England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2010] EWCA Civ 894
Case No: C1/2009/2762/QBACF

IN THE HIGH COURT OF JUSTICECOURT OF APPEAL (CIVIL DIVISION)ON APPEAL FROM Mr Justice CranstonCO/10993/2009

Royal Courts of Justice
Strand, London, WC2A 2LL
30/07/2010

B e f o r e :

LORD JUSTICE SEDLEYLORD JUSTICE LLOYDandLORD JUSTICE SULLIVAN_____

Between:

R (ON THE APPLICATION OF FRIENDS OF HETHEL LTD)	**Appellant**
- and -	
SOUTH NORFOLK DISTRICT COUNCIL	**First Respondent**
- and -	
ECOTRICITY	**Second Respondent**

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Richard Harwood (instructed by Richard Buxton Solicitors) for the AppellantPhilip Kolvin QC and Asitha Ranatunga (instructed by Sharpe Pritchard) for the First RespondentGordon Nardell QC (instructed by Bond Pearce) for the Second RespondentHearing dates : 19th July 2010

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HTML VERSION OF JUDGMENT _____

Lord Justice Sullivan :

On 23rd July 2008 the First Respondent's Planning Committee decided to grant planning permission to the Second Respondent for the erection of three wind turbines, each with an overall maximum height of 120m on a site owned by Lotus Cars Ltd., at Potash Lane, Hethel, Norfolk. The planning permission is dated 15th August 2008.

The Appellant challenged the lawfulness of that grant of permission in proceedings for judicial review. In his Order dated 16th November 2009 Cranston J. allowed the application for judicial review, but only to the extent that he granted a declaration that the First Respondent had failed to comply with the requirements of regulation 21(1)(b) and (c) of the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999 ("the EIA Regulations"). He dismissed all of the other grounds of challenge and refused to quash the planning permission.

The Appellant contends that the judge erred in rejecting a number of those grounds, and in not ordering that the planning permission should be quashed, both on those grounds and on the further ground on which the judge granted a declaration.

At the hearing on 19th July we heard the parties' submissions on the Appellant's two principal grounds:

(1) The First Respondent's constitution contravened the majority voting provisions in paragraph 39(1) of Schedule 12 to the Local Government Act 1972 ("the 1972 Act"); and(2) The First Respondent had failed to consult English Heritage as required by paragraph 8(3) of Circular) 01/01 "Arrangements for handling heritage applications – notification directions by the Secretary of State", and Regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 ("the 1990 Regulations").

At the conclusion of the hearing we allowed the appeal on ground 2, ordered the quashing of the permission on that ground, and said that we would give our reasons for that decision, and our decision on ground 1 in due course. These are the reasons why I, for my part, would allow the appeal and quash the planning permission on both ground 1 and ground 2.

Ground 1

The background facts are set out in considerable detail in paragraphs 2-42 of Cranston J's judgment, and it is unnecessary to repeat them in this judgment. For the purpose of considering ground 1 the following summary will suffice. The application for planning permission came before the First Respondent's North West Area Planning Committee on 11th June 2008. Before the Area Planning Committee there was a report from the Head of Planning Services which recommended that planning permission be granted subject to conditions. Eight members of the Area Committee were present. The minutes record that:

"Members voted 5-3 for refusal on the grounds of visual intrusion. However, as such a decision would have been contrary to the recommendation of the Director of Planning, Housing, and the Built Environment and less than two-thirds of the constituted membership of the Area Planning Committee voted in favour of approval. THE APPLICATION STANDS REFERRED TO THE COMMITTEE FOR DETERMINATION."

Local Authorities have power under section 101(1) of the 1972 Act, subject to any express provision contained in the 1972 Act or any later Act, to arrange for the discharge of any of their functions "by a committee, a sub-committee or an officer of the authority….". The First Respondent made arrangements for the discharge of its planning functions by the Planning Committee and three Area Planning Committees. The Terms of Reference for the former were as follows (so far as relevant):

"1.1 Within the policies adopted by the Council, to exercise

its functions under all Town and Country Planning and Building Control legislation, in particular the determination of applications and the enforcement of planning and building control, preservation, protection and enhancement of amenity (including forestry) listed and historic buildings and highways and traffic

issues."Voting at the Planning Committee is by a simply majority.
The Terms of Reference for the Area Planning Committee (so far as relevant) were as follows:

" Within the policies adopted by the Council, to determine

the following matters within its area:

1.1. Planning applications made under the planning Acts (as defined in the Town and Country Planning Act 1990 or any statutes amending or replacing them) except applications made by the District Council or members of the District Council….

1.3 ….subject to:

a. that decision not being one which the Head of Planning Services has stated would be contrary to policy

b. in the case of any decision contrary to the recommendations of the Head of Planning Services, the number of votes in favour of the proposed course of action amounting to at least two-thirds of the number of the constituted membership of the Area Planning Committee (but applications of minor importance which do not raise issues of significant precedent shall be determined by a simple majority of votes cast); and

c. the matter not having been referred to the Planning Committee by the Chairman of the Planning Committee and/or the Head of Planning Services as having a significance for the District as a whole or more than one area or in the interest of security at an Area Planning Committee meeting.

failing which the matter shall stand referred to the Planning Committee;

1.6 The Area Planning Committee shall be free to refer any matter to the Planning Committee (with or without recommendations) for determination.

1.8 If the Chief Executive is satisfied that the best interests of the Council would thereby be served, he may refer any decision of an Area Planning Committee for review by the Planning Committee. Following such review, which shall have been conducted by rehearing the original application or matter, the Planning Committee shall affirm or vary the original decision which will thereupon stand as the decision of the Council as so affirmed or varied as the case may be."

The policy underlying the making of these arrangements was a desire to localise decision making and place it in the hands of councillors who would be very familiar with their local areas, whilst at the same time ensuring that planning decisions would not be unduly influenced by local considerations.

Mr Harwood's submission was that, however laudable this underlying policy objective might be, the provision in sub-paragraph 1.3(b) of the Area Committee's Terms of Reference is not a lawful means of achieving that objective because the requirement for a two-thirds majority is contrary to paragraph 39(1), as applied to local authority committees by paragraph 44(1), of Schedule 12 to the 1972 Act, the provisions of which "have effect with respect to the meetings and proceedings of local authorities….": see section 99 of the 1972 Act.

Paragraphs 39(1) and 44(1) provide as follows:

"39 (1) Subject to the provisions of any enactment (including any

enactment in this Act) all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting thereon at a meeting of the authority.

44 (1) Paragraphs 39 to 43 above….shall apply in relation to a committee of a local authority (including a joint committee) or a sub-committee of any such committee as they apply in relation to a local authority."Ground 1- Discussion

Cranston J. rejected the Appellant's submission for the reasons set out in paragraphs 53 and 54 of his judgment:

"53. In my view, there is nothing unlawful in the way that the council has structured its decision-making and distributed decision-making powers through the system of area planning committees and the planning committee itself. That is because it is a valid exercise of the statutory power to delegate in section 101(1)(a), which confers on a council a broad power to make arrangements for delegating decision-making throughout their organisation. The statutory obligation in paragraph 39 to decide by majority is "[s]ubject to the provisions of any other enactment", including section 101. It is not unlawful under the Local Government Act 1972 for the council to have a referral process from the area planning committees to the planning committee itself for decisions. Nor is it an abuse of the plain wording of paragraphs 39 or 44 of schedule 12, which deals with decisions on matters "coming or arising" before the council. The effect of the council's constitution is that in certain circumstances a planning application stands referred for decision from the area planning committee to the planning committee. That is a system of lawful delegation.

54. The terms in which the referral was actually made in this case are consistent with the language of the constitution, providing that if the preconditions are not met "the matter shall stand

referred to the planning committee". Any decision to refuse planning permission would have been contrary to the recommendation of the council's planning officer in favour of the Ecotricity proposal. Less than two thirds of the membership of the area committee voted in favour of approval, the vote being 5-3 against. As the minutes of the area planning committee suggest, its powers were conditional and on this occasion the conditions were not met. Another way of characterising what happened is a failed attempt before the area committee to make a decision. The vote of the area planning committee was not a decision on this matter but, when it was taken, an identification of the limitations on the area committee's powers. The matter stood referred to the full planning committee. That vote of the area planning committee was part of the process but not the decision on the question "coming or arising" before the council. It was conceptually different from the planning application decision itself."

Mr Harwood submitted that the judge erred in concluding that the majority voting requirement was authorised by section 101. That section does not deal with how decisions are to be taken by local authorities, but with who takes them within the authority: the full council, a committee or a sub-committee, or an officer of the council. If the decision is delegated to an officer the question does not arise. If it is delegated to a committee or sub-committee, any question coming before that committee or sub-committee must be decided by a majority vote: see para. 44(1). Paragraph 39(1) is "subject to any enactment", but section 101 makes no reference to voting, much less does it authorise delegation subject to a special majority. The power to make arrangements under section 101 is subject to any express provision contained in the 1972 Act. Paragraph 44(1) makes express provision (by applying paragraph 39(1)) for majority voting where arrangements have been made for the discharge of a local authority's functions by a committee or sub-committee.

On behalf of the First Respondent Mr Kolvin QC submitted that section 101 conferred a general power to make arrangements for the discharge of functions by committees or sub-committees, and those arrangements could include conditions or limitations upon the power conferred on the committee or sub-committee. In the present case, it was common ground that the Area Planning Committee's power to determine planning applications was subject to a number of limitations: it could not make a decision if the Head of Planning Services had stated that the decision would be contrary to policy, nor could it make a decision if the matter had been referred to the Planning Committee by the Chairman of that Committee or the Head of Planning Services: see sub-paragraphs 1.3(a) and (c) of the Area Planning Committee's Terms of Reference. The limitation in sub-paragraph 1.3(b) was equally valid. Where the limitations on the Area Planning Committee's powers were breached, it had no power to make a decision, and the matter was automatically referred to the Planning Committee.

On behalf of the Second Respondent Mr Nardell QC submitted that under the Area Planning Committee's Terms of Reference its power to determine the application was entirely contingent. Until the outcome of the vote was known the Area Planning Committee was not deciding anything, therefore paragraph 39(1) of Schedule 12 to the 1972 Act was not engaged. Depending on the voting figures, the Area Planning Committee might or might not have power to make a decision: if there was not a two thirds majority, there was no decision and the matter was referred to the Planning Committee; if there was such a majority then, and only then, would there be a decision on the matter coming before the Area Planning Committee.

I accept the Appellant's submissions. I readily accept that delegation arrangements made under section 101 may include conditions or limitations as to the extent of the delegation or the

circumstances in which it may be exercised: see for example sub-paragraphs 1.3(a) and (c) of the Area Planning Committee's Terms of Reference. However, the power to make such arrangements is subject to any express provision contained in the 1972 Act, and paragraph 44(1), in applying paragraph 39(1) of Schedule 12 to the Act, does make express provision as to how all questions coming or arising before any committee or sub-committee to which powers have been delegated in accordance with arrangements made under section 101 shall be decided: by a majority vote. Paragraph 39(1) is subject to the provisions of any enactment; it is not subject to the provisions of arrangements made under some other enactment, section 101, an enactment which is not concerned with the manner in which questions shall be decided, but with who is to decide them.

The delegation arrangements made under section 101 could lawfully have included a proviso that the Area Planning Committee had delegated authority to determine planning applications if its decision (by a majority) was in accordance with the recommendation of the Head of Planning Services; if not the matter would be referred to the Planning Committee. What the arrangements could not lawfully do was to override paragraph 39(1) and provide, in effect that a decision to grant or refuse planning permission contrary to the recommendations of the Head of Planning Services would be taken by a two thirds majority. The Respondents' submission that there was no decision, or no decision until the voting figures were known, ignores the fact that under paragraph 1.3(b) of the Area Committee's Terms of Reference if there is a two thirds majority, planning permission will be granted or refused. Thus, a question coming before the Area Planning Committee – whether planning permission should be granted or refused – will have been decided, not by a majority, but by a two thirds majority, contrary to paragraph 39(1). Unsurprisingly, paragraph 1.3(b) refers to a decision, not to a decision whether to make a

decision. The Area Planning Committee made a decision in this case when it voted 5:3 for refusal.

Mr Kolvin submitted that this ground of the Appellant's challenge was irrelevant, because there had been a lawful decision of the Planning Committee regardless of the lawfulness of the Terms of Reference for the Area Planning Committee. He submitted that there was no limitation in the Planning Committee's Terms of Reference upon its power to determine planning applications, and it could at any time, and for any reason, decide to "call in" any planning application that was before an Area Planning Committee for its own determination. I do not accept that submission. The delegation arrangements must be read as a whole. They include the Terms of Reference for both the Planning Committee and the Area Planning Committee. The Terms of Reference for the former do not confer any power of "call in". The Terms of Reference for the latter do make specific provision for those circumstances in which matters which have come before the Area Planning Committee are to be referred to the Planning Committee. In addition to the provisions of paragraph 1.3 (see above) the Area Planning Committee may, of its own volition, refer any matter to the Planning Committee (para.1.6); and the Chief Executive may refer any decisions of the Area Planning Committee for review by the Planning Committee (para.1.8). If those responsible for drafting the Terms of Reference had wished to confer a general power of "call in" upon the Planning Committee they would have done so. In the absence of such an express power, the only way in which a matter which is before the Area Planning Committee for determination can be determined instead by the Planning Committee is pursuant to a reference under paragraph 1.3, 1.6 or 1.8 of the Area Planning Committee's Terms of Reference.

In the present case the reference was under 1.3(b) because the decision was contrary to the recommendation of the Director of

Planning, Housing and the Built Environment "and less than two thirds of the constituted membership of the Area Planning Committee voted in favour" (see para.6 above). If the two thirds requirement was unlawful, as I think it was, there was no valid reference to the Planning Committee and it did not have power to determine the application.

Mr Kolvin submitted that the Appellant's Ground 1 was self-defeating: if the Terms of Reference for the Area Planning Committee were unlawful, that unlawfulness tainted its decision, and one was left with the only lawful decision, that of the Planning Committee. I do not agree. The arrangements delegating power to determine planning applications to the Area Planning Committee are lawful in principle. The Terms of Reference are unlawful in only one respect: the two thirds majority voting requirement in para. 1.3(b) for a decision contrary to the recommendation of the Head of Planning Services. The Area Planning Committee voted 5-3 to refuse planning permission. Whether the resolution is to grant or to refuse permission, there is no planning permission and no refusal of permission until the decision notice is issued. In view of the lapse of time since the Area Planning Committee's decision over 2 years ago it will have to consider whether there has been any material change of circumstances, e.g. changes in planning policy since 2008. It may wish to refer the matter to the Planning Committee, or the Chief Executive may decide that its decision should be reviewed by the Planning Committee. Whatever procedure the First Respondent may decide to adopt hereafter, I am satisfied that the planning permission must be quashed on ground 1.

Ground 2

The application for planning permission dated 13th March 2008 was accompanied by an Environmental Statement (ES). By regulation 3(2) of the EIA Regulations the First Respondent was

required to take "the environmental information" (including the ES) into account before granting planning permission. The ES dealt with the landscape and visual impact of the proposed development in Chapter 6, and with its impact on "Cultural Heritage" in Chapter 10. Paragraph 10.06 explained how the ES measured the value of "the historic landscape and of the settings of listed buildings….". Thus, a "substantial negative change" would occur if the proposals would "seriously damage the setting of a cultural heritage asset, such that its integrity is compromised….". An "Intermediate negative change" would occur if the proposals "would be intrusive in the setting, and would negatively impose on the appreciation and understanding of the characteristic heritage resource….", etc.

The ES assessed the value of the affected "cultural heritage resource" as High, Medium or Low. Grade I and II* listed buildings were assessed as having a "High" value. Table 2 in the ES contained a "Matrix for measuring Significance of Effect". Thus, an Intermediate Negative change in respect of a High value resource was described as a "Major/Moderate Adverse" effect, as was a Small-scale Negative change. A Substantial Negative change in respect of such a resource was described as a "Major Adverse" effect.

Applying this methodology, the ES considered the impact of the proposed development on the Grade I and Grade II* listed buildings within the 5km study area. Paragraphs 10.68 and 10.69 of the ES said this:

"10.68 Where a building was historically designed to be seen from a certain perspective, and this view forms part of a building's architectural or historic interest, this is indicated in the table below with a 'High sensitivity' in the final column, which indicates that the views to and from this building contribute to the buildings significance.10.69 All Grade II Listed Buildings in the study area are considered to be of medium to high value."

Table 3 identified the Grade I and Grade II* listed buildings in the study area. The last column in the Table summarised "Key aspects of setting, including sensitivity of views". By way of example, the key aspects of the setting of All Saint's Church at Wreningham were summarised as:

"Set within the village of Wreningham with a large open area between the church and the development site. Church partially screened by a row of trees to the north. High sensitivity."

Under the sub-heading "Assessment of Effects" the ES assessed both the "Impact on the historic landscape" and the "Impact on Built Heritage and setting of Listed Buildings". Paragraph 10.83 said:

"10.83 As paragraph 10.9 of this assessment states a building is listed due to its architectural or historical importance, and the view of and from the property can contribute to that architectural or historical importance in terms of 'setting'. The wind turbines may therefore have an impact on the setting of these buildings. As the photomontages demonstrate, the scale of the impact of the development on the setting; views across the landscape and on the views of the Grade II listed buildings, varies due to distance from the development site."

In paragraphs 10.91 – 10.104 the impact of the proposed development on each of the Grade I and Grade II* listed buildings shown in Table 3 was considered in more detail. The residual effects of the proposal, after taking account of the mitigation strategies outlined in the ES, were summarised in tabular form in paragraph 10.129. In respect of seven Grade I and II* listed buildings within the study area the residual effect was "Moderate to Major Adverse". There was a "Minor to Moderate Adverse" impact on six more Grade I and II* listed buildings within the study area.

The Report referred to the ES. Paragraph 5.1 said:

"5.1 As mentioned in Section 1 the application is accompanied by

an Environmental Statement, which describes the wind park, the nature of the site and its surroundings, the potential impacts and any mitigation measures proposed. Following the scoping opinion the major impacts identified was as listed in paragraph 7.1 of the non-technical statement (appendix 3) and the Statement addresses each of the impacts in detail."

The non-technical summary considered the impact of the proposed development on the "Cultural Heritage" in paragraphs 7.18 and 7.19. Paragraph 7.18 said that there would be no negative effect upon any archaeological remains at the Lotus site. Paragraph 7.19 said:-

"7.19 Also the impact on Listed Buildings, Scheduled Ancient Monuments and other protected landscapes was assessed. Photographic impressions were created for the views from some protected sites in the direction of the wind turbines to see if they would impact on the inherent value of these features. This assessment has determined that within 5km of the proposed wind turbines there are 260 Listed Buildings, 24 of which are Grade I or Grade II*. Of these 24, 11 have the potential for views from the listed buildings to be affected in by the development. However, the actual effect will depend on the distance between the turbines and the listed building and the initial status of the listed building, for example, is it Grade II or Grade II* etc."

There appears to be a discrepancy between the 11 Grade I and Grade II* listed buildings referred to in paragraph 7.19 of the non-technical summary and the table in paragraph 10.129 (paragraph 26 above) which refers to 13 grade I and II* buildings falling within either a "Moderate to Major" or a "Minor to Moderate" residual effect, but the discrepancy is of no consequence for the present purposes. What is significant is the conclusion that, unlike the lack of any negative effect on archaeological remains, there will be an effect on a number of Grade I and II* listed buildings, although, and it might be

thought that the non-technical summary was at risk of stating the obvious in saying so, the actual effect would depend on the distance from the turbines.

Paragraph 8(3)(a) of Circular 01/01 directs local planning authorities outside Greater London to notify English Heritage of an application for planning permission if it is an application for "Development which in the opinion of the local planning authority affects the setting of a Grade I or Grade II* listed building……"

Regulation 5A of the 1990 Regulations applies where an application for planning permission is made "and the authority thinks that the development would affect the setting of a listed building….". (Reg. 5A(1)). In addition to advertising the application by publishing and displaying notices, the authority must send English Heritage a copy of the notices (Reg. 5A(3)), and may not determine the application before a period of 21 days has elapsed from publication/display of the notices.

Pausing there, while the question whether a proposed development affects, or would affect the setting of a listed building is very much a matter of planning judgment for the local planning authority ("in the opinion of the local planning authority", "and the authority think"), in view of the conclusions in the ES the First Respondent had to consider whether this proposed development affected, or would affect the setting of the listed buildings referred to in the ES. Unless the First Respondent disagreed with the conclusions in the ES it is difficult to see how it could rationally have come to the conclusion that there would be no such effect. Paragraph 5.1 of the Report suggests endorsement of, rather than disagreement with, the description in the ES of the potential impacts of the development.

Mr Kolvin referred to the two paragraphs in the Report which dealt with the "Impact on Listed Buildings":

"5.22 There are 8 I grade listed buildings, 17 grade II* listed buildings and 227 Grade II listed buildings within 5 km of the site (this would include Wymondham), 3 of the Grade I buildings are within 3 km. The Conservation and Design Officer has inspected the Environmental Statement and assessed the impact of the proposals on nearby Listed Buildings. He did request further information regarding the impact on Corporation Farm and also had some concerns about the proposed view of the Grade I listed Church at Wreningham as he felt the southerly turbine adversely affects the appearance of the church in landscape views from the B1113.5.23 A photomontage of this view will be shown at Committee. Whilst the turbine will have some impact on this long distance view it is not considered that this impact is so great that it would in itself justify refusing consent. Other than the above the Conservation and Design Officer is satisfied that the proposal would not adversely impact on any other listed buildings or adversely affect views of any conservation areas. The proposal is consequently considered to comply with policies IMP 15 – Setting of listed buildings and IMP 18 – Conservation Areas of the South Norfolk Local Plan."

In his report dated 16 April 2008 the Conservation and Design Officer said that he had nothing to add to his comments on the previous application. Those comments, dated 9 August 2007, were as follows:

"The site is situated in a rural location some distance back from the main road. The land around the site is relatively flat so the turbines at nearly 400ft in height will be prominent in landscape views some miles from the site.Southeast of the site is Corporation Farm, which has a Grade II listed farmhouse and curtilage listed buildings including a converted barn. The large barn and adjacent buildings are visible in views from the main road as one approaches the site from the west side. None of the submitted photographic views indicate the impact of the proposal on views of the farm complex from 200-300 yards east

of the site along the road. A further detail is therefore required.I also have some concern about the proposed view of the Grade I listed Church at Wreningham as the southerly turbine adversely affects the appearance of the church in landscape views from the road. Is it possible for the turbine to be sited so it has much less of an impact on this building?Other than the above I consider that the proposed turbines will not adversely impact on any other listed buildings. They will also not adversely affect views of any conservation areas."

Although paragraph 5.22 of the Report says that the Conservation and Design Officer had inspected the ES, the Conservation and Design Officer's comments in August 2007 pre-dated the ES which had accompanied the application for planning permission in March 2008. The 2007 application was probably accompanied by an ES, but we do not have a copy. If the Conservation and Design Officer and the Head of Planning were, in effect, disagreeing with the assessment in the ES of the impact of the proposed development on the Grade I and Grade II* buildings in the study area, as submitted by Mr Kolvin, it is surprising that they did not say so, and explain why, particularly in view of the apparent endorsement of the ES in paragraph 5.1 of the Report (para 27 above).

In the event, it does not matter because, even if the conclusions in the ES are ignored, both the Conservation and Design Officer and the Head of Planning concluded that the proposed development would affect the setting of a Grade I or Grade II* listed building. The former had "some concern about the proposed view of the Grade I listed church at Wreningham", and the latter considered that while there would be "some impact on this long distance view …..this impact is not so great that it would in itself justify refusing consent." The question for the purposes of Circular 01/01 and the 1990 Regulations is whether the development would affect the setting of the listed building,

not whether it would affect it so seriously as to justify a refusal of planning permission. The extent of the effect, and its significance in terms of the setting of the particular listed building, are precisely the matters on which English Heritage's expert views should be sought.

On the face of its own documents, and assuming that for some unexplained reason the First Respondent disagreed with the assessment in the ES, it did conclude that the proposed development would affect the setting of a Grade I listed building. This conclusion is not displaced by the brief statement in the reasons for granting planning permission that:

"The proposal will not adversely affect….the setting of listed buildings….and complies with policies….IMP 15….of the adopted South Norfolk Local Plan 2003."

Policy IMP 15 requires the First Respondent to give special attention to the design, scale and impact of proposals for development within the setting of listed buildings. The reasons (prepared by the Head of Planning) are a brief summary of the Planning Committee's reasons for deciding to grant planning permission. The minutes of the meeting on 23 July 2008 record that the Committee considered the Report. There is nothing to suggest that the members disagreed with the Report's assessment of the impact on Listed Buildings. The Report had concluded, not that there was no effect on the setting of the Grade I Church at Wreningham, but that the effect was not so great as to justify refusing planning permission.

In addition to adopting Mr Kolvin's submissions on this issue, Mr Nardell made the further submission that the impacts of the proposed development referred to by the Conservation and Design Officer and the Head of Planning were impacts on the landscape, and not impacts on the setting of any listed building. The judge rejected this submission, saying that it was not a

tenable reading of the documents (paragraph 60 of the judgment). I agree. The submission flies in the face of Chapters 6 and 10 of the ES submitted on behalf of the Second Respondent which separately consider the impacts of the proposed development on the landscape, and on the setting of listed buildings (see paras. 21-26 above).

Both Mr Kolvin and Mr Nardell submitted that the failure to notify English Heritage should not result in the quashing of the permission. Mr Nardell referred to paragraph (4) of Regulation 5A which provides that an application to which the regulation applies "shall not be determined" before the expiry of the 21 day period. The fact that a local planning authority has no jurisdiction to determine such a planning application prior to the expiration of that period does not mean that the Court does not have a discretion to quash a permission when there has been a failure to comply with one of the other requirements of Regulation 5A.

I have no doubt that quashing the permission is the proper course in the present case. This was a finely balanced decision, as demonstrated by the voting figures in both the Area Planning Committee and the Planning Committee. If the assessment in the ES is accepted there would be an effect on the setting of a significant number of Grade I and Grade II* listed buildings. In these circumstances it is possible that a response from English Heritage to consultation might have tipped the balance.

<u>Other grounds</u>

In these circumstances it is unnecessary to consider the Appellant's remaining grounds. Its criticisms of the manner in which the Report dealt with the issues of noise and safety, and the manner in which the First Respondent complied with Regulation 21 of the EIA Regulations can be addressed when the application for planning permission is re-determined.

Conclusion

I would allow the appeal and quash the planning permission on grounds 1 and 2.
Lord Justice Lloyd

I agree.
Lord Justice Sedley

I too would allow this appeal.

On the second of the two grounds addressed in the judgment of Lord Justice Sullivan, I have no difficulty in accepting that the district council's failure to notify English Heritage of the application vitiated the subsequent grant of planning permission.

As to para. 41 of the leading judgment, while I agree with the proposed outcome, it should not be thought that it is only in relation to such finely-balanced decisions as we have here that a quashing order will go. There may be other reasons of practice or principle for taking a similar course in other cases.

I have had greater difficulty with the first ground on which Lord Justice Sullivan would allow the appeal.

If you start not with Schedule 12 but with the arrangement made by the respondent council, the arrangement makes very good sense. It allows an area planning committee to decide local applications which are referred to it, but, to guard against parochial bias or local idiosyncrasy, any vote by less than a 2:1 majority to refuse permission contrary to officers' advice goes back to the district planning committee. If legislation prevents this, it seems to me to be a great pity.

I would therefore have liked to find a way of enabling the respondent's arrangement – which forms part of what is rather

grandly called its constitution – to operate without transgressing Schedule 12. Mr Kolvin's argument for this is in effect that unless and until two thirds of those present are prepared to reject officers' advice and to refuse planning permission, the area planning committee is without power. But this logic depends on collapsing outcome into process. If you were to apply it to an ordinary majority vote it would mean that until half of those present plus one supported a particular outcome, the body concerned was acting without power. That would have remarkable implications for the functioning of local democracy. The argument gets no better when Mr Nardell resorts to the epistemology of Dr Schrodinger and his poor cat. It is true but uninteresting that until a decision has been taken nothing has been decided.

What in the end has to be conclusive is that an area committee, as a body to which the local authority's powers have been delegated, is required by law to exercise those powers by a simple majority of those present and voting and in no other way.

We have not been pressed with the argument that there is, within the meaning of Schedule 12, more than one kind of majority, so that a council is free to choose what size of majority is to operate in each of its forums. One can see why: a council could paralyse its successor by requiring all decisions (including a decision to change the rule itself) to be taken by, say, a four-fifths majority. And it is in the end the possibility that this district council's well-meant and sensible provision could recur in less sensible form elsewhere in local government law that finally persuades me that Lord Justice Sullivan is right on this issue.