CO/5547/2013

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

Priory Courts
33 Bull Street
Birmingham
West Midlands
B4 6DS

Wednesday, 23rd October 2013

B e f o r e:

MR JUSTICE LEWIS

Between:
THE QUEEN ON THE APPLICATION OF CAMPAIGN TO PROTECT RURAL ENGLAND OXFORDSHIRE

Claimant

v

OXFORD CITY COUNCIL
&
OXFORD UNIVERSITY

Defendant

Tape Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr McCraken appeared on behalf of the **Claimant**
Mr Maurici QC appeared on behalf of the **Defendant**
Mr Warren QC and Miss Blackmore appeared on behalf of the **Interested Party**

P R O C E E D I N G S

(This transcript has been prepared without the assistance of documents)

1. MR McCRACKEN: May it please your Lordship? I appear in this matter on behalf of the Oxfordshire branch of the Campaign to Protect Rural England. My learned friend, Mr Maurici, represents the City Council and my learned friends, Mr Warren and Miss Blackmore, represent the interested party.

2. Can I say right at the outset that in the entertaining sense this application concerns a building which was approximately excessive in this year's carbuncle of the year competition but I place no reliance on that.

3. MR JUSTICE LEWIS: It might still be all right.

4. MR McCRACKEN: I think it is important, right at the outset, bearing in mind the way in which this case is resisted by the defendant and interested party, to remind the court of what the authoritative work setting out the practice in these courts says, that is in the civil procedure, the White Book 2013.

5. MR JUSTICE LEWIS: I ought to declare an interest before opening because I write that section, so if it is authoritative it is not that authoritative. Just so you know. I have not updated it yet.

6. MR McCRACKEN: It had the merits of corresponding with your Lordship's thinking. 54.4.2, at page 1862.

7. MR JUSTICE LEWIS: It does not include some of the cases that are referred to in these bundles because I have not actually seen them.

8. MR McCRACKEN: Very well.

9. MR JUSTICE LEWIS: 24.2 yes?

10. MR McCRACKEN:

> "The purpose of the requirement for permission is to eliminate, at an early stage, claims which are hopeless, frivolous or vexatious and ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is case fit for further consideration. The requirement that permission is required is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints about administrative error and to remove the uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review are actually pending although misconceived."

The authority for this is the passage in the White Book of the highest, it is from the House of Lords.

11. The test is therefore arguability. I want, at the outset, to deal with one point raised by Mr Warren, somewhat surprising, when in his skeleton says: "If the claimant persists in an application for a stay". I shall make it absolutely clear that my client's position has always been to wish for an early hearing and my clients wrote twice to the interested party, asking for them to join in an application for expedition. My clients have not had the courtesy of a reply to that letter.

12. Our position when Hickinbottom J, having accepted that the case potentially raised an important point of law, was to co-operate when he suggested a stay. We were prepared to co-operate on the basis it seemed pointless to argue any further about whether permission should be granted and then a stay or a stay in the light of the fact that there were likely to be in the relatively near future further decisions of the Court of Appeal that would have a significant influence on the position of the English courts as to the relevant law.

13. There are four questions that need to be addressed this morning in this permission hearing. First: is it arguable that there was a judiciable error in the screening opinion of the council? That is the first point. I should right at the outset indicate that contrary to the position taken by the city, both in its response to our protocol letter and also in its skeleton argument that there is no duty to give reasons and the duty is simply that set out in the Court of Justice's decision of Mellor is, and Mr Maurici accepts this, a misconceived point in the light of the fact that the regulations which govern this application are ones that require full reasons precisely to be given whatever the screening decision that is made. This is a case where now Mr Maurici, albeit --

14. MR MAURICI: My Lord, can I clarify that? My Lord, the position is this. It is true under the domestic regulations there is now a requirement to give reasons for screening opinions. My Lord, my focus has been on whether there could be any European law requirement for that reason.

15. MR JUSTICE LEWIS: Because you say the European requirement you are not getting --

16. MR MAURICI: My Lord, that is my assertion on that.

17. MR McCRACKEN: I can deal with that point very quickly. In a case that Mr Maurici and I were both involved in, Berkley v Secretary of State for the Environment (No 1) which was heard by the Appellate Committee of the House of Lords about a decade ago, Lord Bingham of Cornhill, who delivered the leading opinion, made it absolutely clear that if the United Kingdom had transposed a European Directive by a particular mechanism, but could have transposed it by another mechanism, the obligation to, to make sure that European Union obligations were fully complied with applied to the transposed regulations and therefore the mere fact that the requirement to give reasons is the way that we have chosen to transpose the Directive is not an answer

to the point that this is both an obligation of law and one that derives from European Union law.

18. MR JUSTICE LEWIS: Your first question: is it arguable that a judicial and screening opinion, if the alleged error, the failure to give reasons or is there another error?

19. MR McCRACKEN: No, no, it goes beyond that.

20. MR JUSTICE LEWIS: It is not the first question, set out judiciable error in the screening opinion.

21. MR McCRACKEN: I want to set out the road map, as it were, first of all.

22. The second question: is it arguable that that therefore there is a duty to take discontinuance proceedings? That is a point of law that Hickinbottom J characterised as being an important one when he made his first order.

23. If I, as it were, if the application, if the answer to those two questions is in the affirmative, then the matter switches and the defendants seek to persuade you, both that the claim is premature and that the claim is too late, that it is out of time. So those are the four, as it were, matters that will need to be canvassed in front of your Lordship this morning.

24. So far as the judiciable error in the screening opinion is concerned, there are two aspects to that. First, there is of course, if your Lordship is persuaded by the response of the City Council and by Mr Maurici's skeleton argument that the city did not actually give its reasons. If your Lordship is persuaded by those submissions that have previously been made that the city did not give its reasons then of course, we have immediately established ex-hypothesis, a failure to comply with the requirements of the transposed Directive.

25. MR JUSTICE LEWIS: Does that mean that triggers discontinuance alleged duty in any event? Even if you choose to transpose it by a particular way, and if you fail to do it, if in fact there is no underlying European problem, Mr Maurici will be saying: that still does not mean you have to go over the top and over transpose and be compliant to the EU law in the way that you over transposed the first. That is what he will say.

26. MR McCRACKEN: Your Lordship is absolutely right. You do not have to over transpose, but if you choose to transpose, by over transposition then you are bound by the procedure you adopt. I will in due course, when we look at the authorities take you to what Lord Bingham of Cornhill said in that case, because he dealt expressly with that point, which was a point that had been raised by Mr Elvin, who was leading Mr Maurici in that case and said: we need not have transposed in this way, and Lord Bingham of Cornhill said: may be you did not have to transpose in that way, but you chose to. Having chosen to transpose in that way, that was, as it were, the obligation to which the European Union duty to nullify the unlawful consequences of a breach of European Union law, that derives from --

27. MR JUSTICE LEWIS: That is the first decision, the failure to give reasons.

28. MR McCRACKEN: The second aspect of this first issue is this. If your Lordship turns to the screening opinion at page 23, your Lordship will see how it was, how the matter was dealt with by the officer who dealt with it. He had a very straightforward document, which we took to be the reasons but which Mr Maurici has been at pains to submit did not set out the reasons. But there were in this, and we have set this out at paragraph 5 of our statement of facts and grounds which serves in the office of course for the skeleton for the permission hearing. We set out there the three manifest errors of this screening decision. The first is that the officer in his screening opinion completely ignored the requirements both of the Directive and the transposing 2011 regulations to have regard to and, if you turn over the page, you will see that the footnote that covers the relevant part viii "landscapes of historical, cultural or archaeological significance". He completely fails to have regard to that mandatory consideration.

29. MR JUSTICE LEWIS: Where do you get from page 23 that failure?

30. MR McCRACKEN: Twenty-three is in the bundle.

31. MR JUSTICE LEWIS: Which page shows you?

32. MR McCRACKEN: If you look through there is absolutely no reference here or discussion of the effect on the historic environment.

33. MR JUSTICE LEWIS: The absence of any reference.

34. MR McCRACKEN: Absolutely my Lord. It is very powerfully arguable that this checklist fails, manifestly fails to comply with either the requirements of the Directive or even the requirements of Circular 2 of 99, which is a document that on many occasions has been found by the Court of Justice in Luxembourg to be deficient.

35. MR JUSTICE LEWIS: That is the first point and the second point is the side threshold? They say question 5 does not mean something and you say it does.

36. MR McCRACKEN: There may be an argument about what question 5 means but the argument that they are putting forward is not a knock out blow. Question 5 says, talks about the size threshold in schedule 2 of the 1999 regulations. It may be that at the end of the day, having heard evidence at the judicial review it is conceivable they would will win on that point. It cannot seriously be suggested there is not an arguable point.

37. MR JUSTICE LEWIS: You say I can read the words for myself and "in the regulations" means in the regulations or at least it arguably means in the regulations.

38. MR McCRACKEN: Indeed.

39. MR JUSTICE LEWIS: The third error would be?

40. MR McCRACKEN: The third one is they looked at the additional consequences of the additional development which is in excess of that which has previously permitted. You can see that in the summary of comments "applications of rework of an extant permission granted in late 1990s. It gives rise to some impacts but these are not significantly addressed by appropriate mitigation."

41. I will develop that particular point by taking you to a subsequent document which clarifies, so some extent, the approach that the officer was taking. Your Lordship will appreciate that when people realised what the actual consequences of this development would be, they were horrified.

42. MR JUSTICE LEWIS: Much bigger than they thought, yes.

43. MR McCRACKEN: It is much more than that. Your Lordship will see in paragraph 3 and 4, some of the background to it and I will simply invite your Lordship to note from our paragraph 3 that the location is a sensitive one because is on the edge of Port Meadow.

44. MR JUSTICE LEWIS: Can I understand your point 3. Are you saying that they only looked at the consequences from the new additional planning permission and they should have looked at all the consequences including that in the original planning permission?

45. MR McCRACKEN: What they should have looked at is not the difference between the new and the original, what they should have looked at is the totality.

46. MR JUSTICE LEWIS: There is a Court of Appeal case on that called Snipe v Welsh Ministers(?) and that is not referred to, which addresses this question in what the Baker v Baines case actually meant.

47. MR McCRACKEN: I have to confess, none of us appear to have been aware of that decision my Lord, but if it is said that you only have to look at the difference between what had been permitted previously and what is now committed; in other words if you look at the difference between the two, then I would submit it is plainly arguable that is incompatible with the true position in European Union law having regard to cases, such Ayuntamiento de Madrid East College In Action and the other cases cited in Baker.

48. MR JUSTICE LEWIS: I do not think we need to. What it actually says if you look at the cumulative consequences but you have to bear that some of those happen any way. If you extend a runway by 30 metres, it is not the work involved in 30 metres, it is the fact it can now take 747s when it previously took small planes. If you are going to go further with this you need to draw the court's attention to relevant authority including Snout(?).

49. MR McCRACKEN: I am sure all of us, as it were, blushed if we were not aware of that decision.

50. MR JUSTICE LEWIS: It is not reported. Those are your three errors that you say create the European that requires --

51. MR McCRACKEN: I need to take your Lordship I think in this context to a document that was prepared for the West Area Planning Committee by the officers which sets out, at a later stage, this is after screening but discusses the development. I want to take you to page 136 of the bundle and this goes particularly to the first of the three criticisms. Paragraph 11:

> "Although the immediate environment of the development consists of railway sidings to the east and allotments to the west, it is also located close to Port Meadow to the north beyond the public car parks at Walterwell Road. Port Meadow is a unique and sensitive location which constitutes an important heritage asset."

The paragraph then goes on to indicate the importance which was attached in the then current PPS, Part 2 historic to heritage assets. That is the first reference. The second one is at paragraph 13:

> "Policy HE9 of PPS/5 is also relevant as Port Meadow is a designated heritage asset."

Then paragraph 14, having, as it were, dealt with the areas immediately adjoining the site, starts, in the last three words of the page, to deal with Port Meadow and it says, last three words:

> "The land at Port Meadow is more sensitive however. Indeed the very northern tip of the application site falls just within the view cone from Wilvercombe."

Then it goes on to page 15:

> "The view across Port Meadow is a low lying, distant and expansive one across the flood plain of the River Thames towards the centre of Oxford. There is virtually no topographic variation to the view except the wooded hills of east Oxfordshire which are just visible in the background to the left, east of the view. The open and historic grazed common land of Port Meadow which is publicly accessible plays an important part in the character of the view providing a historic green setting to the city. The line of trees along the railway line and the variety of more ornamental trees in the gardens of north Oxford reinforce this green setting from which the dreaming spires emerge and are seen against the open sky line. The green, fore and middle grounds contrast with the colour and texture of the buildings on the sky line, enabling the sky line buildings to stand out in silhouette. The expansiveness of the view means the spires, towers and domes appear relatively small. Close to the edge of the built-up area it is clear that trees..."

52. MR JUSTICE LEWIS: I have read to the end of that now.

53. MR McCRACKEN: I take you to paragraph 17.

54. MR JUSTICE LEWIS: Shall I read that to myself?

55. MR McCRACKEN: Yes, if you wish to (Pause).

56. MR JUSTICE LEWIS: Yes, I have read that.

57. MR McCRACKEN: Then paragraph 17, my Lord:

> "Nevertheless there can be no doubt of the significance of the Oxford sky line and its landscape setting is one of the enduring images of city, an image which in planning terms successive local plans sought to protect."

58. MR JUSTICE LEWIS: I have read all of that Mr McCracken.

59. MR McCRACKEN: The point that emerges here is that in the February 2012 report to the Committee officers are acknowledged, indeed positively asserted the considerable sensitivity of anti historic importance of Port Meadow. So there is an inconsistency between the screening opinion and what was said in the February report.

60. The next thing that one needs to look at is a report that was prepared after the public controversy had arisen which is in December 2012. This we find at page 155. By this stage, there is considerable public controversy and the offices are under some pressure as to why there was no EIA and the justification for not producing an EIA is set out at paragraphs 7 to 10 and we can pick it up at paragraph 8:

> "Although the Roger Dudland waste site exceeds that minimum size, that does not mean an EIA is necessarily required. Rather guidance on the requirement is given elsewhere in the regulations in department of community local government Circular 2/1999."

There is then set out a passage from Circular 2 of 99 which says in certain circumstances EIA is more likely if it cites more than 5 hectares and so on. If it had not been intensively developed previously and/or if it would have a significantly urbanising effect. Then paragraph 9:

> "Whilst this is a significant development that does not mean an EIA was automatically required to be submitted."

Then this is very important, in relation to the first ground:

> "Port Meadow bears designations as a site of special scientific interest and schedule ancient monument. However these designations relate to its nature conversation and below ground archaeological interest, which officers assessed as not being significant impacted by the development. In assessing that no EIA was required, regard was also had to a similar extant planning permission for student accommodation and proved in outline in 2000 and indeed 2002 of which only the first phase was constructed as existing Castle Mill development and which had a similar relationship to Port Meadow."

It goes on at paragraph 10:

> "There are no provisions within the EIA regulations to require the applicant to undertake an environmental assessment following the grant of planning permission."

61. In so far as further clarification of the thinking of the offices is given in this report, and since they are justifying their decision not to call for an EIA, it plainly is intended to clarify their thinking. They make it clear, so far as they were concerned, the sensitive of Port Meadow was confined to its status as one of a triple aside and the (inaudible). They also make it clear that in considering the impact of the proposed development, they looked at the additional impact rather than the cumulative impact of the whole thing. Those are, in my submission, very clearly justiciable errors. I do not have to persuade you at this stage they are judiciable errors.

62. MR JUSTICE LEWIS: The real issue is prematurity.

63. MR McCRACKEN: There is an argument upon that.

64. So far as prematurity is concerned, this is the point that Hickinbottom J correctly characterised as an important point in his original order which you see at page 183, where he says:

> "This claim potentially raises the important issue whether there is a duty to nullify the consequences of breach of EIA Directive."

He says "potential" because it obviously all depends on there being a justiciable error at the earlier stage. But once you cross the threshold of demonstrating that it was a justiciable error at the earlier stage, then the question arises: was there a duty to nullify the unlawful consequence of breach of European law?

65. MR JUSTICE LEWIS: Does it turn on what they actually do, now that point can be raised?

66. MR McCRACKEN: No, it does not. For this reason. I think here, I can cut to the chase, the prematurity argument is intriguingly based upon a whole series of cases dealing with immigration and asylum, where there is an obvious motive on the part of the claimants to delay as long as possible proceedings and where the motivation for asking for a stay may be rather suspect. This is a case where we said at the outset we want expedition if possible. We continue to be of that view. We want the case to be heard so soon as we can. But recognising the views of Hickinbottom J, recognising also our duty to seek to comply with the overriding objective, since the case of Evans v Vitapress(?) is going to be heard this term, we are quite happy that the substantive hearing is dealt with after that case has been determined.

67. MR JUSTICE LEWIS: What are you going to review?

68. MR McCRACKEN: We are going to review the decision, communicated by letter to us that the council does not have a duty to serve a discontinuance notice.

69. MR JUSTICE LEWIS: What do you mean by that. Do you say they have got to?

70. MR McCRACKEN: Yes, yes. We say they have to serve a discontinuance duty.

71. MR JUSTICE LEWIS: They do not have to consider what they have to do now, and what does a discontinuing notice have to include?

72. We set out the discontinuance, both in the correspondence and at paragraph 11 of the claim, so if I take your Lordship to that. I should say the discontinuance order is the appropriate method rather than the revocation under section 97 because section 97 which deals with revocation does not permit, that cannot apply to building operations that have already been carried out. So it is discontinuance where building operations have already been carried out.

73. Perhaps your Lordship ought to look at the terms of section of 102 before looking at what I have drafted there because that is important.

74. The label is rather odd because it is --

75. MR JUSTICE LEWIS: Never mind the label, look at the substance.

76. MR McCRACKEN: Indeed:

> "If having regard to the development plan and any other material considerations it appears to a local planning authority expedient addressed proper planning..."

I readily accepted in a purely domestic context of course you have regard to all these factors, such as money which Richards J (as he then was) did not think was relevant in the Anik(?) case, but which is now accepted is relevant and the development plans and so on. In the context in the EU law applying the Marleasing principle, you do not have to have to regard to those. You simply have to comply with your duty. Then the content of the order is:

> "Any buildings or works should be altered or removed."

And:

> "What they require is the discontinuance of the use and they can impose such conditions as may be specified in the order on the continuance or require such steps as may so specified to be taken to the alteration or the removal of the building or works as the case may be."

An order can require removal or alteration of buildings. It can require the taking of steps and it can impose conditions.

77. MR JUSTICE LEWIS: Do they need to know whether or not that is really necessary? The point, you say, there was an EIA which was flawed and there should not have been

EIA. You are not surely telling me, are you, they must pull it down, do the EIA, if the EIA says it is fine, they can put it back up again.

78. MR McCRACKEN: No, my Lord, I am not telling you. I appreciate....

79. MR JUSTICE LEWIS: They have to decide what to do.

80. MR McCRACKEN: I appreciate your Lordship did not have a chance to read our letter before action or to read my opinion, or to my statements of facts and grounds. I appreciate that.

81. MR JUSTICE LEWIS: Your letter before action I thought that was the one....

82. MR McCRACKEN: My Lord, if your Lordship turns to paragraph 12 of the statement of facts of grounds.

83. MR JUSTICE LEWIS: Is that not the one at 102 and in the reply, 105?

84. MR McCRACKEN: It probably is. I think your Lordship will find there is nothing inconsistent with what is set out at paragraph 12 of the statement of facts and grounds.

85. MR JUSTICE LEWIS: You carry on.

86. MR McCRACKEN: Your Lordship raised the point of what was said in my opinion.

87. MR JUSTICE LEWIS: You said I had not read it and I say I have. Let us not argue about that. Where do you want me to go next?

88. MR McCRACKEN: Paragraph 12, the statement of facts and grounds my Lord. Because it is important that one understands that when my clients wrote to the council in March 2013, they made it absolutely clear that the consequences of a proper assessment would not necessarily or even be likely to include the removal of the buildings of their entirety. It might well lead to removal of the top storey of two of the blocks *inter alia* restoring (inaudible) Mews and St Barnaby's Tower from the bins area, the cladding of the Port Meadow frontage with wood, with evergreen wall planting and green wall might be considered necessary mitigation in addition or an alternative.

89. So it is very important that I emphasise: we are not saying as Ardar(?) was saying in Ardar v Chester(?): if there has been a breach of the EIA Directive you have to demolish what has been built before you carry out a retrospective EIA. We are not saying that. We accept the decision of the Court of Appeal in Ardar v Chester that an EIA can be undertaken retrospectively.

90. What we say the council must require by way of discontinuance is set out at paragraph 11.

91. MR JUSTICE LEWIS: Yes? Can we look at 101?

92. MR McCRACKEN: That would be my Lord, for example, that would be to submit an environmental statement. That would be one of the steps that the council --

93. MR JUSTICE LEWIS: May consider necessary.

94. MR McCRACKEN: Yes.

95. MR JUSTICE LEWIS: You go to 101 and I look at your letter at 101, do I not?

96. MR McCRACKEN: I am not sure whether that is where it is set out.

97. MR JUSTICE LEWIS: That is the letter your client sent.

98. MR McCRACKEN: Very well, yes I think it was set out at 101.

99. MR JUSTICE LEWIS: Their reply and there is a pre-action protocol letter and their reply of 105.

100. MR McCRACKEN: Can I take your Lordship to page 104, where you will see that at paragraphs 10 and 11, the form of the order was set out in paragraph 10 and then the point that I have just made to your Lordship was made at paragraph 11:

> "It is important to emphasise the consequence of a proper assessment would not necessarily or even be likely to include the removal of buildings in their entirety."

101. MR JUSTICE LEWIS: What do they say in reply on the next page?

102. MR McCRACKEN: They made all sort of points. They said the notice that we had suggested was not meaningful. They said we had not particularised alleged efficiencies in the screening opinion. They said they ran a sort of general delay point.

103. MR JUSTICE LEWIS: All of which is irrelevant.

104. MR McCRACKEN: They said at page 106, if you look at the (inaudible) pre-penultimate paragraph:

> "It would therefore appear to be clear that there is no continuing duty and that if there is some legitimate criticism of the screening or any criticism of the process leading to grant of permission, the correct manner in which to challenge that decision would seek the quashing of the grant of the permission within 3 months of the ground."

This is the delay point. Then in the pre-penultimate paragraph they say:

> "However, it has been set out about your argument relies on emitting an integral part of the judgment relied up and clearly and repeatedly been shown to be wholly misconceived. It follows that the council denies that it is under a mandatory obligation to make a discontinuance order."

There is the heart of the dispute: "We submit there is a mandatory obligation to serve a discontinuance order", which will enable the requirements of the EIA Directive to be complied with retrospectively and that would be screening and that if it is screened to require EIA then the submission of an environmental statement by the university.

105. MR JUSTICE LEWIS: I am just wondering whether we are at cross purposes. At some stage they may have to require something to be done to the building. It may to clear the top storey, it may be mitigation, it may be something else. But they have to decide whether to do that or not.

106. MR McCRACKEN: Yes. But they have to decide whether to do that, after complying with the requirements of the EIA Directive which they have not at the moment.

107. MR JUSTICE LEWIS: They are doing that, because they have asked for voluntarily EIA.

108. MR McCRACKEN: That, with respect my Lord, is very far from compliance with the requirements of the EIA Directive. There are two reasons for that. The first reason for that is that the EIA Directive requires an assessment by the competent authority not by the developer. What the city have agreed to is that the developer should carry out an assessment. That simply does not begin to comply with the requirements of the Directive. Second reason is that the process of EU compliant environmental assessment requires participation by those who are interested. What is proposed by the university and been accepted by the City Council does not involve participation.

109. MR JUSTICE LEWIS: Does that not mean that if they tell you in 2 months' time: we have had something in from the developer, he says everything is hunky dory, and we are not going to issue an order under section 102. You will say that is not good enough and you will challenge the decision. At the moment we do not know whether or not there is going to be continuance, do we? We do know whether it is lawful or unlawful.

110. MR McCRACKEN: We can be very sure that the city will not actually serve a discontinuance order.

111. MR JUSTICE LEWIS: How do you know that?

112. MR McCRAKEN: They have been manifestly adopting the Charizard approach to this case, whereby they are reluctant to concede that they made their decision. Whether you do or do not accept the view that I suggest to the court that their approach is a Charizard one. Whether or not you accept that, if you look at the cases that are relied upon by particularly Mr Warren but also Mr Maurici about prematurity, the real point in the cases that where permission has been granted notwithstanding potential prematurity, is there, as it were, a real point of law in issue that is in issue now and will be in issue later and with the discontinuance order undoubtedly is. We submit there is a duty to serve a discontinuance order.

113. MR JUSTICE LEWIS: I think you could only actually be submitting there is a duty potentially to submit a discontinuance order, but whether or not that treaty will come into effect, whether or not the one they served is lawful, it seems to depend at moment what are the factors, the factors 426 of the Stadlen J judgment.

114. MR McCRACKEN: No, with respect my Lord. I am undoubtedly submitting that there is a duty to serve a discontinuance order, whether that submission is sound or not is a matter that will --

115. MR JUSTICE LEWIS: How can they serve a discontinuance order until they need to know (a) they do actually need to do something substantively to address issues here and (b) until they know what is going to be?

116. MR McCRACKEN: The beauty of the way in which I have crafted the discontinuance order that I invite them to serve is that it does not actually require the university physically to do anything unless and until the council have (a) decided that environmental impact assessment must be undertaken retrospectively and (b) having undertaken that environmental assessment retrospectively they consider that some further steps need to be taken. The discontinuance order, as crafted by me, would not require the university to do anything other than initially to wait for the new screening opinion and then when the new screening opinion had been issued, if required to serve an environmental statement, followed by the usual procedure of consultation and so on. A discontinuance order is very carefully drafted to go as far as but no further than that which European Union law requires the emanations of the United Kingdom to do.

117. MR JUSTICE LEWIS: There should have been, on your case, a proper EIA and there was not.

118. MR McCRACKEN: Yes.

119. MR JUSTICE LEWIS: The purpose of an EIA is to make sure that assessments are made of the likely significant effects on the environment you described.

120. MR McCRACKEN: Yes.

121. MR JUSTICE LEWIS: There are likely significant effects to refuse it, to have mitigation and so on and they have not done that.

122. MR McCRACKEN: Yes.

123. MR JUSTICE LEWIS: The thing that has permission, it has been build. It may be that substantively had they done an EIA it would not have been built at all; it may be that it would have been one storey lower. It may be that it would have had more trees in front of it or setback 20 yards. All of those things are substantive things that make flow, if the substantive process involved in the EIA has been done. But the purpose of the discontinuance order is to require the steps that need to be taken now, to address the underlying substantive error. You should have a discontinuance order, should you, just to require them retrospectively to do the EIA? The question now is at some stage, if they decide not to do something, you have to look at whether or not their decision not

to do anything is lawful, or if they only decide to do some things, whether that is lawful. Until we know what they are doing and why they are doing it, it is artificial, is it not?

124. MR McCRACKEN: It is not at all artificial my Lord. I mean first of all the EIA is not undertaken by the developer, it is undertaken by the --

125. MR JUSTICE LEWIS: I understand that and you may come back in 6 months' time and say: it was never good enough.

126. MR McCRACKEN: It is quite important that I make that clear because the second thing is that the first thing that has to be done is a lawful screening decision has to be made. It might be the City Council will lawfully decide that no EIA was required and then, in those circumstances, the discontinuance order would end up with being a requirement for the university to do nothing.

127. MR JUSTICE LEWIS: You are not actually seeking a discontinuance order, you are seeking a *mandamus* to comply with the EIA Directive as far as I see at the moment then.

128. MR McCRACKEN: No, with respect, it has to be by way of discontinuance order because --

129. MR JUSTICE LEWIS: And *mandamus*, yes.

130. MR McCRACKEN: It is not that, but you --

131. MR JUSTICE LEWIS: Let me have a look at the words.

132. MR McCRACKEN: I think it is very important that your Lordship reads very carefully and thinks about the wording of A and B, because it is carefully drafted to encompass the fact that the first thing that has to happen is that the City Council has to carry out a screening opinion. Then, if it thinks that there should be EIA, it requires the developer to submit an environmental statement. Then, after that environmental statement has been submitted and a consultation process has been undertaken by the council, if the council thinks it is appropriate it can require various things to happen as a result of that.

133. MR JUSTICE LEWIS: So one was the need to carry out an EIA and what was the second and third?

134. MR McCRACKEN: No, my Lord. The first was that the council, after it served its discontinuance order will decide, would go through a lawful screening process. Okay? Then if it decides that EIA is required, then it will require the discontinuance order. It would impose, communicate in writing to the university of the step of submitting an environmental statement. Then, after the city has carried out the necessary consultations and made a decision on the basis of this retrospective EIA as to whether the buildings can continue and with or without additional or different mitigation, the university will

be required to carry out those additional or different mitigation measures or removal measures, depending on what conclusion is reached.

135. MR JUSTICE LEWIS: You say there is no way in which an obligation to do the screening process and, if required, an EIA can be avoided and the continuance powers must be used for steps 1 and 2, to achieve the screening and the EIA before you get to 3?

136. MR McCRACKEN: The point is the university has, in terms of domestic law, a planning permission. Therefore that has got to be something has to be done to oblige the university to comply with the requirements that are imposed upon the United Kingdom. I should emphasise the university entitles compensation from the city, in so far as it suffers any financial loss as a result of what is required. That is just one of those consequences that flows where a competent authority fails to comply with its duties.

137. MR JUSTICE LEWIS: But 102 is not a power in 1 and 2 of your list, 102--

138. MR McCRACKEN: Yes, it is.

139. MR JUSTICE LEWIS: I understand your argument if you have a power you use it to EU law:

> "If having regard to the development plan and to any other material consideration it appears it is expedient that any use of land should be discontinued or any condition should be imposed on continuance on the use of land, or that any buildings or works should be altered or removed then they may-
>
> (a) require the discontinuance of that use, impose such conditions as may by specified in the order on the continuation of the use or require such steps as may be specified to be taken for the alteration of removal of the works."

I read that as applying the stage 3 of your process. What you are doing is trying to use a power which does not exist for the purpose to enforce the obligations in the Directive in the EIA regulation.

140. MR McCRACKEN: I think what your Lordship is perhaps not appreciating is that absent a discontinuance order, there is absolutely no point in the City Council recognising that it made an error at the early stage. It is not in a position to require an environmental statement to be submitted at this stage. It is not in a position at this stage to require works to be removed. It is not in a position at this stage, to require mitigation measures to be taken. The only mechanism available to it is that under section 102.

141. MR JUSTICE LEWIS: Yes. If they look at all these matters and if they decide a storey must come off or a couple more trees go in, they require that. They have not got to that stage yet.

142. MR McCRACKEN: They will never be in a position to make a lawful decision, they either require or they do not require that. The only way they can make a lawful decision about that is after the requirements of the EIA Directive have been complied with. They cannot be complied with whilst this concern permission stands.

143. MR JUSTICE LEWIS: The EIA was required before the grant of planning consent and that has been granted. The situation we are in now is whether it was granted you say unlawfully and you cannot chance that as too late and you are saying there is an obligation under EU law to take all necessary steps to remedy the substantive breach of EU law.

144. MR McCRACKEN: I think one needs to qualify that. The development consent has not, so far as I am aware, yet actually been issued as a whole and certainly at the time this challenge was launched there was no, for the purpose of EU law, there was no grant of development consent because there were a number of conditions that required further material to be submitted and that further material was never submitted. In the context of the European Union concept of a development consent, that had not been issued at the time that the challenge was launched. In terms of the time the challenge launched there had been a development consent.

145. MR JUSTICE LEWIS: I am having real trouble in understanding what you are trying to do. You seem to me to be seeking to get an order enforcing the requirement on the council to comply with the EIA regulations and because you say they should have done it and they have not done it, they have been very naughty and what you will do is you will make them do it under 102. It may never be necessary to do it in order to get a requirement, because even if they did, it may say they do not need to make any alterations. Nonetheless you are saying they must because it is the only mechanism you can find. Use the 102 to get an EIA. That seems to be what you are saying.

146. MR McCRACKEN: Yes, you will not have an EIA while you have a valid planning permission. You cannot have any EIA while there is a valid planning permission. The case of Carlton-Conway makes it absolutely clear that when authorities are making decisions such that of screening, they need to do so without any desire to avoid, as it were, losing mitigation that they are already engaged in it.

147. MR JUSTICE LEWIS: Your case is that it is arguable that given the absence of an EIA, you should use a power, which can require conditions of discontinuance of use or removal or alteration of building to require an EIA.

148. MR McCRACKEN: I think to require the developer to co-operate in the process of carrying out a retrospective EIA and thereafter to comply with any requirements which the planning authority consider are necessary in the light of the information that has been supplied to them and the comments that have been made to them in the process of the EIA.

149. MR JUSTICE LEWIS: It says: "To require the developer to co-operate and thereafter to carry out any necessary works."

150. MR McCRACKEN: Yes, whether those works be by way of removing a storey or by putting in wooden --

151. MR JUSTICE LEWIS: It is not enough for the authority to say: we are looking at this. We have taken various steps and we can work out whether substantively the thing that an EIA would have shown up would have been addressed. It has to go through the formalities. Section 102 must be used to achieve that.

152. MR McCRACKEN: Yes. Absent any alternative, section 102 must be used to achieve that end. So far as substantial compliance is concerned, that was actually another of the matters discussed in the Berkley case and the argument of substantial compliance was rejected there by the House of Lords and indeed the doctrine of substantial compliance only really applies in circumstance where a Directive has not been transposed, where you can say: the Directive was not transposed but there was substantial compliance with its requirements so therefore, we --

153. MR JUSTICE LEWIS: My questions are not directed to that. We are on a different waive length Mr McCracken. You are saying there has been a breach of EU law.

154. MR McCRACKEN: Yes.

155. MR JUSTICE LEWIS: Domestic powers must be used to remedy a breach of EU law.

156. MR McCRACKEN: Yes.

157. MR JUSTICE LEWIS: I am saying the breach of EU law is they should have considered an EIA (inaudible) required they should have it. The purpose of having an EIA was to see what significant environmental effect there were and require conditions to deal with it.

158. MR McCRACKEN: Yes.

159. MR JUSTICE LEWIS: The end result of EU law was not to have a piece of paper with an EIA stamped on the front but to have a proper assessment of whether or not steps needed to be taken to address significant environmental effect. That is what EU law aimed to achieve. If there has been a failure to do that, then the section 102 order would be made. If they built a ginormous extension on the side of St Paul's and it is obvious that should not have happened, then they can require the ginormous extension to be removed. But, at the moment, I am having huge trouble in seeing how it is not premature to start deciding whether or not they are going do something, or require something to be done, when they have even finished the consideration of what should happen. If they come back and say: there are no significant environmental effects. We have looked at it, there is not any. You would say that is still not good enough. They can only do that, if there EIA process.

160. MR McCRACKEN: Let me take you to Carlton-Conway.

161. MR JUSTICE LEWIS: It is 1 o'clock, do you want to do that after?

162. MR McCRACKEN: I should say that I think this hearing is going to take some considerable time.

163. MR JUSTICE LEWIS: No, it is not. You may like it to, but it is not going to. It is a 20-minute application at the moment but we have already had 45 minutes. You can....

164. MR McCRACKEN: I mean.

165. MR JUSTICE LEWIS: Did you request a particular time?

166. MR McCRACKEN: We are in your Lordship's hands. The issue is arguability and perhaps one needs to bear in mind the issue is arguability.

167. MR JUSTICE LEWIS: I understand that, and I am not bothered, I assuming at the moment what who you say (inaudible). My one concern at the moment, and you can come back and address me on, that is prematurity. The concern I have about it is not so much Evans, although you can tell me why Evans is going to deal with it. I have 46 in front of me. The problem I have is that the aim of EU law would be to rectify any breach, any substantive breach, not just they have not got the document. What I see in Mr Maurici's defence is that they are still at the stage where they are addressing whether or not the need to do it to the end of the discontinuance order. If they are considering that, I cannot quite see how it is not premature.

168. MR McCRACKEN: By the way my Lord, it was a three-and-a-half hearing slot not a 20 minute. This is not a case where we were refused on the paper, we were down for three-and-a-half.

169. MR JUSTICE LEWIS: I was not told it was down for three-and-half hours, there is another litigant as well. Okay. You have had 45 minutes, you say you are entitled, taking into account Mr Maurici, to the balance of three-and-a-half hours. We have to carry on after lunch then. That is where I am at the moment. A lot of the submissions you make are all very interesting but they are not assisting me at the moment. What I see is the key issue is whether there is a situation now, where we have to wait to see what the council does and then you decide to bring proceedings or whether it is clear, now, what they must do and therefore this is arguable.

170. MR McCRACKEN: I will deal with it after lunch. That is very helpful my Lord.

171. MR JUSTICE LEWIS: That is where I am coming from at the moment. Is it arguable they have got to do this now and there is no other way round it, is it they can wait and see what they have done and decide whether or not it is something that is lawful. So it will be 2 o' clock.

(Luncheon Adjournment)

172. MR JUSTICE LEWIS: Mr McCracken, I have double checked, Hickinbottom J ordered half a day, so I have cleared the diary for this afternoon, so you will end up having more than half a day. So we have had the morning and we carry on to 4.00. So (inaudible) 20 minute time estimate. We were dealing with questions 2 on 3.

173. MR McCRACKEN: I posed the question of prematurity, so I deal with in response to your Lordship's question, if your Lordship having given an indication as far as question 1 and 2 were concerned there was an arguable case.

174. MR JUSTICE LEWIS: So there is no confusion, I am proceeding on the assumption that 1 is arguable. Two, I think it is a question of wording. I am not even remotely persuaded that it is arguable, you can use the discontinuance procedure to require an EIA. It may be arguable in due course (inaudible) decision is something that can be rectified, used to rectify EU law.

175. MR McCRACKEN: If your Lordship is not remotely persuaded that discontinuance ... I need to take you to the European authorities then before I do that. Let me take your Lordship to the European authorities on that point.

176. I think we start then, I think I need to take you to the skeleton to paragraph 10.

177. MR JUSTICE LEWIS: Whose skeleton?

178. MR McCRACKEN: My skeleton my Lord.

179. MR JUSTICE LEWIS: I thought there was not one from you.

180. MR McCRACKEN: The statement of facts of grounds. It may not be labelled as "skeleton" but it is in reality a skeleton.

181. MR JUSTICE LEWIS: I do not care what it is called, as long as I am looking at it. Paragraph 8.

182. MR McCRACKEN: We can start with some general principles of EU law which made good the claim that a discontinuance order is a means of achieving the result required by the Directive. First of all, your Lordship notes that the EU constitution requires for a high level of protection and enhancement to the environment and the application of preventive, precautionary case principles.

183. MR JUSTICE LEWIS: Yes.

184. MR McCRACKEN: Secondly, these principles are critical to interpretation and application of EU legislation and the first case I ought to take you to is (Inaudible) which is dealing with the Halifax Directive but also applied expressly to the EIA Directive. This was a case where these principles caused the Court of Justice to interpret the words "likely to have significant effects" as effectively meaning "possibly having significant effects". This case was a case dealing with, it is tab I think 28 of the bundle I think. Does your Lordship have it?

185. MR JUSTICE LEWIS: I have it here.

186. MR McCRACKEN: A case dealing with mechanical cockle fishing and the question was whether this was a project that required appropriate assessment under the Habitats Directive, but the test for that was "likely to have significant effect". The court when it

was dealing with what that meant expressly associated the wording of the Habitats Directive, the wording of the Environmental Directive. So paragraph 42 of the judgment.

187. Your Lordship will see there that the court expressly equates the wording, the test and the trigger for an environmental impact assessment with the test and the trigger for an appropriate assessment.

188. MR JUSTICE LEWIS: Yes.

189. MR McCRACKEN: Then 43, having quoted the test, that is, that there is likely to be significant effects on the environment, the court says:

> "It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
>
> 44 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned."

In other words "likely" does not mean what we would think "likely" means, it means "impossible". So there I make good the submission in paragraph 9.

190. Then I go on to look at Article 4(3) of the Treaty on the European Union and which used to be Article 10 and before that it was Article 5 and then Article 288 of the Treaty on the function of the European Union which used to be 249, that is on Directives. The first thing is national legislation must be so far as possible interpreted as to be consistent with it. You will remember the facts in the Marleasing case were very striking. It was a case where a company had been formed in Spain, with a fraudulent intention, and this was accepted by everybody but because there was a Directive that limited the circumstances in which companies could be, as it were, nullified, even though it was accepted that the company had been formed for fraudulent purposes, the domestic legislation had to be interpreted to be consistent with the Directive:

> "In so far as domestic legislation cannot be so interpreted it must be disapplied [that is the Symmental case]. All emanations of the State have a duty to use their power to secure the implementation of EU law."

That is the Milan football case, Fratelli Costanzo v Milano. In that case, your Lordship will remember, the tendering process for the Milan football club had not complied with the relevant Directive. We have not set that case out because it is so common place. The tendering process had not been complied with and the unsuccessful tenderer was

able to persuade the Court of Justice that Italy and the local authority in Italy had to, as it were, to renegotiate and the mere fact that the successful tenderer lost his contract was nothing to the point. That is sometimes referred to as "the triangular effect situation". That includes of course refraining from action which makes it more difficult the achievement for the purpose of EU legislation, that is the Kraaijeveld case and looking at the last sentence of Article 4(3).

191. The next proposition is very important in this case. "Domestic courts must enforce the obligations of Member States deriving from Directives." I am going together Kraaijeveld. That is the case known as the Dutch dykes case generally speaking. That is in the bundle at tab 6.

192. MR JUSTICE LEWIS: Middle of tab 6.

193. MR McCRACKEN: 26, I am sorry.

194. MR JUSTICE LEWIS: Got it.

195. MR McCRACKEN: That was a case relating to dykes in the Netherlands and a question arose in the case of whether or not even if a party did not raise a point, the court had a duty, of its own volition, to take a point. It also raised the question of whether or not the Directive was one that was capable, that is the EIA Directive was capable of being directly effectively.

196. MR JUSTICE LEWIS: Yes.

197. MR McCRACKEN: We pick it up at 54 first of all:

> "... it appears from the order for reference that in its action Kraaijeveld did not raise the question whether an environmental impact assessment ought to have been made."

Then 55:

> "First of all it should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189."

That has obviously been replaced by (inaudible):

> "That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts."

There is then a discussion of whether or not that means individual can rely upon inadequately transposed Directives and the answer was yes, they can in paragraph 56. In 57, this is the bit very important to us:

> "Secondly, where, by virtue of national law, courts or tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned."

That is dealing with the situation, if there is a duty on a court to take a domestic rule, you have the same duty to take a European rule. This is what is important:

> "The position is the same if national law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law."

What is significant there is the court is saying is that there is a duty to take European Community law points even if in terms of national law all you have is a discretion.

So paragraph 60:

> "Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for matters within its jurisdiction..."

Then paragraph 61:

> "If that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment..."

That in a sense, that paragraph 51 goes to the heart of this case, because we have here two competent authorities. We have the city of Oxford and we have the court. Both of them have to exercise their powers so as to ensure that this project is examined to determine whether it is likely to have significant effects on the environment. If so, to ensure they are subject to an impact assessment. You have to ask yourself, the question you are going to have to ask yourself is: would a discontinuance order enable that result be achieved? If it would, the power has to be exercised.

198. It does not end there, because we also need to look at the Wells case and than the Berkley case. The Wells case is No 21. That was an old mining permission case. In 1997, the (inaudible) planning authority imposed a new set of conditions and amongst the conditions was one that required further matters to be the subject of submission and approval later on. Nearly 2 years passed and just before the approval of the deferred conditions in 1999, a challenge was launched by Delena Wells. That challenge went both to the originally set of conditions that had been imposed in 1997, so on a

conventional domestic view, well out of time, but also to the new conditions that were imposed, the deferred conditions in respect of which a decision was made later on.

199. It is important to bear in mind the challenge was based both on a challenge to the lawfulness of the original set of conditions in 1997 and the later ones. We need to pick it up in the judgment I think. That at paragraph 47, the court holds, says this:

> "Accordingly, decisions such as the decision determining new conditions [that was the 1997 one that was not challenged for nearly 2 years] and the decision approving matters reserved by the new conditions [that is the later one] for the working of Conygar Quarry must be considered to constitute, as a whole, a new consent within the meaning of Article 2(1) of Directive 85/337, read in conjunction with Article 1(2) thereof."

That is why I say in this case, we did not have a development consent, when the permission was first granted, we do not have the development consent (we do have one now) when the matters that had to be submitted for approval before development could begin have been proved.

200. MR JUSTICE LEWIS: When did that happen?

201. MR McCRACKEN: I do not think it has happened yet, because there was a "condition 16" that said in relation to contamination, matters had to be submitted to the council. If I can pick that up in the bundle.

202. MR JUSTICE LEWIS: If you are right and it is development consent and collectively constitute new consent, challenging or EIA before they approved the other matters?

203. MR McCRACKEN: We are doing what we can, as and when we can, my Lord. As yet, we have no concession, by the ... I think the answer to your question is that the domestic procedure to deal with this situation is the discontinuance order, I think that is the point. The reason why we are doing this that is the domestic procedure that is the procedure to deal with the situation in domestic law.

204. MR JUSTICE LEWIS: It would not be appropriate to challenge the new combined consent.

205. MR McCRACKEN: Not in the domestic law, domestic law, you need to do the discontinuance, I think that is the answer to your Lordship's question. The appropriate domestic procedure, having regard to the system of law that we have is a discontinuance order.

206. MR JUSTICE LEWIS: I thought we had to use it to ensure EU law. I would have thought the best way to insist on getting an EIA assessment is to make sure they do not grant a new consent or what would be a new consent without (inaudible) EIA. If they use discontinuance I am finding it puzzling that you cannot use the new consent.

207. MR McCRACKEN: There is a very good reason why you can only use discontinuance and cannot do the other one. Discontinuance will give the university

the compensation to which it is entitled and the city is punished for its failure to comply with EU law originally. If one sought to do something else, one would be depriving the university of the compensation to which it is entitled from the city.

208. MR JUSTICE LEWIS: You tell me you cannot use the new consent procedures as a vehicle for your EIA and discontinuance is the proper procedure.

209. MR McCRACKEN: Yes, yes.

210. MR JUSTICE LEWIS: Okay. I took you away from the cases.

211. MR McCRACKEN: Yes, okay. Going back to Wells, at paragraph 49, this becomes quite important under the heading:

> "The time at which the environmental impact assessment must be carried out
>
> 49 Given that, in the context of a consent procedure comprising several stages, merely establishing that there is a development consent within the meaning of Directive 85/337 cannot provide the referring court with a complete answer as regards the obligation on Member States to carry out an assessment of the environmental effects of the project at issue, it is necessary to consider the question as to when such an assessment must be carried out.
>
> 50 As provided in Article 2(1) of Directive 85/337, the environmental impact assessment must be carried out before consent is given."

I have already indicated we accept it can be retrospective if necessary:

> "According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question at the earliest possible stage in the decision-making process."

That is quite important. That is one of the reasons why we cannot wait and see what emerges from the university's voluntary so-called environmental impact assessment because that would not be at the earliest possible stage.

212. MR JUSTICE LEWIS: I do not follow that.

213. MR McCRACKEN: The environmental assessment has to take place at the earlier possible stage so the consultation process can be effective as possible. If we sit back and wait until the university have put in their voluntary so-called environmental assessment and see whether the council do anything about it, we will not be participating as at early a stage as we can, because the stage at which we wish to participate is as soon as it has been decided that there should be an environmental assessment, and we want to be able to do so in accordance with the procedures which have been laid down. I come to ask you (inaudible) about that in a little while. The

longer you leave it the more entrenched positions will be and the less likely it will be there is any effective opportunity for participation:

> "Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."

We will seek what the court is said by the court later by Barker. But, this is a case where the city, on any view, have not appreciated there are likely to be significant environmental effects until after the consent, the planning permission has been issued. Then, there is a reference again to the fact that the original set of conditions and subsequent deferred matters as a whole constitute development consent and then there is further discussion which is important. Paragraph 58:

> "The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that State's obligations. Such a consequence cannot, however, as the United Kingdom claims, be described as inverse direct effect of the provisions of that directive in relation to the quarry owners."

Then the court goes on to discuss the period that had elapsed between the decision determining new conditions and Mrs Wells' request for the situation to be remedied:

> "The United Kingdom Government further submits that the considerable period which has elapsed since the decision determining new conditions in 1997 renders revocation of that decision contrary to the principle of legal certainty. The claimant in the main proceedings should have challenged the decision in due time before the competent court.
>
> 60 As to that submission, the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty."

Then 63:

> "The United Kingdom Government contends that, in the circumstances of the main proceedings, there is no obligation on the competent authority to revoke or modify the permission issued for the working of Conygar Quarry or to order discontinuance of the working.
>
> 64 As to that submission, it is clear from settled case-law that under the

> principle of cooperation in good faith laid down in Article 10 EC [now Article 4(3)] the Member States are required to nullify the unlawful consequences of a breach of Community law..."

That is a very important passage that was initially set out in paragraph 36 of the Francovich case:

> "Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned."

I emphasise that includes this court and Oxford City Council:

> "Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment... Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.
>
> 66 The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> 67 The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)...
>
> 68 So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.
>
> 69 In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."

So what we have to do is to ask: is it possible under domestic law to achieve a result

in which an environmental assessment pursuant to the Directive is actually carried out? Our submission is that section 102 makes that possible but section 102 is the only mechanism whereby that is possible. There has been no suggestion by either of my learned friends that there was another mechanism which is possible which could have achieved that result.

214. I will deal in reply with any suggestion they put forward there is another mechanism that can deal with that.

215. MR JUSTICE LEWIS: Looking at 69 for a moment, there has to be an assessment of its environmental effects. Does that have to be a screening opinion and the full EIA, or is it sufficient for authority to look at now and say: in retrospect, yes, is this is hideous and should not have been granted and must be revoked? As I understand your case at the moment, you seem to be saying: they should have done certain things prior to the grant of consent, they have not done it, therefore we have a continuation order to require them to do now what they should have done now, if I understand your case.

216. MR McCRACKEN: That is right, yes.

217. MR JUSTICE LEWIS: I am wondering out loud: having seen 62 to 70 whether that is what it is saying, or whether it is saying you have to look at the environmental effects and form a view on (whether you are talking about revocation or suspension) another alternative would be discontinuance although a fourth one they say would be compensation. It has to be within the sphere of the competence of the body concerned. There are two questions really. Does this help in insisting that there be a screening opinion and an EIA in the way it would normally be carried out prior to consent if things had gone, I think they should have gone properly. Alternatively, if I consider that 102 just does not cover the kind of order you are dealing with and it is dealing with the end result, ie do you take the storey off the building, not carrying out procedural assessments, does that affect matters? Those two questions.

218. MR McCRACKEN: As to the latter point, Marleasing principle makes it clear you have to interpret section 102 to achieve the result required. Your Lordship will recollect the Litster v Forth Engineering case where --

219. MR JUSTICE LEWIS: I have got to 102, yes.

220. MR McCRACKEN: You have to adopt a flexible approach to you. If you remember the Litster v Forth Engineering case the House of Lords actually read words in to achieve the legislation. So I do not think that is a problem.

221. MR JUSTICE LEWIS: What about the first question?

222. MR McCRACKEN: Answer to the first question. Revocation under section 97 cannot apply where the building has already been carried out so it is discontinuance or nothing. That is why it is discontinuance.

223. MR JUSTICE LEWIS: That is not my question.

224. MR McCRACKEN: I thought it was. I thought you had two questions my Lord. One was: why not revocation or suspension?

225. MR JUSTICE LEWIS: My first question is, I understand you to be wanting the following. If this case had started before they got planning permission there would have been a document called "screening opinion" filled out by the officer in one box. That would have been handed to another officer and you would assess the need to be an EIA and if there was the people concerned, the planners, would have to do it. It seems to me that what you are saying is that we have got to replicate that exact same documentary procedure now. As I say, is that what it is saying or is it saying no more than the purpose underlying the EIA was to see if there were environmental effects and provided they do that, by whatever machinery they do it, not having two boxes and two pieces of paper and so as they write: goodness me, looking back now we should not have two storeys we should have one storey, take a storey off. That is my question.

226. MR McCRACKEN: I follow. I will deal with that when I deal with the Berkley case because that makes it clear, the essence of the Directive, the substance of Directive is procedural and therefore it is no good saying the result would have been the same.

227. MR JUSTICE LEWIS: I do think we are at cross purposes about this. I fully understand. I really do understand that Mr McCracken but this is not that case. This is not whether or not you can remedy a breach of the Directive at a time it applied by saying: has there been any substantial compliance. This is a separate question. We are working on the assumption there has been a failure to comply. We have a new duty, the old Article 10 duty to do all that is necessary to comply. I say does that point to substantial compliance, in a very different use of the words, ie the purpose of the procedure was to subject it to an assessment. So provided it is subjected to an assessment and they then take the substantive steps required that is enough.

228. MR McCRACKEN: No. First of all that would be to give me more than I am asking, more than I am entitled to. What I am entitled to is that the unlawful consequences of breach of community law are nullified. The starting point for that is to carry out a proper screening exercise. So the outcome of the screening exercise cannot be known in advance. I mean one can make certain submissions about that, but the screening exercise is an exercise of judgment.

229. MR JUSTICE LEWIS: Could the university do the following: this is a mess. We do not care about screening. We do not care about sitting down and considering whether or not we could require an EIA. We want one. If you do not do it we are going to take steps. Could they have done that?

230. MR McCRACKEN: Your Lordship's question is: could the city have done that?

231. MR JUSTICE LEWIS: Yes.

232. MR McCRACKEN: The city could have served a discontinuance placement.

(At this point in the proceedings the recording was corrupted)

233. MR JUSTICE LEWIS: They say: we are not even worried about that. We are not worried about screening opinions, we are not worried about EIA. We want to be provided with the information that we have been provided with, prior to deciding whether or not to grant permission. How does that stand?

234. MR McCRACKEN: The city has no power to require the university to co-operate in that process.

235. MR JUSTICE LEWIS: I understand that. If they say: if you do not co-operate we are going to grant a discontinuance order.

236. MR McCRACKEN: They have not done that.

237. MR JUSTICE LEWIS: Hypothesis.

238. MR McCRACKEN: With respect my Lord, they have had 6 months to do that if that is what they wanted to do and they have not done it.

239. MR JUSTICE LEWIS: You say they have to have a screening opinion and a decision on whether or not they assess significance and if they need an EIA they have got ... there is no other way they can go about it.

240. MR McCRACKEN: They have not suggested it my Lord.

241. MR JUSTICE LEWIS: Okay.

242. MR McCRACKEN: I want to take your Lordship in a little while to Carlton-Conway and Berkley.

243. MR JUSTICE LEWIS: Keep an eye on the time.

244. MR McCRACKEN: Just before I do I want to take your Lordship to Wells.

245. MR JUSTICE LEWIS: We are in Wells.

246. MR McCRACKEN: Sorry, to Berkley.

247. MR JUSTICE LEWIS: Which tab?

248. MR McCRACKEN: It is at tab 4. This was a case that was decided after the authorities such as Noble v Thannet, that tab 24 yes, that my learned friend rely on. Back to Jones v Mansfield and Noble v Thannet.

249. MR JUSTICE LEWIS: What do you want to look at in here?

250. MR McCRACKEN: This was the Crystal Palace development and relationship between reserved matters and planning permission of development consent. English doctrine was: you get your planning permission in outline stage and reserve matters. Not part of that. The Court of Justice said: it is the combination of reserved matters

and planning permission that outline planning permission constituted development consent. It is important to note what the court said. Paragraph 46:

> "Having regard to those points, it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a 'development consent' for the purposes of Directive 85/337 (see, in this connection, the judgment delivered today in Case C-508/03 Commission v United Kingdom."

Then we go on and paragraph 48 is perhaps is important here:

> "If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, Commission v United Kingdom, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment."

251. That is the, as it were, European position and the Wells case posed the question: is there a mechanism available in the English courts to nullify the consequent breach of community law? There are two things that need to be done there. One needs to carry out the assessment but also one needs to have the ability at the end of that assessment to say: take the building down. So it not just a matter doing it.

252. I then turn to the Berkley point and I do think it is important to look at the Berkley point, because ... That is at tab 10 I think of the authorities.

253. MR JUSTICE LEWIS: I am familiar with it but.

254. MR McCRACKEN: My Lord, the first point is to note in the opinion of Lord Bingham of Cornhill at H.

255. MR JUSTICE LEWIS: Which page?

256. MR McCRACKEN: Page 607:

> "It is common ground that the Secretary of State's failure to consider the question cannot in law be justified or excused on the ground that the outcome (namely the grant of planning permission on the terms of the actual grant) would have been the same even if he had considered it. The parties agree that the Secretary of State's failure can in law be excused, if at all, only on the ground that there was, on the special and perhaps

> unusual facts of this particular case, substantial compliance with the requirements of the Directive and the Regulations."

This was a case where there had been a six-day inquiry including two leading practitioners at the planning Bar. So there had been rather more consideration of environmental matters in the Berkley case than there have been in this case.

257. Lord Bingham then discusses the question of whether or not there would have been, the Secretary of State would have waived the procedure or and he came to the conclusion that the Secretary of State could not lawfully achieve by inadvertence your Lordship which he could not have achieved deliberately.

258. MR JUSTICE LEWIS: Yes.

259. MR McCRACKEN: Then there is the celebrated passage where Lord Bingham says at D:

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow."

260. MR JUSTICE LEWIS: Yes.

261. MR McCRACKEN: And then at F and G:

> "But the cornerstone of the régime established by the Regulations is provision by the developer of an environmental statement as described in Schedule 3 to the Regulations, setting out (among other things) the data necessary to identify and assess the main effects which the development was likely to have on the environment. The developer provided no document which, in my view, met that requirement."

Then Lord Hoffman delivered the most lengthy opinion at page 613G to H.

262. MR JUSTICE LEWIS: Yes.

263. MR McCRACKEN:

> "Before your Lordships, Mr. Elvin has not attempted to support this reasoning. He accepts that the fact that a court is satisfied that an EIA would have made no difference to the outcome is not a sufficient reason for deciding, as a matter of discretion, not to quash the decision. The argument which he submitted to your Lordships was a different one, namely that there had on the facts been substantial compliance with the requirements of the Directive. So the narrow issue argued before your Lordships was whether the objectives of the Directive as transposed into domestic law by the Regulations had been substantially satisfied."

Here it is very important to look at the discussion which - I will not read you the

whole of it but section 7 as Lord Hoffmann opinion is very important.

264. MR JUSTICE LEWIS: I am very familiar with this.

265. MR McCRACKEN: Yes. I think what one needs to bear in mind, in particular, is what he then says in paragraph 8 on page 615D to G. I will read out what he says at G because it goes to answer some of the questions your Lordship has asked:

> "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."

I think that answers one of the questions that your Lordship raised:

> "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."

I will not read out the remainder of that section.

266. Section 9 he deals with substantial compliance and at D to F he says:

> "My Lords, I do not accept that this paper chase can be treated as the equivalent of an environmental statement. In the first place, I do not think it complies with the terms of the Directive. The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language. It is true that article 6.3 gives Member States a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows Member States to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the Annex III information which should have been provided by the developer."

Then, here is a very important, in light of some of the points that are made at G:

> "Secondly, the Regulations represent the way in which the United Kingdom has chosen to implement the Directive. This is not a case like Commission v. Germany (Case C-431/92) [1995] E.C.R. I-2189, in which the Directive had not been implemented and the court had to consider whether its terms had nevertheless been satisfied. In the present case the Directive had been transposed into domestic legislation and there was a failure to comply with the terms of that legislation. In my view, a court should not ordinarily be willing to validate such an act on the ground that

> a different form of transposing legislation (e.g. by allowing an environmental statement to take the composite form put forward in this case) might possibly have also satisfied the terms of the Directive."

So here is a case where we are, for example, in relation to duty to give reasons, we are transposed and there is a duty to give reasons and therefore the fact that we might have chosen not to require reasons is no answer.

267. I want to take your Lordship the case of Carlton-Conway, a decision of the Court of Appeal and it is, in my submission, very, very important to this suggestion and actually one does not seem to....

268. MR JUSTICE LEWIS: You have not understood my question. Never mind. Plough on.

269. MR McCRAKEN: Your question again my Lord.

270. MR JUSTICE LEWIS: Best if I just hear your submissions. Where are we?

271. MR McCRACKEN: I am anxious to deal with the point that your Lordship has and your Lordship appreciates if in a permission hearing such as this, one comes along and one does not know whether the attack is to be delay or prematurity, arguability, this or that. So that I would appreciate your Lord put the question again.

272. MR JUSTICE LEWIS: The questions that I have been trying to get to the bottom of this. I am working on the assumption for present purposes there was a failure to comply with the Directive in the sense they did not do the EIA that they should do. I have your submission that you have to the three stages they should have required a screening opinion. They should then decided whether or not to require an EIA and if they did require an EIA, they should have done all the consultation that you normally have. I understand that. You are saying that duty in EU law is the duty to use the powers available to you to nullify the consequences of (inaudible).

273. The question that I have been trying to explore is this. Is that really a question of substance? What the authority has to do now is to consider whether or not there is significant effects on the environment, including if necessary procedures for consultation and involvement. That is one thing they have got to and they are say they are doing, or is it is the case that they must go through each of the steps you outlined, with the same heading and same piece of paper: stage 1, screening; stage 2, doing assessments; stage 3, we therefore follow step by step the regulations now, as it was the situation before. So the question is if the underlying aims procedurally and substantively of the Directive that must now be achieved, or are you saying each and every step must be followed through as if this was a situation where you are working through the regulations and the Directive prior of the planning permission.

274. MR McCRACKEN: The answer is yes, because that is the only way you can achieve the underlying aims and objectives.

275. MR JUSTICE LEWIS: You have to go through each and every step in the Directive or the regulations.

276. MR McCRACKEN: Yes. Otherwise you would not be achieving underlying aims of the Directive.

277. MR JUSTICE LEWIS: The underlying are procedural and not just substantive, and therefore you must comply step by step with the procedural obligations in the regulations.

278. MR McCRACKEN: Yes, you must do, because that was in a sense, the heart of the Berkley case. Could you simply say: we have achieved substantial compliance and the answer was: you cannot just say that. The essence of the Directive requires certain procedures to be followed and --

279. MR JUSTICE LEWIS: The only way you can rectify the consequence of it not being followed is by replicating each and every step of the Directive.

280. MR McCRACKEN: So far as you can retrospectively. Obviously *mutatis mutandis*.

281. MR JUSTICE LEWIS: Procedure obligation, each and every step must be replicated.

282. MR McCRACKEN: Yes. But each and every is a rather pejorative way of describing the relatively limited.

283. MR JUSTICE LEWIS: I do not mean to be pejorative in the sense I understand the submissions but each and every step must be replicated if possible.

284. MR McCRACKEN: Yes with that *mutatis mutandis* qualification.

285. MR JUSTICE LEWIS: That is why I put in English if possible, yes. But I understand the submission. Yes. I thought the case was quite different, but it is not.

286. MR McCRACKEN: I do not think what I have said is inconsistent with what is in the statement of facts.

287. MR JUSTICE LEWIS: I understand it now, it is my fault not yours. Do you want me to look at another cases.

288. MR McCRACKEN: I want you to look at Carlton-Conway because that a very important decision.

289. MR JUSTICE LEWIS: Tab?

290. MR McCRACKEN: It is tab 19 I think.

291. MR JUSTICE LEWIS: Where do you want me to look at?

292. MR McCRACKEN: Tab 19, look at the back of the case first of all. It was a case where there had been an error of law in the approach of a local planning authority to a planning application that was in front of them.

293. During the course of the proceedings the local planning authority purported, as it were, to put things right, in other words to adopt the approach that your Lordship in a sense has characterised as dealing with the underlining aims and objectives as it were. The question before the Court of Appeal was whether that was whether that was acceptable, whether that would actually achieve the right result. It is discussed in the judgment of Pill LJ in paragraph 27 to 30, and Walker LJ, as he then was agreed, as did Sir Martin interveners:

> "I reject the argument on discretion. In my judgment, the appellant is entitled to a fresh consideration of the application by the planning committee. There is a real risk that in taking the decisions they did in October 2001 there was a potential motivation, as would be perceived by a fair-minded member of the public, that a wish to support their chief planning officer and to avoid the possibility of judicial review were factors which led to the relevant decisions. I stress that it is a potential risk. There is no evidence that there was improper motivation.
>
> 28. In my judgment, an appellant who has established what this appellant has established is entitled to a fresh consideration by a committee which is not burdened by the possibility of the extraneous factors to which I have referred. Upon a fresh application the procedures of the respondent permit the appellant to address them orally for a period of up to three minutes. That is a right which he should have the opportunity to exercise. Wisely, in my view, the appellant was advised to have nothing to do with the procedures which the council proposed to follow on 6 October 2001.
>
> 29. I only add that I regard it as unfortunate in this case that the planning officer did not set out in writing the factors which led him to the decision he took which has led to the quashing of the planning permission."

If Mr Maurici is right on might the same observation in this case:

> "Anyone who has been involved in decision making knows that it is a valuable guide to clarity to set out the factors which are relevant before taking the decision.
>
> 30. I do not consider a procedure satisfactory whereby, after the event, considerable resources have been expended by the respondent in preparing the long reports to which I have referred."

This in a sense is a classic instance where the defendants are putting forward the same argument. They are saying: wait until the voluntary environmental assessment has been submitted. Wait and see whether we do decide to make distance infarction but the reality is that these proceedings have been launched and they have a very powerful

motivation for trying to reach a decision that simply, as it were, justifies what they have done in the past. Like now, I would like to, unless I can help you further on that aspect of the case.

294. MR JUSTICE LEWIS: I understand the submissions now.

295. MR McCRACKEN: I want to now deal with the point of prematurity, which your Lordship raised before the midday adjournment.

296. MR JUSTICE LEWIS: Rather choose together. If you are right there is a duty to take all the steps to nullify referring to the Directive, and it is not premature you would say. If it does not go to that and it is a substantive thing, then the argument is that premature they are trying to do it. You say the procedural sense.

297. MR McCRACKEN: I say that. I want to pose this question my Lord. Suppose when we received the council's letter in Easter last year, suppose we said: oh, we will not do it. Then, they have made a decision in December that they were not actually going to serve a discontinuance order and we then launch the proceedings saying it was duty, would it be met with the argument: you are out of time? You were told we did not recognise there was a duty more than 3 months ago and you should have launched the proceedings then.

298. The second point is this. The letter from the council said: you are too late. We did not accept that we were. Just suppose we were, as it were, guilty of some form of delay, then the sooner we moved the more likely we would have been to be given an extension of time. So those are powerful arguments, in my submission, for saying that we are not premature.

299. Likewise, the fact, and I drew attention to that in Wells that the obligation is to, as it were, to carry as early possible applies to us.

300. MR JUSTICE LEWIS: I have that.

301. MR McCRACKEN: I raised the Carlton-Conway point and of course, the Berkley point. I suppose the other point is quite simply this. This is a situation where one needs to think about the overriding objective. What is the sensible thing to do in these circumstances. Is it to say: you are premature, come back again if things do not pan out right in a few months' time. Or is it simply to say: we grant permission and then we either stay it depending the outcome of evidence or not. In my submission, the overriding objective leads only one way.

302. MR JUSTICE LEWIS: Which is what?

303. MR McCRACKEN: Which is what Hickinbottom J --

304. MR JUSTICE LEWIS: Granted the stay.

305. MR McCRACKEN: I say grant and stay. We are very happy for it to be expedited but I would say, practically speaking, having regard to the overriding objective, the sensible thing is to grant and then to stay.

306. MR JUSTICE LEWIS: You say the sensible outcome is to grant permission but to stay it.

307. MR McCRACKEN: I emphasis, we are very happy for an early hearing date but I can see the sense of saying: grant and then stay. But we prefer to have an early hearing date. So I think ultimately I put it this way. We would like permission and we would like to go ahead as soon as we can.

308. MR JUSTICE LEWIS: You want to go ahead but you see the force of stay.

309. MR McCRACKEN: If your Lordship, as it were, is attracted to prematurity then the correct answer of overriding objective is to grant permission and to stay. Unless I can be of further assistance. I hope I have at last made my position clear.

310. MR JUSTICE LEWIS: I understand the point and it is going to be the very first question that I put. I had understood, Mr Maurici, that the argument was that you were going to look at these things, take a view as to whether or not it was too big, too wide, not straighted enough and do the discontinuance. What Mr McCracken is saying, as I now understand, is quite different. You have only got choice which is to replicate the EIA Directive now, so far as you can and we must interpret section 102 (inaudible) to allow that. The answer is?

311. MR MAURICI: My Lord, the first answer is my learned friend is wrong to say that one has to effectively undertake a process of replicating identically the procedural steps. My Lord, the best place to see that my Lord, you have been already been to the Wells case at tab 21. If you go to one paragraph it is a very short paragraph, 66 on page 610, tab 21, page 1057 paragraph 66:

> "The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment."

My Lord the focus there is clearly on the underlying substance rather than on the procedure. My Lord, we will come back to this in a bit more detail. But the second point is this. My learned friend accepts, it is paragraph 12 of his claim form, that one can do a retrospective exercise. My Lord he accepts that and want to touch a bit more detail in a moment, but he accepts you can do respectively exercise. He also accepted, although he said to your Lordship one has to go through all the procedures he said by qualification: "so far as it is possible to do so". My Lord, recognition is once one gets into the retrospective process there are going to be differences.

312. My Lord, can I deal with this in way --

313. MR JUSTICE LEWIS: What he is saying you should decide to have a screening opinion, then you should decide whether you require one and if you do require one

there should be consultation, and there should not be this broad overall: is it okay? He says that misses asserted environment procedure protection.

314. MR MAURICI: My Lord, in my submission it is a completely different position to that my Lord. But the starting point, you will see in paragraph 11 of my skeleton argument what I say it is the council propose to do. I would like to summarise. I have given you the detailed chronology and I have given you the reports. I have tried to summarise it at paragraph 11. We say what we are proposing to do is having received voluntary EIA which is the university has agreed to produce. Secondly, having received detailed proposals for university mitigating impact on views from Port Meadows. That is what the university also agreed to look at. Also having looked at how these would be secured:

> "Following [this is a consultation with all interested parties] we will ask the Planning Committee to determine..."

My Lord, there are three questions and I need to deal with these. On the first two relate to a point that Mr McCracken has touched on but really shied away from, and my Lord that is this point about the contamination condition, condition 16. That was a pre-commencement condition which was not complied pre-commencement. We had all the details now, but they were not provided pre-commencement as they should have.

315. The first question we have to ask ourselves is whether those conditions should be discharged retrospectively, as the case law tells us they can be. If not, whether the development that proceeded was unlawful. My Lord, if it was unlawful that options that opens up to us are completely different from discontinuance. They include for example enforcement.

316. My Lord, can I ask you to note Mr McCracken in the Evans case, at paragraph 337 accepted that in some cases where it is argued about the failure to do an EIA, in some cases one way forward could even be enforcement. It depends on the facts of the case. Here that is another possibility.

317. MR JUSTICE LEWIS: If that worked. You would say: the land is contaminated and you must take the building down.

318. MR MAURICI: Not so much --

319. MR JUSTICE LEWIS: Notice directed by the breach, would you not?

320. MR MAURICI: The question is we have had all the reports now. We need to decide whether we discharge those conditions retrospectively. My Lord, there is another element to that. Under the 2011 regulations where you are dealing with the discharge of a subsequent condition that is a pre-commencement condition, you are required to screen those conditions. We withdrew a report that was going to Committee quite recently on the basis that we are going to screen the submission of details under that condition, to see whether there is a need for an EIA in respect of that subsequent discharge of conditions.

321. So my Lord, my learned friend touched on this but shied away from it. There are these other procedures which are going on, which if they were going to come to a certain result would actually mean we never got near discontinuance.

322. But my Lord --

323. MR JUSTICE LEWIS: This is where I think there has been crossed wires. I understand, I read "continuance" in the Act as meaning you require a building to be removed or altered or your require a land use to stop or to have conditions. What Mr McCracken actually is saying is community law requires something quite different. Take any power you have and use it to insist on an EIA.

324. MR MAURICI: He has two problems with that my Lord. Two problems with that. The first problem is that Wells actually says: one has to take steps to remedy it in so far as national procedure autonomy allowance. It is not you can make up any procedure you want. My Lord, if we go back to Wells again in tab 21.

325. My Lord it is the end of 65:

> "Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337."

326. MR JUSTICE LEWIS: Could I not just fiddle with the wording of 102?

327. MR MAURICI: It is not about fiddling with the wording of 102. The order that Mr McCracken suggested we should make is plainly ultra vires, the section 102. What section 102 allows us to do is to deal with the substance. It allows us to require the use to be discontinued. It allows my Lord, for us to impose conditions specified in the order which must be complied with to allow the use to continue. It requires us to require the alteration or removal of the building.

328. MR JUSTICE LEWIS: Mr McCracken would say that is what you do, you either impose such conditions as may be specified in the order and the continuance of it. You can only continue the use if you now take all the steps that you would have required prior.

329. MR MAURICI: His suggestion goes even further than that. His is paragraph 11, which is his claim, the discontinuance order. What he is actually suggesting here is a discontinuance order that requires a university to do anything that we require in writing. That is what he is actually asking.

330. MR JUSTICE LEWIS: "...necessary to ensure compliance with. Or as a result of compliance with." In a sense, or I certainly got confused by the word "discontinuance". If we forgot the word "discontinuance" and said "discontinuance (or used to achieve EU law)" and you use it to achieve an EIA, is it arguable? Standing back first, is it arguable that the underlying objective of EU law in this area is not simply the

substantive assessment of effect but the procedural, everybody has to be involved, got to be these steps? If it is the latter arguably - as Mr McCracken says it is - should you then, can you then arguably interpret 102 as covering that? If it is arguable Mr McCracken wins on the permission.

331. MR MAURICI: Look at 67 in Wells:

> "The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order."

332. My Lord, this is not the ECJ telling us we must completely avert the legislative regime. It is telling us we must decide and 69 is even clearer:

> "In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment."

Not that it must be. It is a question for the national court, not something required by EU law, whether it is even possible under domestic law to go so far as to revoke or to suspend in order to allow assessment process to go ahead.

333. My Lord, my first point is simply that my learned friend is trying to get something out of Wells that is just not there. He is trying to take the obligation far further than the ECJ itself took it.

334. MR JUSTICE LEWIS: I understand that. But is not the real problem the Dutch dykes case - I have lost it now - where is that?

335. MR MAURICI: My Lord, which case.

336. MR JUSTICE LEWIS: Dutch dykes .

337. MR MAURICI: In other words that 26 I think. It is really the.... No, it is might be... There is one case where there is a distinct section on, and it seemed to be the only section which bit on the question: as to what are the obligations to nullify. It is not that case.

338. MR MAURICI: My Lord it is back in Wells I think, in the early part of Wells. (Pause).

339. MR JUSTICE LEWIS: Yes, paragraph 62 and onwards of Wells that is the relevant section.

340. MR MAURICI: Yes. My Lord, that section. The key to that section my Lord, is both in 65 my Lord, also in 67, but perhaps more importantly in 69, it makes clear that ultimately this is a matter for national law to decide what can be done. You are required to do only what it is possible to do as a matter of national law subject to normal principles of equivalence and effectiveness.

341. MR JUSTICE LEWIS: Is it not arguable that (i) there are procedural steps to the Directive that are reported, so decisions are properly thought about, information provided, the public consulted. Two, it is arguable that you could use section 102 to achieve that first stage, get that procedural (inaudible) in place and then depending on what comes out of it you decide whether to take the top off.

342. MR MAURICI: My Lord, I say not my Lord. But suppose you are against me on that. My Lord, can we step back and look at the procedure that is actually proposed to be followed here as counsel. Because, my Lord what my learned friend says we must do a screening opinion, he says another screening opinion, we have already done a screening opinion, his complaint is he says the reasoning is defective.

343. MR JUSTICE LEWIS: I am assuming for the moment the screening opinion is flawed.

344. MR MAURICI: The first step is a screening opinion. My Lord, secondly, if we then conclude that the proposal was one that was likely to have significant effects on the environment, what we are supposed to do then is effectively to require an environmental impact assessment from the developer. We do not take into account and decide what it is that we can do at this retrospective stage, my Lord. But my Lord, what is happening, what is actually happening on the ground, is that the university have determined they are going to put in a voluntary environmental statement.

345. We are already going to get exactly what we would get if we went through all these procedural steps. We are going to this voluntary statement. Yes, it is retrospective but my learned friend accepts that.

346. MR JUSTICE LEWIS: The voluntary EIA would have been exactly the same in procedural terms as what you would have got had you had a screening opinion saying: yes, one is required.

347. MR MAURICI: I repeat what Mr McCracken says. It will do as much as it can given that it is, everybody acknowledges now, must be retrospective.

348. MR JUSTICE LEWIS: The building is there for a start, yes. The tree has been cut down and that is the end of it. In substantive terms you have skipped the screening opinion which would have resulted in the EIA. You are having an EIA which you say is in substance the same thing. What about Mr McCracken's about the rights of consultation.

349. MR MAURICI: He makes two complaints about that. One he said: no consultation. As I recalled in paragraph 11 of my skeleton argument before we take any decision we have said we will consult all interested parties. There will be effectively compliance

with the regulations in spirit. So, whereas the regulations would have required the environmental statement to be advertised, to allow people to have a chance to have their say, this environmental statement we will ensure will be advertised and people will have their say.

350. MR JUSTICE LEWIS: You would do everything you would have done, had you been doing it before the Planning Committee.

351. MR MAURICI: So far as we can my Lord. The first complaint was no consultation my Lord. That is simply wrong; there will be consultation of this environmental statement.

352. MR JUSTICE LEWIS: In the same way as it would have occurred as it happened before the planning.

353. MR MAURICI: That is the aim of this whole process is to try to mirror, as closely as we can, albeit it is retrospective the process under the regulations. My Lord, everyone recognises there are limitations on that because it is retrospective but in terms of consultation, we are going to do, as close as we can, as to what would have been required if this was a planning application.

354. MR JUSTICE LEWIS: So the EIA, the same content.

355. MR MAURICI: Same content, same consultation.

356. MR JUSTICE LEWIS: Consultation, the same as if it was preplanning so far as you can.

357. MR MAURICI: My Lord, the other complaint that Mr McCracken made about it was that he said: it is no good because the developers is doing it and this should be done by the city. My Lord, I simply do not understand that submission. As we saw when we looked at Berkley the cornerstone of the EIA regime is that it is a developer who is invited to produce the statement. That is what is happening here, albeit it has been produced as a voluntary ES.

358. MR WARREN: Forgive me for rising. Very clearly what it is said is going to happen is that the university will be putting in a voluntary environmental assessment, not a voluntary environmental statement pursuant to the regulations and Directives so far as possible.

359. MR JUSTICE LEWIS: This is what I am trying to understand.

360. MR MAURICI: The court is being inadvertently misled here.

361. MR JUSTICE LEWIS: Just pause. Do not have a fight. I just need to know the plan. I have understood your case Mr McCracken, I had not understood it before. Your argument is there should be a replication in effect - I am using that word - a replication of the process. I have never been bothered about a screening opinion because if they are going to require the same as an EIA, it does not matter you have an

SO or not. Mr Maurici tells me that the EIA would have the same content as what would have been required had there been a positive screening opinion.

362. MR McCRACKEN: We have absolutely no basis.

363. MR MAURICI: There was attached documents to my skeleton argument. Did you get those attachments? There is a letter from the university, my Lord, at page 14 it starts. The 9th July, from the director of the states. My Lord this is where we learned the university would do this. It is page 16 "environmental information." "The university does not accept the development is ... required assessment. It will nevertheless carry out an assessment..."

364. MR JUSTICE LEWIS: I have not found that yet.

365. MR McCRACKEN: Can you take the judge to the first case of that letter.

366. MR JUSTICE LEWIS: I have not read anything yet. Just be quiet a moment Mr McCracken. It is Mr Maurici's turn. Where are you reading from?

367. MR MAURICI: Page 16, at the very end of the letter my Lord, there is a heading "Environmental information".

368. MR JUSTICE LEWIS: Okay. The university does not accept that it is required. "It will carry out an assessment on a voluntary basis following the processes of the Director and the regulations so far as possible."

369. MR MAURICI: That is what they have undertaken to do and that is what we are expecting them to do. My Lord, again, and my learned friend, Mr McCracken ... perhaps I should go to Mr Warren's skeleton argument. He does also say - I am not sure I have the right part of it - at paragraph 3, he again talks about what the university is doing, and my Lord, it is four lines:

> "The interested party has been preparing voluntary environmental to enable that full consideration and review. The voluntary environmental statement ... not finales, expect will be. Traffic and noise assessments need to be carried out further consideration referred to take place within the next few months."

370. My Lord, again we are expecting the university to produce an environment statement which in their own words will follow the processes in the Directive and regulations so far as possible.

371. MR JUSTICE LEWIS: So it is not then a situation of something you "as good as" or nearly good as, it is going to be as far as feasible will replicate what I call the preplanning EIA.

372. MR MAURICI: My Lord, it is when we have received that we will then look at the options, all the options, that are open to us. One possible option is the enforcement route, one possible option is discontinuance order, and my Lord, we have made very

clear, as I said in my skeleton argument in a number of places, that we have been considering and accept that we have the power to discontinue. But my Lord, what the university's proposal to produce the environmental statement in accordance with, so far as possible, the regulations and Directive has done, is effectively allow us to engage in a process which involves my Lord, at the very least substantial compliance with the Directive.

373. My Lord, although my learned friend took you to Berkley and said: substantial compliance is not permissible, that is in fact the exact opposite of what Berkley says. Berkley says: substantive compliance with the Directive is acceptable what is not acceptable is to say the EIA make a difference. That is a different point. Substantial compliance is allowed and my Lord, the House of Lords simply referred to EU authorities, Commission of Germany, which established that that was the position.

374. MR JUSTICE LEWIS: Show me that in Berkley again.

375. MR MAURICI: My Lord, yes.

376. MR JUSTICE LEWIS: You cannot have a paper chase here.

377. MR MAURICI: You cannot have a paper chase but that is not... It is really page 617, in the speech of Lord Hoffmann at B:

> "Commission v. Germany in my opinion establishes that an EIA by any other name will do as well. But it must in substance be an EIA. Can this be said of the procedure followed in the present case?"

On the facts of that case - no.

378. My Lord, here - yes, because that is what the university has promised us they are going to do.

379. MR JUSTICE LEWIS: Standing back from that your powers for a discontinuance order, even I assume against you that they could be used arguably to require an EIA in the form and with the procedures of the Directive, you are saying they are going to do that any way. You do not need to have a discontinuance order, everybody is doing it. Then when you get on to the next take, do you take the top off - shall we put it? That is another decision and you may have to take a lot off if there had been a breach of the condition.

380. MR MAURICI: My Lord, all options are open to us. One of my learned friend's submissions to you, as you may recall was that we are not genuinely considering all these options. Obviously, I would completely refute that my Lord. One can see, my Lord, again in a bundle of documents attached to my skeleton argument.

381. MR JUSTICE LEWIS: I have been slow, it took me a while to get to grips with what Mr McCracken's case was. I have it now and I see what the answer to that case is now. It is my fault nobody elses.

382. MR MAURICI: You see at page 1213, is a relatively ... the 22nd April 2013, a letter to the Vice-Chancellor of the university from the Chair of the West Area Planning Committee. It is page 13, the very last paragraph:

> "In this context I am writing as instructed by the Planning Committee urging us to take all steps available to ensure ... progress promptly and openly, so you must be clear as possible about your proposals to ameliorate the impact of the development. The Planning Committee also instructed to draw to your attention the existence of further compulsory remedial steps which it may recommend to the City Council in due course, including discontinuance in respect of the whole development."

383. MR JUSTICE LEWIS: This is the early procedure stages.

384. MR MAURICI: True my Lord. What that letter then my Lord, what happens of course next in stage is one gets the letter from the university. So my Lord, your Lordship postulates the question: could the council say to the university: unless you go through all these steps and do what should be done. We actually say it was not required to be done. Leave that aside for now, do all the things that would have been done had an EIA be required. One option open to us, we have been saying to them is: we will simply discontinue the whole thing. That is what the Chair of the Planning Committee say of the matter. What the university's response was, in due course, was a number of points. My Lord you have seen the 9th July letter. They talk about landscaping proposals, additional things they could do to ameliorate it but my Lord, the key one for us, because of my learned friend's procedural complaint is the very last page, page 16, which we have looked at. So, my Lord, effectively, in my submission, what my learned friend really wants in paragraph 11, my Lord, has already been achieved.

385. MR JUSTICE LEWIS: It is not prematurity, it is lack of necessity for a court order.

386. MR MAURICI: Lack of necessity for a court order. It is premature my Lord, so far as my Lord is seeking to go any further down the line. My Lord, that I have to say, my Lord, it is not just your Lordship who has not appreciated it was simply the procedural point which was of such concern to Mr McCracken until today. My Lord if that is his concern it is met.

387. My Lord, if we can step back from it. What are the other complaints that my learned friend could have about this? My Lord, he seems to go to the Carlton-Conway case to say: it is not acceptable to be doing these kind of exercises in the shadow of judicial review proceedings. My Lord, I do not understand where Carlton-Conway fits into my learned friend's case.

388. MR JUSTICE LEWIS: The real issue is Wells and that section that says what we must do when there has been a breach. You say you are doing what Mr McCracken says you need to do and therefore I need not lie awake at night.

389. MR MAURICI: My Lord, all you can say is that that there is some advantage in having a formal discontinuance order rather --

390. MR JUSTICE LEWIS: A matter for you actually. Achieving it that is far and it is not achieved.

391. MR MAURICI: In essence that is my case. My Lord, the reason we get into prematurity is if my learned friend was, and I do not think it is his case now my Lord. If he was saying: keep these proceedings on hold, so they could be used going forward to challenge the next stage of the decision making - actually the only stage of decision making my Lord. You have seen our response, the letter before court, which is the decision identified in the challenge. My Lord, we say it is premature because we have not actually decided.

392. MR JUSTICE LEWIS: It could be two section 102 decisions. There could be the 102 decision on procedure and that arguably is not premature because it needs to get on with that now. There will be a section 102 decision on "take the top off" as I call it pejoratively, ie the substance. I had understood this case was all about: what do you do because it is too big? But it is not. Mr McCracken is making it absolutely clear there are European Union principles and objectives on a procedural level and that decision is the one at issue. He has managed to get into my head what is I am doing but you say I need not have worried because you are doing it.

393. MR MAURICI: We are doing it. In my submission, everything that could possibly be required in terms of the procedural side is going to be achieved through the process.

394. MR JUSTICE LEWIS: We are not having a screening opinion because there is no point, you are going to have the EIA.

395. MR MAURICI: Exactly what is the point of having a screening opinion if you are going to get the voluntary EIAs?

396. MR JUSTICE LEWIS: The screening opinion you would either say you do not need one, or I would say you would need one. You are working on the assumption that one is needed.

397. MR MAURICI: Yes my Lord. I think the university and the City Council are both agreed one was not needed but the university had decided nonetheless to produce one, and therefore to effectively avoid having to have that sterile debate, as I think Lord Carnwath called it in the Berkley case, but we are going straight to the nub of it: there will be an environment statement.

398. MR JUSTICE LEWIS: In accordance with the procedures of the Directive as far as you can.

399. MR MAURICI: My Lord, yes.

400. MR JUSTICE LEWIS: That is very helpful. That changes the complexion of the case. Anything else Mr Maurici? That is very helpful.

401. MR MAURICI: Unless I can assist you further that is the answer.

402. MR JUSTICE LEWIS: I will let Mr McCracken reply.

403. Mr Warren, does the interested party have anything to add?

404. MR WARREN: One observation to my Lord.

405. MR JUSTICE LEWIS: Is Mr Maurici correct that you are intending to do what that letter says which is to carry out what I called a replication of the EIA process of the Directive of the regulations as far as possible, skipping the screening opinion.

406. MR WARREN: He is, he is entirely correct about that matter of fact and I adopt, obviously with gratitude, with what he says on the law.

407. My Lord the point that I would add which ties in with the point you were discussing with Mr Maurici is if you go to Wells and focus on the paragraph which deals with the procedural aspects of where there has been default, which is paragraph 65 because 66 and 67 talk about the harm, dealing with the harm of the substance. Sixty-five is the one that deals with examining the projects; in other words doing, you know, having the ES and consulting of it. You will see there that the Court of Justice identifies that it is all the general or particular measures necessary to ensure that projects are examined. Obviously that depends on a fact specific assessment of the case.

408. MR JUSTICE LEWIS: Hold on. There is a pre-assumption in the EIA Directive that in order to get the right answer on that there are procedural things like consultation.

409. MR WARREN: Absolutely. That is right. In order to understand whether there is a duty to make an order here as a domestic Court, one has to understand that the Court of Justice is saying one has to take the measures that were necessary to ensure that they are identified. Here of course the facts are that the voluntary environmental statement plus consultation etc will take place.

410. MR JUSTICE LEWIS: In order for there to be any room for slippage or misunderstanding I had thought and I had a discussion with Mr McCracken, we are talking about broadly, getting in an assessment is it too big and too small. Mr McCracken was saying: no, no, there were procedural issues and that is a value. That may lead to a substantive decision which is a separate value. I hope you are not slipping back from 1 into 2.

411. MR WARREN: Not at all. The reason why I am focussing on 65 is because it deals with whether it is necessary to do anything, to ensure (inaudible) there are examined. That is the procedural paragraph and you go on at 66 likewise, "required to make good any harm caused" and that is whether it is a discontinuance order in due course take your top off etc.

412. MR JUSTICE LEWIS: You are not diluting the procedures by reference to overall it looks --

413. MR WARREN: Not at all. Forgive me. I did not mean to say that at all. I was merely drawing the distinction one finds in Wells between what is necessary for the procedural side, 65, and what is necessary to make good the harm in substance 66, and what Mr McCracken seems to be basing his case on is more at 65. Here the facts are that all of those matters are going to be dealt with. That is all, my Lord, unless I can assist you further than that.

414. MR JUSTICE LEWIS: Mr McCracken things have changed and I have caught up with everybody. I understand what you want. You want, as I have said throughout, broadly a replication of the procedures skipping the screening opinion. Now they say that is what they are going to do.

415. MR McCRACKEN: First of all, so far as Mr Warren's last point, that he suggested we are only concerned about the paragraph 65 elements of Wells, we are concerned about the paragraph 66 element of Wells as well. The discontinuance order that we want is directed towards both of those. That is the first point.

416. The second point, Mr Maurici said that the screening that he is envisaging will only be in relation to whether or not in respect of contamination condition, we go way beyond --

417. MR JUSTICE LEWIS: That is a red-herring entirely, there is nothing to do with what has go on here.

418. MR McCRACKEN: It is interesting he said that, bearing in mind what he also said. It is lightly odd. On the one hand he says: we do not need our order because it is going to happen any way. On the other hand, he is proposing to carry out screening.

419. MR JUSTICE LEWIS: For one condition.

420. MR McCRACKEN: Exactly. But the point is he is only proposing to carry out screening for one condition and if it really were the case the city genuinely believed they were going to get an environmental statement of the kind you would normally get, then there would not to be screening in respect of one condition.

421. MR JUSTICE LEWIS: As I understood Mr Maurici they think there might be a big problem with contamination. They are going to make sure they have crossed all the Ts before they act.

422. MR McCRACKEN: But if they genuinely believed that the voluntary environmental assessment that the university are going to submit would do everything that the regulations and Directive required then it would be covering contamination and all the matters that in respect of which they are going to have their limited screening exercise. It is very, very strange. There is an inconsistency on the one hand saying: we are going to carry out a limited screening exercise and on the other hand, saying: we are doing a full environmental statement.

423. MR JUSTICE LEWIS: What I had understood, I mean I am not obviously planning lawyer in the way you three are. There is potentially a big problem with the condition

of contamination and the council want to make sure they have crossed every T and dotted every I in case they are going to say this is an unlawful development. They are treading very carefully there. But at the same time, irrespective of that, on the general issues, not the contamination issue, they are going to have, so far as you reasonably can, a replication of the EIA. I do not at the moment --

424. MR McCRACKEN: I follow that my Lord. But a general environmental statement - I want to use the correct term - I do attach significance to the fact that the university have talked about "them" carrying out an environmental assessment. That is exactly what they proposed to do. They propose to give the city, not their first pitch, as it were, they propose to give the city their conclusions. If they genuinely were going to submit an environmental statement of the kind that you would get if the discontinuance order we seek were to lead to a screening upon that says: you need to carry out an environmental assessment, then contamination would be covered by that. Contamination is one of the obvious things that would be covered that would be within the ambit of an environmental statement.

425. MR JUSTICE LEWIS: Can I go behind 16 of the court. This man, whoever is, the Secretary of State served the University of Oxford, tells me that they are going to carry out an assessment of environmental impact "following the process of the directive regulations as far as possible".

426. MR McCRACKEN: Can we have a look at the context of letter of my Lord. I mean in a sense I am a little bit surprised at the way this has formulated.

427. MR JUSTICE LEWIS: They seem to have won.

428. MR McCRACKEN: Well...

429. MR JUSTICE LEWIS: Unless I have missed something.

430. MR McCRAKEN: I think you have missed something, with greatest of respect. What the university is promising to do is that it will carry out an assessment. It is not suggesting for a moment that the city will be carrying out the assessment or there be consultation. It is saying it will be carry out the assessment. The fact that any developer can say: he is going to carry out an assessment, indicates that he does not understand one of the fundamentals of the process which is the assessment is carried out by the competent authority not by the developer.

431. MR JUSTICE LEWIS: What he means is he is going to do it with a piece of paper which has all the information.

432. MR McCRACKEN: I do not think we can draw that conclusion, my Lord, at all.

433. MR JUSTICE LEWIS: I have two counsel telling me that, and I have the submission and you have the letter.

434. MR McCRACKEN: This is exactly the sort of situation when permission should be granted, so the matter could be investigated. Can I take you to the start of the letter my

Lord. I quite simply have the greatest of respect for both Mr Maurici and Mr Warren, but I really do not think they have got a window into the mind of Mr Gottling any more than Queen's Elizabeth had a window into the mind of her subjects. This is a letter written in July. We do not have Mr Gottling here - we do but we do not have him on the witness stand. I would be very happy to cross-examine him when permission is --

435. MR JUSTICE LEWIS: In a judicial review it is virtually unheard of in a permission application.

436. MR McCRACKEN: It is unusual but he says at the outset:

> "I thought it might be helpful to update you on the university's process with providing options to amelioration of the impact of the development at Castle Mill."

Then he sets out, he says in relation to landscaping that effectively they are proposing to plant some more trees, in so far as there are opportunities there are opportunities to carry out screening planting within the elopements. That falls very far short of what we would envisage is an effective environmental assessment process requiring by way of mitigation measures and he then says under William Lucy Way:

> "The university therefore does not propose any further landscaping for the elevation of buildings opposite William Lucy Way."

So nothing proposed there. "Roof":

> "The university does not consider the reduction in the roof line will have any benefit.
>
> Light spillage. University have spoken to glass manufacture. They have confirmed that when it is dark outside there is no film which will completely prevent light from transmitting through our glass."

They do not deal with the question of whether or not there should be a requirement that at night blinds should be drawn or some other measure would be relatively straightforward to prevent light spillage.

437. That is the context in which they offered to carry out a voluntary assessment of the environmental effects, not at all on an open basis. It is on a basis that has already ruled out a very substantial number of the matters that my clients think would be obvious candidates for consideration.

438. MR JUSTICE LEWIS: What is the correct word to describe what the developer does in a normal EIA assessment?

439. MR McCRACKEN: He submits an environmental statement but that is not what they said they are going to do.

440. MR MAURICI: My Lord, it is often referred to an environmental impact assessment. It is an environmental statement. It is often referred to as an environmental impact assessment. My Lord, I am just concerned there is a bit of an attempt to confuse the issue here.

441. The only thing the university can do is produce environmental statement and our obligation is to consider it. My Lord, I do not really know where the argument goes beyond that. The university has made very clear what they are producing. That is all they can produce. They cannot carry out the assessment for us.

442. MR McCRACKEN: It is more than English, it is more the attitude that is being demonstrated there but never mind.

443. My learned friend, Mr Maurici, says: oh well section 102 will not do what we want. Section 102 is certainly capable of requiring the removal of the buildings. We do not go so far as to say section 102 must be operated in such a way that in this case the building should be removed before the environmental assessment takes place. But, if it were the case that you could not interpret section 102 in the convergently constructed way that Marleasing requires. If it were the case that you could not do that - fine. The simply discontinuance order would require the removable of the buildings.

444. MR JUSTICE LEWIS: You say you can do it. Can I not do it under 102 by such conditions as may be specified?

445. MR McCRACKEN: My Lord, you can say.

446. MR JUSTICE LEWIS: You can say you can continue to use it if you have done an EIA.

447. MR McCRACKEN: Absolutely my Lord. Yes, I say that this criticism that 102 is not flexible enough to cover is manifestly false.

448. The important thing about Carlton-Conway is it makes it clear that during ... it is not desirable for authorities that have.

449. MR JUSTICE LEWIS: This is your reply, do not forget. We have gone through Carlton. What you are saying they are going to do one and you set out three reasons why it is wrong. One if that is the case is it not jolly odd they are doing the contamination screening opinion. Two, it is wrong to say the developer assesses, I can read the letter and understands the obligation and three, if I read the letter as a whole you prejudge the outcome.

450. MR McCRACKEN: Yes, it is certainly --

451. MR JUSTICE LEWIS: No, no need to hear the whole case again, I need to hear your reply and what date is set.

452. MR McCRACKEN: I was dealing what was said. I think they were saying that it does not matter whether this is done. It does not matter if everything is done on a

voluntary basis. I say: no, the answer to that is Carlton-Conway. That makes it absolutely clear. That was a case where the public authorities purporting to put things right on a voluntary basis and Pill LJ, with then Walker LJ and with Sir Martin Nourse rejected that argument and said, if your Lordship looks at the last page: that will not do.

453. MR JUSTICE LEWIS: I have not got to that. I have lost the tab now.

454. MR McCRACKEN: It 19 is I think.

455. MR JUSTICE LEWIS: I thought that was paragraph...

456. MR McCRACKEN: It is tab 19 I think, Carlton-Conway.

457. MR JUSTICE LEWIS: I have it now.

458. MR McCRACKEN: He says at paragraph 27:

> "...the appellant is entitled to a fresh consideration of the application by the planning committee. There is a real risk that in taking the decisions they did in October 2001 there was a potential motivation, as would be perceived by a fair-minded member of the public, that a wish to support their chief planning officer and to avoid the possibility of judicial review were factors which led to the relevant decisions."

That would be a problem we face if this is dealt with on the voluntary basis.

459. So far as Mr Maurici's point that Berkley accepts substantial compliance, the point about Berkley is it says very clearly: that since the essence of the Directive is procedural you do not achieve substantial compliance unless you follow the procedures of the Directive as transposed, as it were.

460. MR JUSTICE LEWIS: They are going to do that in their case.

461. MR McCRACKEN: That is what they say but I, with greatest respect, do not accept that. Also point this out in relation to prematurity point, my Lord. Our challenge was launched in May. The offer that is said to be the offer gives us what we want was made in a letter of 9th July; it was after the challenge had been launched. That being so, there are very powerful reasons for granting permission and staying rather than refusing permission on the ground of prematurity. If the offer had been made before we launched proceedings well, there would be something to be said for that argument but it was not. This was an offer that was made in the face of these proceedings as an attempt to defeat them. What we are being asked to do is to take on faith that everything will work out fine. In my submission, we are well justified in not taking that on faith in adopting the same approach as Pill LJ commended in Carlton-Conway, and the proper course of action is to grant permission because our points are all arguable and then if your Lordship is persuaded by the prematurity argument, to stay the proceedings. Unless I can be of any further assistance to your Lordship.

462. One final point I should make is this. This is a case which we say needs to be referred to the Court of Justice. That is an important --

463. MR JUSTICE LEWIS: I am not surely doing that this afternoon, am I. Do I need to worry about it today?

464. MR McCRACKEN: We do have to worry about it today, because you should not refuse permission if there is a case which might call for a reference to the Court of Justice. I think a lot of the points that have been raised against us are points that need to be examined by the Court of Justice.

465. MR JUSTICE LEWIS: If they are fundamental to my decision, yes.

466. MR McCRACKEN: I am not suggesting that you refer at this stage, I am saying that would be a reason for granting permission. My point is --

467. MR JUSTICE LEWIS: I understand that if what they say does not influence me at all and I am making my decision on other grounds then so be it.

468. MR McCRACKEN: Yes. I do not have a window into your Lordship's mind, I might have a sense of some features of it but I do think I ought to draw that to your Lordship's attention because it is quite important. What Wolfe J (as he then was) says. If the case raises something where there is a possibility of a reference might be appropriate, then permission should be granted.

469. What we ask for is permission and I hesitate but in a sense I do need to end by saying the vast amount of material that has been presented, the fact that ultimately the key point upon which the defendant and interested party seek to rely is a letter that came in after these proceedings were launched. If ever there was a case that indicated this is one that does call for further consideration permission should be granted, this is that case.

470. MR JUSTICE LEWIS: You have been extremely helpful and very patient with me as I have caught up with. I am very, very grateful to you Mr McCracken.

(Judgment Followed)