R. (ON THE APPLICATION OF CAIRNS) v HERTFORDSHIRE CC

QUEEN'S BENCH DIVISION

Lang JDBE: 2 August 2018

[2018] EWHC 2050 (Admin); [2019] Env. L.R. 6

Archaeological sites; Green belt; Planning authorities' powers and duties; Planning conditions; Planning permission; Screening opinions; Secondary schools

H1 *Town and Country Planning—environmental assessment—"negative" screening opinions—failure to mention potential significant environmental effects on likely archaeological remains—whether mitigation measures should be taken into account—whether screening decisions irrational—whether failure to undertake adequate assessment of effects—whether relief should be granted*

H2 The claimant (C) was a local resident who applied for judicial review of a grant of planning permission by the defendant (H) to itself or the construction of a new secondary school on a site in the Green Belt. The proposed development was within Sch.2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and was the subject of two screening opinions; one in August and the second in September 2017. H determined in both that the proposed development did not comprise "EIA development". By the time of the second screening opinion, reports were available that identified likely Anglo-Saxon graves. For unexplained reasons, the opinion made no mention of the potential significant environmental effects of the proposal on the archaeological remains. C submitted that the decisions in both screening opinions were irrational; failed to make any, or any legally adequate, assessment of the likely effects of the development, particularly on the openness of the Green Belt and on the archaeological significance of the site; and/or failed adequately to assess the significance of those effects. Arguments included that mitigation measures should not have been taken into account, relying on *People over Wind v Coillte Teoranta (C-323/17)* [2018] Env. L.R. 31.

H3 **Held**, in dismissing the claim:

H4 (1) The *People over Wind* decision related to the Habitats Directive. The EIA Directive, as amended, expressly required consideration of "the possibility of effectively reducing the impact". The domestic courts had also confirmed that mitigating measures could be a relevant factor, prior to the change to the Directive.

H5 (2) When considering the effect of the development on the openness and purposes of the Green Belt, H had given appropriate and sufficient consideration to the relevant criteria and made a legitimate exercise of judgment.

H6 (3) The conclusions in the two screening opinions did not come anywhere near the high threshold for a finding of irrationality. Although the reasons given were brief, they had been sufficient to discharge the duty imposed under the regulations.

H7 (4) Schedule 3 to the Regulations required H to have particular regard to sites of historical or archaeological significance. On the balance of probabilities, it was likely that the issue of the potential significant environmental effects of the proposal on the archaeological remains had been accidentally overlooked by the author of the screening opinion. The archaeological remains had been referred to in the first screening opinion and by September 2017 there was new evidence which indicated that there were significant archaeological remains which could be adversely affected by works at the Site. At the very least, the potentially significant effects of the proposal on the archaeological remains ought to have been included and assessed in the screening opinion. In consequence, the screening opinion was incomplete, and it failed to meet the statutory requirements under reg.5(4). If such an assessment had been properly carried out, it would probably have led to the conclusion that the proposal was likely to have significant effects on the archaeological remains. It was apparent at this stage that the remains either had to be protected on site or excavated. If, on the other hand, H had considered the issue, but decided that it did not need to address the effect of the proposal on the archaeological remains, then its assessment had been inadequate, and it had failed to state the main reasons for its conclusions in respect of it, contrary to reg.5(5).

H8 (5) Relief would, however, be refused. The evidence in this case left no doubt that, even if the significant environmental effects of the proposal on the archaeological remains had been assessed in the second screening opinion, and the proposal had been treated as EIA development, the outcome would have been the same. Permission would still have been granted because the proposal did not include any construction near the site of the remains. H would have imposed conditions on the grant of planning permission, to ensure that the site of the remains was appropriately protected. For those reasons, there would be no purpose in quashing the grant of planning permission in order that the EIA process could be properly followed.

H9 (6) Further grounds relating to the approach to material considerations were dismissed.

H10 **Cases referred to:**

British Telecommunications Plc v Gloucester City Council [2001] EWHC Admin 1001; [2002] 2 P. & C.R. 33; [2002] Env. L.R. D10

Edinburgh City Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447; [1998] 1 All E.R. 174; HL

Hockley v Essex CC [2013] EWHC 4051 (Admin); [2014] Env. L.R. 24

People over Wind v Coillte Teoranta (C-323/17) EU:C:2018:244; [2018] P.T.S.R. 1668; [2018] Env. L.R. 31; ECJ

R. (on the application of Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157

R. (on the application of Birchall Gardens LLP) v Hertfordshire CC [2016] EWHC 2794 (Admin); [2017] Env. L.R. 17

R. (on the application of Champion) v North Norfolk DC [2015] UKSC 52; [2015] 1 W.L.R. 3710; [2016] Env. L.R. 5

Secretary of State for Communities and Local Government v Hopkins Homes [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] P.T.S.R. 623
Seddon Properties Ltd v Secretary of State for the Environment (1981) 42 P. & C.R. 26
Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; [2012] P.T.S.R. 983; 2012 S.C. (U.K.S.C.) 278

H11 **Legislation referred to:**
Senior Courts Act 1981 s.31
Directive 85/337 (EIA) art.2
Town and Country Planning Act 1990 s.70
Planning and Compulsory Purchase Act 2004 s.38
Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) regs 2, 3 & 4 and Schs 2 & 3
Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) regs 3, 5 & 76 and Schs 2 & 3

H12 *Mr A. Goodman*, instructed by Downs Solicitors LLP, appeared on behalf of the claimant.
Mr R. Glover QC, instructed by the Council Legal Department, appeared on behalf of the defendant.
Ms I. Tafur, instructed by the Council Legal Department, appeared on behalf of the first interested party.
Mr T. Buley, instructed by the Government Legal Department, appeared on behalf of the second interested party.

JUDGMENT

LANG J:

1 The Claimant applied for judicial review of a grant of conditional planning permission by the Defendant to itself, on 15 March 2018, for the construction of a new secondary school, on a site north of Lower Luton Road, Harpenden, Hertfordshire ("the Site"), which is in the Green Belt.

2 The Site is an open area, about 17.20 hectares in size, comprising grassland used for agricultural purposes (grazing cattle). There are trees and hedgerows on the Site, together with other vegetation. Planning permission has been granted for school buildings, new vehicular and service access, pedestrian access, car parking, cycle storage, coach parking, playing fields, tennis courts/multi-use games area, surface water attenuation measures, hard and soft landscaping and other associated development.

3 The Claimant's overarching challenge was to the manner in which the Defendant concluded that the proposed development, which would harm the Green Belt, was nonetheless justified by very special circumstances, and so ought to be approved under the development plan (Policy 1 Metropolitan Green Belt) and the National Planning Policy Framework ("the Framework"), at [87].

4 The Claimant is a local resident who objected to the development in his own right and as chair of a campaign group called Right School Right Place ("RSRP").

5 The Defendant is the local planning authority for the area in which the Site is situated.

6 The First Interested Party ("IP1") is the education authority for the area which applied for planning permission to construct the school, together with the Education and Skills Funding Agency, an executive agency of the Department for Education. For convenience, they are referred to as "the Applicants". The Secretary of State for Education is the Second Interested Party ("IP2").

7 Ouseley J directed that the claim be listed for an expedited rolled-up hearing, as the Applicants hope to commence construction soon to enable the school to open in September 2019.

Legal and policy framework

8 Section 70(2) TCPA 1990 provides that, in deciding whether to grant or refuse planning permission, the decision-maker shall have regard to:

> "(a) the provisions of the development plan, so far as material to the application…
> (b) any local finance considerations so far as material to the application, and
> (c) any other material considerations."

9 Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

10 In *City of Edinburgh Council v Secretary of State for Scotland* 1998 S.C. (HL) 33; [1997] 1 W.L.R. 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters… By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is helpful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission….. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It

has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell J observed in *Loup v Secretary of State for the Environment* (1995) 71 P & C.R. 175, 186:

> 'What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations.'

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

11 This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, per Lord Reed at [17].

12 In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37 [2017] 1 W.L.R. 1865, Lord Carnwath warned against the excessive legalisation of planning decision-making, based on challenges to the interpretation of national and local policies, (at [23]–[26]). He said (at [26]) that recourse to the courts may sometimes be needed to resolve distinct issues of

law, or to ensure consistency of interpretation in relation to specific policies. But issues of interpretation, which are appropriate for judicial analysis, should not be elided with issues of judgment in the application of that policy.

13 It follows from the principles set out above that the Claimant's challenge to the grant of planning permission can only succeed on public law grounds. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P. & C.R. 26.

National Planning Policy Framework[1]

14 The National Planning Policy Framework ("the Framework") is a material consideration to be taken into account when applying s.38(6) PCPA 2004 in planning decision-making, but it is policy not statute, and does not displace the statutory presumption in favour of the development plan: *Hopkins Homes Ltd*, per Lord Carnwath at [21].

15 Relevant parts of the Framework provide:

> "17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:
>
> …
>
> • take account of the different roles and character of different areas, promoting the vitality of our main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it;
>
> …"
>
> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 80. Green Belt serves five purposes:
>
> • to check the unrestricted sprawl of large built-up areas;
> • to prevent neighbouring towns merging into one another;
> • to assist in safeguarding the countryside from encroachment;
> • to preserve the setting and special character of historic towns; and
> • to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."
>
> 87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt.

[1] All references are to the first edition of the Framework published in March 2012, which was operative at the date of the relevant decisions. the second edition was published on 24 July 2018, after the hearing.

> 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
> 89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
> …..
> 90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:
> … "

Local Plan

16 Policy 1 Metropolitan Green Belt is a saved policy in the Local Plan which identifies the Metropolitan Green Belt, which is in effect, all the areas outside the town of Harpenden and nearby settlements. The restrictions on development in the Green Belt reflect national policy preventing development (other than for specified purposes) unless there are "very special circumstances".

Environmental Impact Assessment

17 Article 2(1) of the EIA Directive 85/337/EEC (as amended) requires Member States to adopt all measures necessary to ensure that, before consent is given, projects likely to have a significant effect on the environment are made subject to an assessment of their effects. The Directive was implemented into UK domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations 2011"), and thereafter by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations 2017").

18 A planning authority is prohibited from granting planning permission for "EIA development", as defined, unless it has "taken the environmental information into account" (reg.3 of the EIA Regulations 2011), or carried out an EIA in respect of the development (reg.3 of the EIA Regulations 2017).

19 "EIA development" is defined in reg.2(1) of the EIA Regulations 2011 and 2017 as Schedule 1 development or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

20 It was common ground that the proposed development in this case was Schedule 2 development, namely, an "urban development project", within the scope of para.10(b) of Sch.2, which exceeded the statutory threshold of more than 5 hectares ("ha"). The issue was whether it was "likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

21 In deciding whether Schedule 2 development is EIA development, the planning authority must take into account such of the selection criteria set out in Sch.3 as are relevant to the development (reg.4(6) of the EIA Regulations 2011 and reg.5(4) of the EIA Regulations 2017). Schedule 3 includes criteria which relate to the characteristics of the development, its location and its potential impact.

Ground 1

22 The Claimant challenged the Defendant's first screening opinion, dated 4 August 2017, made pursuant to the EIA Regulations 2011. It was common ground that, since the application for the first screening opinion was dated 15 May 2017 (the day before the EIA Regulations 2017 came into force on 16 May 2017), the EIA Regulations 2011 applied, by virtue of the transitional provisions in reg.76(3) of the EIA Regulations 2017.

23 The Claimant also challenged the Defendant's second screening opinion dated 26 September 2017, which stated that it was made pursuant to an application dated 11 September 2017, under the EIA Regulations 2017. In my judgment, the Defendant and IP1 correctly submitted that the second screening opinion was governed by the EIA Regulations 2017 as the application post-dated the coming into force of the EIA Regulations 2017.

24 In both screening opinions, the Defendant decided that the proposed development fell within paragraph 10(b) of schedule 2 to both the EIA Regulations 2011 and the EIA Regulations 2017, since it was an urban development project exceeding 5 ha. However, the Defendant went on to decide, in both screening opinions, that the proposed development was not an EIA development, as defined in reg.2 of both the EIA Regulations 2011 and the EIA Regulations 2017, as it was not "likely to have significant effects on the environment by virtue of facts such as its nature, size or location".

25 The Claimant submitted that the Defendant's decisions in both screening opinions were irrational. They failed to make any, or any legally adequate, assessment of the likely effects of the development, particularly on the openness of the Green Belt and on the archaeological significance of the site; and/or failed adequately to assess the significance of those effects. In consequence, planning permission was considered and granted without legally adequate consideration as to whether the development constituted an EIA development.

Challenges to screening opinions—legal principles

26 In considering the Claimant's submissions, I reminded myself that the local planning authority has been entrusted with the task of judging whether the development is likely to have significant effects on the environment, and the Court will only intervene if it errs in law. In *R. (Hockley) v Essex County Council* [2013] EWHC 4051 (Admin), Lindblom J helpfully reviewed the authorities at [23]–[25]:

> "23. In *R. (on the application of Jones) v Mansfield District Council* [2004] Env. L.R. 21 Carnwath L.J., as he then was, emphasised (in [58] of his judgment) that 'the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle race', and that "it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case.
>
> 24. In *R. (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 Moore-Bick LJ said (in [20] of his judgment) that it was important to bear in mind 'the nature of what is involved in giving a screening opinion'. A screening opinion, he said, 'is not intended to involve a detailed assessment of factors relevant to the grant of planning permission;

that comes later and will ordinarily include an assessment of environmental factors, among others'. Nor does it require 'a full assessment of any identifiable environmental effects'. What is involved in a screening process is 'only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all'. The court should not, therefore, impose too high a burden on planning authorities in what is simply 'a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment …'. In the light of the decision of the *European Court of Justice in Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Lnadbouw, Natuurbeheer en Visserij* [2004] E.C.R. I-7405 and the Advocate General's opinion in *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* [2010] Env. L.R. 18 Moore-Bick LJ said (in [17] of his judgment) that a likelihood in this context was 'something more than a bare possibility … though any serious possibility would suffice'. 25. In *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, Pill L.J., with whom Toulson and Sullivan L.JJ. agreed, said (in [31] of his judgment) that there was 'ample authority that the conventional *Wednesbury* approach applies to the court's adjudication of issues such as these'. That principle is firmly established in the domestic jurisprudence. For example, in *R. (on the application of Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114) Beatson LJ said (in [22] of his judgment) that the 'assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of "likelihood" and "significance"' (see also [40] of Laws L.J.'s judgment in *Bowen-West v Secretary of State* [2012] EWCA Civ 321). In *Jones v Mansfield* Carnwath LJ said (at [61]) that because the word 'significant' does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped."

27 More recently, in *R (Birchall Gardens LLP) v Herts CC* [2017] Env. L.R. 17, Holgate J reiterated these principles at [66]–[67]:

"66. It is common ground that the analysis in [20] of the judgment of Moore-Bick LJ in *R. (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 continues to apply to the screening process under the 2011 Regulations (*Mackman v Secretary of State for Communities and Local Government [2015] EWCA Civ 716;* [2016] Env. L.R. 6 at [7]). A screening opinion does not involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include environmental factors. Nor does it include a full assessment of any identifiable environmental effects. It includes only a decision, almost inevitably on the basis of less than complete information, as to whether an EIA needs to be undertaken at all. The court should not impose too high a burden on planning authorities in relation to 'what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment.'

67. The issues of whether there is sufficient information before the planning authority for them to issue a screening opinion and whether a development is likely to have significant environmental effects, are both matters of judgment for the planning authority. Such decisions may only be challenged in the courts on grounds of irrationality or other public law error (*R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408; [2004] Env L.R. 21 (at [14]–[18] and [52]–[55] and *R. (Noble Organisation Ltd) v Thanet District Council* [2005] ECWA Civ 782; [2006] Env. L.R. 8 at [30]).”

28 The criteria which the Defendant was required to consider were set out in schedule 3 to both the EIA Regulations 2011 and the EIA Regulations 2017. The Claimant submitted that the Defendant erred in taking into account mitigating measures, relying upon the judgment of the ECJ in *People over Wind v Teoranta* (C-323/17). However, that case was concerned with the different statutory scheme under the Habitats Directive. In the context of the EIA Directive, the amendments introduced by the 2014 amendment expressly require consideration of “the possibility of effectively reducing the impact”. This requirement was implemented as para.3(h) of Sch.3 to the EIA Regulations 2017.

29 Even prior to the legislative change, the UK courts had confirmed that mitigating measures could be a relevant factor to take into account. The correct approach under the EIA Regulations 2011 and the EIA Regulations 2017 was set out by Lord Carnwath in the Supreme Court in *R. (Champion) v North Norfolk District Council* [2015] 1 W.L.R. 3710, at [49]–[51]:

“49. The relevance of mitigation measures at the screening stage has been addressed in a number of authorities. One of the first was *R. (Lebus) v South Cambridgeshire District Council* [2003] Env. L.R. 366 (relating to a proposed egg production unit for 12,000 free-range chickens). Sullivan J said, at para 45-46:

‘45. Whilst each case will no doubt turn on its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.

46. It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance.’

50. Of the particular proposal in that case, he said, at para 50, that it must have been obvious that with a proposal of this kind there would need to be a number of ‘non-standard planning conditions and enforceable obligations

under section 106', and that these were precisely the sort of controls which should have been 'identified in a publicly-accessible way in an environmental statement prepared under the Regulations':

> 'it was not right to approach the matter on the basis that the significant adverse effects could be rendered insignificant if suitable conditions were imposed. The proper approach was to say that potentially this is a development which has significant adverse environmental implications: what are the measures which should be included in order to reduce or offset those adverse effects?' (Para 51.)

51 Those passages to my mind fairly reflect the balancing considerations which are implicit in the EIA Directive: on the one hand, that there is nothing to rule out consideration of mitigating measures at the screening stage; but, on the other, that the EIA Directive and the Regulations expressly envisage that mitigation measures will where appropriate be included in the environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA."

30 The Claimant also relied upon *British Telecommunications PLC v Gloucester CC* [2002] 2 P. & C.R. 33 in which Elias J quashed a planning permission because the local planning authority had not properly addressed the question whether or not an environmental statement was required by asking whether the development had significant effects on the environment. He held at [71]:

> "…. There are features of the development which can only be said to have an adverse effect on the environment, and it is not legitimate to treat them as compensated for elsewhere. It follows that in my view if Mr Scott concluded that there were no adverse features, he erred in law and reached an irrational conclusion. If, as his evidence suggests, he was satisfied that the beneficial effects overrode the adverse effects, he erred because even on the assumption that the environmental statement need only be required where there are significant adverse effects, there is no principle which justifies such adverse effects being ignored or treated as nullified in some way on the grounds that they are outweighed by the environmental benefits of the project."

31 It was common ground between the parties that, where an EIA process is required under the terms of the EIA Directive and EIA Regulations, a local planning authority cannot lawfully achieve the same end by an analogous procedure of its own: see *Champion*, per Lord Carnwath at [45].

Screening opinions: Green Belt

32 Turning now to the screening opinions in this case, on the issue of significant effects of the proposal upon the openness and purposes of the Green Belt, the Applicants submitted reports assessing the effects on the purposes of the Green Belt, which the Defendant considered.

33 In the first screening opinion, the Defendant described the Green Belt policy and concluded:

> "The proposal seeks to limit the harm to the openness of the Green Belt by placing buildings as close as possible to the edge of the settlement and limiting the building height to two storeys. The north and east sides of the site would be developed for school playing fields and thereby help to maintain an open character to this part of the site. Subject to careful consideration of siting, form and massing ….. of the proposed development in respect of the Green Belt, it is considered unlikely there would be any significant environmental effects."

34 In the second screening opinion, which referenced the first screening opinion, the Defendant found:

> "…Although the overall size of the development is 17.2 ha, the area of built development will be less than 5 ha. The development is on the edge of a large residential area, bordering a rural area, it is therefore unlikely to cause any cumulation issues…. Although the development is within the Green Belt and must demonstrate special circumstances, it looks to keep buildings near other buildings and retain openness…. All other areas with environmental designations are a sufficient distance away so any significant inputs from the development are unlikely…. While the development may impact the landscape, this is considered to be minimal due to the siting of the buildings…."

35 In my judgment, when considering the effect of the development on the openness and purposes of the Green Belt, the Defendant gave appropriate and sufficient consideration to the relevant criteria (e.g. the size of the development, the existing land use, the protection afforded by the Green Belt, the nature and extent of the impact), and made a legitimate exercise of judgment. For my part, I would not characterise any of these factors as mitigating measures, but if I am wrong about that, I consider that the Defendant did not depart from the approach set out in *Champion*. The assessment did not, by its very nature, require detailed specialist investigation. The conclusions in these two screening opinions did not come anywhere near the high threshold for a finding of irrationality.

36 I did not accept the Claimant's submission that the first screening opinion failed to give "clearly and precisely the full reasons" for its conclusion on the Green Belt, contrary to reg.4(7)(a) of the EIA Regulations 2011. I refer to the legal analysis by Holgate J in *Birchall Gardens*, at [78]–[87], and the analysis by Moore-Bick LJ in *R. (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, at [20]. Although the reasons were brief, they were sufficient to discharge the duty, because the issue was straightforward. The reasons given in the second screening opinion for its conclusion on the Green Belt were also sufficient, in my view, for similar reasons, applying the slightly differently worded requirements for reasons set out in reg.5(5) of the EIA Regulations 2017.

Screening opinions: archaeological remains

37 On the issue of significant effects of the proposal on the archaeological remains, the first screening opinion, on 4 August 2017, stated:

> "…. There are no scheduled ancient monuments within 1km of the site. A Heritage Impact Assessment should be provided to assess the potential impact upon heritage assets including listed buildings near to the site and archaeology

within the site. Subject to the impact on heritage assets being properly assessed and any necessary mitigation implemented, it is considered unlikely the development would result in significant environmental effects."

38 Read in isolation, this paragraph might suggest that the Defendant acted contrary to the legal principles set out above by carrying out assessments outside an EIA process, and considering the environmental effects after mitigation. However, upon considering the factual context within which this conclusion was reached, it appears that the Defendant made a legitimate exercise of judgment. The Applicants' planning consultants, Vincent + Gorbing, provided a detailed report on 15 May 2017 in support of their application for a screening opinion which stated *inter alia*:

> "The site is not in an area of archaeological importance. A heritage assessment (archaeological) was undertaken to support the January 2015 town planning assessment. This assessment considered that there was:
>
> • Very low to low potential for prehistoric archaeological potential
> • Very low to low potential for Roman archaeological potential
> • Low potential for Anglo-Saxon and early medieval potential
> • Very low to low potential for late medieval, post medieval and modern periods archaeological potential
>
> Research was undertaken by a university student studying archaeology who undertook some further investigations. The research raised potential questions about possible anomalies in the southern part of the site. As such it has been agreed that a geo-physical survey of the entire site and trial trenching will be required to uncover potential remains prior to the submission of a planning application. This will be undertaken over the next few months and the reports will be submitted alongside an updated desk-based assessment. This will fully assess the archaeological potential of the site."

39 Thus, the evidence before the Defendant at the time it carried out the screening opinion was that there was "very low" to "low" archaeological potential, which would not have merited an EIA process. Additionally, research by a university archaeology student had given rise to potential questions about possible anomalies which were going to be investigated over the following few months, prior to the submission of a planning application. In my view, it was a legitimate exercise of judgment by the Defendant to await the outcome of those investigations, to see if they did indeed call into question the earlier assessments. The evidence before me was that it was the Defendant's usual practice to carry out a screening opinion upon submission of a planning application, and so there would be a second screening opinion in this case.

40 The application for planning permission was submitted on 11 September 2017, and it was duly referred for a further screening opinion which was completed on 26 September 2017. As at 26 September 2017, the planning officer had the benefit of the further assessments on archaeological remains which the Applicants had commissioned. The main reports were as follows:

i) "Archaeological Desk-based Assessment" by Peter Reeves of CgMs Consulting. Date of issue June 2017. This was a revision of the desk-based assessment originally compiled in September 2014 and finalised in October 2015. The revision was required due to geophysical surveys subsequently

undertaken on the site in March 2015 and September 2016, which were found to be inaccurate. Thus, the original conclusions and site ratings in the previous report remained the same. The site was considered to have a very low to low archaeological potential for all past periods of human activity.

ii) "Archaeological Evaluation Land North of Lower Luton Road" by Angus Forshaw and Robin Wroe-Brown (archaeologists). Date of issue September 2017. The detailed report concluded, following the trial excavations in eighty trenches, that:

> "7.6.2 There is evidence for prehistoric land use within the site. To the south there were a number of prehistoric features which together demonstrate a general background of activity over a long period between the Neolithic and the Late Iron Age/early Roman periods. This includes a scatter of flints which is suggestive of a knapping site. There is no discernible focus to this activity and no obvious settlement sites. However, to the north, set at a distance from this activity, was a small enclosure of potentially Middle Iron Age date.
>
> 7.6.3 A group of fourteen graves tentatively ascribed to the Anglo-Saxon period was discovered on the west side of the site. One of these has been excavated and is awaiting examination by specialists. These remains are likely to constitute an unenclosed cemetery belonging to a rural community. This is an important discovery as Anglo-Saxon cemeteries are rare in Hertfordshire, and no known Anglo-Saxon finds have been previously made in the vicinity of this site.
>
> …..
>
> 7.6.5 The recorded archaeological remains survive below 0.26-0.52m of topsoil and, in places, subsoil deposits. It is judged that construction works such as excavation of foundation and service trenches, creation of roads, ground reduction and landscaping, and heavy plant movement will have the potential to adversely impact upon them."

41 For reasons which were not explained in the evidence, the second screening opinion made no mention at all of the potential significant environmental effects of the proposal on the archaeological remains. Mr Dempster, Principal Planning Officer at the Defendant Council, made a statement in the proceedings in which he stated that he was not responsible for preparing or signing off the screening opinion, but he did review the material submitted, including the archaeological reports, and it was his view that the proposal was unlikely to have significant effects on the environment. As the Claimant observed, this was *ex post facto* evidence to which little weight could be attached.

42 On the balance of probabilities, it seems likely that the issue of the potential significant environmental effects of the proposal on the archaeological remains was accidentally overlooked by the author of the screening opinion. However, para.2(1)(viii) of Sch.3 to the EIA Regulations 2017 required the Defendant to have particular regard to sites of historical or archaeological significance. The archaeological remains had been referred to in the first screening opinion and by September 2017 there was new evidence which indicated that there were significant

archaeological remains which could be adversely affected by works at the Site. In my judgment, at the very least, the potentially significant effects of the proposal on the archaeological remains ought to have been included and assessed in the screening opinion. In consequence, the screening opinion was incomplete and it failed to meet the statutory requirements under reg.5(4) of the EIA Regulations 2017. If such an assessment had been properly carried out, it would probably have led to the conclusion that the proposal was likely to have significant effects on the archaeological remains. As Mr Dempster acknowledged in his witness statement, it was apparent at this stage that the remains either had to be protected on site or excavated.

43 If, on the other hand, the Defendant did consider this issue, but decided that it did not need to address the effect of the proposal on the archaeological remains, then its assessment was inadequate, and it failed to state the main reasons for its conclusions in respect of it, contrary to reg.5(5) of the EIA Regulations 2017.

Relief

44 In considering whether or not I should quash the grant of planning permission because of the breach of the EIA Regulations 2017, I have the benefit of the subsequent analysis in the Officer Report ("OR"), dated 19 February 2018. Paragraphs 5.9 to 5.13 summarised the findings from the trial excavations in August 2017. At paras 8.9 to 8.18, the OR set out in some detail the statutory consultee responses from the County Archaeologist and Historic England. In section 9, the OR summarised the issues as follows:

> **"Heritage Assets**
>
> *Archaeology*
> 9.144 The archaeological site investigations discovered an unenclosed Saxon cemetery in the north-west corner of the site, an Iron Age enclosure in the northern part of the site, and Neolithic finds in the southern part of the site. The Saxon cemetery and Iron Age enclosure are not located within the building zone and are therefore not a risk of being directly impacted by the development. These remains will continue to form part of a pastoral landscape within an extensive area of meadow planting.
> 9.145 The proposal is to preserve the significant remains in situ by placing additional soils over the remains. The archaeological consultants submitted two separate method statements setting out how the archaeology would be conserved. The submitted proposals are not acceptable to the County Archaeologist as currently shown, however he would support preservation in situ provided that an acceptable methodology can be delivered. Historic England also confirms that the current proposals do not adequately show how the archaeology will be conserved. The County Archaeologist is able to recommend conditions to require further archaeological works prior to the commencement of development to ensure that the remains are not harmed.

Evaluation

9.146 The application documents are sufficient to demonstrate significance of the heritage asset to inform decisions of how they should be treated. The proposed preservation in situ is regarded as the most sensitive way to conserve the Saxon cemetery.

9.147 In determining applications, local planning authorities should:

• require an applicant to describe the significance of any heritage assets affected, including any contribution made by their setting (Paragraph 128); and

• When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting (Paragraph 132)

9.148 The condition requires further details to be submitted and further investigations to be carried out on site prior to the commencement of development, including excavations of a wider area surrounding the identified remains, and submission of a detailed methodology for preservation in situ, which will be assessed by the County Archaeologist and English Heritage prior to any scheme being agreed. The proposals have given due consideration to the significance of the heritage assets, and the archaeological remains will be properly preserved."

45 In section 10, the OR considered the planning balance, including at para.10.8, that the proposals provided for conservation of the heritage assets, and the method of achieving this, would be assessed by the County Archaeologist and English Heritage before any decision was made.

46 The OR went on to recommend, at para.11.1, that there were very special circumstances for the inappropriate development in the Green Belt, relating to the urgent and sustained need for additional secondary school places, and that these matters were of sufficient weight to clearly outweigh the harm to the Green Belt by reason of inappropriateness and any other harm.

47 Following the recommendations in the OR, the Defendant granted planning permission on 15 March 2018, subject to the following conditions on archaeological remains:

"Archaeology

(A) No demolition/development shall take place/commence until an Archaeological Written Scheme of Investigation has been submitted to and approved in writing by the local planning authority in writing. The scheme shall include an assessment of archaeological significance and research questions; and:

• The programme and methodology of site investigation and recording

• The programme and methodology of site investigation and recording as required by the evaluation

• The programme for post investigation assessment

• Provision to be made for analysis of the site investigation and recording
• Provision to be made for publication and dissemination of the analysis and records of the site investigation
• Provision to be made for archive deposition of the analysis and records of the site investigation
• Nomination of a competent person or persons/organisation to undertake the works set out within the Archaeological Written Scheme of Investigation.

(B) The demolition/development shall take place/commence in accordance with the programme of archaeological works set out in the Written Scheme of Investigation approved under condition (46A) above;
(C) The development shall not be occupied until the site investigation and post investigation assessment has been completed in accordance with the programme set out in the Written Scheme of Investigation approved under condition (46A) and the provision made for analysis and publication where appropriate.

Reason: To ensure the archaeological remains are adequately protected in accordance with National Planning Policy Framework 2012 policies aimed at protecting the historic environment.

47 Preservation of Archaeological Remains in-situ – Mitigation Strategy
Prior to the commencement of the development, a detailed mitigation strategy for the preservation in situ of the archaeological remains at the site shall be submitted to and approved in writing by the local planning authority. The mitigation strategy shall address:

• the range in depth of the archaeology – the methodology must take this into account so that it is clear the proposed strategy will be suitable for shallow remains as well as those that are more deeply buried;
• additional information regarding the loading pressure placed upon the underlying deposits during and after soil placement on top of the remains and the type of machine(s) used to carry out the works;
• a method statement setting out clear working arrangements demonstrating how the operator(s) charged with carrying out the work will comply with the risk management strategy;
• management plan – setting out how the area of the cemetery would be managed as part of the school's grounds, to ensure that the existence and protection of the site was documented and actively managed, to avoid accidental damage to the remains from works associated with maintenance, services or longer term development.

Reason: To ensure the archaeological remains are treated as if they were of national importance and that any harm is avoided in accordance with policies in the National Planning Policy Framework 2012 (Paragraphs 132–134, 139) directed towards preserving the historical environment."

48 Mr Dempster summarised the position in his statement dated 15 June 2018, stating:

"23. What the assessments showed was that the most significant archaeological remains were found in the northern part of the site in an area originally proposed for playing fields and subsequently for meadow.

24. From the outset, it was apparent that the archaeological interests could be secured either by the preservation of the remains in situ or by excavation. As the development proposal was to alter the site levels over the burial ground, there was some debate between the County Archaeologist and the Applicant's archaeological consultants about the method of ensuring that, were preservation to be in situ, the change of levels did not damage the archaeology unnecessarily. There was never any question of the archaeology not being preserved in accordance with policy. The question was the means of doing so.

25. There was, in fact, some disagreement between the experts as to which means of preservation was to be preferred. The County Archaeologist favoured preservation in situ while his counterpart at St. Albans DC preferred excavation.

26. In determining the application the LPA has (a) identified and assessed the significance of the archaeological remains, (b) taken account of how the significant archaeological remains should be treated, and (c) made information about the historic environment publicly available in accordance with NPPF paragraphs 129, 132 and 141 respectively."

49 The Court's approach to the exercise of its discretion where there has been a failure to comply with the EIA Directive and Regulations was considered by the Supreme Court in *Champion*.

50 In my view, it is important to appreciate the nature of the legal defect in *Champion*, as described by Lord Carnwath in the paragraphs below:

"46. In the present case, there is no disagreement that it was appropriate for the authority to undertake a screening exercise in April 2010, once the application was formally registered. Nor is it now in dispute that the exercise was legally defective. As Mr James Dingemans QC said [2013] Env LR 859, para 60:

> "in circumstances where the pollution prevention measures had not been fully identified at that stage …. the council could not be satisfied that the mitigation measures would prevent a risk of pollutants entering the river, when the mitigation measures were not known"

… it was impossible at that stage to reach the view that there was no risk of significant adverse effects to the river. All the expert opinion, including that of CMGL's own advisers, was to the effect that there were potential risks, and that more work was needed to resolve them. It was also clear that the mitigation measures as then proposed had not been worked up to an extent that they could be regarded as removing that risk. This could be regarded as an archetypal case for environmental assessment under the EIA Regulations, so that the risks and the measures intended to address them could be set out in that environmental statement and subject to consultation and investigation in that context.

47. In my view, that defect was not remedied by what followed. It is intrinsic to the scheme of the EIA Directive and the Regulations that the classification

of the proposal is governed by the characteristic and effects of the proposal as presented to the authority, not by reference to steps subsequently taken to address those effects…."

"53. As far as concerns the present case, it is not now in dispute that the screening opinion should have gone the other way. The mitigation measures as then proposed were not straightforward, and there were significant doubts as to how they would be resolved…. The fact that they were ultimately resolved to the satisfaction of Natural England and others did not mean that there had been no need for EIA. The failure to treat this proposal as EIA development was a procedural irregularity which was not cured by the final decision."

51 Thus, having found that the screening opinion was defective and that the proposal should have been treated as EIA development, Lord Carnwath then went on to consider whether the Court should grant relief, in the exercise of its discretion, at [54]–[66]:

""54 Having found a legal defect in the procedure leading to the grant of permission, it is necessary to consider the consequences in terms of any remedy. Following the decision of this court in *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, it is clear that, even where a breach of the EIA Regulations is established, the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice (para 139 per Lord Carnwath, para 155 per Lord Hope).

55 Those statements need now to be read in the light of the subsequent judgment of the CJEU in *Gemeinde Altrip v Land Rheinland-Pfalz* (Case C-72/12) [2014] PTSR 311. That concerned a challenge to proposals for a flood retention scheme, on the grounds of irregularities in the assessment under the EIA Directive. A question arose under article 10a of the Directive 85/337 (article 11 of the 2011 EIA Directive), which requires provision for those having a sufficient interest to have access to a court to challenge the "substantive or procedural" legality of decisions under the Directive. One question, as reformulated by the court (para 39), was whether article 10a was to be interpreted as precluding decisions of national courts that make the admissibility of actions subject to conditions requiring the person bringing the action –

> "… to prove that the procedural defect invoked is such that, in the light of the circumstances of the case, there is a possibility that the contested decision would have been different were it not for the defect and that a substantive legal position is affected thereby."

56 In answering that question, the court reaffirmed the well-established principle that, while it is for each member state to lay down the detailed procedural rules governing such actions, those rules—

> "in accordance with the principle of equivalence, must not be less favourable than those governing similar domestic actions and, in

> accordance with the principle of effectiveness, must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law" (para 45)

Since one of the objectives of the Directive was to put in place procedural guarantees to ensure better public information and participation in relation to projects likely to have a significant effect on the environment, rights of access to the courts must extend to procedural defects (para 48).

57 The judgment continued:

> (Case C-72/12)49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.
>
> 50. In that regard, it should be borne in mind that article 10a of that Directive leaves the member states significant discretion to determine what constitutes impairment of a right …
>
> 51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of subparagraph (b) of article 10a of that Directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked.
>
> 52. It appears, however, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.
>
> 53. Therefore, the new requirements thus arising under article 10a of that Directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.
>
> 54. In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived

> the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337."

58 Allowing for the differences in the issues raised by the national law in that case (including the issue of burden of proof), I find nothing in this passage inconsistent with the approach of this court in Walton. It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive.

59 Judged by those tests I have no doubt that we should exercise our discretion to refuse relief in this case. In para 52 of its judgment, the Court of Appeal summarised the factors which in its view entitled the authority to conclude that applying the appropriate tests, and taking into account the agreed mitigation measures, the proposal would not have significant effects on the SAC. That, admittedly, was in the context of its consideration whether the committee arrived at a "rational and reasonable conclusion", rather than the exercise of discretion. However, there is nothing to suggest that the decision would have been different had the investigations and consultations over the preceding year taken place within the framework of the EIA Regulations.

…..

Conclusion

62 For the reasons given, I would dismiss the appeal, albeit for somewhat different reasons from those of the Court of Appeal, taking account of the different emphasis of the arguments before us. Although the proposal should have been subject to assessment under the EIA Regulations, that failure did not in the event prevent the fullest possible investigation of the proposal and the involvement of the public. There is no reason to think that a different process would have resulted in a different decision, and Mr Champion's interests have not been prejudiced. Finally, I see no need for a reference to the CJEU. As I have attempted to indicate, the principles, in so far as not clear from the Directives themselves, are fully covered by existing CJEU authority, and the only issues are their application to the facts of the case.

63 I would add two final comments. First, as I have said, no issue has been taken on the delay which elapsed between the screening opinion in April 2010 and the date when it was first challenged in correspondence more than a year later. The formal provision, in both the EIA Directive and the Regulations, for a decision on this issue at an early stage seems designed to provide procedural clarity for the developer and others affected. It is in no-one's interest for the application to proceed in good faith for many months on a basis which turns out retrospectively to have been defective. However, in *R. (Catt) v Brighton & Hove City Council* [2007] Env. L.R. 32, at [39ff], it was decided by the Court of Appeal (applying by analogy the decision of the House

of Lords in *R. (Burkett) v Hammersmith and Fulham LBC* [2002] 1 W.L.R. 1593) that a failure to mount a timeous legal challenge to the screening opinion was no bar to a challenge to a subsequent permission on the same grounds. Although we have not been asked to review that decision, I would wish to reserve my position as to its correctness. I see no reason in principle why, in the exercise of its overall discretion, whether at the permission stage or in relation to the grant of relief, the court should be precluded from taking account of delay in challenging a screening opinion, and of its practical effects (on the parties or on the interests of good administration).

64 Secondly, although this development gave rise to proper environmental objections, which needed to be resolved, it also had support from those who welcomed its potential contribution to the economy of the area. It is unfortunate that those benefits have been delayed now for more than four years since those objections were, as I have found, fully resolved. I repeat what I said, in a similar context, in *R. (Jones) v Mansfield District Council* [2003] EWCA Civ 1408:

> "57. The appellant (who is publicly funded) lives near the site, and shares with other local residents a genuine concern to protect her surroundings. … With hindsight it might have saved time if there had been an EIA from the outset. However, five years on, it is difficult to see what practical benefit, other than that of delaying the development, will result to her or to anyone else from putting the application through this further procedural hoop.
>
> 58. It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race. Furthermore, it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case."

65 In this case also CMGL may feel in retrospect that it would have been better if they had prepared an environmental statement under the EIA Regulations on their own initiative rather than simply relying on the negative opinion of the planning officer. That might in any event have been a more logical response to the advice of their own consultant that appropriate assessment under the Habitats Directive was likely to be required.

66 Jones was decided at a time when the extent of the court's discretion to refuse relief in such cases was less clear. It is to be hoped that this appeal has enabled this court to lay down clearer guidance as to the circumstances in which relief may be refused even where an irregularity has been established. In future cases, the court considering an application for permission to bring judicial review proceedings should have regard to the likelihood of relief being granted, even if an irregularity is established. (I emphasise that this is said without any reference to the new section 31A(2) of the Senior Courts Act 1981, which as is agreed does not apply to this appeal.)"

52 Section 31(2A) of the Senior Courts Act 1981 is now in force and it provides:

> "The High Court –
>
> (a) must refuse to grant relief on an application for judicial review;

> ….
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

53 By subsection (2B), the court may disregard this requirement if it considers that it is appropriate to do so for reasons of exceptional public interest.

54 The evidence in this case leaves me in no doubt that, even if the significant environmental effects of the proposal on the archaeological remains had been assessed in the second screening opinion, and the proposal had been treated as EIA development, the outcome would have been the same. That is to say, planning permission would still have been granted, because the proposal did not include any construction near the site of the remains. The Defendant would have imposed conditions on the grant of planning permission, to ensure that the site of the remains was appropriately protected. Depending on the outcome of the investigations, and consultation with the archaeological experts, the remains would either be left *in situ* or excavated, whichever the experts advised was the more appropriate course to take.

55 For these reasons, I do not consider that there would be any purpose in quashing the grant of planning permission in order that the EIA process could be properly followed. It would merely result in further delay in constructing the new school. In exercising my discretion, I have taken into account that there is no other basis upon which to quash the grant of planning permission, as I have found that neither ground 2 nor ground 3 succeeds (see judgment below). Therefore, I refuse relief in the exercise of my discretion, both at common law and applying s.31(2A) of the Senior Courts Act 1981.

Grounds 2 and 3

56 Grounds 2 and 3 overlap and so I have considered them together. In my view, ground 3 logically comes prior to ground 2, so I have reversed the Claimant's order.

57 Under ground 3, the Claimant submitted that, in making its judgments as to the scale and duration of need, and in assessing to be given to that need as part of the "very special circumstances" justifying inappropriate development in the Green Belt, the Defendant erred in taking account of irrelevant considerations and in failing to take account of relevant considerations, thus reaching irrational judgments.

58 Under ground 2, the Claimant submitted that, in considering whether very special circumstances outweighed the harm to the Green Belt and other harm:

i) the Defendant failed to take adequate account of the possibility of meeting the need for the development at alternative site D (albeit at higher cost and with potential delay); and

ii) by prioritising as a material consideration the low acquisition cost of the development site (which correlated to the important role the site played in preservation of the purposes of the Green Belt and its consequent unsuitability for development) the Defendant's decision-making thwarted the objects of the statute; the development plan and national policy on protection of the green belt.

Educational need

59 The OR considered the educational need for a new school at paras 9.1 to 9.36.

60 The Applicants submitted an Education Needs Assessment which concluded that there was a clearly identified and ongoing need for additional secondary school places to serve the Harpenden Education Planning Area ("EPA"). This was supplemented by the letter of 8 November 2017 from Mr Wilson (IPI Principal Planning Officer) to the Defendant addressing issues raised by the Claimant about the assessment. Before me, Mr Hardy, Senior Planning Officer in the School Planning Team, Children's Services, Hertfordshire County Council, provided an explanation of the educational needs in Harpenden EPA in his witness statements.

61 Pupil numbers were forecast by a model which took into account:

i) Historic pupil numbers in each school year group;
ii) 0-5 year olds registered with GPs;
iii) Primary pupils moving onto secondary school;
iv) Additional pupils arising from new housing development; and
v) Pupil movement patterns, taking account of cross-area flows both within planning areas in Hertfordshire and out of county, as well as from the independent sector.

62 Thus, the forecast was not based solely upon primary school numbers; it took into account a number of different factors. However, IP1 and the Defendant were entitled, in the exercise of their judgment, to treat primary school numbers as significant. The OR set out the evidence that the number of children needing primary school places had grown significantly in recent years, and primary schools had expanded to meet demand. These larger cohorts of primary school children were moving into the secondary phase but there were insufficient places available for them at secondary schools in Harpenden. The shortfall was estimated at approximately six forms (with thirty pupils in a form) at entry into secondary school at year 7, over the next 5 years (abbreviated to "6FE").

63 Whilst it was correct to say that some places in Harpenden schools were taken up by children from outside Harpenden EPA, this was the result of the operation of school admission policies, at both primary and secondary school level, which IP1 had no power to restrict. Places were not limited to those residing in Harpenden EPA. Factors such as sibling policies and special consideration for pupils with special educational needs or looked after children also affected admissions.

64 In recent years, Harpenden children had been accommodated at St Albans schools because of the shortage of places in the Harpenden area. This situation was regarded as unsustainable in the long term, due to the increase in demand for places within St Albans EPA, the temporary nature of the arrangements, and the accessibility of St Albans schools.

65 Because of the number of children from the Harpenden area being educated in St Albans' schools, the published model (which was based on trends over the previous 3 years) produced forecasts of need which artificially depressed the apparent demand for school places in Harpenden. In order to provide an accurate forecast of need in the Harpenden area, on the assumption that Harpenden children should be educated in Harpenden, not St Albans, IP1 adjusted the published model to reflect that assumption.

66 The OR considered the criticisms of IP1's assessment in the consultation responses, which touched upon points made by the Claimant in this case. The OR advised that IP1's forecasts were a robust basis upon which to assess the educational need, and allow time needed to plan for and deliver options to meet rising demand. It was reasonable for IP1 to adjust the forecasts to take account of the anomaly of Harpenden children attending St Albans' schools, as otherwise the actual number of children requiring a place in Harpenden would be under-estimated.

67 The Claimant criticised the Defendant's reliance upon the adjusted forecast. I accepted Mr Glover QC and Ms Tafur's submissions that the Defendant's Planning Committee was entitled to accept IP1's forecasts as the most accurate assessment of educational need. Both the published and the adjusted forecasts were put before the Planning Committee and the reasons for the adjustments to the modelled forecast were explained in the Education Needs Assessment and the letter of 8 November 2017, as well as in the OR. The forecasting of educational need, like all demographic forecasting, is not a precise science. It relies on the exercise of judgment.

68 The OR addressed the issue of the size of the new school. The OR recorded at paragraph 9.34 that the "arguments against a new school at the site include criticism that the County Council has not considered the option to build a 4-6FE secondary school which, it is argued, would provide sufficient additional places to meet demand, and moreover, may not require a site in the Green Belt". The OR stated that IP1 had stated its preference for new secondary schools of between 6FE and 10FE for educational reasons, related to the extended opportunities which schools of this size could provide for students, as well as economies of scale. The Claimant submitted that the Defendant failed to take into account the distinction between "preference" and "need". However, I accepted Mr Glover QC and Ms Tafur's submissions that the Planning Committee would have been able to see from the evidence, summarised in the OR, that there was a need for additional provision of between 2.2 FE and 6.7 FE over the ten year period from 2018 to 2028. There was no reason to suppose that the Planning Committee failed to understand the distinction between the need for a new school and the choice as to the size and capacity of the new school. The Planning Committee was entitled, in the exercise of its planning judgment, to accept the reasons given by IP1 for preferring a school which was 6FE or larger.

Location

69 The OR addressed the choice of Harpenden as the location, and the option of expanding capacity at existing schools.

70 Reasons in favour of Harpenden as the location for the new school were set out in paragraph 9.69 of the OR:

> "Harpenden has more primary school children than any other area within the Harpenden EPA and is regarded as the most sustainable location for a new school due to being in the upper tier of settlements providing access to a range of services and sustainable travel choices. This option would also enable the higher numbers of primary children attending Harpenden school to move to a secondary school in Harpenden and thereby reduce the level of disruption for families. The choice of Harpenden for a new secondary school, above Redbourn and Wheathampstead, is regarded as a sustainable location in school planning, sustainable travel, and town planning terms".

71 Existing secondary school sites were each assessed in turn in the OR at paras 9.40–9.41. In summary, there was clear evidence that only limited additional capacity could be provided, because of space limitations, and it would be insufficient to meet the forecast need. The Defendant was entitled to proceed on that basis.

72 The OR advised at para.9.37:

> "9.37 In summary with regards to the options to expand capacity at existing schools and the choice of Harpenden as the location for a new school:
>
> - The options to expand capacity at existing school sites would not provide sufficient places, evidenced in the viability assessments, to meet the level of deficit of places, evidenced in the forecast model;
> - Harpenden is located in the centre of the Harpenden EPA, which it serves and the three other secondary schools within the EPA are located there;
> - Harpenden is identified as in the upper hierarchy of settlements in the district and serves the local community in terms of services, employment, public transport and recreation;
> - Harpenden is a hub for sustainable travel, with a choice of buses and trains, cycling and walking;
> - Harpenden is an appropriate and sustainable location for a new 6FE secondary school.
> - The construction of a new 6FE secondary school in Harpenden is a reasonable option to provide the right numbers of school places within the area of need."

73 In the light of the factors identified, the Defendant was entitled to conclude, in the exercise of its planning judgment, that expansion of existing sites was not a a viable option and that Harpenden was the most suitable location for the new school.

74 The Applicants carried out an extensive site search exercise, which was described in the OR at paras 9.39 to 9.77. No available, suitable sites were found within urban areas which met the Government minimum size of 2.1 ha for school buildings, with playing fields detached from the school.

75 Harpenden and the smaller settlements around it are encircled by Metropolitan Green Belt, and so the search then proceeded to Green Belt sites. Government guidance indicated a minimum site size of between 8.7 ha and 10.92 ha for non-urban sites. The site search considered sites of 12 ha and above "to allow for abnormals and changes in site characteristics" (para.9.46). Though the Claimant criticised this approach, I considered that it was a valid exercise of judgment on the part of IP1, which the Defendant was entitled to accept. In the event, this Site did have areas which could not be utilised, because of archaeological remains.

76 Eleven sites at the edge of Harpenden were identified, and after assessment and ranking, a shortlist of three sites was drawn up. The sites were ranked in terms of their environmental effects; their effect upon the purposes of the Green Belt; levels of policy compliance and site viability. Paragraph 9.61 of the OR set out a summary of comparative environmental effects; para.9.62 showed the effect of each site on the purposes of the Green Belt; para.9.63 ranked the sites in terms of likelihood of obtaining planning permission; para.9.64 assessed viability and deliverability for the three shortlisted sites.

77 The shortlisted sites were sites A, D and F—F was the site eventually selected. Site A had the least number of adverse environmental impacts and the least adverse impact on the purposes of the Green Belt. Sites D and F ranked equal second in the assessment of adverse impact on the purposes of the Green Belt. However, at a value of £35m, site A was significantly more expensive than the other two sites because it was potentially suitable for residential use. Site D was valued at £2.8m but as it was comprised of six separate ownership titles, a compulsory purchase process might be required, and it might not be available within the required timeframe. Site F was the least expensive (£1.7m), and was deliverable within the required timeframe as Hertfordshire County Council had been able to buy the freehold.

78 The site assessment and selection process conducted on behalf of IP1 was lengthy and thorough. It was scrutinised by the Defendant in detail, which concluded that it was comprehensive and robust. Contrary to the Claimant's submission, it was clear from the OR that Site F was carefully compared with Sites A and D, in respect of impact on the Green Belt, as well as all the other factors. In my judgment, it was legitimate, and indeed proper, for IP1 and the Defendant to take into account the relative costs and deliverability of the sites, as well as their environmental effects and impact on the Green Belt. In my view, the Defendant's endorsement of Site F, in preference to the other options, was a legitimate exercise of planning judgment.

79 The OR accurately summarised Green Belt policy, at both national and local levels (paragraphs 9.78 to 9.88). In its evaluation, it advised that the proposal represented inappropriate development which was, by definition, harmful to the Green Belt. It carefully analysed the adverse effects on the Green Belt (paras 9.89 to 9.96), recognising that it harmed openness, and two of the five purposes of the Green Belt, namely, to prevent towns from merging with one another and to safeguard the countryside from encroachment. Substantial weight was given to the inappropriateness of the proposed development and its conflict with Policy 1 (Metropolitan Green Belt).

80 The OR correctly advised, at para.9.77, that for "planning permission to be granted very special circumstances must be demonstrated, which should clearly outweigh the harm to the Green Belt and any other harm (NPPF: Paragraph 88)". The other harm which the development would potentially cause, such as increased traffic, effect on heritage assets and the conservation area, landscape, noise, air quality and ecology, was assessed in detail in the OR.

81 At section 10, the OR weighed up the planning balance. It concluded:

> "10.12 The education needs assessment has demonstrated that there is an urgent and sustained need for the additional secondary school places required within the Harpenden School Planning Area. Therefore great weight is attached to the educational need in accordance with the NPPF (paragraph 72).
> 10.13 The education benefits and the development of a new 6FE secondary school within the area of need, combined with the lack of available sites within the built up area of Harpenden, and the lack of any more suitable, available and deliverable sites with the Green Belt surrounding Harpenden are considered to constitute very special circumstances to justify inappropriate development in the Green Belt.

10.14 It is considered that the very special circumstances in this case clearly outweigh the harm to the Green Belt and the other harm that have been identified."

82 The Planning Committee accepted the recommendations in the OR and granted planning permission. Whilst I appreciate that the Claimant and other local people disagree with the choice made, there is no doubt in my mind that this decision was a legitimate exercise of planning judgment by the Defendant, with which this Court cannot and should not interfere. The Claimant's submission that the decision failed to promote, and indeed thwarted, the objects of the development plan and Green Belt policy was, in truth, a merits challenge thinly disguised as a public law challenge. The decision that there were very special circumstances justifying the grant of planning permission was not vitiated by any error of law.

Conclusions

83 Permission to apply for judicial review is granted on all grounds. In respect of grounds 2 and 3, I have granted permission in recognition of the fact that careful scrutiny of the evidence was required before it became apparent that the points raised by the Claimant lacked any merit, and that grounds 2 and 3 had to be dismissed.

84 Ground 1 is allowed in respect of the second screening opinion which appeared to have overlooked the effect of the proposal on the archaeological remains. In consequence, the screening opinion was incomplete and failed to meet the statutory requirements under reg.5(4) of the EIA Regulations 2017. If screening had been properly carried out, it would probably have led to the conclusion that the proposal was likely to have significant effects on the archaeological remains. If, on the other hand, the Defendant did consider the archaeological remains, but decided that they did not need to be addressed in the screening opinion, then its assessment was inadequate, and it failed to state the main reasons for its conclusions in respect of it, contrary to reg.5(5) of the EIA Regulations 2017.

85 However, I decline to grant relief, in the exercise of my inherent discretion, and applying s.31(2A) of the Senior Courts Act 1981, as even if the proposal had been treated as EIA development, the outcome would have been the same. Planning permission would still have been granted, because the proposal did not include any construction near the site of the remains. The Defendant would have imposed conditions on the grant of planning permission, to ensure that the site of the remains was appropriately protected. Depending on the outcome of the investigations, and consultation with the archaeological experts, the remains would either be left *in situ* or excavated, whichever the experts advised was the more appropriate course to take.

86 For these reasons, I do not consider that there would be any purpose in quashing the grant of planning permission in order that the EIA process could be properly followed. It would merely result in further delay in constructing the new school. I have taken into account that there is no other basis upon which to quash the grant of planning permission as neither ground 2 nor ground 3 has been successful. Therefore, the claim is allowed on ground 1, but relief is refused.