CO/11315/2010

**Neutral Citation Number: [2011] EWHC 2083 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 8 July 2011

**B e f o r e:**

**RABINDER SINGH QC**
**(SITTING AS A DEPUTY HIGH COURT JUDGE)**

**Between:**
**THE QUEEN ON THE APPLICATION OF WARLEY**

**Claimant**

v

**WEALDEN DISTRICT COUNCIL**

**Defendant**

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(Official Shorthand Writers to the Court)

**Mr J Pereira** (instructed by Richard Buxton Environmental and Public Law) appeared on behalf of the **Claimant**
**Mr M Reed** (instructed by Sharpe Pritchard) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

Introduction

1. THE DEPUTY JUDGE: This is a claim for judicial review of the grant of planning permission on 11 August 2010. The claimant is a local resident, the defendant is the relevant local planning authority, and the interested party is the beneficiary of the planning permission, namely Wadhurst Tennis Club. The interested party has not taken any active part in the hearing before me, although I have received a letter on its behalf dated 15 June 2011, which I have taken into account.

2. Permission to bring this claim for judicial review was granted by Lindblom J on 14 February 2011. He granted permission to advance two of the four grounds which were pleaded. The claimant has not sought to pursue the two grounds on which permission was refused. The grounds on which permission was granted were then numbered 1 and 4. For ease of reference I will call them the environmental impact assessment, or EIA, issue and the conditions issue.

3. It has become common ground before me that the first part of what was previously ground 4, namely the conditions issue, is not necessary to pursue at least at this stage. This is the result of a concession made by the defendant at paragraph 27 of the detailed grounds of resistance.

Factual background

4. The site which is the subject of the present case lies within an area of outstanding natural beauty (AONB). Before the relevant time there were already there some tennis courts and other recreational facilities. In 2008, an application was made for the erection of nine static columns with floodlighting. I can take the relevant facts from the first witness statement of Mr Douglas Moss who has filed evidence on behalf of the defendant in this case.

5. At paragraph 6 of his witness statement, Mr Moss says that the planning application which was granted planning permission by the council was submitted in 2008:

> "...For the 'erection of nine static columns with attached floodlights alongside Court numbers 1 and 2 only' at Wadhurst Tennis Club Sparrows Green Recreation Ground, South View Road, Sparrows Green, Wadhurst. It was reported to the meeting of the Council Planning Sub-Committee North on 29 May 2008 ... which resolved to grant full planning permission following receipt of an officer's report and an update recommending that planning permission be refused."

6. At paragraph 10 of the same witness statement, Mr Moss states:

> "When I considered the status of the development proposed by the planning application in 2008 I had regard to the fact that the application site was within Sparrows Green recreation ground, owned by Wadhurst Parish Council with the tennis courts and changing rooms building let to the Wadhurst Tennis Club and the planning history of the site showed that outline planning permission was given in 1997 for the replacement of

> existing changing rooms and public toilets with a new pavilion incorporating new changing rooms, canteen for soft refreshments during and after matches, provision of 4 tennis courts, cycle track, adventure playground, new vehicular access and associated car and disabled parking in the recreation land. Reserved matters approval for this development was issued on 6 October 1999."

7. The planning permission which was granted on 29 May 2008 was subsequently quashed by consent by this court on 12 August 2009 for reasons which are not material for present purposes. As a result, the application had to be considered again in 2010. But some of the events which occurred in 2008 are still important because they remain relevant, as will become apparent in a moment.

8. There are no contemporaneous documents available on the EIA issue. The question of disclosure of such contemporaneous documents was expressly raised in the letter before claim before these proceedings were issued, and the defendant authority's response was to the effect that no such documents existed.

9. Accordingly, it has been important in this case for the court to have evidence before it in the form of witness statements setting out the reasons for the stance which the defendant took on the EIA issue. I can most conveniently set out that stance by reciting in full the relevant passages in the first witness statement of Mr Moss, which are at paragraphs 11 to 14:

> "11. The proposal in 2008 was for the erection of nine columns with floodlights. Although it was immediately clear that the impact of floodlighting on the area of outstanding natural beauty in which it was located and on the residential amenity were going to be a significant material planning considerations [sic], I took the view that the development did not fall within either schedule 1 or schedule 2 to the EIA regulations 1999 [I will return to those regulations in due course].
>
> "12. It has been suggested by the Claimants ... that the development should have been regarded as falling under either paragraph 10(b) (urban development projects) or paragraph 13 (Any change to existing category development) of Schedule 2. I would confirm that I considered the application when it was submitted in 2008 that I considered that neither the application proposals, nor the existing courts, fell within those categories.
>
> "13. My reasoning for this conclusion was that by reference to the list of developments within Schedule 1 of the 1999 Regulations, it is very clear that minor works are excluded from the major projects listed. [I interpose to say that it is common ground before me that there is no issue as to the applicability of Schedule 1]. Turning to the issues regarding Schedule 2 alleged by the Claimant, I formed the view that the lighting column project could not be considered under paragraph 10(b), urban development projects, which includes the construction of shopping

centres and car parks, sports stadiums, leisure centres and multiplex cinemas. In my opinion at the time, I could not identify any reasonable comparison between the nature of a simple lighting column proposal before me with the far more substantive physical forms of urban development which are clearly embraced within 10(b). I was aware of the lighting impact issue, but was not of the opinion that this characteristic meant such minor development would fall within class 10(b). The fact that thresholds on the size of listed categories of development are not applicable within sensitive areas (like the AONB) was known to me, but where development does not fall within the schedule, I considered it would not require screening for an EIA.

"14. I now consider the allegation that the development should otherwise be considered as Schedule 2 paragraph (13) development, that is, a change to an existing category of development already listed in Schedule 1 or 2. I consciously took one step back to consider the existing permitted use/development of the site (before the floodlight application). Noting that this was already recreational ground when the hard surfaced courts were formed, I was convinced in my view that the tennis courts on the land were not an 'urban development project'. They simply did not square with the category 'character' and limitations. It is also relevant to note that recreational development of land has its own heading in Schedule 2 and could have been included in paragraph 12 (Tourism and leisure) if relevant. As a result of the above, it is clearly, therefore, outside the category of an 'urban development project'. For the avoidance of doubt, I am also clear in my view that these established tennis courts do not fall within Schedule 2 paragraph (12) development either, as there is no relevant entry within the list of leisure developments."

10. I should go at this juncture to two other witness statements filed by Mr Moss in these proceedings. The first is his third witness statement. Towards the end of what is paragraph 6 of that witness statement, Mr Moss states:

> "As stated in my first witness statement, I considered that the proposal for lighting the two tennis courts did not fall within either Schedule 1 or Schedule 2 to the EIA Regulations 1999. My assessment at that stage was reached on the basis of the 15 column scheme which were in a similar location to the subsequent 9 column scheme ie around the perimeter of the two existing tennis courts."

And paragraph 7, he goes on to say:

> "The differences between a scheme for 15 or 9 columns are minor as the purpose of both schemes is to create the same defined illuminated area or box of light over the two tennis courts giving adequate illumination in which to play tennis."

During the course of paragraph 9 of his statement, he states:

> "I took the view that, when the amended 9 column scheme was submitted, that as with the 15 column scheme it also fell outside the scope of Schedule 1 or 2 of the EIA Regulations."

11. He ends that paragraph by expressing the view that the 9 column scheme was "marginally better" than the 15 column scheme, in that there would be less clutter in daylight by having fewer columns.

12. It has not been suggested before me that the difference between the original 15 columns envisaged and the amended application in 2008 to include nine columns, as in 2010, is material to any of the issues in this case.

13. The other witness statement to which I should make reference is Mr Moss's fourth witness statement, which is dated as recently at 1 July 2011, some six days before the hearing date in this case. At paragraph 7 of that witness statement, Mr Moss says:

> "In paragraph 13 of my first statement ... I refer to the 'lighting column project' and in paragraph 14 ... I refer to the 'tennis courts on the land not being an urban development project'. My comments have to be seen in the context of that fact that the lighting column application site is that land shown by dark edging (actually red on the original) on the block plan submitted with the planning application ... That shows not only the tennis courts but the pavilion/changing rooms and the car park/access and the intervening path which links them. My reference to the lighting column project and the tennis courts should be taken as including those areas of land within the boundary of the application site which was what my decision relating to whether the development should be considered as Schedule 2 development under paragraphs 10(b) and the 13 was based on. I did not have particular regard when considering paragraph 13 to the adventure playground or the open play area as those areas have discrete small scale uses and are not used by the tennis club and are unlikely to be used by children when it is sufficiently dark to necessitate the use of lighting to play tennis. I did not regard them as part of the planning unit and the changes proposed in the application did not in any way relate to these small scale facilities by either distance or function."

14. Before I leave Mr Moss's fourth witness statement, I should make it clear that objection was taken to the admissibility of that witness statement, especially because it was filed very late in the day and after the claimant had not only started these judicial review proceedings but had indeed filed a skeleton argument for the purposes of this hearing.

15. In that context, my attention was drawn to a decision in this court by Stanley Burnton J, as he then was, in Nash, R (on the application of) v Chelsea College Of Art & Design [2001] EWHC Admin 538. At paragraph 34 of his judgment, Stanley Burnton J sought to summarise the propositions which can be derived from the authorities which he had extensively cited earlier in his judgment:

> "(i) Where there is a statutory duty to give reasons as part of the

> notification of the decision, so that (as Laws J put it in Northamptonshire County Council ex p D) 'the adequacy of the reasons is itself made a condition of the legality of the decision', only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons."

16. I interpose to say that it is common ground before me that the present case does not fall within category 1.

> "(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
>
> "(a) Whether the new reasons are consistent with the original reasons.
>
> "(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.
>
> "(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).
>
> "(d) The delay before the later reasons were put forward.
>
> "(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly."

17. The present case does not fall altogether straightforwardly into the type of case that was being considered in that passage, but nevertheless I have had regard to what is said there and to the submissions based upon it. In the exercise of my discretion, I regard it as just to admit the fourth witness statement of Mr Moss in this case. In particular, this is because the reasons which are set out in the fourth witness statement appear to me to be consistent with what has been said earlier by Mr Moss. They help to elucidate what has earlier been said in evidence to this court, and it would be somewhat artificial and potentially unjust in my view for the court to close its eyes to that helpful elucidation of the earlier evidence by Mr Moss in this case.

18. Although I accept of course that the reasons in the fourth witness statement have been given late, the explanation for that appears to me, as counsel for the defendant has submitted, that the issue which he was specifically addressing in his fourth witness statement had not really been put as clearly as it now has been until the claimant's skeleton argument in this case. It is understandable, therefore, that the defendant should wish to assist the court as well as it can by filing evidence by elucidating, but

not contradicting, its earlier evidence which had already been filed in these proceedings.

19. I return to the factual history of this case. In 2008, when the original planning application was to be considered by the defendant's relevant planning committee, the planning officer's report recommended refusal of permission. There were attached as an appendix to that report extracts from a report which had been commissioned by the planning authority from Capita Symonds on the issue of floodlighting. Section 2 is headed "light pollution" and sets out in tabular form various kinds of light pollution, such as glare and light presence. Relevant guidance is then referred to at section 3 and paragraph 3.2 states:

> "Referring to the ILE guidance notes [which is a reference to the Institution of Lighting Engineers Guidance in 2005] these recommend that a site is classified according to the prevailing lighting conditions in the immediate surrounds. These classifications are as follows..."

20. The relevant one is the first bullet point, which is "E1: intrinsically dark areas (eg National Parks or AONBs)." At section 4 of the extract, which is headed "Proposed scheme", the report sets out at paragraph 4.3 in tabular form the main effects in terms of light pollution which would be expected from the floodlighting scheme proposed. In relation to glare, the column headed "Expected impact from the 6m scheme" stated this to be "slight adverse". In relation to light presence, the impact is expected to be "severe adverse". The comment in the final column of the table against this item stated that this was "Due to the area being classified as E1, any lighting will have a high impact after dark."

21. Section 5 of the report set out its conclusions and I will read those in full:

> "5.1. The 6m lighting solution proposed is appropriate for its application and as far as reasonably practicable it minimises the impacts of lighting in this sensitive area. However due to the level difference between the courts and the neighbouring properties, views up into floodlights will inevitably occur from some properties. Shielding the rear of the properties closest to neighbouring properties will reduce this impact to some extent, however the extent of shielding is limited, as the required light output for the intended purpose needs to be maintained.
>
> "5.2. In breaking down the lighting impacts into different types, we found that several receptors adjacent to the site would experience a Severe Adverse impact in terms of 'Light Presence' which refers to the visual intrusion of lit elements within the nightscape. For all other types of impact, including 'Light Trespass', 'Glare', and 'Local Sky Glow', we assessed the impact as Slight Adverse or Negligible.
>
> "5.3. Controlled hours of use will mitigate impacts to some extent.
>
> "5.4. *Planning Conditions:* In any installation such as this there is a

> significant likelihood that a particular source could cause glare and therefore a nuisance. Even with the best design it is not always possible to guarantee that this will be completely eliminated, and furthermore wind pressure can misalign a floodlight if it happens that the fixings were not properly tightened in the first place. Therefore it is strongly recommended that the Council includes a Planning Condition along the following lines:
>
> "At any time during the first 12 months of operation, the Council shall be entitled to require the applicant to adjust or shield any light source that is deemed to be a nuisance as far as reasonably practicable."

22. As we shall see, a condition to that effect was indeed imposed when planning permission was granted in 2010.

23. That was the report in 2008. When the matter had to be reconsidered in 2010, an additional report was commissioned from Capita Symonds by the defendant authority. The report notes that Capita Symonds originally provided a lighting report in May 2008, and states:

> "1.3. For the avoidance of doubt, the scheme assessed used columns that placed the floodlights at a height of 6 metres above the playing surface with the lanterns at zero degrees tilt. The type of floodlight chosen used horizontal flat glass technology. This is consistent with the parameters used in the applicant's lighting calculations.
>
> "1.4. The supplementary information submitted does not alter the proposals in any form and it is the purpose of this supplementary report to justify and explain further the reasoning for the original findings and address the comments made by Wadhurst Tennis Club and LTL Contracts."

24. In section 2 of the report, which is headed "Justifications", it stated:

> "2.3. The assessment of light presence as Severe Adverse has also been questioned. The definition of this effect is the visibility of lit elements (both sources and illuminated surfaces), affecting the character of the nightscape. The applicant argues that although the site is within the AONB, it is bordered by built environment and hence should not be classified as being within Environmental Zone E1 and thus our classification is onerous. We disagree, as the adjacent built environment is predominantly dark, being free even of street lighting. The introduction of high intensity sports lighting will clearly be a substantial change.
>
> "2.4. Light presence is a form of light pollution assessed in terms of environmental zones and the existing elements of the lit environment. The applicant is uncertain that light presence could even be categorised as Severe Adverse, however, we disagree. The floodlighting would be very

prominently visible in the near (and middle) distance for nearby residential properties. The views are at the moment almost completely dark at night."

25. Section 3, which is headed "Conclusions", stated as follows:

> "3.1. Capita Symonds stand by their original assessment that the effect of the proposed floodlighting in terms of glare would be Slight Adverse and light presence would be Severe Adverse for some receptors.
>
> "3.2. It should be noted that the individual perception of these effects will vary. It is not our intention to determine whether such effects are acceptable or not. It is fair to say that glare and light trespass tend to be more emotive than sky glow and light presence and thus the importance of these effects need to be judged accordingly.
>
> "3.3. The effects need to be balanced against the advantages this scheme will bring to players and the community."

26. When the matter was being considered again in 2010, as in 2008 the officer's recommendation was that planning permission should be refused. This was set out in a report dated 29 July 2010. In the recommendations, the planning report said that planning permission should be refused for the following reasons:

> "1. The application site lies within an environmentally sensitive area within the High Weald Area of Outstanding Natural Beauty and outside the development boundary for Wadhurst where the Council applies planning policies that strictly control new development. It is considered that the proposed floodlighting would cause significant and unjustified harm to the character and appearance of the area and would have an undesirable visual impact on the locality, detrimental to its considerable rural and visual amenities, that would neither conserve or enhance the natural beauty and character of this area. The proposals are contrary therefore to [various policies in the development plan which are there referred to, as well as Government guidance on the subject].
>
> "2. The proposals would have an unacceptable impact on the residential and visual amenities of dwellings in the vicinity of the site. Although mitigation measures have been incorporated within the scheme, some residential properties will inevitably experience adverse impacts given the juxtaposition of the dwellings with the tennis courts. The proposals are contrary therefore to [relevant parts of the development plan and advice]."

27. On the question of lighting as such, the report says this under the heading "Impact on Local Residents":

> "The relative levels of the tennis courts and the nearest residential dwellings reduces the effect of mitigating planting. As previously reported, it is evident when viewing the site from above ground level

> windows of several neighbouring dwellings that the proposed lighting would have a seriously detrimental impact on these dwellings that could not be satisfactorily mitigated. This view is confirmed by the independent lighting consultants who state that even with the hedge and club house to provide some screening some properties will inevitably suffer adversely from Light Presence and Glare."

28. As I have indicated, the planning committee decided not to accept its officer's recommendation, but instead resolved to grant planning permission in this case, and I will read the material parts of it.

29. The description and location of development at the beginning of the permission are said to be "Erection of nine static columns with attached floodlights alongside court numbers 1 and 2 only," and the address of the site is given. In condition 2, attached to the planning permission, the following is stated:

> "The court lighting hereby approved shall only be on when the courts are in use for playing and/or coaching tennis during the months of September to April inclusive and they shall not be operated after 21:00 hours or before 08:00 hours on any day without the prior consent in writing of the Local Planning Authority."

30. Condition 3 states as follows:

> "The columns and floodlights hereby approved shall be erected in accordance with the approved specifications and plans and adjusted at the time of installation so as to minimise any overspill of light to the surrounding area. UV filters shall be fitted to each floodlight and baffle fittings shall be installed on those floodlights sited around the outside of both courts at the time of installation and retained and maintained thereafter. At any time during the first 12 months of operation, the Local Planning Authority shall require the applicant to adjust or shield any light source that is deemed to be a nuisance as far as reasonably practicable and thereafter the adjustment/shield shall be retained and maintained."

31. In the summary of reasons for the grant of planning permission, which under the current legal regime a planning authority is required to set out, the relevant reasons are stated as follows:

> "The proposed floodlighting would enable the use of these high quality tennis courts throughout the year. The potential harm on the character and appearance of the High Weald Area of Outstanding Natural Beauty (AONB) has been carefully weighed against the benefits that would accrue from extended use of the facilities. It is considered that the scheme has been designed to a high standard to mitigate any potentially negative impacts either on local residents, ecological interests in the locality or the character of the AONB. It is considered that the amended application has satisfactorily considered and addressed biodiversity

concerns following the quashing of the original planning permission after judicial review. Wider environmental considerations have been taken into account and the submitted information is considered proportionate to the proposed development.

"Subject to the conditions imposed on the decision notice, the provision of floodlighting would not have a significant impact on the amenities of local residents to warrant refusal of the application and there were no other material considerations considered to be sufficient to justify a decision other than to grant permission."

Material legislation

32. The current regulations which govern this kind of case are to be found in the Town and Country Planning Environmental Impact Assessment England and Wales Regulations 1999 (SI 1999/293). The principal operative provision in the regulations is to be found in regulation 3, paragraph 2, which states:

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

33. The environmental information required applies to every application for planning permission for EIA development (see regulation 3, paragraph 1). The interpretation provision is to be found in regulation 2. There, the phrase "EIA development" is defined as:

> "Development which is either -
>
> (a) Schedule 1 development; or.
>
> (b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

34. Schedule 1 applications are not directly relevant in the present case. "Schedule 2 application" is defined in the interpretation provision as meaning:

> "(a) An application for planning permission for Schedule 2 development; or
>
> "(b) A subsequent application in respect of Schedule 2 development."

35. "Schedule 2 development" is defined to mean:

> "Development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where.

> "(a) any part of that development is to be carried out in a sensitive area; or
>
> "(b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development."

36. It is common ground before me that the present case would fall within subparagraph (a), in other words a sensitive area, because it concerns an AONB. That much is made clear in the definition of "sensitive area" later in the interpretation provision at subparagraph (h).

37. I turn then to schedule 2 itself so far as relevant. Two particular paragraphs are important, and another needs to be mentioned in passing. Paragraph 10 of schedule 2 has the heading "Infrastructure Projects" and so far as relevant applies to (a) Industrial estate development projects and (b) urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas. It does have a threshold of an area exceeding 0.5 hectares, but as I have already said, it is common ground before me that that minimum threshold does not apply where a case falls within a sensitive area, as the present one does.

38. Paragraph 13 of schedule 2 applies so far as material to the following:

> "(a) any change to or extension of a description listed in ... paragraphs 1 to 12 of Column 1 of this table, where that development is already authorised, executed or in the process of being executed, and the change or extension may have significant adverse effects on the environment."

39. Paragraph 12 of schedule 2 need not be set out, but should be mentioned in passing because it is referred to in the witness statement of Mr Moss which I have already quoted. It has the heading "Tourism and Leisure" and mentions a number of facilities, such as theme parks, golf courses and marinas.

40. It is common ground before me that the 1999 Regulations were and are the current national measure by which this country implements its obligations to the European Union under Council Directive 85/337/EEC, that is the directive on the assessment of the effects of certain public and private projects on the environment. It is also common ground therefore that the regulations should be construed in a manner which is compatible with the directive, not least because they are intended to implement that directive.

41. Further, as I understand it, it is common ground before me that the directive itself has a wide scope, and that a purposive approach should be taken to the interpretation of both the directive and the regulations which implement it. Authority for the proposition that the directive has a wide scope and a broad purpose can be found, for example, in case C-72/95 Kraaijeveld, a judgment of the European Court of Justice of 24 October 1996, at paragraphs 31 and 39. In similar vein, in case C-142/07 Ecologistas v Ayuntamiento de Madrid [2008] ECR 1-6097, a judgment of the European Court of Justice dated 25 July 2008, at paragraph 28 the court said:

"The Court has stated on numerous occasions that the scope of Directive 85/337 and that of the amended directive is very wide ... It would, therefore, be contrary to the very purpose of the amended directive to allow any urban road project to fall outside its scope solely on the ground that the directive does not expressly mention among the projects listed in Annexes I and II those concerning that kind of road."

Relevant domestic authorities on the EIA issue

42. There are three decisions of the Court of Appeal which have been cited extensively to me by both parties. The first is Goodman, R (on the application of) v London Borough of Lewisham [2003] EWCA Civ 140. The main judgment in that case was given by Buxton LJ. He said:

"8. In the present case, the only serious contender for a category of Schedule 2 development under which the application might fall is paragraph 10(b) of the Schedule: infrastructure projects that are urban development projects. These are very wide and to some extent obscure expressions, and a good deal of legitimate disagreement will be involved in applying them to the facts of any given case. That emboldened Lewisham to argue, and the judge to agree, that such a determination on the part of the local authority could only be challenged if it were Wednesbury unreasonable. I do not agree. However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgement. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgement as embodied in Wednesbury simply has no part to play. That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions may be legitimately available. That approach to decision-making was emphasised by Lord Mustill, speaking for the House of Lords, in R v Monopolies Commission ex p South Yorkshire Transport Ltd [1993] 1 WLR 23 at p 32G, when he said that there may be cases where the criterion, upon which in law the decision has to be made,

> "'may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational.'

"9. That is the decision as to whether the development is a Schedule 2 development. If the authority concludes that it is such, it then has to go

> on and decide whether that Schedule 2 development is also an EIA development, by determining whether it is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. That is an enquiry of a nature to which the Wednesbury principle does apply..."

43. Later in his judgment at paragraph 13, Buxton LJ returned to the question of the court's approach to questions of whether a proposal falls within the concept of an infrastructure project in paragraph 10(b), schedule 2, and said, by reference to the facts of the case before him**:**

> "13. The flaw in this approach is that I cannot agree with the construction that Lewisham sought to put upon its own decision. It seems to me entirely plain that Miss Sterry, and the author of the report to council, were deciding and reporting that storage and distribution as a category did not fall within paragraph 10(b). I cannot think that that can be right as a matter of law and, although the point was far from conceded, Mr Maurici's strenuous attempts to support a different analysis at least indicated the importance of the issue. 'Infrastructure project' and 'urban development project' are terms of wide ambit, perhaps more easily understood by those versed in planning policy than by mere lawyers, and attracting the observations of Lord Mustill quoted in paragraph 8 above. But the examples of urban development projects set out in paragraph 10(b) of the Regulation demonstrate that in this instance 'infrastructure' goes wider, indeed far wider, than the normal understanding, as quoted to us from the Shorter Oxford Dictionary, of 'the installations and services (power stations, sewers, roads, housing, etc) regarded as the economic foundations of a country'. I am unable to accept that a storage and distribution facility (particularly when, as in the present case, it provides services to business and the community at large, and is not simply a private operation), however large and extensive, can never be reasonably regarded as part of the infrastructure as understood in the Regulations..."

44. The grant of planning permission in that particular case was therefore quashed (see paragraph 15 in the judgment of Buxton LJ). In a concurring judgment, Morland J said as follows:

> "20. A planning authority when determining whether a development falls within the description and limits set out in Schedule 2 should heed the exhortation of the European Court in the Kraaijeveld Case (C-72/95, 1-5403) where the Court considered the interpretation of annexe II to the Directive.
>
> ...
>
> "21. In paragraph 31 the Court said:
>
> "'The wording of the directive indicates that it has a wide scope and a

broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods - and therefore dyke works - even if not all the linguistic versions are so precise.'

...

"24. The words 'including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas' are not words of limitation but of description which emphasises the wide ambit encompassed by 'urban development projects'."

45. Brooke LJ agreed with both the judgments by Buxton LJ and Morland J.

46. The next case which has been drawn to my attention in this context is Wye Valley Action Association Ltd, R (on the application of) v Herefordshire Council [2011] EWCA Civ 20. The issue in that case concerned a different provision in the 1999 Regulations, but statements of principle as to the general approach to be adopted by the courts in cases of this kind were also made. At paragraph 1, giving the only substantive judgment with which Smith LJ and Rix LJ agreed, Richards LJ identified:

> "The main issue in this appeal is whether Herefordshire Council was entitled to conclude that development consisting of the erection of polytunnels for soft fruit production on existing farmland in an Area of Outstanding Natural Beauty ... in the Wye Valley did not fall within the description 'projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes' in paragraph 1(a) of Schedule 2 to [the 1999 Regulations] and did not therefore require an environmental impact assessment ... pursuant to those regulations."

47. At paragraph 28, Richards LJ referred to the Goodman case, and in particular noted that the description "uncultivated land or semi-natural areas" is "imprecise and open-textured" and therefore the same approach needs to be adopted in relation to it as was adopted in Goodman in relation to paragraph 10(b) of Schedule 2, which of course is relevant in the present case.

48. Richards LJ said further:

> "34. Responsibility for determining under the 1999 Regulations whether a development for which planning permission is sought is an EIA development, including a decision on whether it falls within paragraph 1(a) of Schedule 2 ... lies with the local planning authority. The court's role is supervisory, to check that the decision was taken lawfully. The court must not take upon itself the function of primary decision-maker.
>
> "35. In determining the lawfulness of the council's decision in this case, the court must apply the approach laid down in Goodman ... I think that all parties were agreed on that, but it is in any event plainly the correct course. The description in paragraph 1(a) of Schedule 2 is

> inherently imprecise. The degree of imprecision is underlined by the Commission's guidance ... which effectively acknowledges that there is legitimate scope for differences of approach as between different Member States and even as between different authorities in a single Member State. It is therefore necessary to ask, first, whether the council correctly understood the meaning of the expression and, secondly, whether in applying the expression to the facts it reached a conclusion that was open to a rational decision-maker.
>
> ...
>
> "37. Considerable caution is required when considering the meaning of "uncultivated land or semi-natural areas". One has to accept the inherent imprecision of the expression and avoid glosses or attempted re-definition in pursuit of a spurious precision..."

49. Applying that approach to the facts of the case before him, Richards LJ went on, particularly at paragraphs 41 to 44, to identify the error of law into which the learned deputy judge in that case had fallen, which was, as I understand it, not sufficiently to distinguish between whether there had been a legal error which had crept into the approach adopted by the planning authority in that case and whether there had been an application of the law as correctly understood to the facts of the case. If a case is an example of the latter, then it is clear from Richards LJ's judgment that the only basis on which the court can intervene with the judgment of the planning authority is on the well known principle of irrationality.

50. The last of the main Court of Appeal decisions which were cited to me in the context is Save Britain's Heritage, R (on the application of) v Secretary of State for Communities and Local Government [2011] EWCA Civ 334. The main judgment was given by Sullivan LJ, with whom Toulson LJ and the Chancellor of the High Court agreed.

51. The issue in that case was whether demolition of buildings is capable of constituting a project, falling within Annex II of the directive (see paragraph 3(i) of the judgment). As Sullivan LJ said at paragraph 4 of his judgment:

> "4. Throughout these proceedings the Respondent's position has been that demolition does not fall within the definition of project in Article 1.2 of the Directive, and that even if it fell within that definition, demolition was not one of the projects listed in Annex II. In the Respondent's view, demolition is not within the scope of the Directive unless it is carried out as part of a project that does fall within Annex I or Annex II to the Directive."

52. At paragraph 17 of his judgment, Sullivan LJ noted that counsel before him had:

> "... readily accepted the proposition that the Directive must be interpreted in a purposive manner. If it is accepted that works are capable of having significant effects on the environment, the definition of 'project' in Article

> 1.2 should, if possible, be construed so as to include, rather than exclude, such works. Applying this approach to the first limb of the definition in Article 1.2, it seems to me that the execution of demolition works falls naturally within 'the execution of ...other...schemes...'. Demolition works are the antithesis of construction works, but the first limb of the definition is not confined to 'construction works', it expressly includes 'other schemes', ie schemes which are not construction works."

53. Finally at paragraph 26 of his judgment, Sullivan LJ so far as material said**:**

> "If demolition is capable of being a 'scheme' for the purposes of Article 1.2, it is also capable of being an 'urban development project' within paragraph 10(b) of Annex II, even though the project comprises only demolition and restoration of the site in accordance with a notice..."

54. In my view, there is, on proper analysis, no conflict between any of these authorities as to the approach to be taken by the court in cases of this kind. Without in any way wishing to summarise what I have more fully set out in the passages already quoted, it is clear that the correct approach is to envisage two stages. The first stage is to ask whether on well established principles of administrative law there has been any misdirection by the local planning authority as to the law. If there has, then it is the proper role of the court to correct that error of law.

55. The second question is to do with situations where the law is being applied to a particular set of facts. The court may only intervene in such a situation if the conclusion to which a local planning authority has come is one which is irrational.

The EIA issue

56. The claimant submits in the present case that the defendant authority did indeed adopt an erroneous approach in law in deciding that the proposal for floodlighting in this case did not fall within the scope of schedule 2 to the 1999 Regulations. Alternatively, the claimant submits that in applying the law to the present case the outcome of the defendant's conclusions was itself irrational.

57. It seems to me that crucial to determination of this issue are the reasons set out by Mr Moss in his first witness statement at paragraphs 13 to 14, and I will return to those in a moment. Before I do so, I should say that it is common ground before me that Mr Moss's witness statement should be read as a whole and that it should not be read as if it were a statute or a contract. It needs to be read fairly, having regard to Mr Moss's experience and qualifications and the purpose of the witness statement. With those considerations well in mind, I turn then back to those passages in Mr Moss's first witness statement.

58. Although paragraph 13 of that witness statement is in terms addressed to the question of whether the proposal fell within paragraph 10(b) of schedule 2 and paragraph 14 of the witness statement is addressed to the different question of whether the proposal fell within paragraph 13 of schedule 2, nevertheless it appears to me instructive to read the

passage as a whole, as I have been asked to do by both parties, because certain indications of the approach which Mr Moss was taking to each of those questions before him can be found in both of those paragraphs. Light is therefore shed on his thinking by reference, for example, to paragraph 14 when one is considering how he approached the issue expressly being considered in paragraph 13 and vice versa.

59. It seems to me that on a fair reading of Mr Moss's reasons for the decision to which he came, there are at least five indicators that he adopted an erroneous approach and misdirected himself as a matter of law. The first is when he says at paragraph 13:

> "I could not identify any reasonable comparison between the nature of a simple lighting column proposal before me with the far more substantive physical forms of urban development which are clearly embraced within 10(b)."

60. That suggests that Mr Moss was seeking to identify something similar to the kind of projects which are expressly set out in paragraph 10(b). But even allowing for the latitude which the phrase "any reasonable comparison" would give, that appears to me to be starting in the wrong place. The definition in paragraph 10(b) is expressly an inclusive one and not a exhaustive one. The real question in a paragraph 10(b) case is to ask whether a project is an urban development project. What then follows are simply examples of such projects. By asking himself whether a reasonable comparison could be made between the proposal before him and the other forms of urban development in paragraph 10(b), Mr Moss it seems to me misdirected himself in law by asking himself the wrong question. That is the first indicator.

61. The second indicator is that in paragraph 14, expressly in the context of the paragraph 13 of schedule 2 question, but cross-referring by implication to the underlying development project which is relevant in a paragraph 10(b) case also, Mr Moss says this:

> "They simply did not square with the category 'character' and limitations."

62. That again suggests that Mr Moss was approaching the question he had to decide by reference to whether something fell within a certain category, by reference in particular to its character and what he regarded clearly as being limitations set out in the legislation. But, as was made plain by Morland J in the Goodman case which I have already cited, the definition of urban development projects in paragraph 10(b) is in fact a wide one. The words used are not words of limitation, but words of description.

63. The third indicator that Mr Moss erred in law again appears in paragraph 14 of his witness statement, when he said:

> "It is also relevant to note that recreational development of land has its own heading in Schedule 2 and could have been included in paragraph 12 (Tourism and leisure) if relevant. As a result of the above, it is clearly, therefore, outside the category of an urban development project."

64. This again suggests that the approach Mr Moss was taking was to ask himself which of different pigeonholes a proposal could be put into by reference to its express language. Because this appeared to him to be a recreational project, but one which was not expressly set out in the list in paragraph 12 of schedule 2, he drew from that, it would seem, the inference that it could not be within the scope of schedule 2 projects at all.

65. The fourth indicator of an erroneous approach in law, it seems to me, is again the final sentence in paragraph 14 of his witness statement when he says:

> "For the avoidance of doubt, I am also clear in my view that these established tennis courts do not fall within Schedule 2 paragraph (12) development either, as there is no relevant entry within the list of leisure developments."

66. That again suggests that the approach Mr Moss was taking was not specifically to do with the fact that the lighting columns in front of him might not have been regarded as a particularly large project, because at this juncture of his reasoning, Mr Moss is clearly dealing with the underlying development which had already taken place several years earlier.

67. In this context, of course, one has to remind oneself of paragraph 7 of his fourth witness statement when Mr Moss had made it clear that when he is referring to "tennis courts", he does not just mean the physical surface where the playing of tennis would occur, but some of the associated development which I have already referred to when quoting from his fourth witness statement. Again, he seems in that passage to have asked himself the wrong question in the sense that he appears to be looking for a reference to a type of recreational development which is not to be found expressly in any of the paragraphs of schedule 2, and in absence of such a reference, drawing the inference, it would appear, that a project such as the development of tennis courts could not be within the scope of the schedule.

68. The fifth indicator is in similar vein. Earlier in paragraph 14 of his witness statement, Mr Moss stated:

> "Noting that this was already recreational land when the hard surfaced tennis courts were formed, I was convinced in my view that the tennis courts on the land were not an 'urban development project'."

69. That reference to tennis courts again, as his fourth witness statement has made clear, is intended to be a wide concept and not a narrow one.

70. There are two other legal errors as it seems to me disclosed in the passage which I have quoted at length from Mr Moss's first witness statement. The first relates to the sentence I have just quoted from, when he said that he had noted that this was already recreational land when the hard surfaced tennis courts were formed. It seems to me that that consideration has no relevance to the question that Mr Moss is in fact addressing at paragraph 14 or more generally the question of whether a project falls within schedule 2 of the Regulations.

71. If and in so far as it is meant to be a reason or part of the reasoning process that Mr Moss has adopted in answering that question in the negative, that again appears to me to be an erroneous approach in law. This is because it is readily possible to envisage that there may be recreational land in a given area where what takes place upon it is on any view an urban development project. The history of the site and in particular whether recreational use has taken place upon it beforehand is simply immaterial to answering the question whether what is now proposed is an urban development project and therefore falls within the scope of schedule 2.

72. The other legal error that it appears to me Mr Moss has fallen into is one identified by the claimant, whose submissions I accept on this point, based upon paragraph 13 of schedule 2 and the decision by Collins J which is referred to in the claimant's grounds, to which I will make reference now.

73. The case is Baker, R (on the application of) v Bath and North East Somerset Council [2009] EWHC 595 (Admin). In Baker, Collins J referred to the judgment of the European Court of Justice case of Abraham v Wallonne C-2/07, which held at paragraph 43 that:

> "It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works."

74. Collins J went on to state at paragraph 44 of his judgment:

> "It seems to me that that is clearly not only consistent with but applies the approach that it is necessary to look at the effect of any modification or modifications on the project, or on the development, and to see whether the whole, as modified, has or is likely to have other significant effects which need to be taken into account and may require an environmental impact assessment, albeit they do not fall themselves within the criteria which have been adopted by the Member State."

75. It seems to me, accepting the claimant's submission, that approach is also applicable in the present case. To take one example, although floodlighting itself might on one view be thought to have relatively limited impact on the environment, if what it does is to facilitate more extensive use of a sports facility for longer hours and at different times of the night or day, that may well have an impact on other relevant considerations, for example impact on car parking issues and other environmental impact. It is for that reason that, if the answer to the question posed by paragraph 13 of schedule 2 was to be answered correctly, as distinct from the question in paragraph 10, then a careful analysis was needed of what the local planning authority's view was on what the overall consequences of the project would be once there had been the change made by reason of the floodlighting, "change" being the word used in paragraph 13 of schedule 2.

76. As the claimant has submitted before me, there is no material before the court, either from Mr Moss in his four witness statements or any other documentary evidence contemporaneous or not, to show that the defendant authority ever carried out that exercise or analysis.

77. For all those reasons, therefore, I have come to the conclusion that this is a case where there have been misdirections of law and the planning permission granted in this case is vitiated by those misdirections.

78. I will turn, in those circumstances, more briefly to the next issue because it is common ground before me that, if that is the conclusion which I reach on the EIA issue, then the planning permission falls to be quashed. Nevertheless, for the sake of completeness I will deal with the conditions issues.

Conditions issues

79. In relation to condition 3, which I have already cited earlier in this judgment, two criticisms were made and they are helpfully summarised in paragraph 27 of the claimant's skeleton argument. The first criticism made is that:

> "Condition 3 on its face envisages that the floodlights may cause a nuisance -- indeed action under the condition is only possible in such an event. Since the condition must have been considered necessary by the defendant, it must follow that the defendant accepted that there was a prospect of a nuisance by reason of light. Yet such a conclusion is inconsistent with the defendant's position in these proceedings that there would be no significant impacts on residential amenity."

80. I do not see any inconsistency at all. On a fair reading of what the summary of reasons by the planning committee itself was saying, based upon the material which the committee had before it including the reports from Capita Symonds from which I have already quoted extensively above, it seems to me that they were accepting the recommendation in the report by Capita Symonds. As Capita Symonds reminded the committee and the Authority more generally, it is not possible, even with the best of designs, to guarantee a complete elimination of any deleterious effects of a lighting project such as the present one. It was Capita Symonds themselves who recommended that a condition like condition 3 be imposed in order to mitigate, but not therefore necessarily to eliminate, all the possible adverse consequences for amenity.

81. That recommendation was clearly accepted by the committee, and in doing the best they could to mitigate the possible adverse effects on residential amenity, the committee imposed the condition for that reason.

82. The second criticism that is made by the claimant of condition 3 is that:

> "...The condition is limited in time to 12 months and in scope by the requirement that any measures required of the defendant be 'reasonably practicable'. There is no evidence ... that the defendant refers to which assesses the extent to which it will be reasonably practicable to mitigate

> any nuisance which may arise or which demonstrates that the defendant in fact considered this matter ... No reasonable decision maker [in other words invoking the principle of irrationality] would have granted planning permission subject to this condition without a thorough assessment of the extent to which it would be effective in preventing light nuisance from arising."

83. An analogy is sought to be drawn with the decision of Wyn Williams J in Technoprint Plc & Anor, R (on the application of) v Leeds City Council & Anor [2010] EWHC 581 (Admin) at paragraph 45. In my view, there is no proper analogy with that case. Each case has to be considered on its own facts, and in the circumstances of the present case it is clear to me that what the local planning authority through its relevant committee was doing was seeking to accept the recommendation, as I have said, of Capita Symonds, and impose a condition which would so far as reasonably practicable mitigate, but not necessarily eliminate, all the possible detrimental environmental effects.

84. The 12-month limitation on analysis, it seems to me, was not in fact a temporal limitation at all. The condition was in fact to remain in that the equipment required would have to be maintained after the 12-month period. 12 months was simply chosen because it would be possible in practice to identify and correct any mistake in the initial installation or design of the lighting concerned, and it should be possible, therefore, to put matters right in the first 12 months. This condition is giving the local planning authority power to intervene to require such works within that time frame.

85. I turn then to the criticism made by the claimant of condition 2, and in particular what has been described as the tailpiece to that condition, in other words the clause which indicates that a variation of the condition can in effect be made by writing in a decision by the local planning authority in respect of hours. In this context, the claimant invokes a principle to be found in a judgment by Ouseley J in Midcounties Co-Operative Ltd, R (on the application of) v Wyre Forest District Council [2009] EWHC 964 (Admin). In that case, as is apparent from paragraph 7 of the judgment, there was a condition imposed on a planning permission relating to a new supermarket in the following terms, so far as material:

> '"The food store hereby approved shall not exceed the following floor space allocations (maxima) [...] unless otherwise agreed in writing with the Local Planning Authority."'

86. At paragraph 66 of his judgment, Ouseley J said:

> "It makes hopelessly uncertain what is permitted. It enables development not applied for, assessed or permitted to occur. It side steps the whole of the statutory process for the grant of permission and the variation of conditions..."

87. Then at paragraph 70, Ouseley J continued**:**

> "... While the tailpiece in the condition in question could be applied in that way, it contains no words purporting to limit its application. The tailpiece on its face does enable development to take place which could be very different in scale and impact from that applied for, assessed or permitted and it enables it to be created by means wholly outside any statutory process. It undermines the effect of specifying floorspace limits. I do not consider that a public document such as a planning permission should contain such a provision. It is unreasonable that the public should be expected to know that the plain meaning of the tailpiece was so radically qualified by Henry Boot and Lever (Finance), nor should it be expected to know that giving effect to its apparent scope would be unlawful for the reasons given by Mr Holgate in relation to Henry Boot in particular. The consequence is that unless the tailpiece can be excised and quashed, the condition is unlawful and so too is the planning permission. No question of severing the condition from the planning permission could arise. The floor space limits are of central importance."

88. Eventually and in the result, Ouseley J concluded in the circumstances of that case that the tailpiece was to be excised from condition number 6.

89. Very much the same it seems to me, accepting the claimant's argument on this point, can be said about the present case. Paraphrasing what Ouseley J said in my own words, it seems to me that tailpieces of the kind in question in both cases offend against the rule of law. This is because the public, and not only the parties to the particular planning permission concerned, are entitled to know in public documents what planning permission relates to a given development, and what therefore is permitted and what is not.

90. The tailpiece in question leaves wholly uncertain for example who is to grant the variation, according to what criteria which may be non-existent or at least unpublished and secret. On the face of it at least there is nothing to stop, it would seem, an application being made to vary the temporal limitations in condition 2 to such an extent that "any" day could become each and every day, or perhaps each and every day over a sustained period of time.

91. For all those reasons, it seems to me, the tailpiece was unlawful. But it is common ground before me that if I came to that conclusion, then it would be possible to delete the tailpiece from condition 2 without having to quash condition 2 in its entirety, still less for this reason having to quash the planning permission as a whole.

Conclusion

92. For the reasons I have given, this claim for judicial review is granted and as a consequence of my decision on the EIA issue, the planning permission, as is common ground, falls to be quashed in its entirety. Even if I had not come to that conclusion on the EIA issue, I have concluded that the tailpiece attached to condition 2 is unlawful and it is common ground before me in those circumstances that the tailpiece alone would fall to be quashed on that alternative scenario.

93. MR PEREIRA: My Lord, I am grateful. There are two matters I want to raise. The first is just a few points in the judgment which are obviously a matter entirely for you, but on the first occasion when the regulations and then when the directive are introduced, my Lord may want to think about inserting "(As amended)" if they have been amended.

94. Then, my Lord, when the quotation from paragraph 66 of the Ouseley J judgment was given, that is actually Ouseley J referring to the claimant's submission, albeit he later agrees with those submissions.

95. THE DEPUTY JUDGE: I see, yes. I will make that clear in perfecting my judgment. Thank you for reminding me of that.

96. MR PEREIRA: I am also told that the citation for Baker at paragraph 24, page 17, in the grounds should be [2009] EWHC, not [2010] EWHC.

97. THE DEPUTY JUDGE: Right, thank you for correcting that. Yes, is there anything else?

98. MR PEREIRA: My Lord, there is then the question of costs and **(Inaudible)** we would like you to summarily assess costs. Schedules have been provided. I do not know if you have them.

99. THE DEPUTY JUDGE: I have not seen them. I know that there was a PCO made in this case.

100. MR PEREIRA: There was.

101. THE DEPUTY JUDGE: And a corresponding limitation on the defendant's liability.

102. MR PEREIRA: There was, and there is an issue that arises on that.

103. THE DEPUTY JUDGE: Yes.

104. MR PEREIRA: My application is that costs should follow the event in the normal way. Both myself and my solicitors are working on a conditional fee basis with an uplift. The cost cap that was imposed which I will have to come back to was £15,000. You will see that without the uplift and without VAT, the total comes to £19,500.

105. THE DEPUTY JUDGE: Right.

106. MR PEREIRA: That is the first bold box on the second page.

107. THE DEPUTY JUDGE: Without the uplift.

108. MR PEREIRA: Yes, without the uplift. We can see my solicitors' costs are on the first page, £13,841, then mine without the uplift.

109. THE DEPUTY JUDGE: What can I do in these circumstances when you have only be given a ceiling of £15,000?

110. MR PEREIRA: My Lord, I am raising that with you because as I understand it Mr Reed may make an application that there should be some partial award, and therefore a discount on our costs. Therefore I am drawing this to your attention so that you can see where our base costs without the uplift fall in relation to the £15,000 cap because it may not make any difference. Even if you make a reduction on our costs, they may still be above the cap anyway.

111. My Lord, that is the first matter. The second matter is that there is a question arising about whether the £15,000 should include VAT or whether VAT should be on top of the £15,000. My Lord, Mr Reed's position, as I understand it, will be that the £15,000 should include VAT, that is to say that is the total that should be payable. My position, but I will need expand upon it, is that it should be read as £15,000 with VAT allowed on top. If you are not with me on that, my application is for to you amend the costs cap to allow that, and I can I explain why I say that.

112. THE DEPUTY JUDGE: Yes.

113. MR PEREIRA: My Lord, the application was made in the claim form and it starts on page 23 of the bundle.

114. THE DEPUTY JUDGE: Yes.

115. MR PEREIRA: Having said what we were asking for, which was a cap to cap the costs liability to the defendant and interested party, £2,500, there is then a recitation of relevant case law. At paragraph 51 on page 25, there is a reference to costs likely to be incurred. You can see about two-thirds of the way down that paragraph, it says:

> "Indeed, the Applicant submits that beyond this sum a public law claim is likely to be too expensive for most, if not all, individuals. The Applicant's base costs to trial are estimated to be £20,000 plus VAT..."

116. So that was the way our costs were being expressed. My Lord, when the defendant replied to this and the reply you will find starting at page 43 of the bundle, it is said in effect there is no justification for the order. But then if we turn to page 45, paragraph 45, there is a reference to the Garner case:

> "[It was] indicated that the evidence presented by the Claimant (which was given by the same solicitors acting in this case for the Claimant) as to the costs of a one-day straightforward judicial review is £15,000 plus VAT..."

117. So both sides were talking about a sum plus VAT. Then at paragraph 46, the defendant was saying there should be a PCO or alternatively a reciprocal cap at £15,000. But when read together with 45, one would naturally read that as £15,000. Lindblom J made an order capping the relevant liability for costs at £15,000, but not saying anything about VAT.

118. My Lord, if you then turn to page 259/1 of the bundle, you will see that this matter was then raised by my solicitors in a letter to the court which was copied to the defendant's solicitors. The second paragraph says:

> "We note that the Judge has limited the Defendant's cost liability towards our client's costs to £15,000. We will assume, unless we hear anything to the contrary, that this sum is plus VAT."

119. And then there is a mention of the Garner case. Then on the following page, there is a letter from the defendant's solicitors saying:

> "We refer to the order of Mr Justice Lindblom dated 14 February 2011, a copy of which we enclose... We would point out that we are considering the directions and the Protected Costs Order with our client."

120. So the matter was raised, both with the court and with the defendant. We know the defendant was taking advice on the order. We never received any response from either, as it happened, and certainly from my perspective I only realised this point was being taken against us in relation to VAT when my Lord rose prior to lunch.

121. So my submission in those circumstances is either that the order, having regard to the way the parties put their cases, should be £15,000 plus VAT; or, if you are not with me on that, I apply formally for you to amend the order so that it has that effect and that application will be made under part 3 of the CPR which gives my Lord a power to amend orders.

122. My Lord, in my submission, it is entirely just and fair, because in that way it would simply be reflecting the position which the defendant said it wished to be in.

123. THE DEPUTY JUDGE: Well, it may be supportive of your submission if I make the observation that one is aware from general knowledge that on 1 January this year the rate of VAT was increased. As I understand it, VAT is essentially a form of tax where a person registered for VAT is required by the state to be a tax collector. You do not keep the money yourself, or at least you should not. The money was resting in your account, as sometimes it is said, if you have not paid it on, but you are supposed to pay it on and you are effectively a tax collector. The thing could be doubly unjust if in the meantime for extrinsic reasons not within the person's control, the Government raises the rate of VAT, you will have to pay it. Yet if the order does not either implicitly or explicitly exclude VAT, you will have to bear the loss then. Is that what you are saying?

124. MR PEREIRA: My Lord, yes, that is why we wish the order to be interpreted or amended, to have that effect. There is obviously a material difference between a costs cap that allows us on top of that to claim VAT and one that does not, particularly in the circumstances where our costs are capped already.

125. THE DEPUTY JUDGE: I understand the submissions.

126. MR PEREIRA: My Lord, those are my submissions.

127. THE DEPUTY JUDGE: Thank you. Yes.

128. MR REED: My Lord, can I make two points. My instructions are that the order is clear and on the face of that order it says £15,000, and that is how it should be interpreted. My Lord, that is what I say in terms of response to Mr Pereira's submissions on that issue. Can I deal with the question of the issue-based award of costs question, if I can put it like that.

129. THE DEPUTY JUDGE: Just on that first point, Mr Reed, suppose I am with you that on its terms that is what the order says. Do you wish to say anything to me as to whether I should vary that in order to make it clear that the ceiling is £15,000 plus VAT, for the reason I have already provisionally indicated to Mr Pereira that I would tend to take the view that justice requires that the burden of paying VAT should not fall on a particular person who is a party to litigation, because they are effectively just collecting the tax on behalf of the Treasury.

130. MR PEREIRA: My Lord, all I say on that issue is that the decision of Lindblom J was made in the light of those submissions and included the question of VAT and nevertheless he imposed it as not including VAT.

131. THE DEPUTY JUDGE: Well, he did not say anything about it.

132. MR REED: He did not say anything about it, **(Inaudible)** and in the light of that consciously reached the conclusion it should be £15,000.

133. THE DEPUTY JUDGE: I understand that submission.

134. MR REED: That is the first point. The second point, if I can deal with it, my Lord, is that of course on the conditions issue, in terms of the important parts of the challenge which may have led, if they were successful, to quashing the decision, of course the claimant was unsuccessful on those points. In the light of that, my Lord, I ask that there be a percentage reduction in the amount of costs awarded to reflect that failure to succeed.

135. My Lord, the point has been made by Mr Pereira that if one looks at the actual costs that have been incurred, whatever reduction might be made, it will not be so significant as to in fact eat into any part of the costs cap that has been imposed by Lindblom J. My Lord, what I say about that is that the proper approach is to look at the costs cap and to ask the question on that costs cap, what percentage reduction should there be? It is irrelevant that there may be more costs incurred by the claimant in this issue because the cap is there, that is the purpose of the cap. To then seek to go behind that when dealing with the issue-based award in my submission is not reflective of the import of that costs cap.

136. THE DEPUTY JUDGE: Do you have a suggestion as to what the reduction ought to be to reflect the issue-based approach?

137. MR REED: My Lord, I was anticipating something in the region of 20 per cent, reflecting of course that the primarily submission was on the **(Inaudible)**. I do not seek to go behind that.

138. THE DEPUTY JUDGE: I was against you also on the tailpiece point.

139. MR REED: My Lord, yes, and my 20 per cent is reflective of that. My Lord, those are the submissions.

140. THE DEPUTY JUDGE: Thank you very much.

141. Do you want to deal particularly with the last point?

142. MR PEREIRA: Yes. My Lord, the costs cap is to limit the overall liability of one party to the other. It does not change what the actual costs incurred in the case are, and any percentage reduction should fairly be a percentage reduction on the overall costs. Otherwise, the claimant with the costs cap is being, as it were, penalised twice: he has the burden of the costs cap and then he has the further burden of the reduction being imposed not on the general costs but on the costs that are already capped. So, my Lord, in my submission the proper approach is to make a reduction if one is to be made **(Inaudible)**.

143. THE DEPUTY JUDGE: Do I not need to reflect in some way, if there is a partial victory, that it is that, because otherwise the purpose of having costs rules might be undermined, which is that people would just make arguments, take a chance, knowing that even if they lose actually there is no costs exposure?

144. MR PEREIRA: My Lord, there are two issues: one is the principle of the reduction in the first place and the other is to what sum should that reduction be applied. I was dealing with the second of those. It should be applied on the totality of the costs, not the capped costs.

145. THE DEPUTY JUDGE: So what you are saying, I think, is that suppose you had lost much more of the case, let us say I was asked to make a 50 per cent reduction, then your £19,000 would go down to £9,500. You would still say that that is the way to do it, not that you take £15,000 and reduce it to £7,500.

146. MR PEREIRA: My Lord, yes, because a reduction in costs is reducing the amount of our costs.

147. THE DEPUTY JUDGE: So if you just take your schedule, even excluding the success fee, you say the total is £19,500.

148. MR PEREIRA: Yes.

149. THE DEPUTY JUDGE: Which is for all practical purposes, let us round it up to £20,000, that just makes the maths easier. So if I accept the defendant's submission that I should make a 20 per cent reduction on that to reflect an issue-based approach, first of all do you accept that?

150. MR PEREIRA: My Lord, I accept it is within your discretion **(Inaudible)**.

151. THE DEPUTY JUDGE: And 20 per cent you would not quibble with in principle?

152. MR PEREIRA: My submission was going to be 10 per cent, because of the minor nature of the issue, but that is entirely for your judgment.

153. THE DEPUTY JUDGE: The point of more importance that you are making, if I may say so, is that even if I accept the submission that it is 20 per cent, that will take you down to £16,000 or so, and that is the correct approach in principle, it has been capped, there is a ceiling. What you do not do is start with the £15,000 and say there is going to be 20 per cent off that.

154. MR PEREIRA: Yes, and you are not infringing the costs cap in any way doing that.

155. THE DEPUTY JUDGE: Because it is always envisaged, as I understand it, everyone knows the realities of mitigation in this country, and whatever the reasons for that may be, it is not for me to go into today. Mitigation is very expensive in this country, and it is recognised whenever caps are imposed that they are not likely to be reflective of actual costs.

156. MR PEREIRA: That is absolutely right.

157. THE DEPUTY JUDGE: So people are always taking a risk anyway that work done, and no one suggests the work has not been done or that it was not done for a reasonable rate, it is always recognised whenever the court imposes a ceiling, for example on a PCO, that costs will actually be incurred which are never going to be recovered in fact.

158. MR PEREIRA: My Lord, that is right and obviously I do not have the documents here and it would not be appropriate to refer to them, but one of the points that Sullivan J said in his report on costs in environmental litigation, one of the points he made was that the effect of having reciprocal costs capping is that lawyers sometimes end up subsidising the litigation there is then a limit placed on what they can recover. There is a double risk, because we are also acting on a conditional fee.

159. THE DEPUTY JUDGE: You are saying I should approach it on the basis of a base costs figure.

160. MR PEREIRA: Yes, on the assumption that any reduction you make would not make a material difference because of the costs cap that is in place.

161. THE DEPUTY JUDGE: That is very helpful.

162. MR PEREIRA: My Lord, I am just asked, I do not think it will change anything, but the costs schedule was obviously made on the basis of a one-day case, so there are additional costs.

163. THE DEPUTY JUDGE: Well, if anything I do not think it is going to make any difference to what I am about to say.

164. First of all, I will exercise my discretion to vary the order of Lindblom J to make it clear that the costs ceiling is to be £15,000 plus VAT. Indeed, in so far as it may be necessary for the basis of reciprocity, on the other side the ceiling of the PCO is £2,500 plus VAT. It seems to me that that is the just order to make in this case, because even if it was not necessarily what Lindblom J had in mind, which it may well have been given the nature of the submissions that were put before him by both sides, but leaving that out of the count and take the decision afresh myself, it seems to me that that is reflective of the justice of the case.

165. There are two essential reasons for that: one is that, as I understand it, the way in which the VAT scheme works in this country is the that registered VAT payer is simply acting as a sort of tax collector on behalf of the Treasury, and as a conduit through which publicly required taxation is collected. The second is that it could well be, as indeed by coincidence has happened in this case, that while a case is proceeding from start to finish the rate of VAT may be increased or indeed decreased. The loss, it seems to me, in that sort of situation should not in principle fall upon the legal representatives or the lay client concerned. Whatever VAT is in fact due ought in principle, it seems to me, to be recoverable from the losing party when an inter partes costs order is made. So that is what I decide on the VAT question.

166. On the issue-based reduction point, I accept the defendant's submission to me in the sense that I will make a 20 per cent reduction on the overall costs claimed by the claimant, which I am told on the base costs, assuming a one-day hearing, would have been £19,506. I am told that may in fact be a higher figure now, because the case has gone into a second day. But in any event, what I also make clear is that I order, again exercising my discretion that that reduction is to be made on the actual costs, not from the ceiling of £15,000.

167. It seems to me again that that is the just approach to apply in cases of this sort because there is always a ceiling, and so it is always recognised that there is a serious risk that the party concerned will never recover from the defendant the actual costs incurred. Suppose, for example, on an issue-based approach the court were to reduce the costs recoverable by a claimant by 50 per cent. On that basis, if the defendant's argument were right, then for a completely arbitrary reason the reduction would be from £15,000 down to £7,500, whereas it seems to me the more just approach would be that the reduction ought to be from £19,500 down to whatever it would be, approximately £9,500, well below the ceiling. So the ceiling is not something that the claimant is actually entitled to, come what may, but it is supposed to be a ceiling and no more than that. It is not a substitute as it were which is deemed to be the total actual costs incurred. So for those reasons, I will make an order in the terms that I have outlined.

168. Now is there anything else?

169. MR PEREIRA: My Lord, just that we would ask for payment within 14 days.

170. MR REED: My Lord, I have no instructions on that particular point, so I cannot respond.

171. THE DEPUTY JUDGE: 14 days. Can you both please draft an agreed order reflecting what I have decided today. When I rise, the clerk will give you her email address, and if you would kindly communicate with her, she will then run the draft order past me. This is my last day of sitting at present, and so I will be available in my chambers in the normal way. Is there anything else?

172. MR REED: No, thank you.

173. MR PEREIRA: No, thank you.

174. THE DEPUTY JUDGE: Thank you both very much for your assistance, and can I thank the court staff for staying a little bit later than normal as well.