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CO/7746/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday 9 April 2014

B e f o r e:

MR JUSTICE SUPPERSTONE

Between:
THE QUEEN ON THE APPLICATION OF GILBERT

Claimant

v

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(2) HARBOROUGH DISTRICT COUNCIL

Defendants

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(Official Shorthand Writers to the Court)

Mr J Pereira QC (**Miss R Jones** for judgment) (instructed by Richard Buxton Solicitors) appeared on behalf of the **Claimant**
Miss J Thornton (**Mr P Mant** for judgment) (instructed by the Treasury Solicitor) appeared on behalf of the **First Defendant**
Mr J Smyth (instructed by the Solicitor to Harborough District Council) appeared on behalf of the **Second Defendant**
Mr R Kimblin (**Mr C Burcher** for judgment) (instructed by Marrons Shakespeares LLP) appeared on behalf of the **Interested Party**

J U D G M E N T
(Approved)

1. MR JUSTICE SUPPERSTONE: By this application Mr Philip Gilbert, the Claimant, seeks to quash two decisions. First, a Screening Direction by the Secretary of State for Communities And Local Government ("the First Defendant") dated 26 March 2013, made pursuant to regulation 6 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011; and second, the grant of planning permission dated 27 March 2013 by Harborough District Council ("the Second Defendant").

2. The effect of the Screening Direction is a ruling that the proposal to make permanent temporary planning permission for additional vehicular activities at Bruntingthorpe Proving Ground ("BPG") is not likely to have significant effects on the environment. The proposal does not thereby constitute "EIA development", so as to subject it to a full scale environmental assessment during the development consent process.

3. The thrust of the Claimant's challenge is directed at the Screening Direction. It is common ground that if the Screening Direction was unlawful, then the grant of planning permission was also unlawful.

4. The Claimant is a local resident who, together with others, is concerned about what is seen as an incremental and poorly controlled expansion of noisy activities at BPG. The Screening Direction was made by Mr Colbourne on behalf of the First Defendant. The Second Defendant is the local planning authority that granted the permission. C Walton Limited, the interested party, operates BPG and is the beneficiary of the planning permission under challenge.

5. BPG is a 250-hectare site located in the open countryside in Leicestershire, east of Lutterworth. It was formerly an airfield built in 1942 for use by bomber aircraft in the second world war. Since 1973 it has been used as a vehicle proving and testing ground and is one of the largest proving and testing grounds in Britain. The second defendant's planning officers in their report dated 31 July 2012 described it as having a "very complicated and vast planning history." As Mr Pereira for the Claimant observes "this has resulted in the authorisation of a range of noisy activities on the site associated with aircraft and motor vehicles" (Claimant's skeleton argument paragraph 6).

6. There is also an aircraft museum which has an open day twice a year; and aircraft recycling took place from May 2012 until December 2013, as a result of which aircraft occasionally landed at the site.

7. On 22 December 2008 the Second Defendant issued an enforcement notice against a range of unauthorised activities on the site. The enforcement notice was appealed and a public inquiry was held.

8. The First Defendant's Inspector who heard the appeal issued his decision letter on 8 December 2009. He granted temporary planning permission for two years -- until the end of December 2011 -- for the following uses on the site: the use of emergency service vehicles; the use of vehicles by the media for the purpose of photography or display; the use of go-karts; vehicles being used for the tuition of drivers; vehicles operated for the purposes of corporate entertainment and which have been approved for

use under the terms of the Operational Programme and the use of the site by cycling clubs.

9. A central issue in the appeal was noise control. The Inspector considered that there was "a real problem being caused to nearby residents" (paragraph 28). He said that the levels of noise which he heard in Bruntingthorpe and Upper Bruntingthorpe were "especially invasive" (paragraph 30) and he appreciated that noise from high performance vehicles and peak noise events which seem to be a particular feature of the uses of BPG not involving proving and testing can be "very disturbing" (paragraph 31).

10. At paragraph 34 Inspector stated:

> "I can well understand that the cumulative impact of the total noise regime from BPG, in contrast to the generally quiet area, can cause significant annoyance to local residents and harm their living conditions."

11. However, the Inspector concluded at paragraph 54 that:

> "Appropriate controls would ensure that the impact of the development… on the living conditions of nearby residents with particular regard to noise and disturbance, would be acceptable."

12. At paragraphs 56 to 70 of his decision letter the Inspector expressly considered the question of conditions and other controls on the development and the question of whether to grant temporary consent or not. At paragraphs 57 to 59 he concluded as follows:

> "57. The suggested and offered control mechanism is a complicated one and to a large extent depends on the regular availability of complex data and its collation with other information. This seems to me critical to the acceptability of the uses in question that the controls actually operate as envisaged, are enforceable and adequately enable identification of any breaches. In these circumstances I consider that it is necessary to have provision for the details of their operation and their effectiveness to be reviewed after a temporary period. This could identify whether additional data is needed…
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> 58. At the inquiry the appellant resisted a temporary consent as being contrary to advice in circular 11/95. A series of temporary consents is generally discouraged but here I believe one is necessary to assess the working of the equipment, the provision and interpretation of data and the consequent enforceability of conditions. In these circumstances a temporary provision giving a 'trial run' would accord with the circular's advice.
>
> 59. The residents ask for a period of one year. However, I have taken account of the complexity of the controls involving conditions… It seems to me that a year is not long enough for the monitoring process and equipment to be agreed and then for BPG to operate in accordance with

the agreed details for long enough for their effectiveness to be assessed. Two years is a more reasonable period. This would be long enough to establish whether the controls are effective or require modification."

13. The outcome of the appeal was that temporary planning permission for the activities enforced against was granted for a period of two years by Condition 1 of the consent. The range of uses covered by the permission is described in Condition 2. Conditions 3 to 18 provide for restrictions on the times activities can take place (Condition 3); a use only in accordance with an operational programme (condition 4) and a noise management plan (condition 5). No sounding of alarms, horns or sirens in connection with the uses permitted (condition 8); a limit on the total number of vehicles on site at any one time in connection with the uses permitted, but excluding go-karts and emergency vehicles (condition 9); installation of noise monitoring equipment on site; access for the local planning authority to the site for noise assessment purposes and noise monitoring data to be provided to the local planning authority on a regular basis (conditions 12 and 13); no public address system to be audible outside of the south site boundary (condition 14); vehicles on site to have passed a noise emotion test (condition 15); a cap on overall noise from the motor vehicles and associated activities at the site at 40dB(A) (condition 16); production of a track/events diary to be provided to the local planning authority (condition 17); and no vehicles to be driven on site on at least one Sunday in each calendar month, one of those Sundays should be Easter Sunday (condition 18).

14. On 19 December 2011 the interested party applied for planning permission to remove Condition 1 of the planning permission. On 25 June 2012 the Second Defendant's Environmental Health Officer ("EHO") published a report assessing noise from BPG and the effectiveness of the planning conditions on the 2009 permission. The report explains that 12 visits were undertaken in the 12 months between May 2011 and May 2012 to measure noise levels and monitor compliance with the 2009 conditions. A tabulated summary of all monitoring visits is set out in table 1 at pages 7 to 10 of the report. Under the heading “Community Noise Level and 2009 Planning Conditions" at page 11 of the report, it is noted that condition 16 of the 2009 planning permission refers to a community noise level ("CNL") at 40dB(A) applicable to permitted vehicle uses involving corporate entertainment, i.e. Big Thunder, emergency vehicles, media, driver tuition and go-karts. The report continues:

> "Although noise levels were measured above 40dB(A) on four occasions throughout 2011/12, corporate activity only took place on one of those occasions. A level of 54dBA was measured in Gilmorton on 5 April 2012 between 11.53 and 12.03 hours. The track diary for this date is tabulated below (table 2) and shows that during this measurement period there was proving and testing and corporate use taking place. It is therefore not possible to distinguish between the two activities and conclude with any certainty which use was responsible for exceeding 40dB(A). A breach of condition 16 cannot therefore be proven. This demonstrates the difficulty that HDC has in differentiating between uses when trying to enforce the community noise limit. This potential breach should, however, be put in perspective in terms of the harm caused by BPG noise emissions

> exceeding 40dB(A) in the community. The use on this day gave rise to one complaint, which shows that an exceedance of 40dB(A) in the local community does not necessarily give rise to significant harm. There have been numerous occasions throughout 2010, 2011 and 2012 up until 31 May 2012 when complaints have been received and the track diary shows that more than one use was taking place. Therefore HDC has been unable to categorically say which use gave rise to compliant. This clearly makes it extremely difficult for HDC to fully judge the impact that the 2009 permission has upon the local community."

15. The report at page 13 includes graphs setting out a number of uses giving rise to complaints over the three years 2010 to 2012. The report states at page 14:

> "The graphs clearly demonstrate that proving and testing is the main use that gives rise to complaint. In comparison, the amount of times that the 2009 planning permission has been found to give rise to complaint is small. However, it must be recognised that there are a significant number of occasions whereby complaints were received and the use identified was proving and testing AND corporate use under the 2009 planning permission. In these cases it has not been possible to distinguish which activity gave rise to complaint and it remains inconclusive as to whether the 2009 planning permission use gave rise to complaint and whether the resultant noise level was in breach of the community noise level 40dB(A). Therefore there is still a lot of uncertainty around how the 2009 planning permission impacts upon the local community."

16. The EHO made recommendations to address these problems, which it was accepted would require an amendment to the 2009 Noise Management plan. They included measures to control cumulative impacts.

17. On 31 July 2012 a report on the application was presented to the Second Defendant's planning committee. The Officer's report was preceded by an EIA screening decision by the Second Defendant which concluded that EIA was not required. The report contained at pages 2 to 3 a summary of the EHO's report. It stated that the report known as the "2012 Report" had been produced by Harborough District Council as an addendum to a noise report produced in February 2011, known as the "2010 Report", and that both reports are available for inspection. The material part of the summary of the 2012 EHO report at pages 2 to 3 of the Officer's report stated:

> "Noise monitoring undertaken through 2011 and 2012 (up to 31 May 2012) has failed to demonstrate that noise levels have increased since 2010. The evidence suggests that there has been an improvement in noise emissions from the site and this may be related to a reduction in PD [that is permitted development] days since 2010. An analysis of complaints since 2010 has shown a downward trend, and it is also apparent that a small minority of complainants make up the majority of complaints. In 2011 one complainant was responsible for almost 40 per cent of complaints. The conclusion on noise emissions from BPG is that a

statutory nuisance does not exist.

Proving and testing was identified as being the largest cause of complaint since 2010, although there are a large proportion of complaints whereby it is unclear as to which use persistently gave rise to complaints, whether it was proving and testing and/or corporate vehicle use undertaken in accordance with the 2009 planning permission.

Noise monitoring undertaken on 5 April 2012 confirmed the difficulty that HDC has in being able to differentiate between the various uses taking place at BPG. This supports the fact that the community noise level ("CNL") is at the present time extremely difficult to enforce. It is for these reasons that several recommendations have been made to try and address the concerns that this report has identified."

The four recommendations are then set out.

18. At pages 11 to 12 of the Officer's report there is an assessment of residential amenity which reads:

"Residential Amenity:

In 2010 HDC undertook a detailed assessment of noise from BPG. Monitoring was undertaken in community locations to determine whether a statutory nuisance existed and to check the community noise level and other planning conditions that were introduced by a recent 2009 planning permission. Permitted Development (PD) usage was also monitored. The assessment included reactive visits in response to complaints, proactive visits during periods of expected intrusion and some targeted snapshot visits to check and compare at other times.

Mike Stigwood Acoustician and Environmental Health Practitioner was asked by HDC to review the noise evidence collected throughout 2010. In January 2011 he produced a comprehensive report giving his view that a statutory nuisance does not exist and the reasons why. He made comparisons between BPG and Croft Promo-Sport Ltd, as a recent nuisance case involving Croft set a precedent and a benchmark for the boundary of acceptability in relation to nuisance.

There is no doubt that some vehicular activity at BPG causes annoyance and intrusion to residents of the local community. This is consistent with the comments of DJ Holland in his decision in 2007 (C. Walton Limited v HDC) and also the comments of planning Inspector A Fussey in his decision in 2009.

Mr Stigwood recognise add this there is an intrusion from activity at BPG especially from Drivers Dream Day Events and particularly the ASDA event but he concluded that this intrusion does not occur on sufficient occasions or intrude with sufficient duration to constitute a nuisance.

Both of these events are carried out under the Permitted Development Rights that the site enjoys. Furthermore, in his expert opinion whilst Mr Stigwood considered that there is a significant degree of unacceptable impact, he was unable to support a conclusion that there was an actionable nuisance.

HDC therefore, having regard to Mr Stigwood's expert opinion as well as the subjective opinion of the Environmental Health Officers that undertook the noise monitoring, the Croft nuisance case, the judgment of DJ Holland (2007) and the findings of Planning Inspector A Fussey (2009), concurred with Mr Stigwood and concluded that noise from BPG did not constitute a statutory nuisance at that time. Following the 2010 noise report, further noise monitoring has been undertaken throughout 2011 and 2012. There is no evidence to suggest that noise levels are any worse than they were in 2010 and therefore, it remains the Council's view that a statutory nuisance does not exist. The evidence suggests that there is less noise intrusion from vehicular activity at BPG. There has been a steady decline in noise complaints received and an analysis of the complaints has demonstrated that the majority of complaints are made by a small proportion of complainants relative to the overall population of the local community. It is also apparent and perhaps directly related that there has been a significant reduction in PD days at BPG since 2010.

The 2009 appeal decision imposed a community noise level of 40dB LAeq, 10min in order to protect the residential amenity of the neighbouring communities. Since the permission was granted, noise levels have been recorded above 40dB LAeq, 10min on four occasions, however, 2009 consent activities were only taking place on one of those occasions. A level 54dB LAeq, 10min was measured in Gilmorton on 5 April 2012. The track diary for this date shows that during the same time period there was also proving and testing taking place. It is therefore not possible to distinguish between the two activities and conclude with any certainty which use was responsible for exceeding 40dB LAeq, 10min.

In the context of the overall operation of the site, the complaints which can be specifically attributed to the uses which are subject of the 2009 appeal decision are much lower than those which are attributed to other uses such as proving and testing and aircraft uses. Comments received by the EHO recognise the fact that there are difficulties in directly identifying the source of the noise in all cases, which in turn results in uncertainty over whether or not the community noise level can be applied. Furthermore, it must be noted that the complaints received by the Council originate from a very small percentage of the overall communities surrounding the site.

On the basis of his findings, the EHO has made a number of recommendations to the site operators, which are set out in the consultation section of this report. The site operators have been made

aware of these comments and have responded accordingly. Their comments can also be seen in the consultation section of this report. Officers consider that the recommendations made by the EHO seek to add further control to the permitted uses over and above that which was set out by the Inspector, or they seek to add control to uses which were not subject to the appeal decision. Whilst helpful, these approaches are not essential as monitoring of existing conditions has not resulted in a conclusion that the use is unacceptable, and as such, officers do not consider that further restrictive conditions are necessary, nor would they satisfy circular 11/95 - Use of Conditions and paras 203 and 206 of the Framework. Furthermore, as set out above, there have only been 4 occasions in the 2 years since the granting of the appeal decision on which the Community Noise Level has potentially been breached. As such it is considered to be reasonable to allow the removal of Condition 1 of the appeal decision to allow permanent use of the site for the uses set out in both the recommended Condition 1 and the Details of Consent section of this report. All other relevant conditions from the 2009 appeal decision would remain in force."

19. The conclusion to the Officer's report states at pages 14 to 15:

> "The use as currently operating is an appropriate use within the site context and contributes to the rural economy. During the duration of the two year temporary period breaches of the controls set out by the remaining conditions have been very limited. Access to the site is adequate and the use of the site will not have an undue detrimental effect on the residential amenity."

20. On 29 November 2012 the Claimant's solicitors requested a Screening Direction from the First Defendant. In making the application the Claimant's solicitors enclosed copies of the screening checklist they had prepared; the planning application of 19 December 2011; the EIA screening opinion of the second defendant of 5 January 2012; the planning officer's report of 31 July 2012 and recent relevant correspondence.

21. The Screening Direction was issued on 26 March 2013. The First Defendant's conclusions are set out at paragraphs 9 and 10 of the direction:

> "9. Bruntingthorpe proving ground is not within or near to a sensitive area as defined by the EIA regulations 2011. The motor vehicular uses permitted by the application would by their nature release emissions to the air, possibly produce solid wastes, for example damaged vehicles, and possibly result in accidents due to the nature of the activities. There is noise associated with the activities, and careful consideration has been given to the representation made on the effectiveness and monitoring of the conditions imposed by the appeal in determining whether the proposals to vary Condition 1 is EIA development and it is considered that significant effects on the environment are not likely.

> 10. On the basis of information provided the Secretary of State is not persuaded that this is development with particularly complex and potentially hazardous effects necessitating an environmental statement. In considering the environmental effects of the proposal, the cumulative effects of the existing uses which also take place at BPG have been considered. Taking account of the nature, characteristics and location of BPG and the information before the Secretary of State, including impacts such as noise, emissions and traffic congestion, it is considered that significant effects are not likely, individually or cumulatively, giving rise to the need for an EIA."

22. A request for background information on the Screening Direction was made by the Claimant's solicitors on 5 April 2013. The First Defendant replied by letter dated 22 April, and enclosed two documents; the internal EIA analysis and screening checklist relating to the case and a working draft of a NPCU site visit protocol for EIA screening. Question six of the questions to be considered in the checklist of the EIA analysis and screening document is:

> "Will the project cause noise and vibration or release of light, heat energy or electromagnetic radiation."

The answer given is:

> "The motor vehicle element of the use will result in noise, and if undertaken at night release light. The appeal decision and material submitted since the decision, including monitoring and operation of conditions, recognise that there was noise associated with the activities but felt that it was within acceptable limits. The Harborough District Council (HDC) Committee Report on the application states: 'The conclusion on noise emissions from BPG is that a statutory nuisance does not exist'. Likely noise impacts on the sight and those on nearby areas have been considered. Taking all the representations into account it is not considered that the project will give rise to noise and vibration or release of light, heat energy or electromagnetic radiation resulting in likely significant effects."

23. On 27 March 2013 the Second Defendant granted permission to make the permitted uses permanent. The reasons given were:

> "The use as currently operating is an appropriate use within the site context and contributes to the economy. The proposal is in accordance with the National Planning Policy Framework, policies EM16 and EM 17 of the Harborough District Local Plan and CS17 of the Harborough District Core Strategy by virtue of the fact it is not harmful to the character of the surrounding area or other material interest, and the special circumstances of the proposal mitigate the fact the site is within a non-sustainable location."

24. The permission under challenge removed Condition 1 of the 2009 appeal permission, but left the other conditions unchanged.

25. The environmental impact assessment framework is well settled. The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 give effect to the requirements of Directive 2011/92/EC. Development, such as the present, falling within Schedule 2 of the Regulations, requires environmental impact assessment where it is likely to have significant effects on the environment by reason of factors such as nature, size or location (regulation 2(1)).

26. Regulation 4(6) provides that:

> "Where a Local Planning Authority or the Secretary of State has to decide under these regulations whether Schedule 2 development is EIA development the Authority or Secretary of State shall take into account in making that decision such of the selection criteria as set out in Schedule 3 as are relevant to the development."

27. The criteria in Schedule 3 include the characteristics of the development (including the accumulation with other development); the location of the development and the characteristics of the potential impact, for example the duration, frequency and reversibility of the impact.

28. Circular 02/99 Environmental Impact Assessment, in operation at the material time, gave guidance on the application of the Directive and Regulations. It provides:

> "33. In the light of these [that is the selection criteria] the Secretary of State's view is that, in general, EIA will be needed for Schedule 2 developments in three main types of case: (a) for major developments which are of more than local authority (paragraph 35); (b) for developments which are proposed for particularly environmentally sensitive or vulnerable locations (paragraphs 36 to 40); and (c) for developments with unusually complex and potentially hazardous environmental effects (paragraphs 41 to 42).
>
> 34. The number of cases of such developments will be a very small proportion of Schedule 2 developments."

29. The relevant legal principles to be applied when screening a proposed development are now clear. In R(Catt) v Brighton and Hove County Council [2007] EWCA Civ 298 Lord Justice Pill said:

> "33. Developments come in all forms and the approach to the screening opinion must have regard to the development proposed. There will be cases such as Gillespie where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.
>
> 34. On the other hand there will be cases where the likely effectiveness

of conditions or proposed remedial or ameliorative measures can be predicted with confidence. There may also be cases where the nature, size and location of the development are such that the likely effectiveness of such measures is not crucial to forming the opinion. It is not sufficient for the party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that an EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment, and a planning judgment made."

30. In R (Loader) v the Secretary of State for Communities and Local Government [2012] EWCA Civ 869 Pill LJ set out his conclusions at paragraphs 43 to 48 of his judgment. The material paragraphs for present purposes are paragraphs 43 and 47:

> "43. What emerges is that the test to be applied is: 'is this project likely to have significant effects on the environment'. That is clear from European and national authority, including Commission Guidance, at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (Commission v United Kingdom [2006] ECR 1-1969). The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker.
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> 47. Applying that approach to the present facts, I have no doubt that the Inspectorate was entitled to conclude that the proposed redevelopment would not have significant effects on the environment. A checklist was completed and no complaint is made about its contents. Judgment was exercised and reasons given for the decision cited at paragraph 5 above, which justify the conclusion reached. It may be added that the application for planning permission in this case did not involve the uncertainties which have presented difficulties of analysis in some of the cases considered. Moreover, judgment was exercised, not at the early stages of the procedure when such decisions are often made, but after full consideration of the planning issues by the local planning authority and also by an Inspector appointed by the Secretary of State. Full information as to the nature of the proposal and its likely effects was available."

31. In R(Evans) v the Secretary of State for Communities and Local Government [2013] EWCA 114 Beatson LJ observed at paragraph 50 that this case, like Loader's case, is not one in which the Secretary of State exercised his judgment at the earliest stage. At paragraph 21 Beatson LJ said:

> "The authorities considered by this court in Loader's case show that an approach which considers whether there is a real risk as opposed to a probability of an impact embodies a precautionary approach. They are set out by Pill LJ, who gave the only substantive judgment: see paragraphs 26 to 30. Lord Justices Toulson and Sullivan agreed with Pill LJ."

32. At paragraph 22 Beatson LJ cited with approval the statement of Carnwath LJ, as he then was, in Jones v Mansfield [2003] EWCA 1408 at paragraph 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 (see also the well known statement of Lord Hoffmann in Tesco Stores v the Secretary of State [1999] 1 WLR 759 at paragraph 57 that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State).

33. At paragraph 27 Beatson LJ added that to require the EIA process where there are differing views would also largely make the Secretary of State's role redundant. In R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 Moore-Bick LJ considered the nature of what is involved in giving a screening opinion. He said at paragraph 20:

> "It 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 involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, of whether an EIA needs to be undertaken at all. I think it important therefore that 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, hence the term 'screening opinion'."

34. Moore-Bick LJ continued at paragraph 21:

> "Having said that it is clear from R(Mellor) v the Secretary of State for Communities and Local Government (case C75/08) that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion itself or in separate reasons, if necessary combined with additional material provided

on request." (see Mellor at paragraph 59).

35. The decision letter and the Planning Inspectorate screening checklist constitute the decision and its reasons (see Evans at paragraph 28).

36. The adequacy of reasons in a Screening Direction is to be assessed by the guidance given by Lord Brown in South Buckinghamshire District Council v Porter (No.2) [2004] UKHL 34 at paragraph 36 (see Evans at paragraph 31).

37. As in every case, the decision maker must ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly (Secretary of State for Education v Thameside [1977] 1 AC 1014 at 1065B). The standard by which a Screening Direction to is to be assessed is on the usual Wednesbury principles (see Loader at 31, and Evans at paragraphs 34 to 42).

38. Mr Pereira submits that when making his screening decision the First Defendant: (1), failed to give lawful effect to the precautionary principle when considering the effectiveness of the noise control regime; (2), failed to have lawful regard to cumulative effects and (3), failed to give lawful reasons for his decision. I shall deal with each in turn.

39. In relation to ground one, Mr Pereira submits that the very same deficiencies in the operation of the noise regime which the EHO had identified were accepted in the Planning Officer's report. Against those findings, it is, he submits, quite impossible to see how the First Defendant could have reached a lawful conclusion on the adequacy of the noise control measures so as to have ruled out the need for EIA. Given the deficiencies in the noise regime acknowledged in the evidence before the First Defendant, the First Defendant cannot have lawfully excluded the risk of significant environmental effects arising in the future, or having arisen in the past.

40. Referring to the answer to question 6 of the First Defendant's checklist in the EIA analysis and screening analysis document, Mr Pereira comments that there was only one appeal decision, and that was in 2009, which did not say that noise associated with the activities was within acceptable limits. It said that that would be so only if the noise was controlled.

41. As for the reference to the material submitted since the appeal decision, Mr Pereira suggests that it is not clear what is being referred to. He submits that no consideration has been given to the effectiveness of the mitigation measures imposed by the conditions. The present case falls, he submits, into the first of the three categories of cases referred to in Catt. On the basis of the evidence and conclusions in the EHO report, which was available for the First Defendant to read, and should have been read in order for the First Defendant to be properly informed, the First Defendant cannot have assumed that the most important of the conditions, Condition 16, had been effectively implemented.

42. Ms Thornton for the First Defendant accepts that the decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental

impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment.

43. However, as Moore-Bick LJ made clear in Loader -- paragraph 47 -- the precautionary principle needs to be considered in the light of the stage of the decision making process. In the present case there had been a four day planning inquiry in 2009 during which local representations had been made, acoustic evidence considered and the Inspector had come to his decision about noise impact and necessary controls. Thereafter there had been to a two year trial of noise controls and regular noise monitoring by the Second Defendant. In reaching his decision for the purposes of giving a screening opinion the decision maker considered the evidence and concluded that the project would not give rise to noise resulting in likely significant effects.

44. Ms Thornton resisted Mr Pereira's attempts to pigeon hole the First Defendant's case into one of the categories identified in Catt. She submitted that it fell into the second category, but there were relevant factors in relation to the third category which were applicable in the present case.

45. I accept Ms Thornton's submission (supported by Mr Kimblin for the interested party) that the starting point in the decision making process is the planning application that is before authority for determination. As Davis LJ said in Burridge v Breckland District Council [2013] EWCA Civ 228 at 78:

> "For the reasons that I sought to give in Candlish... I think that there are strong grounds for not requiring planning authorities to look behind the particular application for development before them."

46. The planning application in the present case is to make permanent what is temporary for additional vehicular activity on a site that has existing noise. Schedule 3 to the regulations deals at paragraph 3 with "characteristics of the potential impact". It states:

> "the potential significant effects of the development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to... (e) the duration, frequency and reversibility of the impact."

47. Paragraph 2 requires that the environmental sensitivity of geographical areas likely to be affected by development has to be considered, having regard in particular to (a) the existing land use.

48. Guidance on EIA screening issued by the Commission in June 2001 provides:

> "The checklists are intended to be used quickly by people with the qualifications and experience typically found in competent authorities, and using the information which is readily available about the in project and its environment." (paragraphs 3.4.1 and 4.1).

49. The First Defendant considered the document submitted by the Claimant's solicitor in relation to the request for a Screening Direction. The EHO report was not provided, but a summary appears in the Planning Officer's report which was before the decision maker. I accept Miss Thornton's submission that the Claimant cannot reasonably complain about the First Defendant's failure to have regard to a document which was not provided to him when requesting him to make a Screening Direction. In any event, I am satisfied that the summary of the EHO report in the Planning Officer's report is a fair and accurate summary of the report as a whole.

50. The screening direction and checklist make clear that the information about noise mitigation and its effectiveness was considered (see paragraphs 9 and 10 of the Screening Direction).

51. The summary of the EHO report in the Planning Officer's report records concerns about the noise cap imposed in 2009 being difficult to enforce. But as Miss Thornton submits, and I agree, concerns about enforceability of the cap did not affect the underlying measurement of noise which is relevant for the test on screening, namely whether the noise is likely to be significant. The Planning Officer attached importance to the limited number of occasions -- only four in all in two years -- on which the cap had been breached.

52. This first ground of challenge is, in my view, really no more than a dispute over whether the regime imposed by the conditions attached to the 2009 permission had worked. The First Defendant plainly had no reasonable doubt in his mind that it had.

53. I turn next to the second ground of challenge, failure to consider the cumulative impact of noise.

54. Mr Pereira points to the range of uses identified in the EIA analysis and screening document in response to question 27 and observes that there is no reference to the aircraft recycling use. He submits that there is no indication in the documentation relied upon by the First Defendant that it has considered the cumulative effect of aircraft recycling at BPG. At paragraph 39 of his skeleton argument Mr Pereira suggests that it is not clear where or how the First Defendant's assessment of cumulative impacts reached a judgment about the impacts of the baseline position, namely the noise generated by activities that were lawful apart from the 2009 authorised uses.

55. Moreover, he criticises the First Defendant's decision for failing to consider that one in three of the limited number of noise measurements taken by the Second Defendant had exceeded 40dB(A) community noise level imposed by Condition 16, and that exceedances had been reached even without the operation of the 2009 permitted development.

56. In my view it is clear from both the decision letter and screening checklist that consideration was given to the effects of cumulative impacts. Paragraph 10 of the Screening Direction states:

> "In considering the environmental effects of the proposal, the cumulative effects of the existing uses which also take place at the BPG have been considered. Taking account of the nature, characteristics and location of BPG and the information before the Secretary of State, including impacts such as noise emissions and traffic congestion, it is considered that significant effects are not likely individually or cumulatively giving rise to the need for an EIA."

57. I accept Miss Thornton's submission that there was ample evidence before the decision maker to justify the conclusion reached. The noise cap and routine monitoring introduced by the planning Inspector in 2009 had assessed the cumulative effect of noise at BPG. The monitoring has shown that the noise cap has only been breached on four occasions in two years.

58. As Mr Kimblin observes, the First Defendant knew what the background noise was, understood the community noise limit and the degree of protection which it afforded and was appraised of the effects during operation in the terms of the temporary permission. In arriving at a view as to the cumulative effects, the First Defendant plainly, in my view, had regard to all that information.

59. Finally, the third ground of challenge. Mr Pereira submits that the reasons given by the First Defendant for his decision did not state whether the first defendant reached a favourable conclusion on the effectiveness of the noise regime or not. If a favourable conclusion was reached, he submits that the First Defendant failed to give any particularity as to how or why he reached that conclusion, despite the adverse evidence as to their efficacy.

60. Similarly, Mr Pereira submits that the reasoning in relation to cumulative effects fails to explain how any real risk of significant environmental effects could be ruled out, despite exceedances of the 40dB(A) level being recorded without the operation of the 2009 authorised uses.

61. The First Defendant has failed, Mr Pereira submits, to explain how he has considered likely noise impacts on the site and those nearby areas have been considered so as to exclude EIA when the Second Defendant's EHO considered that the impacts were uncertain and extremely difficult to judge.

62. In my view this criticism is not well founded. Paragraphs 9 and 10 of the screening decision to which I have referred set out in clear and precise terms, as required by the EIA Regulations, the reasons for the conclusion reached by the First Defendant. Those paragraphs in the screening decision must be read together with the answers in the screening checklist, in particular the answer to question 6. In my view the reasons that were given are intelligible and adequate. For the reasons I have given, this claim fails.

63. MR SMYTH: My Lord, just an application for costs. His Honour Judge Birtles made an order, a cost capping order, so it is £5,000 that the Secretary of State is limited to. My Lord, I don't know whether you have seen the schedule but it comes in at something like £17,000 so I simply ask --

64. MR JUSTICE SUPPERSTONE: I am not surprised that it exceeds five. Yes, that sounds realistic. Any objection to that?

65. MS JONES: My Lord, subject to the PCO limit of £5,000 the Claimant is happy to accept an order for £5,000. But for the avoidance of doubt I don't understand the interested party to be claiming their costs. But for the avoidance of doubt the Claimant's total costs be limited to £5,000.

66. MR BURCHER: My Lord, I appear on behalf of Mr Kimblin. I can confirm that the interested party will not seek its costs.

67. MR JUSTICE SUPPERSTONE: Thank you very much. There will then be an order that the Claimant pay the Secretary of State's costs in the sum of £5,000. Does that conclude matters?

68. MS JONES: My Lord, I do have an application for permission to appeal.

69. MR JUSTICE SUPPERSTONE: Yes.

70. MS JONES: Of course I anticipate that you may be disinclined to grant permission but --

71. MR JUSTICE SUPPERSTONE: You make your application.

72. MS JONES: However, I wish to briefly set out three arguments why in the Claimant's opinion permission ought to be granted and there is a real prospect of success --

73. MR JUSTICE SUPPERSTONE: Most certainly, yes.

74. MS JONES: -- as required by rule 52.3. On grounds three, reasons, I submit with suspect there is a real prospect of success given the case of Bateman. Given the effectiveness of the noise control measures was central to the screening decision, which the First Defendant accepted, the Claimant maintains that the Secretary of State did not satisfy its duty under regulation 4.7, to give full, clear and precise reasons. Indeed, my Lord, another reason in favour of permission is that to my knowledge there is no case law as yet exploring what full clear and precise requires as these regulations are relatively new.

75. On ground two, cumulative effects, the Claimant says there is a real prospect of success on the basis that there was insufficient information before the Secretary of State on what exactly the cumulative impacts were.

76. On ground one, the question of the ineffectiveness, as we say, of the noise control measures, with respect to your Lordship, the Claimant respectfully submits that the evidence clearly gives rise to an inference that the Secretary of State went wrong in the Thameside sense because, one, the Secretary of State was aware that the limit of 40dB had been breached even without the 2009 uses. Two, the only time that the noise from the 2009 use was measured in the year 2011 to 2012 it had been in breach of the community noise limits -- so that one time that is mentioned in the Officer's report --

and therefore we submit that there is no rational basis on which the Secretary of State could conclude that he excluded a real risk of significant environmental effects because on the evidence before him the noise control measures the 2009 Inspector felt were necessary to avoid real harm to residential amenity were not enforceable.

77. My Lord, given this the claimant respectfully argue that is there is a real prospect of success on appeal and we would ask that permission be granted.

78. MR JUSTICE SUPPERSTONE: Thank you very much. For the Secretary of State, anything you wish to stay?

79. MR SMYTH: No my Lord, simply for the reasons you have given in your judgment.

80. MR JUSTICE SUPPERSTONE: Thank you. You put your application very clearly.

81. MS JONES: Thank you, my Lord.

82. MR JUSTICE SUPPERSTONE: But I refuse permission. Thank you very much.

83. MS JONES: Thank you. My Lord, I apologise, can I possibly ask for an extension for the time for filing the appeal notice, given that there is two bank holidays; next week there is Good Friday and Easter Monday.

84. MR JUSTICE SUPPERSTONE: Yes, certainly. How long do you seek?

85. MS JONES: 28 days for the filing of the appeal notice instead of 21, unless there are any objections?

86. MR SMYTH: No objection, my Lord.

87. MR BURCHER: No objection.

88. MR JUSTICE SUPPERSTONE: I will give that extension.