

Neutral Citation Number: [2015] EWCA Civ 716

Case No: C1/2013/3471

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MRS JUSTICE LANG DBE
CO/2408/2013**

Royal Courts of Justice
Strand, London, WC2A 2LL

9th July 2015

B e f o r e :

**LORD JUSTICE SULLIVAN
LORD JUSTICE PATTEN
and
MR JUSTICE ROTH**

Between:

MACKMAN

Appellant

- and -

**THE SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL
GOVERNMENT
UTTLESFORD DISTRICT COUNCIL
REDROW HOMES (EASTERN) LIMITED Respondents**

**George Mackenzie (instructed by Richard Buxton Solicitors) for the Appellant
Richard Kimblin (instructed by Treasury Solicitor) for the First Respondent
Satnam Choongh (instructed by I. Mason, Legal Department, Redrow Homes Ltd.)
for the Third Respondent**

**The Second Respondent did not appear and was not represented
Hearing date: 24th June 2015**

Lord Justice Sullivan:

Introduction

1. This is an appeal against the Order dated 7th November 2013 of Lang J dismissing the Appellant's application under section 288 of the Town and Country Planning Act 1990 ("the Act") to quash a decision of an Inspector appointed by the First Respondent allowing an appeal by the Third Respondent under section 78 of the Act against the Second Respondent's refusal to grant outline planning permission for the erection of 73 dwellings on land North of Ongar Road, Great Dunmow, Essex. The Inspector granted conditional planning permission for the development.
2. There is no criticism of the contents of the Inspector's decision dated 21st January 2013. The sole basis on which the Appellant contends that the Inspector's decision was unlawful is that it had not been preceded by a lawful screening opinion as to whether an Environmental Impact Assessment ("EIA") was not required for the purposes of the Town and Country Planning (Environmental Impact Assessment) (England) Regulations 2011 ("the 2011 Regulations"). The Appellant submits that the screening opinion adopted by the Second Respondent was unlawful because: (a) it did not have regard to the issue of cumulative impact; and (b) if cumulative impact was considered, the screening opinion did not give full, clear and precise reasons why the cumulative impact of the proposed development together with other permitted and proposed developments in the vicinity was not likely to give rise to significant effects on the environment.

Background

3. The background to this appeal is set out in some detail in the judgement of Lang J [2013] EWHC 3396 (Admin). The focus is upon the Second Respondent's screening opinion because the judge concluded that in its screening decision the Planning Inspectorate had confirmed the screening opinion that had been carried out on behalf of the Second Respondent by one of its Planning Officers, Mrs. Denmark (see paragraph 83 of the judgement). That screening opinion was originally dated the 25th June 2012. It erroneously referred to the 1999 EIA Regulations which had been repealed and replaced by the 2011 Regulations. It was reissued in the same terms, substituting references to the 2011 Regulations, on 6th November 2012.
4. The screening opinion referred to Circular 02/99 Environmental Impact Assessment which "provides guidance in regards to procedures which are required when establishing whether an EIA is required." The guidance in the circular was then followed: Mrs. Denmark first considered whether the proposed development was Schedule 1 or Schedule 2 development, and concluded that while it was not within Schedule 1, it was an "Urban development project" falling within paragraph 10(b) in Schedule 2. Having concluded that the proposed development was Schedule 2 development, Mrs. Denmark then considered whether the proposed development was likely to have "significant effects" on the environment by virtue of its nature, size or location.
5. She began her consideration of this issue with a reference to Schedule 3 to the 2011 Regulations which "sets out selection criteria which must also be taken into account in determining whether the development is likely to have significant effects on the environment." The selection criteria in Schedule 3 are grouped under three headings: "Characteristics of Development", "Location of Development", and "Characteristics of the potential impact", as follows:

"1. Characteristics of Development

The characteristics of development must be considered having regard, in particular, to –

- (a) the size of the development;
- (b) the cumulation with other development;
- (c) the use of natural resources;
- (d) the production of waste;
- (e) pollution and nuisances;
- (f) the risk of accidents, having regard in particular to substances or technologies used.

2. Location of Development

The environmental sensitivity of geographical areas likely to be affected by the development must be considered having regard, in particular, to –

- (a) the existing land use;
- (b) the relative abundance, quality and regenerative capacity of natural resources in the area;
- (c) the absorption capacity of the natural environment, paying particular attention to the following areas – [certain types of area are listed].

3. Characteristics of the potential impact

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 –

- (a) The extent of the impact (geographical area and size of the affected population);
- (b) The transfrontier nature of the impact;
- (c) The magnitude and complexity of the impact;
- (d) The probability of the impact;
- (e) The duration, frequency and reversibility of the impact.”

6. The screening opinion considered each of these three headings in turn:

“1) Characteristics of Development

The proposals would introduce a significant element of built form within the rural area on a site that is currently a Greenfield site. The site is located outside the development limits but adjoins an existing residential development and the new A120 dual carriageway. The proposals would have an impact on the character of the area. However indicative plans submitted indicate that the proposals would aim to limit the impact by retaining the majority of the mature trees on the site and existing landscaping.

It would be unreasonable, therefore, on the evidence available at this stage to suggest that the likely affect on the environment would be “significant” enough to justify the requirement of an EIA taking into account the characteristics of the development.

2) Location of Development

The environmental sensitivity of geographical areas likely to be affected by the development must be considered and in particular with reference to the following.

The site is located outside development limits but adjacent to existing residential development and the A120 dual carriageway. The site forms a buffer between the existing built form and the A120. However, none of the site is located within a geographically sensitive location although the site is located adjacent to a County Wildlife Site.

In summary, it would be unreasonable, therefore, on the evidence available at this stage to suggest that the likely affect on the environment would be 'significant' enough to justify the requirement of an EIA taking into account the location of the development.

3) Characteristics of the potential [impact]

The Council has in making the above professional judgements, assessed the potential significant effects of the development having regard in particular to:

- (a) The extent of the impact
- (b) The transfrontier nature of the impact
- (c) The magnitude and complexity of the impact
- (d) The probability of the impact
- (e) The duration, frequency and reversibility of the impact.

On the evaluation of the information submitted by the applicant, and the Council's knowledge of the local area and its environment, bearing in mind that it is not required to have full knowledge of every environmental effect, it is considered that the proposed development is not likely to give rise to significant environmental effects on the environment. An Environmental Impact Assessment (EIA) is therefore not required for the proposed development shown on the submitted drawings by the applicant."

7. The final paragraph of the screening opinion listed a number of documents which were submitted with the application and which formed the basis of the opinion:

Supporting Planning Statement

Design and Access Statement

Statement of Community Involvement

Pre-Assessment code for Sustainable Homes

Energy Performance statement

Archaeological Desk Based Assessment"

Ecological Assessment

Flood Risk Assessment

Outline Drainage Strategy

Noise assessment

Air Quality assessment

Arboricultural Implications Assessment and Method Statement

Root Survey Report

Landscape Statement

Visual Assessment

Transport Assessment

Residential Travel Plan.

8. The three projects in the vicinity relied on by the Appellant as other developments whose impacts ought to have been considered cumulatively with the impact of the proposed development were described by Lang J in paragraph 48 of her judgement:
- “(a) The Ongar Road South proposal to construct up to 100 dwellings on a Greenfield site opposite the proposed development. The application for planning permission was made on 22nd June 2011, and granted on appeal on 20th June 2012, shortly before the screening opinion was issued.
- (b) The proposal to construct a waste transfer station at land off Chelmsford Road. An application was made to the County Council on 9th March 2012 and granted on 26th June 2012. The District Council was a statutory consultee, and the site had been proposed for this purpose in the Local Plan in 2005, subject to a traffic impact assessment.
- (c) Proposed development at Smith’s Farm, west of Chelmsford Road. The site was allocated in the 2005 (and current) Local Plan for development as a Business Park, west of Chelmsford Road. During consultation on the proposed Local Plan, a detailed proposal for the site was presented to the Council on behalf of developer Crest Nicholson, in July 2012. In July 2013, Crest Nicholson applied for planning permission for a mixed use scheme comprising a business park, residential units, a retail food store, and a school.”

Discussion

Was cumulative impact considered?

9. It was common ground that the screening opinion had to be read as a whole and in a common sense way. On behalf of the Appellant, Mr. Mackenzie rightly accepted that the mere fact that cumulative impact had not been expressly referred to in the screening opinion did not mean that it had not been taken into account. He submitted that although there did not have to be an express reference to cumulative impact, there had to be sufficient “linguistic clues” in the wording of the screening opinion itself to support the conclusion that on the balance of probabilities cumulative impact had been considered; and that Lang J had been wrong to rely on extraneous matters such as the likely knowledge and expertise of Mrs. Denmark as a planning officer (see paragraphs 68-73 of the judgement).
10. I accept the Appellant’s submission that a linguistic analysis of the screening opinion is required, but I do not accept the submission that the analysis should be conducted in a vacuum. When considering whether it is, or is not likely that regard has been paid to a particular factor

which has not been expressly referred to in a screening opinion, the context in which the screening opinion was prepared is relevant. A screening opinion is one stage in the process of determining a planning application. In the present case the application for planning permission was made on 31st May 2012. Mrs. Denmark (who is described as the Second Respondent's Development Management Team Leader in email correspondence with the Planning Inspectorate) was the case officer who, having carried out the screening opinion dated 25th June 2012, then prepared a detailed report on the application for the meeting of the Second Respondent's Development Control Committee on 22nd August 2012. In that report she considered a number of the policies in the Uttlesford District Local Plan 2005, and specifically referred to the proposed development of 100 houses on land to the South of Ongar Road, which had been granted permission on appeal on 20th June 2012.

11. I endorse Lang J's conclusions in paragraphs 72 and 73 of her judgement. It is most improbable that when Mrs. Denmark carried out the screening opinion on 25th June 2012 she was unaware of the very recent appeal decision which had granted planning permission for 100 houses on land to the South of Ongar Road, or that she was not familiar with the contents of the Local Plan allocations for a civic amenity site on land off Chelmsford Road, and a business park at Smith's Farm, and with the County Council's application for a waste transfer station on the former.
12. Did Mrs. Denmark ignore these other developments because she failed to realise that the issue of cumulative impact had to be addressed? Mr. Mackenzie submitted that on a common-sense reading of her description of the "Characteristics of the Development" she had simply considered the visual impact of the proposed development, and had not considered cumulative impact. I do not accept that submission. When drafting the screening opinion Mrs. Denmark not only referred to Circular 02/99, she carefully followed the guidance in the circular, taking a step by step approach to deciding whether an EIA was required. Lang J noted in paragraph 69 of her judgement that the guidance in the Circular included the advice in paragraph 46 that:

"in judging whether the effects of a development are likely to be significant, local planning authorities should always have regard to the possible cumulative effects with any existing or proposed development."

Having referred to the Circular, and followed its guidance, it is unlikely that Mrs. Denmark would have overlooked this element of the guidance.

13. Mrs. Denmark also referred to Schedule 3 to the Regulations, and dealt with the three headings in turn. It is true that, unlike the third heading – characteristics of the potential impact – under which she expressly referred to the five factors to which she had to have particular regard, she did not list factors (a) – (f) when dealing with the first heading – Characteristics of development. It does not follow that she failed to have regard to them. Indeed, it is highly unlikely that, having deliberately adopted the structure of Schedule 3 for the purpose of her analysis, she would then have failed to have regard to those factors to which Schedule 3 told her to have particular regard.
14. With the exception of factor (a) – the size of the development – to which the screening opinion does refer ("a significant element of built form") there is no express reference to any of the other factors (b) – (f). When we asked Mr. Mackenzie whether it followed from this "linguistic clue" that factors (c) – (f), in addition to factor (b) – the cumulation with other development – had not been taken into account he replied that there had been no need to refer to those other factors because, unlike cumulative impact, they were not relevant for the purposes of this application.
15. On behalf of the First Respondent, Mr. Kimblin referred to the lengthy list of reports which had accompanied the planning application and which Mrs. Denmark said she had considered for the

purpose of making her screening opinion (paragraph 7 above). The screening opinion does not refer to most of the matters that were dealt with in those reports. This does not mean that, eg ecology, flood risk, drainage, noise etc. were ignored by Mrs. Denmark. On a fair reading of the screening opinion as a whole it is clear that, having considered all of the matters referred to in the reports, and all of the factors listed under “Characteristics of Development” in Schedule 3, including cumulative impact, Mrs. Denmark identified and discussed the only factor – the visual impact of a significant element of built form within the rural area – which, as a matter of planning judgement, she considered might potentially have justified a conclusion that this development was likely to have significant effects on the environment. Having considered this factor, she concluded that significant environmental effects were not likely and an EIA was not required. There is no challenge to the rationality of that conclusion, and in the light of the Inspector’s subsequent decision it is not in the least surprising.

Were adequate reasons given?

16. As a matter of first impression, the obligation imposed by regulation 4(7)(a) of the 2011 Regulations to give “clearly and precisely the full reasons” for a screening opinion is a demanding one. However, it is important to bear in mind the function of a screening opinion under the 2011 Regulations when applying the requirements of regulation 4(7)(a). Mr. Mackenzie rightly accepted that in terms of the amount of detail required in the reasons given for a screening opinion, it is not to be equated with a decision letter on an appeal.
17. We were referred to the judgement of Moore-Bick LJ in *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 in which he said that a screening opinion:

“20 [I]s 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, 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’.
21. Having said that, it is clear from *Mellor* 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.”
18. The majority of the Court of Appeal in *Bateman* concluded that the reasons given for the negative screening opinion in that case were inadequate. Mr. Mackenzie submitted that the reasons given in *Bateman* were less inadequate than the reasons given in the screening opinion as the present case. As in *Bateman*, there was no clear statement of Mrs. Denmark’s reasons for her conclusion that the proposed development was not likely to have significant environmental effects. The “reasons” amounted to no more than a bare conclusion.
19. While there is some force in this submission, the circumstances of this case are very different from those in *Bateman*. In *Bateman* the screening opinion had concluded (unsurprisingly) that the main impacts of a proposal to expand a grain storage facility with a capacity of 90,000 tons in 12 silos to a capacity of 300,000 tons in 60 additional silos each about 18 metres high and 23 metres in diameter, were likely to be “increase in traffic movements, landscape impact and noise disturbance to local residents” (see paragraph 6 of the judgement of Moore-Bick LJ). In

those circumstances, an explanation as to why those impacts on the environment were not likely to be significant was called for, and was not contained in the screening opinion.

20. In paragraph 78 of her judgement Lang J correctly said that the level of detail in a screening opinion would depend upon the complexity of the issues to be considered in the particular case, so that the test was whether the reasons were adequate for this particular application. She accepted that the reasons were brief, but concluded that they were not inadequate “in the circumstances of this particular case which was not complex or borderline.”
21. The adequacy of the reasons given by Mrs. Denmark for her conclusion that the proposed development was not likely to have significant environmental effects must be considered in the context of the answer to the first ground of appeal: that on a fair reading of the screening opinion Mrs Denmark did not fail to have regard to the issue of cumulative impact, or any of the other factors identified in Schedule 3. She did have regard to them, but having considered them she concluded that only one matter – the visual impact of a significant element of built form within a rural area – might have been capable of justifying a conclusion that there would be a significant environmental impact, but concluded that it did not (paragraph 15 above). Unlike *Bateman*, there is nothing in this screening opinion which cries out for further explanation. A fair summary of this screening opinion is that it tells the reader that there is nothing about the characteristics of this particular development, its location, or the characteristics of its potential impact, which would justify a conclusion that it was likely to give rise to significant environmental effects. On the particular facts of this case, the reasoning, albeit brief, is not inadequate, bearing in mind the function of the screening opinion as described in *Bateman*.

Discretion

22. In paragraph 79 of her judgement Lang J explained why she would have refused relief as a matter of discretion even if she had concluded that the reasons in the screening opinion were not adequate.

“Moreover, even if the Claimant was successful in establishing that the reasons were inadequate, he would face insurmountable difficulties in establishing that he was ‘substantially prejudiced’ under section 288(5)(b) TCPA 1990 and that the court should exercise its discretion to quash the grant of planning permission. This site has been screened on numerous occasions, and each time the result has been negative. The wording of the opinion has been revised to make it clear beyond any doubt that the cumulative impact of other development has been considered. No one has sought to argue that a full EIA is required for this development at any stage. There has been full consideration of the environmental effects of this proposal by an Inspector at a hearing, and he has confirmed that he specifically considered the cumulative impact of the two housing developments in the light of Mr. Buxton’s letter. By reg. 12(2) he was bound to seek a screening direction if it appeared to him that the development might be EIA development, and he did not do so.”
23. I accept Mr. Mackenzie’s submission that if the screening opinion was unlawful because it was inadequately reasoned, then the challenge to the Inspector’s decision would fall under sub-paragraph (i) in section 288(1)(b) – that the decision was not within the powers of the 1990 Act – so that the Appellant would not have to demonstrate that his interests had been substantially prejudiced by the failure to give reasons: see section 288(5)(b). However, all the matters referred to by the judge are relevant for the purpose of the discretion to quash under section 288(5)(b). Those matters may be summarised as follows:
 - (i) It is clear from the Inspector’s decision that the cumulative impact of the proposed development and the three developments now relied upon by Mr. Mackenzie (see paragraph 8 above) was not raised as an objection at the hearing of the section 78 appeal

on 4th December 2012. Mr. Mackenzie submitted that the objectors to the proposed development, including the Appellant, were not aware of the requirement in Schedule 3 to consider cumulative impact, but that does not explain why, if cumulative impact with the other three sites really was a significant planning issue, it was not raised at the hearing as one of the objections to the development.

- (ii) The High Court challenge by local residents to the appeal decision in respect of the land to the South of Ongar Road was drawn to the Inspector's attention. In paragraph 44 of his decision the Inspector did not accept that there was a linkage between those two sites.
 - (iii) In response to an application on 4th March 2013 by the Third Respondent for approval of reserved matters pursuant to the outline permission granted on appeal the Second Respondents adopted a screening opinion dated 3rd May 2013 which expressly stated that "it is considered that neither the proposed development **nor the cumulative impact of this proposed development and others in the locality** are likely to give rise to significant environmental effects...." (emphasis added).
 - (iv) On the 3rd April 2013 the Third Respondent wrote to the Second Respondent requesting a further screening opinion in respect of the proposed development of the site for 73 dwellings. The letter referred to the Appellant's challenge under section 288 of the Act to the Inspector's decision to grant planning permission on the ground (inter alia) of the Second Respondent's failure to consider cumulative impact. The letter explained why, in the Third Respondent's view, an EIA was not necessary having regard to cumulative impact, and sought confirmation that the development of the site for 73 dwellings did not constitute EIA development either in isolation or in combination with other projects. On 7th May 2013 the Second Respondent issued a further screening opinion which gave that confirmation in the same terms as the 3rd May 2013 screening opinion (see (iii) above).
24. On the 6th April 2015 Schedule 2 to the 2011 Regulations was amended by the Town and Country Planning (Environmental Impact Assessment) Regulations 2015 ("the 2015 Regulations"). The amendment altered the thresholds for Urban development projects in paragraph 10(b) of Schedule 2. The appeal proposal is for 73 dwellings on a 3.8 ha site. The thresholds for residential development are now more than 150 dwellings or an overall area in excess of 5 ha. It was common ground that if the Inspector's decision was quashed and the Third Respondent's section 78 appeal was remitted to the First Respondent for redetermination the First Respondent would be bound to conclude that the proposed development was not Schedule 2 development.
25. The Impact Assessment in respect of the 2015 Regulations carried out by the Department for Communities and Local Government explains the rationale for the amendments to the thresholds in Schedule 2, and the underlying policy objective, as follows:

"Rationale for intervention

The Government is concerned that the unnecessarily low screening thresholds for urban development are adding unnecessary burdens on developers and local planning authorities and slowing down the delivery of homes and other urban development while delivering no additional environmental benefits. The thresholds are set out in Schedule 2 to the 2011 Regulations, which will need to be amended to bring forward the proposed changes.

Policy objective

The objective is to speed up the planning system and deliver more homes and other urban development, and at the same time reduce the cost burdens of unnecessarily screening projects

which because of their nature, scale and location are not likely to give rise to significant environmental effects.”

26. In view of the amendment to Schedule 2 we asked Mr. Mackenzie what would be the purpose of quashing the Inspector’s decision. He replied that there was a real possibility that the First Respondent would then exercise his discretion under regulation 4(9) of the 2011 Regulations:

“The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of “Schedule 2 development” is satisfied in relation to that development.”

27. The submission is ingenious, but wholly unrealistic. The parties were not aware of any case in which this discretion had been exercised by the Secretary of State. Paragraph 77 of Circular 02/99 makes it clear that the power will only be exercised exceptionally. Mr. Mackenzie was not able to identify anything that might reasonably be described as exceptional about this case. He placed great weight on the three developments in the vicinity referred to in paragraph 8 above, but the only change since the hearing before the Inspector in December 2012, when cumulative impact with those three developments was not even raised as an issue, has been the recent grant of planning permission for the mixed use scheme at Smith’s Farm for which proposals had been made in July 2012 as part of the consultation on the local plan.

28. In view of:

- (a) the Inspector’s decision which does not suggest that there might be anything unusual about the environmental impact of the proposed development;
- (b) the Second Respondent’s negative screening opinions in May 2013 which expressly considered the cumulative impact;
- (c) the policy objective underlying the recent increase in the thresholds for urban development projects; and
- (d) the lack of anything about this development that might reasonably be considered exceptional;

the Appellant’s submission that the First Respondent might exercise his discretion under regulation 4(9) is fanciful, not real. It follows that I would have exercised my discretion to refuse to quash the Inspector’s decision if I had concluded that the Second Respondent’s screening opinion was legally flawed.

Conclusion

29. I would dismiss this appeal.

Patten LJ:

30. I agree.

Roth J:

31. I also agree.