subsequent to its grant when proper research might demonstrate that on scientific grounds relating to the environment the development ought not to be permitted at all.

45. Ground 3: The Secretary of State found that the two applications should stand or fall together; see decision letter paragraph 4. As a matter of principle it was submitted that they should have been treated as one when the question of the need for an environmental impact statement was under consideration; see R v. Swale Borough Council ex p RSPB [1991] JPL 39. The recommendation by the Inspector at paragraphs 437 and 440 of his report formed the basis of the decision of the Secretary of State, in this respect. It was illogical and therefore wrong for the Inspector to have subsequently treated the two applications as requiring separate consideration when he came to consider the requirement for an environmental impact statement. By so doing, he was able to recommend that no such statement was required in order to comply with the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, but he specifically drew the attention of the Secretary of State to this question; see paragraph 441 of his report. Furthermore, the need for the

imposition of conditions subsequent to the grants of permission by their very existence proved that in the scheme as a whole there was indeed an environmental impact which was at least possible, if not actual. Thus, the grant of permissions should fail on this basis, also.

46. Finally, the reference by the Secretary of State to the implications for employment in the area if the CLLR was not built was made without any detailed consideration in the conclusions of the Inspector. Thus there could have been and was no reasoned basis for this statement. The Secretary of State uncritically adopted the inspector's finding in this respect.

The first defendants' submissions

47. The validity of the permission granted: The two permissions which existed following the grant of …/29 meant that there was overlap between them so far as all matters relevant to the present application are concerned. In the absence of it having been demonstrated that the requirements of this permission had not been complied with, it was clear that a simple administrative error had been made by the third defendants when they made their reserved matters application under …/12 which did not lead to any prejudice to the present applicants. The claimants first point was, therefore, no more than an unmeritorious technicality. It was accepted that provided no party suffered prejudice as the result of this approach, the Inspector's recommendation was not shown to be incorrect. It was a question of fact which the Inspector had been entitled to make. If this was capable of being made the object of successful challenge, the proper route for a challenge was through judicial review and not through this court exercising its statutory jurisdiction.

48. It was also submitted that there was no demonstrable prejudice to the applicants as the result of that approach. Since …/29 proceeded on the basis that all conditions in …/12 continued to apply and the conditions attached to that permission included those which related to the position of the CAA, there was no practical difference between the two and the applicants had had an equal opportunity to rely upon the requirements of the CAA.

49. It could not be assumed that if the application had been considered under …/12, the decision would have been different.

50. Whether the road should be in a cutting: if the basis upon which the permission was granted showed that CLLR was in a cutting, as a matter of law it is impermissible for that matter to be reopened on a reserved matters application. As the plan submitted, that is plan 1, showed the road to be in a cutting, that was determinative of this question. It was for the decision maker, in this case the Secretary of State, to determine what had been the scope of the original permission and, consequently, whether or not the application which was before him lay within it.

51. The submission was that, if the plan referred to in the grant of planning permission showed that the road was in a cutting, the road could not, by definition, have been a reserved matter. In the witness statement of Mr Richards, from the Government Department of the South East, he provides evidence that 'Plan 1' which has noted on it "outline planning applications …/11, /12, /14, /15 and was before the Inspector … did indeed show that the road was in a cutting". [Note that the plan is dated 1991, whereas the permission in question dates from 1992, so it is plainly a plan contemporary with the relevant permission].

52. The conditions argument: The applicants had fundamentally misunderstood the effect of the proposed conditions. The true position was that there had been, as recorded above, appropriate assessments carried out, the purpose of the conditions was not therefore to ascertain whether harm would occur if the development was carried out. Rather were they necessary to 'protect the site from effects which were potentially harmful'. Attention was drawn to the provisions of the Conservation (Habitats &c) Regulations 1994, by Regulation 48 of which an appropriate assessment carried out by an appropriate body means that such a body must have been satisfied that the plan or project will not adversely affect the site. Given that it was accepted that the assessments had been carried out in accordance with the Regulations, there was nothing in the point which the applicants were endeavouring to make. The Regulations do however make provision for the imperative of an overriding public interest where the social or economic consequences overcome the consequence of an adverse assessment and a planning authority is, in those circumstances, able to grant permission.

53. Insofar as the applicants relied on the case of R v. Cornwall (above) this was not authority for purposes on which the applicants could found. This was for the two reasons. The first is that although under Regulation 3(2) of the Town and Country Planning (Environmental Impact) Regulations 1999, it is not now lawful for the Secretary of State, or other planning authority, to grant permission pursuant to a qualifying application unless he has first taken into account the environmental information; under the earlier Regulations of 1988, no environmental assessment was required in respect of a reserved matters application, which was the position under application …/29. The second reason was that the application for full permission was not an application which fell within Schedule 2 to the Regulations of 1999 because, it was argued, its grant would not have a significant environmental impact and the Secretary of State had so found. As to this the decision whether the proposed development was likely to have such an effect was that of the Secretary of State alone it was not one which was open to challenge on this application.

54. To meet the argument advanced by the applicants which was to the effect that the Secretary of State had given inadequate reasons for his decision, it was submitted that since the Secretary of State has not decided to call in the relevant applications on environmental grounds, but only on the CAA aspects, the Secretary of State was not obliged to provide reasons for his decision on the environmental issues. Even if he were, it was submitted that paragraph 9 of the statement of Mr Richards provided sufficient reasons to meet any obligation as there might have been. because he said

> I should add that, if …/41 had been a full application and not a reserved matters application, such that a consideration would have had to be given to the question whether an environmental statement was required, it is likely that the Secretary of State would have concluded that no such statement was required for that application. The Inspector's conclusions as to the absence of any harmful effects on the environment would have been relevant to both applications.

55. Employment: The logic of the situation was that the business park(s) which the third defendants were intent on constructing would themselves generate employment. That was the object of the entire exercise, moreover in order to make the enterprise viable there was an obvious need for the construction of the CLLR.

56. The conditions: these should repay careful study. In paragraph 14 of the Decision Letter the Secretary of State set out the conditions applicable to permission …/40. These required that plans had to be submitted to and approved by the LPA and that the development should only proceed in accordance with the approvals. Under (d) was included the method of disposing of surface water. Under condition (xi) it was provided that

> The development shall not be commenced until the developer has
>
> a) provided the technical information requested by the (LPA) in order to inform the measures needed to mitigate against potential indirect impacts on the River Itchen cSAC identified in the findings of the Appropriate Assessment …
>
> b) agreed in writing with the (LPA) the means by which the requirements of the Assessment will be achieved;
>
> (xii) Before development commences a method statement on proposals for the disposal of surface water drainage must be agreed … (and) should reflect the findings of the … Appropriate Assessment … including measures to ensure there is no adverse effect on the integrity of the …cSAC … by … disturbance to existing groundwater levels and … recharge rates, or the quality of the water returned to the ground or water courses.

57. The submission was that the Assessments had already taken place and the delay was required in order to ensure that the conditions imposed would have the desired effect. It is also of importance to note that Regulation 54(3) of the Habitats' Regulations provides that where Regulations 47 and 48 apply and the competent authority considers that

> any adverse effects of the plan or project on the integrity of a European site would be avoided if the planning permission

> were subject to conditions or limitations, grant planning permission … subject to those conditions or limitations.

58. What the Secretary of State has done in the present case is to invoke Regulation 54(3) (above) in the grant of the permission as Regulation 54(1)(a) empowered him so to do. Thus he had followed the recommendations of the Inspector at paragraph 457 of his report. In having acted as above, it is also to be noted that there had been an exchange of correspondence between English nature and the LPA. This did no more than to raise the potential for adverse effects and to propose engineering solutions to ensure that the integrity of the sites was not imperilled. English Nature, as the competent authority, expressed itself satisfied with this outcome. Furthermore, this approach appears to be in conformity with the provisions of Circular 11/95 under the cross-heading **Contaminated land**.

59. Environmental Impact assessment: The Secretary of State had recognised in paragraph 5 of the decision letter that he had to decide whether or not the proposed development required that an environmental impact assessment should be carried out. He reasoned that since there was no such requirement in respect of reserved matters applications, that fell to be disregarded when answering the question which arose on the application for full permission whether the development was likely to have a significant environmental effect. With reference to the decision of the Court of Appeal in R v. Swale Borough Council ex parte RSPB [1991] JPL 39, it was submitted that the concerns expressed by Simon Brown LJ at p47 had no application to the circumstances of the present case. At p47, the Lord Justice had said

> The question whether or no the development was of a category described in either schedule [to the Environmental Impact Regulations] had to be answered strictly in relation to the development applied for, not for development contemplated beyond that. But the further question arising from a Schedule 2 development, the question whether "it would be likely to have significant effects on the environment by virtue of such factors such as its nature, size or location" should be answered rather differently. The development should not then be considered in isolation if in reality it was properly to be regarded as an integral part of an inevitably more substantial development. This approach appeared appropriate on the language of the Regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover, developers could otherwise defeat the object of the Regulations by piecemeal development proposals.

60. This was for the reason that both the Inspector and the Secretary of State had considered the separate aspects of the development, as a whole, and had not come to an irrational decision. On the authority of R v. Secretary of State for the Environment ex parte Marson [1998] 3 PLR 91, there was no call for any or any better reasons to be given for the decision.

The third defendants' submissions

61. The sequence of permission …/12 which incorporated the Statement of Development Criteria which itself indicated that Plan 1 (above) had been approved by the LPA showed that the provision of CLLR in a cutting was an essential part of that permission. When approval of the Development Master Plan was sought in 1996 the permission …/12 was still in force. Nothing which happened thereafter changed that position. Condition 1 of the outline permission …/29 did not affect this fundamental, it merely changed the permitted uses of the southern development area.

62. Paragraphs 9 and 10 of the decision letter, the implications of RESAs was a matter for the CAA and the protection of the cSAC by the incorporation of conditions, were a demonstration by the Secretary of State of the exercise of planning judgment which could only be impugned if the decision was perverse. That was something which the claimants had plainly failed to do. Furthermore, he had been entitled to come to the conclusion that no party had been prejudiced by the confusion between …/12 and …/29, as he had noted in paragraph 3 of the decision letter.

63. The third defendants also submitted that there had been no confusion between the permissions and the reserved matters' applications as the applicants had asserted. The submission of the development master plan had been under both extent permissions and no criticism could therefore be validly made of the decision third defendants to make the reserved matters application under both the original (…/12) and the amended (…/29) permissions. The difference between the two was restricted to the amendment to the uses to which the business park could be put.

64. It should have been noted that the Inspector had been in error when he had stated at paragraph 479 of his report that the outline permission had not required that CLLR be in cutting. Equally, the Statement of Development Criteria had been incorporated into permission …/12 by condition 1 of that permission. All that remained to be done under that permission was for the submission of the Statement under condition 6 for the purposes of settling the details of the road. The Inspector had found that this had in fact been satisfied; see paragraph 435 of his report.

65. In relation to the suggestion that the claimants or CAA had been prejudiced by what had happened, the short answer to this is that the claimants made extensive submission on the issue concerning RESAs in the course of the Inquiry. The Inspector's concerns on this issue plainly demonstrate that this had indeed been the position.

Claimants' response

66. In fact and in law permission …/29 was a fresh outline permission distinct from …/12 and was not merely an amendment of it. On its proper interpretation, application …/29 was an application to vary the nature of the development which was being sought. The findings of the Inspector at paragraph 436 made this clear. In addition,

the provisions of s73 of the Act of 1990 make clear that application …/29 was a fresh application since it differed substantially from the earlier application as to the nature of the development which was being sought. Under the provisions of s 73(2)(b), the application should have been refused.

67. If the true purpose of the Inquiry was to determine the matters identified in the call-in letter, the argument advanced on behalf of the first and third defendants would, if correct, have rendered that purpose nugatory. This would be for the reason that the route and nature of the road having already been fixed by the approval of plan 1, submitted in accordance with application …/12, there was no scope for altering the construction of CLLR to take account of the recommendations of the ICAO. Furthermore, neither the Inspector nor the Secretary of State had referred to plan 1 as having any significance in terms of the outcome of the Inquiry.

Discussion

68. It is at once a striking feature both of the Inspector's report and the decision of the Secretary of State that the two first reasons for the call-in have not been considered to have affected nor been determinative of the outcome of the applications. In the case of the CLLR, the reason expressed was that under permission …/29, the LPA had already granted permission for the construction of the road in a cutting, it was not therefore open to the Secretary of State on that application to come to any other conclusion than the one at which he arrived. Technical, though the claimants' submission may have been, it at least had the potential virtue to empower the Secretary of State to give maximum effect to have ensured a RESA which would have approximated towards the requirements of the ICAA. As it was, the Secretary of State avoided the issue when he stated that "it is a matter for the (CAA) to determine what measures will be necessary to at Southampton Airport following introduction of new standards for RESAs".

69. Insofar as the environmental issues were concerned, the same approach has been adopted and the issue has been effectively side-stepped. Neither of these decisions necessarily fails for having failed to grasp the issue, but the logical consequence has to be that both must be submitted to a rigorous examination of the basis upon which each was reached. Here it will be recalled that both the Inspector and the Secretary of State had concluded that because the outline permission …/12 was granted before the coming into operation of the 1988 Regulations, there was no need to conduct an environmental assessment in connection with that application. They also concluded that application …/40 did not give rise to the need for such an assessment because such development would not have "significant environmental effects … by virtue of its nature size or location". Thus by separating the two schemes, the necessity for an environmental assessment was avoided. There is nothing to indicate that the Secretary of State, any more than the inspector gave any consideration to what might have been considered to have been the correct method of approach, namely by giving consideration to the combined impact of both. This is particularly regrettable since it will be recalled that the Inspector had drawn specific attention to this issue.

70. At page 47 of the judgment of the Swale Borough Council Case, Simon Brown LJ said that he would state his broad conclusions on the question what was the nature of the developments as

> 3. The question whether or no the development was of a category described in either schedule [of the Regulations] had to be answered strictly in relation to the development applied for, not any development contemplated beyond that. But the further question arising in respect of a Schedule 2 development, the question whether or not it "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location" should, be answered rather differently. The proposal should not then be considered in isolation if in reality it was properly to be regarded as an integral part of an inevitably more substantial development. This approach appeared appropriate on the language of the regulations, the existence of the smaller development itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover, developers could otherwise defeat the object of the regulations by piecemeal development proposals.

71. These words might have been drafted with the present set of circumstances in mind. It is clear that neither the Secretary of State nor the Inspector considered the totality of the developments for which the third defendants were seeking permissions as being capable of constituting one integral site. Had either done so as undoubtedly they ought to have done, it is inconceivable that they could have reached the conclusions which they did on this issue. If such consideration had been given to the question whether or not the two applications were part of a single development and the conclusion had been reached that they were not, it is probable that any such decision would have been vulnerable to challenge on the basis of irrationality, and this notwithstanding that the decision in question was one of fact for the Secretary of State himself to have made. Simon Brown LJ left this possibility open in his judgment in the Swale Borough Council Case in numbered paragraph 1 on p 47, above. If necessary, therefore, I would have reached such a conclusion notwithstanding the limitations of the judicial role on issues of fact.

Conclusion

72. The conjunction of these two major features in the present case are sufficient to determine the outcome of this case and make it inevitable that the decision of the Secretary of State cannot stand. His final decision rendered the decision to call in the two applications nugatory. There is no indication in any of the reasoning by the Secretary of State that he appreciated that such was the outcome of his decision. Had he done so, the inevitable result would have been that he would have found himself having to give substantive consideration and effect to those reasons, yet he failed so to do. For these reasons the decision cannot stand and must be quashed. It is in these circumstances unnecessary to consider the further submissions which raise questions in regard to the validity of the conditions subject to which the consents were granted.

73. For completeness, in case it be thought that the question of employment raised by the applicants, has been ignored, the simple position is that given the very nature of the development(s), it is manifest that they would generate new employment in the area. Common sense can ride to the assistance of decision makers when there may be no definite evidence on the effect of developments of the kind in question in this case. The land which was to be developed was brown land which had no employment potential in its undeveloped state. The whole object of the development(s) was(were) to create site(s) for employment within the area of the LPA.