SMITH v SECRETARY OF STATE FOR THE ENVIRONMENT, TRANSPORT AND THE REGIONS

COURT OF APPEAL (CIVIL DIVISION)

(Waller and Sedley L.JJ. and Black J.): March 5, 2003[1]

[2003] EWCA Civ 262; [2003] Env. L.R. 32

H1 *Environmental assessment—planning permission for quarrying followed by landfilling—permission granted on appeal and made subject to conditions—whether lawful for Inspector to leave extent of obligation to carry out mitigation measures to local planning authority—whether rational to impose condition with respect to dust but leave odour and vermin to control by IPPC regime*

H2 The appellant (''S'') sought to quash the grant of planning permission, following a public inquiry, which extended the time and scope permitted under an earlier permission for quarrying activities, with permission also granted for landfilling once quarrying had been completed. A first planning application had been made in April 1998, accompanied by an environmental statement (''ES''), which was refused in July 1999. An appeal was lodged and a second planning application made. S claimed that the local planning authority had considered the first ES to be defective as it failed to set out mitigating measures (as required by Directive 85/337/EEC on environmental assessment (as amended) and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199)). The planning authority received a second ES (including the mitigation information) with the second planning application. Following the grant of outline permission by the Inspector on appeal against refusal of the first application, S's application for judicial review was rejected. The grounds for that application had included that the Inspector had failed to comply with reg.21 of the 1988 Regulations as he incorporated a part of the second ES as part of the environmental information before the public inquiry, without invoking or complying with the Regulation.

H3 S then appealed, the main grounds concerning the extent to which the Inspector had to, in granting planning permission, make it an obligation of the applicant to carry out measures which would mitigate the impact on the environment, and the extent to which the Inspector could leave the extent of the obligation to carry out mitigation measures to a third party (in this instance the Local Planning Authority). Conditions had been imposed in the Inspector's Decision Letter which S argued were defective, those conditions including:

[1] Paragraph numbers in this judgment are as assigned by the court.

"3. Unless otherwise agreed in writing by the Local Planning Authority mineral extraction, landfilling, restoration and aftercare of the site shall be carried out in accordance with the following plans:

. . . [List of Plans] . . .

Save where measures are required by the conditions set out elsewhere on this permission which shall take precedence over the above approved plans."

"5. No development shall take place until a detailed scheme for the landscaping of the site has been submitted to and approved in writing by the Local Planning Authority. Such scheme shall included details of:

(a) the positions, species and sizes of all existing trees, shrubs and hedgerows on the site which are to be retained and the proposals for their protection throughout all operations on site,
(b) the position, species, density and initial sizes of all new trees and shrubs,
(c) the method of planting to be used including any protection measures,
(d) the programme for implementation and carrying out of the scheme.

The scheme as approved shall be carried out in full accordance with the agreed programme of implementation following the date of such approval in writing."

"6. A landscape management plan including management responsibilities and maintenance schedules for all landscaped areas shall be submitted to the Local Planning Authority for approval in writing concurrent with the landscaping scheme required by condition 5 above. The landscape management plan shall be carried out as approved by the Local Planning Authority for the duration of the landfilling site restoration works."

"9. No development shall take place until a scheme to suppress dust generated on site, has been submitted to and approved in writing by the Local Planning Authority. Once approved such scheme shall be implemented in full until site restoration is completed in accordance with condition 19 below."

H4 S submitted that these conditions left the planning authority free to give consent to proposals which departed from those set out in the (second) ES, and that it had been irrational to impose a condition with respect to dust, but leave odour and vermin to control by the Integrated Pollution Prevention and Control regime.

H5 **Held,** in dismissing the appeal:

H6 (1) A condition could not lawfully be so wide as to permit the subsequent renegotiation of an element of the planning permission of which it formed part. If the conditions had in fact provided the degree of latitude submitted, and so had allowed for a total reassessment of the impact on the environment, that would have been contrary to Art.4(2) of Directive 85/337/EEC (as amended). However, the wording of the Decision Letter as a whole was such that the Local Planning Authority was not free to go outside the constraints imposed by the plans submit-

ted in respect of the ES. It had not been intended that that the planning authority could in effect reconsider the impact on the environment and vary the conditions imposed by the approved plans.

H7 (2) It had been permissible for the Inspector to leave details such as species of trees, and planting of the same, to the planning authority, and to rely on the fact that the adverse impact on the environment would be dealt with by approved Landscape and Landscape Management Plans. Having set the parameters of the planning permission, including contours of the land and the provision of trees, the Inspector had been entitled to consider how the planning authority was likely to deal with the details and to conclude that the way in which the details would be dealt would mitigate the environment. In doing so, he had complied with his obligations under Art.4(2) of the Directive.

H8 (3) As there were two aspects to the proposed development—extraction of minerals and landfill—and only the latter would be subject to the IPPC regime, it had been logical to distinguish between the relevant impacts and to leave control of odour and vermin to IPPC (the odour and vermin impacts potentially arising from the second phase of the development, which was subject to IPPC).

H9 **Legislation referred to:**

Directive 85/337/EEC on Environmental Assessment

Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199), regs 2(1) and 4(2) and Sch.3

Town and Country Planning Act 1990, ss.78(1) and 288

H10 **Cases referred to:**

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2000] 3 All E.R. 897; [2001] 2 C.M.L.R. 38; [2001] Env. L.R. 16; (2001) 81 P. & C.R. 35; [2000] 3 P.L.R. 111; [2001] J.P.L. 58; [2000] E.G.C.S. 86; [2000] N.P.C. 77

Gateshead MBC v Secretary of State for the Environment [1995] Env. L.R. 37; (1996) 71 P. & C.R. 350; [1994] 1 P.L.R. 85; [1995] J.P.L. 432; [1994] E.G.C.S. 92

R. (on the application of Barker) v London Borough of Bromley [2001] EWCA Civ 1766; [2002] Env. L.R. 25; [2002] 2 P. & C.R. 8; [2001] 49 E.G.C.S. 117; [2001] N.P.C. 170

R. v Cornwall County Council Ex p. Hardy [2001] Env LR 25; [2001] J.P.L. 786

R. v Rochdale Metropolitan Borough Council Ex p. Tew [2000] Env. L.R. 1; [1999] 3 P.L.R. 74; [2000] J.P.L. 54; [1999] E.G.C.S. 70; (1999) 96(20) L.S.G. 41

R. v Rochdale Metropolitan Borough Council Ex p. Milne [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note); [2001] J.P.L. 470; [2000] E.G.C.S. 103

Policy referred to:

H11 DoE Circular 11/95 on ''The Use of Conditions in Planning Permissions''

H12 *Mr R. Clayton Q.C.* and *Mr C. Zwart*, instructed by Patwa solicitors, for the appellant.
Mr T. Corner Q.C., instructed by the Treasury Solicitor, for the first respondent.
Mr J. Barrett, instructed by Walker Morris, for the second respondent.

JUDGMENT

1 **WALLER L.J.:** This is an appeal from the decision of Silber J. given on December 19, 2001 whereby he dismissed an appeal, brought under s.288 of the Town and Country Planning Act, 1990 (''the 1990 Act''), by Maureen Smith (''the claimant''). By that appeal and the appeal to this court the claimant seeks to challenge the decision of the first defendant, the Secretary of State for the Environment, Transport and the Regions (''the Secretary of State''), who by his Inspector in a Decision Letter dated March 14, 2001 (''the Decision Letter'') granted planning permission in respect of a proposed development at Buck Park Quarry, Whalley Lane, Denholme (''Buck Park Quarry'') subject to certain conditions.

2 The effect of the decision was to extend planning permission (90/9/02224) (''the 1992 permission'') granted on March 26, 1992 for the extraction of stone from Buck Park Quarry so as to extend the period for which permission had been granted, permit an increase in the depth of extraction at the quarry, and at the same time to facilitate the use of the quarry for the landfill disposal of up to 250,000 tonnes per annum of controlled waste for a period of ten years.

3 There were in fact two applications seeking the extension, the first of which was the subject of the appeal to the Inspector, and the second of which was not. Each was supported by an Environmental Statement (''ES''). The first point dealt with by Silber J. related to the question whether the Inspector on the appeal from the first refusal, was entitled to treat the ES relating to the second application as subsumed in the evidence before him. Silber J. decided that the Inspector was so entitled. That point was to be the subject of an appeal, but at the commencement of the hearing Mr Clayton Q.C. for the claimant abandoned that aspect of the appeal. For the purposes of this appeal it is accordingly possible to concentrate on the first application and its history.

4 The main point argued on the appeal did still concern the ES. An Environmental Statement was required by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations, 1988, as amended (''the 1988 Regulations''), which were made pursuant to the Council Directive 85/337/EEC (''the Directive''). There are now some new regulations, but it is common ground that it is the 1988 Regulations that apply to this application. Certain of the authorities cited to us deal with the later regulations. It is not suggested that any change in language makes consideration of those authorities inapposite to the points that arise on this appeal. Certain important provisions of the Regulations and the Directive are matters to which I will return, but in broad terms an ES requires identification of any significant impact on the environment, and identification of mitigating measures to deal with that impact, and the Regulations require the planning authority or the Inspector on an appeal to take into

consideration the ES. The main point raised on the appeal requires consideration of the extent to which the Inspector must in granting planning permission make it an obligation of the applicant to carry out measures which will mitigate the impact on the environment, and the extent to which the Inspector can leave the extent of the obligation to carry out mitigation measures to a third party, in this instance the Local Planning Authority.

The History

5 The applicant and second respondent to this appeal is Integrated Waste Management Limited (''IWM''), 90 per cent of which is owned by the local authorities of Hull, East Riding, North Lincolnshire and North East Lincolnshire. By planning application (98/01089/FUL) dated April 9, 1998 (''the planning application''), IWM applied to their Local Planning Authority, the City of Bradford Metropolitan District Council, (''the LPA''). The planning application sought to achieve three objectives:

(1) to vary conditions 2 and 24 of the 1992 permission,
(2) to landfill the quarry with controlled waste (that is, domestic, commercial and industrial waste),
(3) to introduce access improvements to the site.

6 Condition 2 had provided for a period of ten years, and the extension was for a further four years; Condition 24 permitted quarrying to a certain depth, and the application sought an extra eight metres.

7 The application was supported by an ES setting out the details of the development, the likely impact on the environment, and the measures proposed in mitigation. The application was also supported by the Report of the Head of Transportation and Planning [Tab 4 Core Bundle] (''the Report'').

8 The planning application was opposed by, amongst others, an action Group of which the claimant was one. The claimant has lived in the village of Denholme for many years and she lives less than a mile from the proposed development. She with others contended that she was directly affected by the existing quarrying operation at the site and was likely to be substantially affected by the proposed development. The claimant's concern was, and still is, that the grant of planning permission to extend time, to increase the depth of workings at Buck Park Quarry and to permit the site to be used for the landfill disposal of controlled waste might generate considerable traffic, noise and other nuisance damage particularly from dust, odours or vermin.

9 The application was refused by the LPA by notice dated July 23 1999, on the grounds that:

> ''The proposal will be contrary to GP2 (I), (II), (IV) and policy W1 (I) of the approved Unitary Development Plan, particularly by reason of the smell which would be generated, the visual impact on the surrounding environment and to the detriment of pedestrian safety along the A629 through Denholme Village''.

10 IWM appealed that decision. Mr Keith Durrant was appointed to hear the appeal. IWM was represented by Mr Barrett as they were before Silber J. and before us. The claimant, through her action group, was represented (we were told) by a Planning Consultant Advocate. The LPA took very little part, only appearing in relation to the question as to what conditions should be imposed if the Inspector allowed the appeal, and on the question of costs. The LPA, although defendants to these proceedings, have not been represented either before Silber J. or before us.

11 The hearing took place over 10 days. There was before the Inspector obviously the ES (and the subsumed ES) and the Report. By a Decision Letter dated March 14, 2001 the Inspector allowed the appeal granting permission subject to certain conditions.

12 The terms of the Decision Letter are critical to the points that arise on this appeal . The Inspector by para.6 identified the main issues:

> "Given this site context, I have come to the view that the main issues in this appeal are whether:
>
> filling the quarry with waste would harm the visual amenities of the Green Belt, having regard to the proximity of a Special Landscape Area to the west and to the setting of Park Farm, a Grade II listed building;
>
> a continuation of quarry working and a phased restoration by landfill could be carried out without polluting the local environment and disrupting the lives of local residents to an unacceptable degree;
>
> and, in the light of my conclusions on the above, whether:
>
> the proposed development would be inappropriate in the Green Belt (and if so, whether there are any very special circumstances that would justify it);
>
> there is a need for a new landfill site proximate to Bradford conurbation, involving additional stone extraction, to which appropriate weight should be given in balancing any benefits against harm (having regard to the Best Practical Environmental Option—the BPEO)."

Impact on the environment was therefore identified by the Inspector as the key issue.

13 He then, by paras 13 to 18, dealt with the first issue "the visual impact of the development". It is sufficient to quote paras 14 to 17:

> "14. The phasing and restoration proposals have however been carefully designed, both to screen most of the workings during the extraction and landfill phases and to create a land form appropriate to the grazed and wooded moorland fringe slopes of the areas. Although local climatic conditions are not favourable to fast tree growth, a sensible choice of species and planting techniques can achieve a degree of impact that would help absorb the development into the landscape. In the two key locations of visual impact, I believe therefore that the character of the local landscape would be sustained and that the end result would be attractive. Those locations are

> firstly, along Whalley Lane and in views towards the southern site boundary from Denholme Edge, and secondly from the end of Hewenden Reservoir and its eastern slopes.
>
> 15. In the first case, although for relatively short periods the top of the landfill and/or noise attenuation mounds would be seen during the operational and surcharge phases, set against the broader sweep of the landscape beyond or in passing down Whalley Lane its impact would be slight. In the second example, although there would for short periods be views into the landfall area that would be less pleasant than looking at a stone extraction face, that would be a receding and partially screened experience in the middle distance, again set within a strong land form that can absorb it. After restoration, the landform and its associated woodland planting would, I conclude, be seen as an integral part of the local landscape.
>
> 16. At Buck Park Farm (a listed building), the existing screening bund would have, behind it, an admittedly high but temporary additional earthwork and (possibly) a stone wall both acting as noise attenuation barriers. I conclude below in respect of noise that I see no need for a permanent wall (which could be oppressive immediately above the farmhouse on the skyline). The profile of the temporary bund would slope steeply away from viewpoints on Whalley Lane and be beyond the present high bund at the back of the farmhouse. Subject to noise attenuation being achieved only by temporary earthworks, I conclude that the setting of the farmhouse would not be changed by the development.
>
> 17. The site design and management regime that can be exercised, through landscaping and aftercare planning conditions, through the legal agreements submitted and through the Integrated Pollution Control and Prevention and Control (IPPC) permit under the jurisdiction of the Environment Agency is extensive. I therefore have no reason to doubt that the appellant company is capable of ensuring that the visual impact of the development on the Green Belt, during and after development, would be acceptable.''

I draw particular attention to the reliance by the Inspector in coming to his decision, so far as trees were concerned, on there being in the future ''a sensible choice of species and planting techniques'' (para.14), and on the degree of control that could be exercised ''through landscaping and aftercare planning condition . . . (para.17).

14 He then dealt with ''Water, gas, noise, traffic and other pollution from the development'' from paras 19 to 33. The only paragraph of relevance and then only to the second issue on this appeal, is para.32 which states:

> ''32. Finally in this issue, I turn to other potential pollutants: dust, odour and vermin. I agree with the appellant that the latter two are more properly matters for site management and would be controlled on a day-to-day basis through the operation of an IPPC permit using the best available technique. Although I do not underestimate the concerns of residents after their well-documented local experience at Manywells, such techniques are proven

to be effective when properly and speedily applied on a well-run site. I do however accept that the proximity of Buck Park Farm to potential dust generating activities is a material land use consideration that deserves attention at this stage. I consider nonetheless that any potential harm can be overcome by requiring a dust suppression scheme to be agreed and implemented as a planning condition.''

15 He then dealt with the Green Belt issue, the need for the development and other matters before turning to ''Conditions and Legal Agreements'' under which he said:

''48. In my reasoning above, I have referred directly or indirectly to a number of planning conditions that will need to be imposed and the reasons for them. Overall, I shall impose conditions that seek to:

define the development and its methods and hours of operation;

describe the details and procedures that are needed to ensure that the various phases of development are implemented in a way that mitigates their environmental impact and ensures a high and safe standard of working, set out the arrangements (and where appropriate standards) for the control of the access, noise, dust, odour and water pollution consistent with the controls that are the province of the Environment Agency under LPPC;

control the restoration and aftercare of the site and its associated landscaping;

and in doing so incorporate and update those conditions which are still relevant from the 1990 permission. They are based on those discussed and generally (but not totally) agreed at the inquiry between the appellant and the Local Planning Authority, having considered also the suggestions also made by the third parties.

49. The appellant has submitted a unilateral undertaking under s.106 of the Act. This provides for additional controls over the adequacy of site engineering works, for the provision of highway improvements, for a contribution to Bradford City Council of £40,000 for traffic safety measures in Denholme, and for the landscape management of the site and its immediate surroundings. A local liaison committee would also be established. I regard these obligations on the appellant and the landowner as providing significant environmental and community benefits which would mitigate the impact of the development, as already discussed above.

50. I also note that other agreements and a deed between the appellant and the landowner define the respective responsibilities of the two parties in working the site (the appellant being responsible for the landfill, the owner for stone extraction). Importantly, they provide for the appellant to take control in the event of the landowner not complying with best environmental practice in working the quarry. Given the history of the site, this adds confidence to my conclusions as to the acceptability of the overall development.''

16 He then expressed his overall conclusions in these words, and formal decision in these words:

> "51. I have concluded above that the development as whole would be appropriate in the Green Belt. With the imposition of suitable planning conditions and giving weight to the provisions of the s.106 Obligation and other legal safeguards, I am satisfied that the site can be worked and filled to high environmental standards and can be restored to fit in with the local landscape. I have also concluded that, whilst the outcome of the deliberations on need and proximity is not entirely clear cut, there are strategic advantages to locating a landfill site in this part of Bradford. For these and the more detailed reasons given above and having regard to all other matters raised, I therefore conclude overall that the appeal should be allowed.
>
> 52. In exercise of the powers transferred to me, I allow the appeal and grant planning permission for (1) the continuation of mineral extraction without complying with conditions numbered 2 and 24 of planning permission 90/9/02224 granted by Bradford City Council on March 26, 1992, (2) the improvement of the access arrangements and (3) the disposal of controlled waste, all at Buck Park Quarry, Whalley Lane, Denholme; in accordance with the terms of the Application No.98/01809/FUL dated July 23, 1999, as amended by the letter dated December 3, 1998, and the plans listed below, subject to the following conditions: . . ."

17 The conditions he imposed included conditions 3, 5, 6, and 9 which are as follows:

> "3. Unless otherwise agreed in writing by the Local Planning Authority mineral extraction, landfilling, restoration and aftercare of the site shall be carried out in accordance with the following plans:
> Amended plan referenced 13/5059/4 and titled 'Application Boundary and Land Ownership' as received by the Local Planning Authority on December 1998
> Plan titled 'Site configuration and Phasing' as referenced 16/5059/4 as revised in February 2000
> Plan titled 'Junction improvements (Ghost Island Junction) and Footpath Alterations' referenced ref NL 02785 as revised in December 2000
> Plan titled 'General Layout of Site facilities' referenced and dated 30/5059/4 January 1998
> Plan titled 'Restoration Plan Pre-settlement (Worst Case Scenario) Contours Shown' referenced NL02785/49 and dated Feb 2000
> Plan titled 'Restoration and Pre-Settlement Contours' referenced 25/5059/4 and dated Nov 1997
> Plan titled 'Site topography & Proposed Access Road' referenced 34/5059/4 and dated September 1997
> Save where measures are required by the conditions set out elsewhere on this permission which shall take precedence over the above approved plans.

5. No development shall take place until a detailed scheme for the landscaping of the site has been submitted to and approved in writing by the Local Planning Authority. Such scheme shall included details of:
   (a) the positions, species and sizes of all existing trees, shrubs and hedgerows on the site which are to be retained and the proposals for their protection throughout all operations on site,
   (b) the position, species, density and initial sizes of all new trees and shrubs,
   (c) the method of planting to be used including any protection measures,
   (d) the programme for implementation and carrying out of the scheme. The scheme as approved shall be carried out in full accordance with the agreed programme of implementation following the date of such approval in writing.
6. A landscape management plan including management responsibilities and maintenance schedules for all landscaped areas shall be submitted to the Local Planning Authority for approval in writing concurrent with the landscaping scheme required by condition 5 above. The landscape management plan shall be carried out as approved by the Local Planning Authority for the duration of the landfilling site restoration works.
9. No development shall take place until a scheme to suppress dust generated on site, has been submitted to and approved in writing by the Local Planning Authority. Once approved such scheme shall be implemented in full until site restoration is completed in accordance with condition 19 below.''

18 The first issue which arises on this appeal was identified by the judge in the following terms:

(i) Whether condition 5 of the Inspector's Decision Letter was defective as it failed to require the proposed development to comply with the proposed tree planting and grassland seeding schemes and mitigation measures set out in the Landscape Proposals contained in the Second ES (''*the Landscaping Issue*'');
(ii) Whether condition 9 of the Inspector's decision was defective as it, failed to require the proposed development to comply with the proposed dust mitigation measures set out in the second ES (''*the Dust Issue*'');

19 The only expansion of the above which is necessary so far as identifying the issue in the court of appeal is concerned, would be to include a reference to the wording with which condition 3 commences *i.e.* ''unless otherwise agreed in writing'', and the proviso to that condition ''Save where measures are required by the conditions set out elsewhere . . . which shall take precedence over the approved plans''. Mr Clayton placed considerable reliance on these aspects of condition 3 as supporting his argument that by virtue of the conditions imposed IWM were not tied to implementing the mitigation measures in so far as they were identified in the plans set out under condition 3. His argument was that

the LPA were free to give written consent to any departure from the plans and thus free to vary the mitigation in so far as it was identified in the plans.

20 In the Court of Appeal Mr Clayton has also raised a further issue not argued before Silber J. by reference to para.32 of the Decision Letter, and condition 9. He suggested that it was irrational for the Inspector to impose a condition in relation to the suppression of dust, but so far as odour and vermin was concerned leave it to the IPPC. He submitted that the Inspector should have imposed a condition in relation to odour and vermin as well as dust.

21 Mr Corner Q.C., for the Secretary of State, submitted that it was not right to allow this point to be taken for the first time in the Court of Appeal, but in addition he and Mr Barrett gave their suggested answer to the point. In my view their answer was a complete one, and I would propose to deal with the point without considering whether technically Mr Clayton should be free to argue the matter as he did.

The Statutory provisions and authorities

22 The starting point is the Directive to which the United Kingdom gave effect by the 1988 Regulations. I will quote the relevant provisions of the 1988 Regulations, but the approach to the Regulations is coloured by the Directive, the purpose of which is described in the speech of Lord Hoffman in *Berkley v Secretary of State for the Environment* [2001] 2 A.C. 603 at 615 in the following terms:

> "I said in *R. v North Yorkshire County Council Ex p. Brown* [2000] 1 A.C. 397, 404 that the purpose of the Directive was 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. This was a concise statement, adequate in its context, but which needs for present purposes to be filled out. The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the 'environmental statement' by the developer should have been 'made available to the public' and that the public should have been 'given the opportunity to express an opinion' in accordance with Art.6(2) of the Directive. As Advocate General Elmer said in *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] E.C.R. 1–2189, 2208–2209, para.35:
>
> > 'It must be emphasised that the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether consent is to be given shall be adopted on an appropriate basis.'
>
> The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive

issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (*Aannemersbedrif P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] E.C.R. 1–5403, 5427, para.70), Advocate General Elmer made this point again:

> 'Where a member state's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard.'"

23 Regulation 4(2) of the 1988 Regulations provides:

> "24 The local planning authority . . . shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration [and state in their decision that they have done so]".

According to Reg.2(1):

> "'environmental information' means:
> . . . such a statement as is described in Sch.3."

Schedule 3 describes an "environmental statement" as comprising, with emphasis added:

> "1. . . . a document or series of documents providing, for the purposes of assessing the likely impact upon the environment of the development proposed to be carried out, the information specified in para.2 (referred to in this Schedule as 'the specified information');
>
> 2. The specified information is—
>
> (a) a description of the development proposed, comprising information about the site and design and size or scale of the development;
>
> (b) the data necessary to identify and assess the *main* effects which that development is likely to have on the environment;
>
> (c) a description of the *likely significant* effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on—
>
> human beings; flora; fauna; soil; water; air; climate; the landscape; the inter-action between any of the foregoing; material assets the cultural heritage;
>
> (d) where significant adverse effects are identified with respect to any of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects; and
>
> (e) . . ."

24 We have also been referred to the following decisions: *R. v Rochdale Metropolitan Borough Council Ex p. Tew* [1999] 3 P.L.R. 74 and *R. v Rochdale*

Metropolitan Borough Council Ex p. Milne [2001] J.P.L. 470 decisions of Sullivan J.; *R. v Cornwall County Council Ex p. Hardy* [2001] Env. L.R. 26 a decision of Harrison J. which followed Sullivan J.'s approach in *Tew* and *Milne*; *R. (on the application of Barker) v London Borough of Bromley* [2002] Env. L.R. 631 CA in which Sullivan J.'s approach in *Milne* and *Tew* was approved.

25 Principles which those authorities establish seem to me to be the following: First, where outline planning consent is being applied for (and *Tew and Milne* were cases concerned with outline planning consent, *Milne* being round two of a battle over the same development), it is at the outline consent stage that the planning authority must have sufficient details of the proposed development, sufficient details of any impact on the environment, and sufficient details of any mitigation to enable it to comply with its Art.4(2) obligation.

26 Second, the reason for that is that once outline planning consent has been given there is effectively no going back without (at the very least) the payment of compensation. As Sullivan J. said in *Tew*:

> "Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding" [97F].

There will accordingly be no proper opportunity when the planning authority considers the matters reserved to reappraise the environmental issues. Indeed *Barker* held that the obligation under Art.4(2) is not an obligation on the planning authority at the consideration of the reserved issue stage.

27 Third, the planning authority or the Inspector will have failed to comply with Art.4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given. As Harrison J. put it in *Hardy*:

> "Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions, it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in para.2(c) of Sch.3, and the reference to mitigation measures in para.2(d), that it is intended that in accordance with the objectives of the Directive, the information contained in the environmental statement should be both comprehensive and systematic, so that a decision to grant planning permission is taken 'in full

> knowledge' of the project's likely significant effects on the environment. If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a 'full knowledge' of the likely significant effects of the project. That is not to suggest that full knowledge requires an environmental information statement to contain every conceivable scrap of environmental information about a particular project. The Directive and the Assessment Regulations require likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms in Sch.3, would conflict with the public's right to make an input into the environmental information and would therefore conflict with the underlying purpose of the Directive.''

28 Fourth, (and here as it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the final details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case.

29 The above quotation from Harrison J. in *Hardy* refers to the ES not having to contain ''every conceivable scrap of environmental information''. This reflects a passage in the judgment of Sullivan J. in *Tew* at 98B. Sullivan J, dealing with the same kind of point in *Milne*, and with the argument that where an ES was required Outline Planning Consent which contemplates landscaping as a reserved matter simply could not be granted said this at para.113:

> ''Mr Howell submits that reserved matters, details of the means of access or landscaping, are capable of having an effect on the environment, that is why they are reserved for subsequent approval. That ignores the fact that the environmental statement does not have to describe every environmental effect, however minor, but only the 'main effects' or 'likely significant effects'. It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, 'losing the wood for the trees'. What is 'significant' has to be considered in the context of the kinds of development that are included in schs 1 and 2. Details of landscaping in an application for outline planning permission may be 'significant' from the point of view of neighbouring householders, and thus subject to reserved matters approval, but they are not likely to have 'a significant effect on the environment' in the context of the assessment regulations.''

Then at para.126 he said:

> ''Whilst the Council has deferred a decision on some matters of detail, which, as Mr Beckwith acknowledges, may have some environmental effect, it has not deferred a decision on any matter which is likely to have a significant effect, or any mitigation measures in respect of such an effect.''

At para.131 he said:

> ''The Council has power to ensure that the details which come forward at the reserved matters stage are in 'substantial accordance' with the Development Framework: see condition 1.7 above. It will be noted that the effect of condition 1.7 is that even where siting and means of access are reserved they will have to be substantially in accord with the Masterplan. Armed with all of this information about the proposed building on plot T, ERM were able to carry out a comprehensive assessment of its likely significant effects on the environment including, for example, its likely effect on the setting of listed buildings, and the public were able to make informed comments about the reliability of that assessment and to suggest further mitigation measures if they wished.''

30 The reference to condition 1.7 is of some interest. In the planning permission being considered in *Tew* three conditions appeared and were quoted by the judge at 78G to 79B:

> ''Condition 1.3 states:
>
> The development shall be carried out in accordance with the mitigation measures set out in the Environmental Statement submitted with the application, unless otherwise agreed in writing by the Local Planning Authority and unless otherwise provided for in any other condition attached to this planning permission.
>
> Condition 1.7:
>
> No development shall be commenced until a scheme (the Framework Document) has been submitted to and approved by the Local Planning Authority showing the overall design and layout of the proposed Business Park, including details of the phasing of development and the timescale of that phasing. The Framework Document shall show details of the type and disposition of development and the provision of structural landscaping within and on the perimeters of the site. The Business Park shall be constructed in accordance with the approved Framework Document unless the Local Planning Authority consent in writing to a variation or variations.
>
> Condition 1.11
>
> This permission shall be not construed as giving any approval to the Illustrative Masterplan accompanying the application.''

31 On the renewed application details, although landscaping, design and external appearances of all buildings were reserved, the Outline Planning Application included a ''masterplan and a framework document showing the overall design and layout of the whole site'', and the judge deals with the conditions proposed in paras 28 to 34 as follows:

"28. 1.7:

'The development on this site shall be carried out in substantial accordance with the layout included within the Development Framework documents submitted as part of the application and shown on (a) drawing entitled "Master Plan with Building Layouts".'

29. The reason given for the imposition of this condition was:

'The layout of the proposed Business Park is the subject of an Environmental Impact Assessment and any material alteration to the layout may have an impact which has not been assessed by that process.'

30. Condition 1.8:

'No building within any plot shall exceed the height specified for buildings within that plot as set out in the "Schedule of Development . . . submitted with and forming part of the application".'

31. Conditions 1.9 and 1.10 modified this by reducing the maximum eaves height of certain buildings in the interests of the amenity of residents in adjacent dwellings.

1.11: 'The development shall be carried out in accordance with the mitigation measures set out in the Environmental Statement submitted with the application unless provided for in any other condition attached to this permission.'

1.12: 'The development shall be carried out in accordance with the principles and proposals contained in the Development Framework document submitted as part of the application unless provided for in any other condition attached to this permission.'

1.13: 'The phasing of works within the site shall be carried out in accordance with the details set out in the section entitled "Phasing" in the Development Framework document, subject to the detailed requirements of other conditions in this permission.'

32. In respect of the Stanney Brook Corridor, condition 1.15 said:

'The area of the Stanney Brook Corridor (as defined on (a) drawing and described in the Development Framework Document) shall remain undeveloped apart from the construction of surface water attenuation areas and footpaths/cycleways.'

33. The reason given was:

'to ensure that an area of undeveloped open space is retained in the interests of amenity.'

34. Conditions 1.16 to 1.18 effectively divided the corridor into three parts and required the different parts of the corridor to be enhanced and landscaped in accordance with the principles shown on three application drawings and in accordance with detailed treatment to be approved in writing by the local planning authority, concurrently with the construction of building on certain of the plots. The reasons given were:

'In order to ensure the maintenance of areas of nature conservation interest and to create areas of wildlife habitat in a phased order prior to the loss of existing habitat within the application site.'"

The conditions in *Milne* as I understand it in the view of the judge placed constraints on the degree to which any decision at the reserved stage could have any environmental impact, and the constraints ensured that no decision should have a significant impact.

32 In addition, at para.128 of his judgment in *Milne* Sullivan J. said this:

> "Any major development project will be subject to a number of detailed controls, not all of them included within the planning permission. Emissions to air, discharges into water, disposal of the waste produced by the project, will all be subject to controls under legislation dealing with environmental protection. In assessing the likely significant environmental effects of a project the authors of the environmental statement and the local planning authority are entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority: see, for example, the assumptions made in respect of construction impacts, above. The same approach should be adopted to the local planning authority's power to approve reserved matters. Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the 'likely significant effects', not every conceivable effect, however minor or unlikely, of a major project."

33 In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.

Application of the principles

34 In this case Mr Clayton did not argue that the ES did not contain sufficient details of the development; nor did he argue that the significance of the impact on the environment was not sufficiently identified; nor did he argue that the mitigation features were not fully set out; nor did he argue that the Inspector was not entitled to reach the conclusion that if the mitigation as set out was carried out the Inspector was entitled to reach the view he did as to the granting of permission. His complaint related to the conditions imposed. His first argument was that by virtue of the opening words of condition 3, the proviso at the end of condition 3 and condition 5 and condition 6, IWM, if it could persuade the LPA to consent, would in fact be free to do many things that would have a significant impact on the environment, and be free not to mitigate them. If that were so, his argument ran, it would follow that the actual impact on the environment of what IWM wished to do would not have been the subject of an ES, and would not have

been considered by the Inspector as required by Art.4(2). That would make the permission granted unlawful.

35 This argument led to a considerable debate as to the meaning of the words at the commencement of condition 3, and as to whether there were any limits on what the LPA could consent to under condition 5 and condition 6. If the conditions in effect allowed the LPA to reassess the impact on the environment and alter the features of the plans which were intended to mitigate any adverse effect, that would appear to be a contravention of Art.4(2) of the 1988 Regulations.

36 Mr Clayton's second argument was that by leaving for example the details of the species and planting of the trees etc to a landscape plan to be approved by the LPA, and by relying on the fact that that plan and the landscape management plan under condition 6 would have to be approved by the LPA, the Inspector was in breach of Art.4(2), in that the Inspector was not taking the decision on matters which could have an impact on the environment.

37 Let me deal first with the proper construction of the conditions. Do the conditions allow the LPA to approve a deviation from the plans which might have a significant adverse impact on the environment, or are the LPA constrained when considering the landscape scheme to dealing with details within the parameters identified by the plans? Mr Clayton suggested that the opening words of condition 3 could be read as entitling the LPA to agree in writing that one of the plans should no longer have to be complied with at all, or that some significant aspect of a plan should now be altered including some aspect of the plan that affected the impact on the environment. Thus he submitted that condition 5 can be read as giving the LPA a totally free rein as to landscaping and condition 6 a free rein over the landscape management plans.

38 At one point Mr Corner appeared to accept that the LPA could agree in writing that no trees as shown on the plans would need to be planted at all. His submission was however, that that would simply lead to the LPA not being able to enforce the condition for breach thereof. His argument was that that would not stop the LPA arguing that if no trees at all were planted, that the planning permission had not been complied with as the planning permission was being identified as "in accordance with the plans listed." His submission that nothing apart from a further planning application could alter the planning permission granted was the foundation of this argument.

39 On reflection he retreated from that argument. The concept of IWM gaining written consent to something on which they could rely for not being in breach of a condition, but on which they could not rely if it was alleged they had no planning permission was difficult to sustain. His argument, and that of Mr Barrett, became on refinement that nothing in the conditions could allow for a significant deviation from the plans forming the essentials of the planning consent. The conditions were designed simply to leave matters of detail to the LPA, but all within the concept as identified in the plans including the provision of trees even if the species had not been identified. The submission remained that a condition could not give the power to vary a planning permission.

40 As for the proviso to condition 3, Mr Corner, supported by Mr Barrett, submitted that those words simply allowed for the express wording of a further condition to take precedence, *e.g.* if condition 32 as to depth was inconsistent with the plans, that condition would take precedence.

41 In his response Mr Clayton did not, as I understood him, feel able to refute Mr Corner's submission that a condition cannot give the power to vary a planning consent. I did not understand him therefore to go so far as to say that a plan or an essential feature of a plan could be removed under condition 3 with the written consent of the LPA. My view on construction is as follows.

42 Mr Corner and Mr Barrett's construction of the proviso "Save where measures are required by the conditions set out elsewhere . . ." is clearly right. It is only dealing with conditions that expressly contradict an aspect of a plan to which the proviso applies. Those words if they stood alone would not allow a landscape scheme approved by the LPA to override the approved plans.

43 But I have been troubled by the first words of condition 3 in the context of which conditions 5 and 6 must be construed, and also by what at first sight seem the very general words requiring a "detailed scheme for the landscaping . . . to be approved in writing by the Local Planning Authority." Would this allow a landscape scheme without matters provided for on the plans to be approved by the LPA, and for the LPA to consent in writing to the removal of aspects from the plans? If so, this would seem to allow for a total reassessment of the impact on the environment by the LPA, which would, in my view, be contrary to Art.4(2). Mr Corner and Mr Barrett say clearly not. They say that the words at the commencement of condition 3 relate only to details and could not allow the LPA to consent to IWM not complying with the plans in any substantial way, and in particular, in any way which might have a significant impact on the environment. They submit that condition 5 also allows for a detailed scheme for landscaping, but would not allow a scheme which entailed any substantial non-compliance with the plans, and in particular which allowed for any significant impact on the environment contrary to the plans.

44 It might have made for greater clarity if the first words of condition 3 had stated that what was envisaged was consent as to details and that no consent could be given to any aspect of the plans that affected the substance of the permission granted or the significance of the impact on the environment or the significance of the mitigating measures contained in the plans. Condition 5 could have made clear that a landscape scheme could not allow for anything which had a significant adverse effect on the environment unconsidered by the Inspector. Condition 6 also could have been so limited. The conditions considered in *Milne* to which I have referred above, appear to have such express wording. Does the absence of such express wording lead to the conclusion for which Mr Clayton argues? I think not.

45 If one reads the Decision Letter, and in particular para.48, and if one has regard to the details of the plans which set the contours of the land and the position of trees, it seems to me that it simply cannot have been contemplated that by imposing conditions the Inspector was intending the LPA to go outside the constraints

placed by the plans. It was not intended that the LPA could in effect reconsider the impact on the environment and vary the conditions imposed by the plans.

46 The next question is whether it was permissible for the Inspector to leave details such as species of trees and planting of the same to the LPA, and to rely on the fact that the adverse impact on the environment would be dealt with by an approved Landscape Plan (condition 5) and a Landscape Management Plan (condition 6).

47 It was the LPA who proposed conditions 3, 5 and 6. The reasons they gave for proposing them was as follows:

> ''Condition 3:
>
> 'To ensure the planning permission is implemented in all respects in accordance with the submitted details.'
>
> Condition 5:
>
> 'The provision and maintenance of landscaping [around the site] is required in the interests of visual amenity.'
>
> Condition 6:
>
> 'The provision and maintenance of landscaping [around the site] is required in the interests of visual amenity.'''

48 Mr Clayton would argue that the Inspector was leaving the assessment of impact to the LPA by virtue of the fact that the details identified in condition 5, and the approval of a landscape plan and a landscape management plan was left to the LPA. Mr Corner and Mr Barrett argued that what has been left are the details and the Inspector can and has legitimately assessed the impact by reference to the likelihood of the way which the LPA will act.

49 In my view, the Inspector having set the parameters of the planning permission, including contours of the land and the provision of trees, was entitled to consider how the LPA was likely to deal with the details and to conclude that the way the details would be dealt with would mitigate the adverse effect on the environment. In so doing he complied with his obligations under Art.4(2).

50 Mr Clayton did not address any separate argument on condition 9. The point is once again that the Inspector having made it a condition that a dust suppression scheme be introduced, was entitled to leave the details to the LPA.

Paragraph 32 —distinction between dust, odour and vermin

51 This point was dealt with concisely by Mr Barrett. He pointed out that there were two aspects of the development, landfill and the extraction of minerals. So far as landfill was concerned that would be the subject of the IPPC regime. The extraction of minerals is not subject to that regime. There was thus a logical basis for leaving odour and vermin to the IPPC regime and making dust the subject of a condition. If, and in so far as Mr Clayton was pursuing an argument that even though vermin and odour were the subject of the IPPC regime it was still incumbent on the Inspector to impose a condition, it was not pursued with any

vigour. *Gateshead MBC v Secretary of State for the Environment* [1994] 1 P.L.R. 85, CA is authority for the proposition that it is open to the planning authority to leave matters within an agency such as the IPPC to that statutory body. Once again the principle identified in para.33 above applies.

52 I would accordingly dismiss the appeal.

53 **SEDLEY L.J.:** This contentious new phase of quarrying was correctly regarded by the inspector as involving a significant adverse effect on the environment. It followed that it was his duty to set conditions which would appropriately mitigate the effect; in fact, if he had not been able do so he would arguably have been precluded from granting planning permission at all.

54 Yet anybody reading items 3, 5, 6 and 9 of the conditions which the inspector decided to set could be forgiven for concluding that instead of fulfilling this obligation he had simply passed the buck to the local planning authority, with two apparent results. One was that the content of the conditions could thereafter be set by private negotiation between developer and local authority and become known to the public only when they were a *fait accompli*. The second was that the negotiated content might modify significant elements of the consent.

55 If either of these were the true effect of the conditions which form part of the grant I would have had little hesitation in holding the decision to constitute an abdication of the inspector's functions. It is only if what is left over is so defined that it cannot modify or disrupt the terms on which planning permission is being granted that, in my judgment, the handover of responsibility to the local planning authority is permissible. Not without some doubts, I am prepared to agree with Waller and Black L.JJ. that, carefully and narrowly construed, the conditions imposed by the inspector in the present case are contained in this box. They are to be read, in other words, as operating within not only the plans which the inspector is giving permission to implement but the conditions set by him for remedying the consequent impact on the environment. (I confess in this connection that I have been entirely unable to follow the distinction which Mr Corner Q.C. has sought to make between the variation or enforcement of a condition and the variation or enforcement of the planning permission of which it is part. I am consoled by the fact that Mr Barrett appeared to share my difficulty.)

56 In argument, sensing the proximity of the wall to their backs, counsel for both the Secretary of State and the developer stressed how little was being left by the inspector in the local planning authority's hands—matters only of detail, said Mr Corner, none of them capable of aggravating the environmental impact of the development or impeding its remediation. I am prepared to agree with the other members of the court that counsel are right—but the now accepted modesty of the reserved matters does not exactly leap from the page, and if it had not been for its emergence as a serious issue in this court, I doubt whether the chorus of self-denial would have been quite so plangent. Unglossed, the conditions would have constituted an invitation to the developer to press the local planning authority for relaxation of significant elements of the permission granted by the inspector, and no doubt also an invitation to the local planning authority to try to tighten them up. Such elastic wording, capable of being narrowed only by lega-

listic construction, has no place in decisions on which the public, the developer and the local planning authority are entitled to depend with some expectation of legal certainty.

57 It is evident that, apart from the rider to condition 3, the conditions adopted by the inspector follow the model conditions appended to Circular 11/95. Since the circular is directed principally, though not solely, to local planning authorities it is unsurprising that the model conditions provide for held over matters to be reserved to those authorities. But one apparent result of the absence of a distinction in the circular between local planning authorities and the inspectorate in relation to the framing of the model conditions is that inspectors, we are told, commonly remit matters (landscape management plans, for example) to the local planning authority.

58 If there are significant environmental elements (not, that is, matters of detail arising within a comprehensive grant of permission) it might seem on principle more appropriate that the Secretary of State, through his inspectorate, should reserve them to himself and thereby keep the public in the picture. It may be for consideration whether the full extent of the practice, which appears for many years to have been to remit the amplification of conditions to the local planning authority, is appropriate under the modern regime of environmental protection. It would be odd if such a carefully structured regime could be circumvented in this way by the surrender of public judgment to private negotiation. The point which has been put to us, that on the grant of outline planning permission it is to the local planning authority that outstanding matters are reserved, is not only not an answer: it reinforces the proposition that it is to the decision maker, and not to somebody else, that such matters should be reserved. On the other hand, s.78(1)(b) of the 1990 Act contemplates an appeal to the Secretary of State against, among other things, a local planning authority's refusal of approval required by a condition imposed on a grant of planning permission. This does not in terms include a condition imposed by an inspector, but neither does it exclude it.

59 The issue needs fuller debate than has been possible before us. What is clear for the present is that, remitted or retained, a condition cannot lawfully be so wide as to permit the subsequent renegotiation of an element of the planning permission of which it forms part. This I understand to be a premise of what is spelt out in para.33 of the judgment of Waller L.J.

60 So far as concerns provision for tree cover, my reason for agreeing that this too was made within the inspector's powers is the same as the foregoing—namely that on its proper construction it is limited to the carrying into effect of the elements of landscaping and planting recognised as necessary in the inspector's decision letter.

61 As to odour and vermin control, I agree that it was a proper compliance with the inspector's duty to leave these to the IPPC system, and that there was nothing inconsistent with this in making dust control subject to a distinct condition.

62 I wish lastly to record my concern at the reliance placed by the inspector on a purported s.106 Agreement tendered by the developer and stated on its title page to be unilateral. The inspector noted this but wrote (para.49) that he regarded

some of the obligations it contained as ''providing significant environmental and community benefits which would mitigate the impact of the development''. What he appears to have overlooked is that this unilateral undertaking purports at several points to bind the local planning authority. For example, para.5.3 purports to oblige the authority not unreasonably to withhold or delay approval of the developers' landscape management plan, and para.5.8 purports to bind the council, ''acting reasonably'', to determine outstanding works of maintenance and management. Reasonableness has many registers, the contractual one frequently more interventionist than the public law one. The adoption of a document of this kind, purporting to place obligations of reasonableness upon a public authority which is not a party to it, is capable of causing much dispute and confusion. Mr Barrett did not seek to suggest that its framing was other than unfortunate. Inspectors for their part need to be on the lookout for such Trojan horses.

63 **BLACK L.J.:** For the reasons given by Waller L.J. I agree that this appeal should be dismissed.