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CO/5157/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 26 June 2009

B e f o r e:

MR JUSTICE HICKINBOTTOM

Between:

THE QUEEN ON THE APPLICATION OF
(1) WILTSHIRE BRANCH OF THE CAMPAIGN TO PROTECT RURAL ENGLAND
(2) GEOFF YATES

claimants

v

SWINDON BOROUGH COUNCIL

Defendant

(1) TAYLOR WIMPEY
(2) WILTSHIRE COUNTY COUNCIL
(3) THE HIGHWAYS AGENCY

Interested Parties

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(Official Shorthand Writers to the Court)

Mr Jonathan Powell (instructed by Richard Buxton Solicitors) appeared on behalf of the **claimants**
Mr Timothy Jones (instructed by Swindon BC, Legal Department) appeared on behalf of the **Defendant**
Mr Christopher Lockhart-Mummery QC and **Ms Sasha Blackmore** (instructed by Eversheds) appeared on behalf of the **First Interested Party**

J U D G M E N T

(Draft for approval)

1. MR JUSTICE HICKINBOTTOM: In Swindon, there is a well-recognised long-standing need for housing development generally, and for affordable housing in particular. The importance of identifying major development sites was raised in August 1996 in the draft Wiltshire Structure Plan 2011. Following investigation and public consultation, a preferred site was identified to the south of the town.

2. In July 2002, an application was made to the local planning authority (the defendant, "Swindon") for planning permission in respect of:

> "Southern Town Expansion including up to 4,500 dwellings, employment, commercial, shopping, schools, open space, park and ride, roads, sewers and associated works" on "land to the west of Croft Road, Swindon and north and south of the M4 Swindon, Wiltshire."

3. That land was known as the Southern Town Expansion Area, or, as I will call it, Wichelstowe. Of the dwellings, about one-third were intended to be affordable housing.

4. Following a resolution of Swindon's Planning Committee in January 2004, outline planning permission was granted on 19 May 2005, subject to 102 conditions.

5. A number of those conditions concerned access. The Structure Plan 2011 did not identify means of access in a westerly direction. However, that was issue was considered in the context of the Swindon Borough Local Plan 2011, which was adopted following an inquiry. That designated Wichelstowe as a strategic development area for about 4,500 dwellings, and it prescribed a westerly means of access involving a route under the M4 motorway to the south. That route was also later identified in the Wiltshire Structure Plan 2016, which succeeded the Structure Plan 2011.

6. The first claimants, the Wiltshire Branch of the Campaign to Protect Rural England ("the CPRE"), a registered charity dedicated to the improvement and protection of the English countryside, opposed that access route. They promoted as an alternative a more westerly route from the site over a railway to Great Western Way, which did not involve the construction of a route under the M4. In pursuit of their aim of having this alternative route adopted, the CPRE objected to both the Local Plan and the Structure Plan 2016, and also to the planning application (both in its initial and amended forms). Those objections failed - in the case of the Local Plan, following an enquiry - and no legal challenges to the plans or planning permission were made. Time for any such challenges has long since expired. The means of westerly access to Wichelstowe are now enshrined in paragraph 5.10 of the Structure Plan 2016 and Policy T12 of the Local Plan; and the May 2005 planning permission has been granted on the basis of that means of access.

7. As I have said, a number of the conditions to the planning permission concerned access to the site. This claim particularly concerns Condition 99, which provides:

> "No dwelling shall be occupied until details of the proposed alterations at

> junction 16 and improvement to the B4005 Hay Lane and Wharf Road have been approved in writing by the local planning authority in consultation with the Highways Agency, Wiltshire County Council and [Swindon] as Highway Authorities. Such details will need to ensure that the proposed alterations are safe and legible for all road users, and will need to incorporate specific features to facilitate use by public transport, pedestrians, vulnerable users and cyclists. These features shall be provided with appropriate street furniture, lighting, traffic signal control equipment, signage and road markings. Such works shall be provided with environmental mitigation measures as agreed with the local Planning Authority in consultation with the relevant Highway authorities. For the avoidance of doubt, the details illustrated on the submitted plans shall not be taken as agreed and any amendments shall be carried out in accordance with the latest technical requirements as set out in the Design Manual for Roads and Bridges or other standards and technical requirements considered appropriate by the Highways Agency.
>
> Reason: In the interests of highway safety and to ensure that the operation of the junction is safe and not impaired by the additional traffic generated by the development.
>
> Relevant policies: SEV2 Swindon Local Plan (1999)."

8. A few notes of explanation will assist.

9. (i) The "junction" is Junction 16 of the M4 motorway. At this junction, the A3102 Swindon to Wootton Basset road crosses the M4. The B4005 from Wroughton also feeds into the same junction.

10. (ii) The M4 (including slip roads) is, in substance, a trunk road. The other roads feeding the junction are not trunk roads: they are county roads.

11. (iii) In terms of highway authorities, the third interested party, the Highways Agency, is responsible for trunk roads: and, in the area of the junction until 31 March 2009, the second interested party, Wiltshire County Council, was responsible for county roads. From 1 April 2009, the Wiltshire Council, a new unitary authority, took over many of the rights and obligations of the old County Council, including responsibility for county roads. It is also the relevant planning authority for the area of Junction 16. (I shall refer to the old county council and the new unitary authority as simply "Wiltshire".) Swindon, in addition to being the local planning authority for Wichelstowe, is responsible for the county roads in its area, but its authority does not extend to the junction.

12. The first interested party (Taylor Wimpey, "the Developer") has an interest in developing Wichelstowe with the benefit of the May 2005 planning permission.

13. In 2007, the Developer applied to Swindon to discharge Condition 99. Following investigations and consultations to which I shall refer further in due course, Ms Vivian

O'Connell (Team Leader Major Projects in the Environment & Leisure Group for Swindon) prepared a detailed report recommending discharge ("the Discharge Report"), and the condition was duly discharged on 7 April 2008 by Swindon's Director of Planning and Strategic Transportation under powers delegated to him.

14. It is that decision which the claimants now challenge by way of judicial review. I have already referred to the first claimants. The second claimant, Mr Jeff Yates, is a local resident.

15. The claimants rely upon six grounds, which can be conveniently summarised as follows:

16. Ground 1: Swindon erred in law by discharging Condition 99 in circumstances in which the proposed alterations at Junction 16 incorporated no "specific features to facilitate use by public transport, pedestrians, vulnerable users and cyclists", it being a requirement of the condition that such features be incorporated.

17. Ground 2: In making the decision to discharge the condition, Swindon failed to have regard to a material consideration, namely relevant policies with regard to sustainable transportation set out in the Structure Plan 2016.

18. Ground 3: In relation to discharge of the condition, Swindon failed to understand the representations made by Wiltshire as the local highway authority, and consequently decided to discharge on the basis of a material misunderstanding.

19. Ground 4: Swindon discharged the condition in circumstances in which Wiltshire had not approved the details of the proposed alterations at Junction 16, for which they were responsible as one of the relevant highway authorities. On a true construction of the condition, the claimants contend that Wiltshire's approval was required before discharge.

20. Ground 5: The proposed alterations at Junction 16 are unsafe, to the extent that the decision to discharge the condition was unreasonable in a Wednesbury sense, ie no reasonable authority could have come to the decision to discharge.

21. Ground 6: Swindon erred in failing to reconsider the Environmental Impact Assessment before discharging Condition 99.

22. On 23 April 2009, Burton J gave permission to proceed in respect of grounds 1-5 (grounds 3 and 4 at that stage being subsumed into one head). In respect of ground 6, he directed that the application for permission be heard at the same time as the substantive hearing on the other grounds, and, if permission be given, there should be a rolled-up hearing. Over the last three days, I have heard the substantive applications, and the application for permission in relation to ground 6.

23. I now turn to deal with the grounds in turn.

Ground 1: The Specific Features Ground

24. Because Junction 16 is outside the area of Swindon's authority, Condition 99 is in the form of a negative or "Grampian" condition (after Grampian Regional Council v City of Aberdeen DC [1984] 47 P&CR 633), such that occupation of the development cannot begin until details of the proposed alteration at the junction have been approved by Swindon. That condition is certainly an incentive for the Developer to obtain the relevant approval. It has to be read in the context of the grant of planning permission as a whole, and in particular Condition 79 (another in Grampian form), which provides:

> "No more than 1,100 of the dwellings hereby granted permission shall be occupied before the improvements to the trunk road network at Junction 16 of the M4 as shown on drawing 938/GA/036 have first been completed in accordance with the requirements of the Highways Agency and the Local Highway authorities."

I shall refer to drawing 938/GA/036 as "Drawing No 36".

25. The first ground is based upon the premise that the proposed alterations to the junction referred to in Condition 99 were required "to incorporate specific features to facilitate use by public transport, pedestrians, vulnerable users and cyclists": and, as no such specific features were incorporated into the proposed alterations, the condition was not and could not be satisfied. Consequently, Swindon erred in discharging the condition.

26. The claimants have failed to make good this ground for the following reasons.

27. In my view, the ground is based upon an incorrect interpretation of Condition 99 in two significant respects. These are important, particularly as Mr Powell (counsel for the claimants) sought in his reply to overcome the point that there is a substantial amount of technical judgment in relation to many of the issues raised in this claim by submitting that the various experts had erred because they (and, following them, the decision-maker on discharge) had construed Condition 99 incorrectly. The decision-maker had thereby, he submitted, fallen into legal error.

28. In relation to the construction of the condition, first, Mr Powell sought to persuade me that the requirement for "specific features to facilitate use by public transport et cetera", meant a requirement for "features specifically to facilitate use by public transport etc"; that is, the relevant features must facilitate that use and no other use, either absolutely (which began as his primary submission) or at least as a priority. However, looking at the words of the condition, that is simply not what they say. "Specific" qualifies "features", not the following phrase. On a plain reading of the condition, the wording does not therefore suggest that the relevant features must only facilitate use by the identified users: or that they facilitate such users in priority over other users.

29. Mr Powell submitted, on such a plain reading of the condition, the word "specific" is otiose, and, as a tenet of construction, one strains where necessary to give each word some content. However, this is not an Act of Parliament. It is a condition in a planning permission, and I see no difficulty in construing the word "specific" as indicating that the features referred to must be identified and particular. It is not sufficient for the junction alterations as a whole to be said to facilitate use by the identified users.

30. As well as the proper construction of the condition being, in my view, clear on its face, the construction proposed by Mr Powell suffers if the condition is looked at from a purposive perspective. The intent of the words is in some way to ensure that the interests of users of public transport and non-motorised users are considered and catered for by reference to specific features of the proposed alterations. If, in the process, other users benefit from the same features, that cannot sensibly detract from the facility given to the identified users. For example, if lane widths benefit public transport (and those who use it) by enabling all sizes of bus to negotiate a junction, it cannot detract from that benefit to those users if the same feature also benefits (eg) heavy goods vehicles. I accept that whether a feature facilitates use by a particular group of users is a matter of fact and degree, but it is a matter of fact and degree, primarily for the judgment of the relevant decision-maker (in this case Swindon). They are the public body tasked with the relevant planning responsibilities and making planning decisions.

31. Further, there is no evidence that any features that might in theory assist the identified users would in practice benefit a single user. Whilst I appreciate that the word "facilitate" may infer some benefit, it is another uncomfortable aspect of the construction suggested by Mr Powell that it would or may encourage the adoption within the proposed alterations of features uniquely for the identified users, even if they did not in practice provide such users with any practical benefit.

32. Second, the ground is premised on the basis that the condition is intended to encourage public transport and non-motorised users to use the junction. As Mr Timothy Jones for Swindon and Mr Lockhart-Mummery QC for the Developer submitted, for the condition to encourage use of the junction by public transport and non-motorised users, it would likely be unlawful as requiring something extraneous to the development (see Pyx Granite Co Ltd v The Ministry of Housing and Local Government [1958] 1 QB 554). I shall in due course come on to deal in more detail with usage of the junction: but the evidence was that, so far as non-motorised users were concerned, the development would not materially increase the minimal usage of the junction (see, for example, paragraph 9.4 of the Report of Wiltshire's Director of Environmental Services to the meeting of Wiltshire's Cabinet 30 October 2007: and paragraph 9.8(c) of the Discharge Report). But in any event, as a matter of construction, Condition 99 clearly does not encourage use of the junction by public transport and non-motorised users. "Facilitating" and "encouraging" are entirely different concepts. Condition 99 seeks to "facilitate" use by public transport etc, not "encourage" it.

33. As Mr Powell indicated in his reply, one dictionary definition of "facilitate" is "render easier", and that appears to be its sense in Condition 99. In general, highway authorities seek to discourage or at least minimise the amount of non-motorised movement at and around motorway junctions (Statement Howard Davies 20 August 2008, paragraph 51). That is no doubt for obvious safety reasons, given the high levels of often fast-moving motorised traffic at such junctions. However, whatever the policy of the authorities in this case might be, they (and Condition 99) acknowledge that such highway users may, through choice or accidentally, seek to cross such junctions. The evidence is that pedestrian use of Junction 16 is almost nil, and cyclist use minimal. But it is a perfectly legitimate and sensible aim for relevant public authorities to have

regard to such users, even if they are only occasional, and even if they are not positively encouraged.

34. Furthermore, it is noteworthy that the construction of Condition 99 pressed by the claimants would perversely militate against Swindon's policy of segregation of motorised and non-motorised traffic, which is in pursuit of their general policy of encouraging sustainable transportation.

35. On the proper construction of Condition 99, I do not consider it is sensibly arguable that the proposed alterations contain no "specific features to facilitate use by public transport etc". In relation to pedestrians and vulnerable users, it is proposed that all carriageway crossings (at present all uncontrolled) shall have phased traffic signals with pedestrian activated buttons, and sound signals for the assistance of those with sight disability. More footways are to be made available, of generally greater width: it is not proposed that any have their width reduced. The scheme also includes new dropped kerbs and tactile paving which, together with the sound signals, will be of unique or particular benefit to disabled users, even if the construction of Condition 99, contrary to my firm view, is that propounded by the claimants. Mr Powell suggested that the proposed pedestrian routes involved were "tortuous", and certainly they may not particularly encourage pedestrians to cross the motorway junction. But on any view they clearly facilitate use by pedestrians and vulnerable users by (for example) enabling them to cross very busy roads with the traffic stopped, rather than by having to cross uncontrolled carriageways through gaps in potentially fast moving traffic.

36. For cyclists, the introduction of the right turn configuration from the A3102 from Wootton Bassett into the B4005 to Wroughton means that cyclists on that route (I accept, in common with other road users) do not have to negotiate the junction island at all, which appears to be of particular benefit to them as non-motorised users; and the proposals allow cyclists to dismount and have the benefits of the traffic signals etc to which I have referred in the context of pedestrians.

37. For public transport, lane widths will enable all sizes of bus to negotiate the junction: and the new signalling system will reduce delays for buses. It is noteworthy that none of the highway authorities (including Wiltshire) had any concerns about the public transport facilities at Junction 16 at the time of discharge of Condition 99 (Wiltshire's only concern being about non-motorised users - a concern to which I shall return).

38. Those are, on a proper construction of Condition 99, "specific features to facilitate use by public transport, pedestrians, vulnerable users and cyclists". Of course, on the basis of usual principles, whether these features adequately facilitate that use is a matter of judgment for Swindon as the relevant authority. However, in making that judgment, Swindon were entitled - indeed, in my view, responsibly bound - to take into account the actual and estimated future use of the junction by the identified users. I do not accept the contention made on behalf of the claimants that that was irrelevant, and features - they say, unique features - had to be incorporated to facilitate use by the identified user groups irrespective of their numbers and even if there were no such users at all.

39. An independent non-motorised user count conducted by Ove Arup at the junction on 7 March 2007 during the "rush hour" period of 7.30am to 9.30am showed four cyclists and no pedestrian or equestrian users. In relation to non-motorised users, importantly, the junction is not (or will not be) the only route from Wootton Bassett and the villages west of Swindon into that town: it is the only route for motorised traffic (Kehinde Awojobi statement 9 January 2009, paragraph 17). In comparison with the several thousand motorised users per hour moving through the junction, on any view such usage is "negligible" (the term used in the Discharge Report, at paragraph 6.4).

40. In considering whether the specific features of the proposed alterations adequately facilitate use by the identified users, Swindon were therefore entitled to take into account the advice given to them that, eg, by having a cycle lane round the entire junction island, that would adversely impact on traffic flows generally. They were also entitled not to treat use by those identified users as a priority over use of the junction by motorised users.

41. For those reasons, Ground 1 fails.

Ground 2: The Policies Ground

42. Mr Powell submitted that, when coming to its decision to discharge Condition 99, Swindon erred in failing to take into account a material consideration, namely relevant policies.

43. He relied upon two policies, both within the Structure Plan 2016. First, policy T2, which requires that:

> "At the Swindon Principal Urban Area a package of transportation measures will be identified to enable growth in development within (and beyond) the plan period, so as to assist with realising the economic and regeneration potential of the principal urban area.
>
> The package will provide opportunities to reduce the reliance on the private car by increasing and improving the choices available to meet transport needs and will be strongly biased towards public transport and improving conditions for pedestrians and cyclists."

44. The policy then proceeds to refer to particulars that are required to be within the package, including "New Road Proposals - Croft Road to Hay Lane link and northern orbital road (Purton Road to Great Western Way)". That is relates to the Wichelstowe development. The supporting text to T2 indicates that:

> "The overall package of measures is intended to secure a balanced approach to transport provision in Swindon ...", the package to be "delivered through the implementation of the local transport plan programmes."

45. The other policy relied upon is T5, which requires that:

> "Measures should be provided to encourage cycling and walking and improve safety of these modes in order to offer alternatives to private car use."

46. The supporting text indicates that:

> "Local planning authorities should ensure that new developments provide additional measures to complement and facilitate the provision of comprehensive cycle and pedestrian networks."

47. Mr Powell submitted that Swindon had erred in failing to take these policies into account when discharging Condition 99, particularly relying on the Paragraph 9.8(c) of the Discharge Report, which says:

> " ... neither established highway use policies nor Condition 99 require the developer to provide facilities to encourage the use of motorway junctions or junction 16 in particular for pedestrian or cycling journeys emanating from or going to Wichelstowe."

48. However, ably as Mr Powell attempted to urge this ground, it is meritless. The decision to discharge was not a decision which, by virtue of statutory provision, required Swindon to take into account development plans. In any event, T2 and T5 are broad policies that apply to Swindon and Wiltshire as a whole. Even over that geographical area, they provide only general guidance as to the appropriate approach of authorities to sustainable transportation. They do not purport to - nor can they - "require" any specific facilities at a particular location.

49. In fact, the Wichelstowe development as a whole does seek to address the issue of sustainable transportation, as evidenced by, for example, the Ove Arup March 2007 Audit Report to which I have already referred. By way of example, it is proposed that there be two new bus routes through the development along a "sustainable transport artery" (or "STAr", ie a bus lane) so far as possible: and that there be bus stops within 300m of all dwellings, and within 200m of 90% of dwellings. There is a walking and cycling strategy for Wichelstowe, which proposes significant improvements to ways through South Swindon that will provide alternative access routes: including a strategic segregated lit footway cycleway linking to the STAr, and other non-motorised user routes linked to the main transport network. This forms part of the local policy of segregation of non-motorised and motorised traffic, to which I have referred.

50. From the evidence, it is clear that the importance of a sustainable transportation policy has informed relevant decisions in respect of the development. In relation to the discharge of Condition 99, although they were not obliged by statutory provision to do so, there is no evidence that Swindon failed properly to take into account the identified policies. It seems to me that this ground too is based upon the false premise that the Developer was required to provide facilities to encourage pedestrian and cycling journeys across Junction 16, as well as public transport. That was not the case.

51. In any event, for the reasons I have given, this ground too fails.

Ground 3: The Wiltshire Representations Ground

52. Mr Powell submitted that Swindon had misunderstood the objections of Wiltshire, as the relevant local highway authority, to the proposed discharge of Condition 99.

53. Condition 99 required Swindon to consult the relevant highway authorities, namely the Highways Agency, Wiltshire and the Highways Department of Swindon itself. The Highways Agency and Swindon consented to the discharge of the condition.

54. Wiltshire did not do so. There is some lack of clarity in the evidence before me as to the precise history of the issue within Wiltshire, but it seems that initially Wiltshire's Cabinet either agreed to consent to the discharge of the condition, or agreed that, as a technical issue, the matter could and should be left to the relevant technical director. However, whatever it precisely was, that decision appears to have caused disquiet amongst some members of the public. It was revoked, and Cabinet asked the Director of Environmental Services to present a further report and to make a final recommendation in relation to the discharge of Condition 99. The Director made that report, to which I have already briefly referred, and that was considered by the Cabinet at their meeting on 30 October 2007. Whatever lack of clarity there may have been as to what happened before, it does not impact on this issue: because it is very clear what happened at that meeting and thereafter. In his report, the Director said that he considered that all issues had been addressed by Swindon, and he recommended Wiltshire consequently consent to the discharge. However, at the meeting, the Cabinet resolved that the submitted plans in respect of incorporating specific features to facilitate use by non-motorised users fell short of expectations "to provide facilities to encourage sustainable transport modes", and the facilities indicated would not encourage such users:

> "... and for these reasons [Cabinet] considered that the developer's proposals for the provision of facilities for non-motorised users at junction 16 do not meet the requirement of Condition 99 and consequently considers that [Swindon] should not discharge Condition 99."

55. That indicated, very clearly, that the only outstanding issue so far as the Wiltshire Cabinet were concerned remained the provision for non-motorised users of the junction: and the reason that remained an issue was that they did not consider that the proposals encouraged such non-motorised use.

56. There can be no question that the author of the Discharge Report (Ms O'Connell) fully understood that to be Wiltshire's position and the reason for it. In the report she set out the background in paragraphs 9.3-9.5: Wiltshire's position as resolved in the 30 October Cabinet meeting in paragraph 9.6: and, in paragraphs 9.8-9.9, she set out why, despite those objections, she advised discharge. The main reason why she considered that "the limited objection" of Wiltshire "should not be given significant weight over the technical assessments being made by the other highway authorities (and the professional view of Wiltshire's highways officers) that the requirements of Condition 99 have been met and that approval of the proposals could be given by the local

planning authority" was that Wiltshire appeared to have applied the (in her view, erroneous) test of whether the proposed alterations to junction 16 would "encourage non-motorised users", in circumstances in which neither established highway use policies nor Condition 99 required the Developer to provide facilities to encourage such use for the reasons to which I have already referred. Indeed, as the Discharge Report says:

> "To the contrary, the strategic approach has been to provide accesses to the new development for non-motorised users that are separated from motor traffic."

57. As I have indicated, I consider this ground is without merit. It is quite clear that, far from misunderstanding the position taken up by Wiltshire, those involved in the decision to discharge Condition 99 very well-knew Wiltshire's position, and the Discharge Report set out cogent reasons why Wiltshire's objection to discharge, in the face of their own technical advice and the consent of the other highway authorities (including the Highways Agency), did not persuade Swindon that the requirements of Condition 99 had not been met.

Ground 4: The Wiltshire Approval Ground

58. It was in those circumstances, and for those reasons, that Wiltshire did not consent to the discharge of Condition 99. It is true that, from a technical highways point of view, Ms O'Connell was unimpressed by Wiltshire's stance and the reasons for it. However, whatever the circumstances and what the reasons, it is a fact that Wiltshire did not consent to the discharge of the condition.

59. Mr Powell submitted that, although Condition 99 is phrased in terms of Swindon discharging the condition "in consultation with" the highway authorities (including Wiltshire), properly construed in practice it required their approval: because, without the approval of the relevant highway authorities, for practical purposes the proposed alterations to Junction 16 could not be carried out. Without the approval of the highway authorities, the discharge would be empty.

60. However, I do not accept that Wiltshire effectively had a veto on discharge of Condition 99, as suggested by this submission. Condition 99 requires Swindon to discharge the condition "in consultation with", not "with the approval of", the highway authorities. The meaning of those words is plain and unambiguous. That wording can be compared with that of Condition 79, which refers to completion of the Junction 16 works "in accordance with the requirements of the Highways Agency and the Local Highway authorities". Conditions 81 and 84, to which I was also referred, are in similar terms to those.

61. Even in the face of Wiltshire not consenting to discharge, Swindon were not necessarily acting perversely or unlawfully in discharging the condition. The discharge was to be considered in a planning context, and planning decisions are frequently made in admittedly different contexts, notably on applications, where the applicant is not, in practice, in a position (or not yet in a position) to pursue the development, for example

because he does not own the site. The impracticality or impracticability of proceeding is not a reason for an authority not making a positive planning decision.

62. It is clear, in my view, that Swindon's decision to discharge was not perverse, even in the light of Wiltshire's stance, particularly bearing in mind:

63. (i) the nature of Condition 99 on its proper construction, as considered above;

64. (ii) Wiltshire had refused their consent to discharge against the technical advice of their own Technical Director, in respect of a matter which was quintessentially technical in substance;

65. (iii) when they are approached by the Developer as the local highway authority to enter into an agreement under section 278 of the Highways Act 1980 for carrying out the necessary works at Junction 16 (as the Developer must do: see Condition 98 of the May 2005 planning permission), it is open to Wiltshire, as a public body, to reconsider their position in the light of what they now know; particularly as the relevant Wiltshire body is entirely new, being the unitary authority rather than the old county council;

66. (iv) Wiltshire have as not yet made any decision to refuse to enter into a section 278 agreement with the Developer for the construction of the proposed changes to Junction 16. If they do in due course refuse on public interest highway grounds, then it would be open to the Developer to seek planning permission for the works which, if granted (perhaps after an appeal to an inspector, given that Wiltshire will be the relevant planning authority), would mean that the Developer would be able to rely upon the principles set out in R v Warwickshire County Council ex p Powergen plc [1998] 75 P & CR 89, to require Wiltshire as highway authority to cooperate in implementing the planning permission.

67. In the circumstances, I do not accept Mr Powell's submission that, in the light of Wiltshire's failure to consent to the discharge, Swindon should have acted on the premise that, without such consent, the proposed alterations were bound not to be constructed, and consequently their decision to discharge was perverse. That simply does not follow.

68. As I have indicated, Wiltshire's failure to consent to discharge Condition 99 (and their reasons) were fully considered by Swindon before they proceeded to discharge. They approached the issue with patent care, and, leaving aside for the moment the other grounds of challenge to which I shall come, on this ground they cannot be criticised for coming to the decision that they did, ie that the requirements of Condition 99 had been satisfied and the condition should be discharged. That was their decision to make as the relevant planning authority. For the reasons I have given, I do not consider that Wiltshire had any effective veto over that decision: nor do I consider that Swindon erred in discharging the condition in the face of Wiltshire's non-consent and non-approval.

Ground 5: The Safety Ground

69. The claimants contend that the decision to discharge Condition 99 was perverse or Wednesbury unreasonable - in that, it is submitted, no reasonable local authority could have come to that decision because the proposed alterations at Junction 16 render the junction "manifestly unsafe".

70. There are three strands to this submission. First, Swindon failed properly to take into account and follow the standards and technical requirements in the Design Manual for Roads and Bridges ("the DMRB"). That informs the second and third strands, namely that the design of the proposed altered Junction 16 is (the claimants contend) manifestly unsafe because (i) the proposed lanes are too narrow, and (ii) it incorporates a right turn from the A3102 Swindon Road from Wootton Bassett into the B4005 to Wroughton, which increases traffic flow at the junction because it enables traffic on this route to avoid circulating the whole island junction, but which, it is submitted, renders the junction inherently unsafe, particularly if there were to be a power failure that knocks out the controlling traffic lights.

71. As I have indicated, Mr Powell relied upon the DMRB to support his substantive points relating to lane width and right-hand turn configuration in the south of the junction. In failing to take the DMRB properly into account, he submitted that Swindon erred in law, because they failed to take into account a material consideration.

72. In relation to the former substantive point, he submitted that the DMRB required certain lane widths at particular curve radii (as set out in Table 7/2 in TD 42/95). The claimants' expert (Mr John Orchard) had calculated within the proposed junction complex where the lanes lacked the width indicated in that table. In relation to the right-hand turn configuration, he relied upon TA 86/03, and particularly paragraph 37 of that part, which sets out in diagrammatic form the routing of traffic through the centre part of a junction island in a one-way link in what is called a "half through node". He compares that with the proposed configuration at Junction 16, which has some geometric similarities but where the diverted traffic does not pass into the centre of the junction island, rather simply cutting round without penetrating the roundabout at all. In the DMRB, there does not appear to be a similar configuration illustrated. Nor have the experts been able to identify a similar configuration on the ground. I accept Mr Orchard's evidence that Sherwin Arms, Nottingham, does not appear to be in this configuration.

73. Nevertheless, I do not find the submissions based upon the DMRB compelling. First, the DMRB is "a standard of good practice that has been developed principally for Trunk Roads" (Introduction, paragraph 1.5). It is not mandatory for non-trunk roads, such as the A3102 or the B4005. Even where it does apply, departures from the standard can be agreed with "the overseeing organisation", usually the relevant highway authority (see TD 50/04, paragraphs 1.17 and 1.18). I shall return to that.

74. Second, on a proper construction of Condition 99, the DMRB (and other guidance referred to in Condition 99) has no relevance to the question of whether the condition has been satisfied and should be discharged. The first part of the condition relates to the approval of the details of the proposed alterations. That is the part with which Swindon were concerned when considering discharge. The last sentence of the

substantive part of the condition - the sentence referring to the DMRB - relates not to that stage, but purely to the eventual execution of those works, ie the works that are to be executed in accordance with the latest relevant standards etc. That is consistent with other conditions within the planning permission to which I was taken, which refer to various approvals being required and then, at the end of the condition, refer to the plans, standards or guidance in accordance with which the works are to be "carried out", ie executed. It also fits into the general planning scheme of the development. Condition 99 cannot be construed in isolation. Condition 79, which can only be satisfied at a later stage of the development, requires, before more than 1,100 dwellings are occupied, "the improvements to the trunk road network at Junction 16 of the M4 as shown on drawing 938/GA/036 have first been completed in accordance with the requirements of the Highways Agency and the Local Highway authorities". As I have indicated, those highway authorities can, if so advised, vary any guidance or standards in the DMRB as they consider appropriate, of course bearing in mind the paramountcy of safety, and, under Condition 99, the works when they are carried out have to be carried out "in accordance with the latest technical requirements as set out in the [DMRB] or other standards and technical requirements considered appropriate by the Highways Agency". To an extent, these provisions appear to fit together to form a coherent scheme. The fact that, outside and forward of Condition 99, there are stages of detailed design (which have to be approved by the highway authorities) and execution also explains, in my view, Ove Arup's response in May 2007 to the Highways Agency saying that they assumed that lane widths "comply with DMRB standards", namely:

> "Correct working widths and barriers will be adhered to and will be designed in accordance with the current standards applicable at the point of detailed design. This will be developed and submitted through the statutory bodies for approval where relevant."

75. From that exchange, it is clear that, contrary to the suggestion made on behalf of the claimants, the Highways Agency were not led to assume and work on the basis that the widths shown on the drawings complied with DMRB: Ove Arup made clear that lane widths would be dealt with at a later stage, when the Highways Agency (and the other highway authorities) would be required to approve them before the scheme proceeded to construction.

76. Third, as I have just noted, Condition 99 requires the works eventually to be carried out to the standards etc of the DMRB "or other standards and technical requirements considered appropriate by the Highways Agency". Before the condition was discharged, the Highways Agency consented to it: and I accept the force of the submissions made by Mr Timothy Jones and Mr Lockhart-Mummery that there is clear evidence that the Agency in fact took a greater interest than simply as the highway authority for the M4 and slip roads: for example, the references from their letters quoted by the claimants' solicitor, Mr Richard Buxton, in his statement of 18 June 2009, paragraphs 8 and 12). Whatever standards might have been applicable at the stage of discharge of the condition, the Highways Agency appears to have been content that they had been met.

77. Fourth, Mr Orchard's opinion is that, when the DMRB Standards and Guidance are compared with the proposed alterations to Junction 16, the proposals are found wanting, and this is an indication that the proposed junction scheme is unsafe. The other experts do not agree. In those experts I include not only the independent experts who have submitted evidence in this application (Mr Howard Davies of Halcrow instructed by Swindon, and Mr Richard Hutchings of WSP and Mr Ian Morrow of Ove Arup instructed by the Developer), but also the in-house "experts" within the relevant highway authorities (the Highways Agency, Wiltshire and Swindon). They do not consider that the proposed alterations are unsafe, something to which I shall shortly return. In coming to that opinion, they have taken into account the guidance in DMRB. Indeed, Mr Morrow makes it clear that the DMRB was taken into account in the design of the alterations - he sets out how in his statement of 31 July 2008 at paragraphs 36 and following - and, that being the case, it is a matter of highway judgment as to the weight to be given to that guidance.

78. I can now turn to the two specific areas of the proposed alterations design which, the claimants contend, render the Swindon's decision to discharge the condition Wednesbury unreasonable. In each case, I consider there is a simple and negative response to those submissions.

79. In relation to the lane widths, even in the context of this case in which the claimants' case has been evolving and regularly growing new limbs throughout, this was a late running ground. The issue of lane widths was not raised as an issue by anyone - including Mr Orchard, who has been actively and heavily engaged on the claimants' part in putting forward objections to the proposed junction alterations - until last month. No one raised it as an issue before Condition 99 was discharged. The Discharge Report dealt with all of the objections that Mr Orchard had then put forward (under paragraph 10(f)), together with objections from others. I do not see how it could be argued that Swindon erred in failing to take into account a matter that was simply not before them at the time of the relevant decision. Even if, as Mr Orchard suggests, it is arguable that the lane widths are too narrow for proper safety (an issue to which I shall return), that falls far short of a mistake as to an established fact that may, in some circumstances, found an error of law (see E v Secretary of State for the Home Department [2004] EWCA Civ 49, especially at paragraph 66 per Carnwath LJ). It would not found an error of law.

80. In fact, in paragraph 62 of his statement of 2 June 2008, two months after the decision to discharge Condition 99 had been taken, Mr Orchard accepted that the proposals demonstrated there was sufficient carriageway width, although (in his words) "only just".

81. As I say, lane widths have only been raised as an issue by the claimants over the course of the last month. Mr Timothy Jones and Mr Lockhart-Mummery submitted that the sheer lateness of the suggestion undermines the claim that the proposed lane widths are so inadequate as to make proceeding on the basis of the proposal Wednesbury unreasonable. However, even if the point had been raised in better time - and leaving aside the fact that the issue was not raised with Swindon before they took the decision to discharge - I could not possibly find, on the evidence before me, that the decision to

discharge was one which no reasonable authority could take on this ground. The evidence before me is replete with details of the extensive investigation and consultation that preceded the decision to discharge. By way of example I need refer only to the statement of Ian Morrow of 31 July 2008, at paragraphs 30 and following, which refer to over 40 consultative meetings, over 20 separate evolving drawings and eight major reports. The consultation, of course, included consultation with the CPRE and Mr Orchard. All of the comments they made, and issues they raised, were taken into account before the decision to discharge, and indeed are dealt with in terms in the discharge report itself.

82. Following such intensive technical activity by so many, all of the experts to whom I have referred - other than Mr Orchard - are of the view that the lane widths are adequate, subject to detailing at the appropriate time. Those experts include in-house people from the three highway authorities, including the Highways Agency. Mr Davies's view is that the lanes are wide enough but, if any highway authority wishes them to be wider, then that can be accommodated within the confines of the proposed junction area (letter to the claimants' solicitors 4 June 2009). That is the view of all the experts in the claim, except Mr Orchard (Joint memorandum dated 23 June 2009, paragraph Q4).

83. Even Mr Orchard himself does not appear to go so far as to say that any difficulties with lane width, as he sees them, are such that, with adjustments, it would be impossible to comply with DMRB and make the scheme safe before construction. I do not read even paragraph 17 of his third statement of 18 June 2009 as going quite that far. Mr Powell, in his main submissions, conceded that point, although appeared to resile somewhat from it in reply.

84. All of the experts may not entirely be at one as to whether the lane widths as currently envisaged technically fall within the guidance of DMRB, but none suggests that alterations should be made other than in accordance with appropriate standards, in practice to be dictated by the highway authorities when they come to consider them and approve. Even if there were doubt as to any of these matters now, Swindon could not be criticised as being perverse by discharging Condition 99, when all of the relevant highway authorities will have an opportunity to check the details, including the lane widths, when they are required to approve prior to construction. All of the highway authorities, except for Wiltshire in the circumstances I have outlined, of course consented to that discharge.

85. In relation to the right-hand turn configuration, this was incorporated in Drawing No 36, to which I have referred. That drawing is referred to in Condition 79, which requires the junction to incorporate it as part of the development works for which planning permission was granted. The opportunity to challenge that configuration as a matter of principle - which is how the claimants now seek to challenge it - is passed. Of course, the claimants played a full part in the planning process that led to the permission, including that configuration that was granted in May 2005.

86. In any event, for the reasons I have already given in relation to lane width, in my judgment it is simply not arguable that the decision of Swindon to discharge Condition

99 on the basis of the proposal with that configuration is Wednesbury unreasonable or otherwise unlawful.

87. For those reasons, Ground 5 fails.

Ground 6: The Environmental Impact Assessment Ground

88. An environment impact assessment was performed prior to the May 2005 grant of planning permission, and an environmental statement was part of that grant. Mr Powell does not have any complaint about that statement, except that it failed to include a non-technical summary of the technical information required to be included by Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) (England & Wales) Regulations 1999 (SI 1999 No 293, "the 1999 Regulations"). Such a non-technical summary is required by that schedule itself. Those regulations purported to implement EC Council Directive 85/337/EEC ("the 1985 Directive") and Schedule 4 is reflective of Article 5 of that Directive.

89. Any challenge to the planning permission (of which the environmental statement formed part) is well out of time. It is, however, some comfort that there is no evidence that the claimants, or anyone else, suffered prejudice as a result of any such suggested failure.

90. The current ground of challenge is based on the premise that the original environmental statement was adequate, but that, prior to the decision to discharge Condition 99, Swindon erred in law in failing to review the assessment. It is contended that they ought to have conducted such an assessment because of a change in the development. Comparison of the plans attached to the environmental statement (eg plan 938/GA/036a with plan CH-09-008) suggests that there has been little obvious variation in the basic design and proposals for Junction 16. In any event, the only change relied upon by the claimants in relation to this ground is the increased estimate of traffic flow through the junction.

91. Mr Powell accepts that no obligation to make a further environmental impact assessment arose from the 1999 Regulations as they stood at the time of the decision. However, he submitted that the requirement arose from an obligation on Swindon directly to apply the 1985 Directive, following R (Barker) v Bromley London Borough Council [2006] UKHL 52 (which, after the discharge of the condition in this case, led to amendments to the 1999 Regulations to require more than one assessment and statement in certain circumstances).

92. As the recitals to the Directive make clear, the purpose of the Directive is to ensure that, before there is any development that might adversely affect the environment, there should be an assessment of that impact so that appropriate steps can be taken to mitigate it. As the recitals suggest, in respect of environmental damage, prevention is better than cure.

93. By Article 1, the 1985 Directive only applies to "the assessment of the environmental effects of those public and private projects which are likely to have significant effects

on the environment". A "'project' means - the execution of construction works or of other installations or schemes - other interventions in the natural surroundings and landscape including those involving the extraction of minerals". "'Development consent' means the decision of the competent authority ... which entitles the Developer to proceed with the project". Article 2(1) requires member states to adopt measures to ensure that "before consent is given, projects likely to have significant effects on the environment ... are made subject to a requirement for development consent and an assessment with regard to their effects".

94. The 1985 Directive is not applicable in the circumstances of this case, as submitted by Mr Powell, for two reasons.

95. First, an assessment is only required by the 1985 Directive in respect of a "project" which is defined in terms of operational development, ie some physical change to the land. Condition 99 does not relate to a project so defined: it relates to the occupation of properties already built. Condition 99 is not a "development consent" and it does not permit or relate to the construction of any alterations to Junction 16 or any other part of the development. If and when the junction alterations need planning permission in the future, then, if they are likely to have significant effects on the environment, an environmental impact assessment will be required. Indeed, planning permission and the need to have an assessment go hand in hand, because, if there is likely to be a significant environmental impact, planning permission will be required - that will trigger an assessment: so, in relation to this submission, although it fails on this ground, if the proposed alterations to Junction 16 are likely to have a significant environmental impact, that will have to be considered by the relevant planning authority - Wiltshire - in due course.

96. Mr Powell suggested that a purposive approach to the Directive would not pay such regard to what he called "the legal niceties of the form of restriction used" (written submissions in reply, paragraph 45). I do not accept that criticism of the construction relied upon by Swindon and the Developer. That construction relies upon the plain terms of the Directive: and, given the purpose of the Directive, it does not seem to me that that construction does any purposive damage. Prior to any construction actually taking place at the junction (and therefore before there are any possible adverse effects from any such construction), environmental concerns will have to be taken into account by the relevant planning authority, Wiltshire, in accordance with the Directive and amended Regulations, for the reasons I have given. I do not regard the construction propounded by Mr Timothy Jones and Mr Lockhart-Mummery to be a "legal nicety": it seems to me to be the proper construction of the relevant Directive, both on the clear reading of the words used and on a purposive approach.

97. I add for the sake of completion that Mr Powell said that one road - part of Hay Lane, which is an approach road to the junction - falls within Swindon's area of authority, and therefore it will not be subject to the requirement on Wiltshire to consider an environmental assessment in the context of a planning permission. That part of Hay Lane, as he understands it, already falls within the May 2005 planning permission. However, it can properly be assumed that, if the changes proposed to Hay Lane are likely to result in significant environmental damage, then Swindon will comply with

their obligations under the Directive and (now) the amended 1999 Regulations at the appropriate time, before construction commences. In any event, there is no evidence before me that that part of the development is likely to cause such damage.

98. That links to the second reason why the 1985 Directive did not apply directly in relation to the decision to discharge the condition. There was not at the time of the discharge decision, and there still is not, any evidence that the changes to the propose alterations to the junction are likely to result in any significant environmental damage. Although Mr Orchard refers to what he considers to be a substantial increase in the estimate of traffic through the junction (as shown in Halcrows Report of February 2007), he does not evidence any significant (or indeed any) additional environmental damage as a result. There is no evidence at all before me of such damage that might trigger obligations under the 1985 Directive: and, contrary to Mr Powell's submission, such damage, in my judgment, cannot simply be assumed - at least not on the facts of this case.

99. Nor do I consider that Swindon erred in failing to give reasons in the Discharge Report for not requiring an environmental impact assessment. For the reasons I have given, I do not consider that such an assessment was required for the purposes of the discharge decision: but, although I appreciate the statutory obligation imposed by the Directive upon Swindon as a public body, at the time of that decision, despite the very considerable consultation and investigation, no one (including the CPRE or Mr Orchard or any of the other experts involved) suggested that there was any basis for thinking that significant environmental damage would or might be caused by any change in the proposed works since the grant of planning permission. The issue has been raised by the claimants only in the last month, despite their having had the relevant traffic estimated figures since perhaps a year before the decision to discharge Condition 99. Even now, as I have said, no evidence has been produced of any adverse environmental consequences that might result from the increase in traffic flow through the junction.

100. Mr Powell submitted that the assessment, when conducted, would have to take into account alternatives, including the alternative westerly route to which I have referred. However, for the reasons I have given, I do not consider any obligation under the 1985 Directive was triggered by the discharge decision. The alternative route issue does not therefore arise.

101. For those reasons, I do not find ground 5 made out on its merits.

102. As a result, it is unnecessary for me to decide whether, if the merits of ground 5 were sufficient to succeed, the claimants should in any event be barred from pursuing the ground on the basis of delay. Judicial review proceedings have to be brought promptly and, in any event, within three months (CPR Rule 54.5), a limitation period the courts are loathe to increase except for good reason because of the importance of the principle of finality of administrative decisions. Suffice it to say that I consider the submissions of Mr Timothy Jones and Mr Lockhart-Mummery had considerable force. The relevant new projections for traffic were produced by Halcrows in January 2007, and, given the very active part the claimants, their representatives and Mr Orchard have played throughout these long running issues, it is almost inconceivable that those data did not

come into the possession of the claimants shortly afterwards. Mr Orchard in his evidence does not suggest there was any delay. Mr Powell in closing accepted that the claimants and Mr Orchard must have received these figures shortly after they were prepared. Nevertheless, as a ground of review, this was not raised until well over two years later, and over eight months after the decision sought to be challenged. No good reason for that delay has been put forward: the only reason put forward is that the claimants have failed to investigate and put forward the claim as promptly as they should have done. The fact that this matter is, in some respects, complex is not good reason. The claimants have throughout been represented by specialist legal representatives, assisted by Mr Orchard. There is evidence of prejudice, not only to the Developer (who expended about £8.5m on the development between April and December 2008), but also to those people who are waiting to move into the completed dwellings on the development. 69 dwellings are now complete. Dates of occupation have been delayed for these people because of these proceedings (see the Leslie Durrant Statement, 23 January 2009, paragraph 2).

103. I appreciate that, irrespective of this particular ground, these proceedings would have been brought and pursued on the other grounds relied upon by the claimants, and there is no evidence of any slowing of the works as a result of them - only of the Developer ploughing money into the development at potential risk, and delayed occupation which has prejudiced the Developer and those who seek to live on the development. However, given the importance of finality in public law decisions, and the approach of these courts to delay in challenges to planning decisions (see, eg, R (Hardy) v Pembrokeshire County Council [2005] EWHC 1872, approved [2006] EWCA Civ 240, and Finn-Kelsey v Milton Keynes Borough Council [2008] EWCA Civ 1067), I can only say that, even if (contrary to my firm view) this ground had merit, it should to be assumed that I would have granted permission to proceed out of time. However, given my view on the merits, I shall simply refuse permission to proceed on Ground 6.

104. In relation to Grounds 1-5, I shall dismiss the applications for the reasons I have given.

105. May I add two notes by way of postscript.

106. First, it has been submitted to me, on behalf of Swindon and the Developer, that these proceedings are an abuse of process, because the claimants are attempting a collateral challenge to the planning permission and plans, insofar as they prescribe the westerly access route, which is the claimants' real objection. In this context, I have been referred to the claimants' then solicitors' letter of 5 February 2007 which indicated that the claimants intended to judicially review any discharge of Condition 99; that letter being sent two months before any junction plans (which are now criticised in this claim) were produced. I was also referred to another letter from their current solicitors dated 9 June 2009, which indicates that the CPRE's objective is not to prevent occupation of the Wichelstowe dwellings, but rather "they are only concerned about the proposed western access to the development". Mr Orchard repeatedly refers to the alternative access route issue (eg in his second statement, at paragraph 3 and paras 13-19): which was also raised in relation to the environmental assessment issue (see eg Ms Foster's statement at para 13). Indeed, in the last substantive point made in Mr Powell's reply this morning, he stressed that the westerly access route "is not such as it is settled ... It remains an

alternative to be tested in a proper [environmental impact assessment] in this and subsequent decisions" (para 56 of his written submissions in reply).

107. As the letter of 9 June 2009 indicates, the case papers make clear that the claimants' *only* concern in bringing this claim is the western access route. As I indicated at the beginning of this judgment, the route under the M4 has been enshrined in the Structure Plan and the Local Plan, as well as in the grant of the 2005 planning permission itself, for several years. Neither plans nor grant of planning permission were the subject of legal challenge. The time for challenging them has long since passed. There is certainly evidence that the claimants have, by these proceedings, sought collaterally to challenge earlier now unchallengeable administrative decisions in respect of the westerly access route. Insofar as this claim has been such a collateral challenge, it is at best misconceived.

108. I appreciate the genuine and sincere concerns that the CPRE (a charity with laudable objects) have in relation to the access route to the Wichelstowe development. However, they must ensure that they take care to ensure that their opposition to that route - if it is maintained - is exhibited only in appropriate forms and in appropriate forums. I should not be taken as indicating that I consider this claim has been brought inappropriately or improperly. I have been referred to R (Kides) v South Cambridgeshire Council [2003] JPL 431 (especially at para 10). I very much have in mind that this claim has been brought by a charity who, I consider, have proper locus to have brought it. I am also sensitive to the fact that, in relation to all of the grounds but one, whilst doubting the ultimate outcome, Burton J considered the claims arguable. However, the tenor of some of the documents is of sufficient potential concern for it to warrant a note of warning.

109. Secondly and finally, the Discharge Report is analysed in detail in Mr Lockhart-Mummery's skeleton argument from paragraphs 23 onwards. That is in substance the decision challenged. In my judgment, it is impeccable. It recommends discharge of the condition on the basis of full and careful reasoning, following very substantial investigation and consultation with the relevant highway authorities (as required by the condition itself) and other interested parties (including the CPRE). It sets out the objections that have been made, and a reasoned response to each as to why, in the author's view, they are not compelling. This is not a case in which the decision of the public body has in this court just barely "passed muster". In my view, the decision is not only lawful, but it has withstood intense legal scrutiny, which the author, Ms O'Connell, could not possibly have foreseen. I can only commend the care and competence with which the Discharge Report was compiled.

110. I shall hear submissions on costs, and any other consequential matters.

111. MR JONES: My Lord, I think your Lordship dismisses the claim. I therefore move to apply for an order for costs, and I ask that the claimants be ordered to pay the defendant's costs.

112. MR JUSTICE HICKINBOTTOM: Yes. Mr Lockhart-Mummery, are you making any application for costs?

113. MR LOCKHART-MUMMERY: My Lord, I am making an application for costs. Can I put Bolton in the House of Lords before you as a reminder?

114. MR JUSTICE HICKINBOTTOM: Yes. (Handed)

115. MR LOCKHART-MUMMERY: My Lord, can I make one brief observation before briefly referring to Bolton? My Lord, we have made it clear from the outset that we would be seeking an order for costs of this challenge. We said so in paragraph 87 of our original summary grounds, and have stated that position throughout. My Lord, I expect your Lordship is well familiar with Bolton.

116. MR JUSTICE HICKINBOTTOM: The question is: what have you added to the party? That is put putting it in fairly blunt terms, but that is the question.

117. MR LOCKHART-MUMMERY: My Lord, yes, just looking at Bolton and the analysis by Lord Lloyd, I am on the second page of the extract, the bullet points, and I am at the second of those. My Lord, I do not claim that there was likely to be or was a separate issue on which we were entitled to be heard; that is to say an issue not covered by counsel for the defendant, if I can put it that way, in this case. But, my Lord, can I refer to the special features of that case that his Lordship adverted to, and in particular, first, I do not contend, my Lord, that difficult questions of principle arose, but, my Lord, looking further down, his Lordship was persuaded by the fact that, in that case, the Secretary of State had to "remain aloof from the parties" for the reason that, if the case had gone the other way, the matter would have had to go back to him for re-determination de novo, and then continuing:

> "On the other hand, the developers were concerned only with the outcome of this particular appeal. They were entitled to take the view that on the facts of this case they had a sufficiently independent interest requiring protection so as to justify separate representation."

118. My Lord, I would make the analogy here, if I may, by reference to the DMRB and the way these procedures work. The defendant is, in the context of DMRB, the overseeing organisation or, to put it another way, it is the decision making authority, of course, were this matter ever to have gone back. The interested party has an independent interest as the design organisation under the DMRB, and of course the applicant for approval had this matter gone back. So, my Lord, I rely on that analogy.

119. My Lord, secondly, and second in this example at the foot of page 2:

> "... the scale of the development, and the importance of the outcome for the developers, were both of exceptional size and weight."

My Lord, I invite an analogy here. I do not need to elaborate on the scale of the development.

120. My Lord, thirdly, I hope and believe, and I think know now from your Lordship's judgment, that your Lordship has been materially assisted by the interested party: the witness statement of Mr Morrow, which has featured at key passages of your Lordship's

judgment; the witness statement of Mr Durrant likewise; and the witness statement of Mr Phelps in relation to delay and prejudice. My Lord, I also believe from your Lordship's judgment, although it is a matter for your assessment obviously, that you have been assisted materially by our submissions as well as the evidence.

121. My Lord, penultimately I rely on your Lordship's findings as to the conduct of the claimants in this case; the matters to which your Lordship has just referred from Mr Cooper's letter to Mr Buxton's letter; and your Lordship's finding that these proposals were, at best, misconceived, and, my Lord, on those grounds, I invite an order for costs in our favour as well.

122. Should your Lordship not be with me on a total award in our favour, I would invite the costs of the grounds of opposition, the witness statements, and our skeleton.

123. MR JUSTICE HICKINBOTTOM: Yes, thank you.

124. MR POWELL: My Lord, the grounds before the second award of costs in Bolton, in my submission, are quite clear, and should only be granted exceptionally. In terms of the position of the Developer and the interest as the design organisation and the applicant, in my submission that is no different to that of any applicant for planning permission. I do not think there is anything particularly special about this because the Design Manual for Roads and Bridges is involved, as opposed to any other policy document. So I would not have thought that that would be sufficient to generate an independent interest which required separate representation.

125. My learned friend, Mr Lockhart-Mummery, I think in the course of proceedings described his participation, certainly in terms of reply, as being on the coat-tails of the defendant, and in my submission that is an accurate way of putting it. I do not think there is a great deal more that was brought by the Developer that was not said by the defendant, or indeed could not have been said. There is no separate reason for them to be here in order to press points which are separate from those of the authority.

126. The scale and size of the development, I think, adds nothing to the reason to be represented before your Lordship. The issues are the same irrespective of the size and scale. In Bolton there were innovative policy matters relating to a large out-of-centre shopping development, and the new shopping development bore upon recent policy changes, and it was that, in terms of the size, the impact of a large development and new policies which was particularly significant.

127. MR JUSTICE HICKINBOTTOM: But Lord Lloyd particularly said, and practically this must be right, that a factor to take into account is the sheer scale of the development and the importance of the outcome for the Developers. It seems to me that it would have been unrealistic had he not have included that as a factor to be taken into account.

128. MR POWELL: Indeed, my Lord. It simply comes down to the point that there is more reason on account of the scale of it to engage their interest, but an interest not essentially separate from that of the local authority in pressing the points that are made.

Admittedly the development is of some size; there is no dispute on that point, but how that feeds into this case as opposed to the particular features of the Bolton case, where there was the additional emerging policy point as well, as to make the Developer's attendance essential, and certainly so essential such that it would sound in a second award of costs, which is of course exceptional.

129. MR JUSTICE HICKINBOTTOM: Yes. In respect of the defendant, no submissions to make?

130. MR POWELL: I do, my Lord, yes. Before I finish with that point, my Lord, I would like to draw your attention to the further point -- amplification of this in the case of Berkeley, if I could hand that up to your Lordship. This is a decision in the Court of Appeal. At the bottom of the page there is pagination. It begins at 46. I would invite your Lordship to turn to page 51 of that bundle.

131. MR JUSTICE HICKINBOTTOM: Yes.

132. MR POWELL: And there, my Lord, we see in the judgment of Nourse LJ at 8:

> "I turn to the costs of Fulham Football Club. This question depends on an application of the principles of discretion authoritatively stated by the House of Lords in Bolton ... I read the first paragraph of the headnote, which satisfactorily sets out the essence of their Lordships' decision:
>
> '... A second set of costs is more likely to be awarded at first instance than in the Court of Appeal or the House of Lords, and an award of a third set of costs will rarely be justified.'"

133. It goes on to say:

> "Mr Hicks submits that the Club qualifies for orders for costs here and below within those principles. He has made a number of points. In regard to the environmental assessment question, he has said that the Club, having been throughout represented and fully involved at the public inquiry, was uniquely able to assist the judge as to the information available at the inquiry, in order to help him decide whether, in the absence of an environmental statement, there had, as has since been held, been sufficient information available to take its place."

134. And over the page he has made a similar point in regard to policy questions:

> "His third principal point is that it was recognised ahead of the hearing before the judge that the Secretary of State was unlikely to argue the question whether there had been an urban development project. The Club, on the other hand, intended to submit, and did submit, that there was no definition of that expression and, further, that the development proposed could not be so described."

So that is the way it was put on behalf of the interested party there:

> "Putting that third point on one side, I think that Mr Hicks' submissions amount to no more than that it would be and could be expected to be, as it no doubt was, very helpful for the Club to be represented before the judge. They knew all about the inquiry, at which of course the Secretary of State had not been represented [that clearly is not the case here as the developer defendant was fully informed as to the decision]. While I am entirely clear that the Club was entitled to be represented before the judge (indeed, subject to the question of costs, their application for joinder was not resisted by Lady Berkeley), I am nevertheless unable to conclude that they have been able to demonstrate a separate issue, not covered by the Secretary of State, on which they were entitled to be heard, or an interest requiring representation. I can see that the question of the urban development project could be described as a separate issue not covered by the Secretary of State, but that does not appear to me to have been, in the context of the case as a whole, a sufficient ground for the Club to be represented as well as the Secretary of State. As a matter of discretion, therefore, and we are now exercising the discretion afresh, I do not think it would be right, within the principles of the Bolton case, to make an order for costs ..."

135. That does not deal with the scale of the matter, but it does emphasise the exceptional nature, and indeed when other points have arisen, that would not apply. I have already dealt with the scale issue, my Lord.

136. So that deals with the second set of costs point. My Lord, the way in which the matter was put in the defence grounds on behalf of the interested party, in terms of the costs claimed there, it is at page P48 of the bundle, it is probably sufficient for me to read it out:

> "The developer intends to seek its costs of drafting the summary grounds for resisting the application and reserves the right to ask for its full costs."

137. That was the position then. As of Friday, my Lord, your Lordship will be aware that there was an interlocutory application made for a protective costs order. That was withdrawn, and it was withdrawn following receipt of the skeleton argument on behalf of the interested party.

138. MR JUSTICE HICKINBOTTOM: Mr Lockhart-Mummery's skeleton argument?

139. MR POWELL: Indeed, my Lord.

140. MR JUSTICE HICKINBOTTOM: Yes.

141. MR POWELL: There, my Lord, the question of costs generally, and particularly the costs that could be awarded from Bolton, were considered. Does your Lordship have that skeleton?

142. MR JUSTICE HICKINBOTTOM: I have one skeleton from Mr Lockhart-Mummery.

143. MR POWELL: This is a separate skeleton. I think probably the most straightforward thing, my Lord, is if I was to read the paragraph and then hand this to your Lordship. There is a mention of Bolton. Under the first heading it says "General guidance given when separate costs will be awarded in Bolton MDC", with which the court will no doubt be familiar. Then at page 6 there are two further references to Bolton. At paragraph 27, it says:

> "Five, as to the Developer's position specifically. The developer has consistently indicated that we will seek our costs, to the extent that we are able to do so. The claimants' comment that they 'cannot understand such a stance' are clearly misguided. The claimants have the (considerable) protection accorded to claimants against two sets of costs as indicated by the guidance in Bolton MDC. The claimant, and the Developer, are both well aware of the position; hence indeed why the claimants 'cannot understand the stance' of the developer."

144. The stance was: why resist a protective costs order when the likelihood of costs for a second set of costs is limited?

145. It goes on to say:

> "The claimants have put forward no separate reasons (whether in evidence or in legal argument) as to why the Developer, as the third party directly impacted by the claimants' challenge, choosing to defend its valuable right of planning permission, should not be entitled to its costs of defending and the challenge in so far as Bolton MDC entitles it to those costs, as it would be so entitled in the ordinary course of litigation.
>
> Bolton MDC already involves a balancing act between the claimants' and the Developer's interests. The House of Lords have indicated the (very) narrow circumstances in which a Developer can recover its costs. That balancing act has already been weighed."

146. Now, we took those references to Bolton -- the very narrow circumstances and the considerable protection -- although keeping the door open to some extent, as an indication of the considerable unlikelihood of, in their view, a second award of costs being made in their favour. That was taken into account, certainly on the part of the claimants, in withdrawing the application for a protective costs order, in that it seemed that the Developer there was highlighting the limited prospects, and what I would ask essentially is: what has changed since Friday? If there were very limited grounds for pursuing it on Friday, then here we are a week later and the case does not appear to have gained any further merit in terms of the justification for a second award of costs.

147. The important point -- I will develop this in a moment -- what my clients are facing now is a costs award in favour of the local authority. As your Lordship has observed, the first claimant is a charity and has particular public purposes. It has brought this claim essentially in the public interest, and your Lordship, I would say, should be slow to award two sets of costs against such a claimant, as this would amount to making such

litigation completely prohibitive. So it would send out, in effect, a chilling effect to such charitable claimants who have the public interest as their principal motivation in bringing public law proceedings. I will develop that in a moment. That is essentially I am praying in aid the requirements of the Aarhus Convention, that such public and environmental claims should not be made prohibitively expensive. But if I can turn to the application for costs in respect of the defendant --

148. MR JUSTICE HICKINBOTTOM: Yes.

149. MR POWELL: My response would be that this is a claim which has been brought entirely in the public interest. There is no private interest involved at all. My client is an amenity organisation that is particularly concerned in its objects in the protection of the countryside, and they are anxiously involved and concerned with appropriate development and making representations and participating in such decisions. This is entirely a matter brought in the public interest. Your Lordship will have observed that the particular concerns relating to highway safety and what we have put as being the concerns which we say, whether they were sound in law -- your Lordship has found that they are not -- but they are concerns which are of public concern at a major junction outside Swindon, of concern to many in the area. We say that it is right to be able to bring such matters before the court, and it was right to bring squarely before the court the safety issues, which were at the centre of one of the principal grounds, and that I think is a matter, although your Lordship has found it has not sounded in law in terms of legal remedy, it is something that has been ventilated. It will not form -- this case and the work of Mr Orchard -- the safety concerns relating to lane width would still be unclear, and it is important that of course it appears that, following the questions asked by Mr Orchard in his letter, put to the joint experts, that it must have been the case that there had been more detailed design that we had seen, and the question mark remains as to how much more the Developer knows about such issues. It was appropriate that these matters were explored in these proceedings and brought squarely in that way.

150. We bear those particular factors in mind, and the pure public interest and highway safety concerns which were brought by this case. If I may, my Lord, I would like to just refer in terms to the particular concerns and support that the claimant had received. If I could refer your Lordship to page 1159 of the bundle, volume 5. There, my Lord, is a letter from Mr Buxton to the Council, and this was looking at the questions relating to a protective costs order, but it sets out Mr Buxton's appraisal. This goes to my point that this is a public challenge with public interest. It says:

> "As for the objectors, it is indeed the case that people outside Swindon have expressed concern about the present proposed access arrangements, as they are expected to have a seriously detrimental effect on the locality. Wootton Bassett Town Council and the parishes of Wroughton, Lydiard Tregoz, Lydiard Millicent and Broadtown all lodged official objections together with the Area 2 Committee of North Wiltshire District Council. This Committee represents over 30,000 people in North Wiltshire. We remind you that Wroughton is within Swindon BC's area: objections are therefore not limited to the residents of North Wiltshire. We understand

> that there have been petitions and rallies and substantial attendances at protest meetings in both Wootton Bassett and Wroughton. There has been considerable media coverage. Further, that NWDC sought to get the planning application called in owing to the access arrangements. Overall it is quite clear that this is not just a case of a few objectors who want to hold up a scheme that otherwise has full support. However, as in many of these types of cases, the lead in practice has been taken by those who are fortunate enough to have the time and ability to appreciate the complex matter in hand and speak up."

151. So in that sense I would say that the claimants are something of an umbrella for a wider wing of public interest that has been engaged in bringing this claim.

152. The arrangements for the funding of this litigation have been based on a conditional fee arrangement, which we say is significant, so as to ensure, in terms of the representation to the claimants, that it is not made prohibitively expensive, and that is a matter to be taken into account.

153. If I could refer your Lordship to the case of Davey, where the costs considerations in such cases was considered by the Court of Appeal. If I can begin perhaps at paragraph 21 in the judgment of Sedley LJ. It says:

> "Taking the same approach, these seem to me to be the appropriate guidelines for dealing with the present problem. They should be read subject to the caveats set out in the judgment of the Master of the Rolls.
>
> (1) On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs.
>
> (2) If awarding costs against the claimant, the judge should consider whether they are to include preparation costs in addition to acknowledgment costs."

154. In terms of the views of the Master of Rolls, further on in the report, I think the most appropriate reference is paragraph 29, where the Master of the Rolls concurs with that guidance given by Sedley LJ at paragraph 21 above. He says:

> "I entirely agree with the guidelines set out by Sedley LJ at paragraph 21 above. I would however add one note of caution. It does seem to me that costs should ordinarily follow the event and that it is for the claimant who has lost to show that some different approach should be adopted on the facts of a particular case. That principle is supported by the decision and reasoning of Dyson J in R v Lord Chancellor, ex p Child Poverty Action Group [1999] 1 WLR 347 at 355H-356E. That passage concludes as

follows:

> '... In considering whether, and in what circumstances, there should be a departure from the basic rule that costs follow the event in public interest challenge cases, in my view it is important to have in mind the rationale for that basic rule, and that it is for the applicants to show why, exceptionally, there should be a departure from it.'"

155. The reasons for the departure are set out, my Lord, bearing in mind the entirely public nature of the case and the considerable public concern that has surrounded it, and indeed the public issues relating to safety that have been ventilated.

156. If I could refer briefly to the Aarhus Convention, the overriding obligation is that the costs of environmental litigation should not be made prohibitive.

157. MR JONES: My Lord, I apologise for rising, my learned friend has already been supplied with authority in the context of a protective costs order. The Aarhus Convention makes no difference to orders of costs in judicial review and planning matters. It is already 7 minutes to 4. It would seem quite inappropriate to go into something when there is Court of Appeal authority saying it will not assist your Lordship.

158. MR POWELL: I do not follow that, my Lord. It is clearly a Treaty obligation that costs of the litigation should not be prohibitive, and should not have an effect on such claims by prohibitive levels of costs.

159. MR JUSTICE HICKINBOTTOM: Well, I think Mr Jones' point was how long is this going to take?

160. MR POWELL: I am almost done, my Lord. It is a short point in terms of Aarhus that the Treaty obligations in cases precisely such as this -- the level of costs should not be prohibitive. I raised that already with regard to the second set of costs. The same principle would apply to the defendant as well. In my submission, I would invite your Lordship, on the basis of that, in considering the application for an award of costs, to either make an order for no costs, or costs if reduced in your Lordship's discretion would be such that these would not be prohibitive in the circumstances in terms of bringing claims in the public interest.

161. MR JUSTICE HICKINBOTTOM: Yes, I have the accounts of the first claimant. They have assets of about £200,000; is that right?

162. MR POWELL: They do, my Lord. I think the point to bear in mind relating to the assets that have been accumulated is the nature of the CPRE. These assets have been accumulated over a considerable amount of time by fund-raising activities, by particular individual donations that have been patently built-up over a period of time. They are committed. The CPRE, through its Wiltshire branch, is involved in far more than litigation, of course. It has its own project work to carry on, and that is all fully committed. They have the hope of establishing this in obtaining the facilities for proper administration of a modest sort, and to view all of the resources that have been

assiduously built up over the years through fund-raising, public donation and voluntary work, that would have a very demoralising effect on the good work that is done by the organisation. It would be set against the many hours of voluntary work that volunteers put in, advancing what I think can only be regarded as laudable objects of the charity.

163. So I would not see the sum that is there in the coffers, as it were, as being something that would readily go to litigation. Some apportion of it, perhaps, in your Lordship's discretion, but one needs to be aware of the demoralising effect that it would have on the volunteers, who give their time to the organisation, for example.

164. MR JUSTICE HICKINBOTTOM: Thank you.

165. MR JONES: My Lord, the estimated costs of this case to Swindon Council are £45,000. They have been disclosed. That is approximately twice what a typical -- and I do not mean a simple -- a typical judicial review in which a local authority was represented by junior counsel would cost. I would like to deal, first of all, with the impact of that on Swindon; and secondly, why it has come about that those costs are so high. As far as the impact on Swindon is concerned, you have heard it urged that the claimant is a charity. Swindon is a unitary authority.

166. MR JUSTICE HICKINBOTTOM: I know.

167. MR JONES: Is a unitary authority. The bulk of its expenditure goes on expenditure that, if it were a private body, would be charitable: the two biggest items being education and social services, and then there is housing, parks, libraries and so on.

168. MR JUSTICE HICKINBOTTOM: I am sorry, I only shook my head, Mr Jones, because I just saw this coming. It is not to denigrate your submissions, but I could see this submission coming from Swindon.

169. MR JONES: Of course. My Lord, what it actually means if Swindon bears £45,000 of costs is £45,000 less. I do not know where that will be cut, but £45,000 is the annual cost of employing two people in a very large number of jobs within a local authority. We all know the redundancies in local authorities. We all know that there are jobs which are not being filled because of economic circumstances which are not likely to change. Why are the costs so much greater than usual? My Lord, in my submission it is abundantly obvious why, and it is what I submit was the utterly irresponsible conduct of proceedings by the claimants. There has been a mass of issues and not the slightest attempt to weed out the utterly hopeless: the no pedestrian facilities, when they are sitting there on the plan in front of them; a structure plan of the most general nature said to be not complied with. The utterly hopeless was kept in, and what in fact happened within this litigation is that this so-called poor body was paying people to go out and fish for more information. Ms Foster was sent, as her witness statement says, to go and look at the environmental statement and try and find out other things wrong. Mr Orchard got people to look at plans to try and find other things wrong that he had not mentioned before.

170. What should have happened is that this case could have been dealt with on the basis of what was said at the time of the discharge report: in other words, Mr Orchard's observations then; not four subsequent witness statements, two of which have been put in without any attempt to get leave for the fact that they are after the deadline set by Burton J. The idea that this is a body which is stuck for cash just does not ring true in the context of what it has done -- the willingness to pay experts to go and find out new grounds.

171. Now, my learned friend has said it is a charity. That is true. It is also an unincorporated association. There have been numerous requests from my instructing solicitors, as one would expect with an unincorporated association, at the time seeking protective costs orders, for means of its membership, and they have been declined. It is perhaps not surprising that they have been declined when one looks at Mr Awojobi's witness statement at pages 639 to 641 of the bundle, where he deals with the means of the individual members. One of those members is actually the wife of someone on the Sunday Times Rich List of people. Mr Buxton's reply was that he did not think she was a Committee member, nonetheless she has been present throughout this hearing.

172. So the first point, my Lord, what has effectively been done is to look simply at the charity's accounts, the claimant's accounts -- I should also say nothing, no evidence has been given of Mr Yates' financial means, and nothing has been said by my learned friend as to what they are. He simply relied on charity accounts and not membership of an unincorporated association.

173. The next thing that is said by my learned friend is no private interest. Well, that is not the understanding of my client. The understanding of my client is that the motivating effect for these whole proceedings is the desire not to have the tunnel under the M4 because the tunnel under the M4 is feared to be a Trojan horse which will lead to housing closer to other people's houses.

174. MR JUSTICE HICKINBOTTOM: Yes, south of the M4.

175. MR JONES: Yes, south of the M4, which is most certainly a private interest. Then there is talk about the demoralising effect on a body. Well, this really is not a body, in my submission, which has conducted this litigation responsibly. It is very important for the sort of Councils I represent, which are often like Swindon from the poorer parts of their regions, that they do not end up paying money which normally the losing party would pay, when they are the Council, in Swindon's case, in one of the poorest parts of the south west, or many of its parts are, and the people objecting are from much more prosperous parts of their region. It goes against, in my submission, basic principles of fairness.

176. My learned friend relied on Aarhus, and I have not been able to locate the skeleton argument for the interested party, which I believe referred to the Court of Appeal authority which pointed out that Aarhus does not make any difference to the normal principles that should apply in cases. But, in any event, for the costs to be prohibitive, one must know the means of the membership of the first claimant unincorporated

association which have been withheld despite being asked for, and the means of Mr Yates, which has been withheld despite being asked for.

177. My Lord, those are my submissions.

178. MR LOCKHART-MUMMERY: My Lord, can I make three or four very brief points, obviously going in particular to my client's interest. My Lord, first, the reference to Berkeley in the Court of Appeal, which your Lordship has just been given, that of course is a decision of that court on the specific facts of that case. Each case obviously in relation to costs, as Lord Lloyd indicated, turns on its own facts. My Lord, page 52 of the extract that has been put before you makes it clear that the Court of Appeal in that case was dealing with the first of the Lord Lloyd factors; that is to say, the separate issue. I have made it clear right from the outset of this application that I do not feel I can rely on the separate issue; I rely on an independent interest that reasonably needed its own protection.

179. My Lord, second, so far as the reference to the protective costs order skeleton by ourselves, can I just re-emphasise that we have made it clear throughout that, recognising the Bolton principles, we would seek an order for costs, and as recently as page 1228 of the bundle, which is in file 6 if your Lordship needs to turn it up but I do not think it is necessary, as recently as May of this year my instructing solicitors made it clear again to the claimants' solicitors our pleadings make it clear we intend to seek costs:

> "We accept it is entirely a matter for the court's discretion, but I regret that I cannot give your client's any comfort in that regard."

180. My Lord, third, I would rely on but will not repeat the salient points that my learned friend has just made in relation to means lying either within or behind the first claimant, and Burton J at the permission stage, and dealing initially with a PCO application, was very impressed by Mr Awojobi's material.

181. My Lord, fourth, reliance on the public interest nature of this claim, I respectfully suggest that that is utterly negated by your Lordship's findings effectively in two respects in your Lordship's judgment. Without going as far, as I understood it, to find that the claim was brought improperly, you have found that it was "at best misconceived", and your Lordship has also found that all the grounds should be dismissed as being without merit -- I choose a phrase that your Lordship used, I think, for each ground -- and indeed going on to find that the relevant document in this case, the discharge report, was impeccable. My Lord, those are my further submissions.

182. MR JUSTICE HICKINBOTTOM: Yes, thank you.

183. Having dealt with substantive matters, I now come to deal with the question of the costs of this application, which has occupied the court for three days.

184. It is trite to say that costs are in the discretion of the court, but that, generally, as a matter of principle, a losing party pays a successful party's costs of the claim. (CPR Rule 44.3(1) and (2)).

185. In environmental claims, it has been submitted by Mr Powell that that general principle is affected by Davey v Aylesbury Vale District Council [2007] EWCA Civ 1166, in which Sedley LJ said (at paragraph 21(1)) that where a judicial review claim is brought partly or wholly in the public interest, albeit unsuccessfully, that "may properly result in a restricted or no order for costs". He also referred to the judgment of the Master of the Rolls, particularly paragraph 29, in which, although he "entirely agreed" with Sedley LJ at paragraph 21, it seems to me he did not give a ringing endorsement to paragraph 21(1).

186. It seems to me that, in environmental claims in which the claimant brings proceedings in the public not a private interest, that is just one relevant factor to be taken into account in considering how the court's discretion as to costs should be exercised. I will take that into account, together with the other factors which I consider of particular importance in this case.

187. Those factors include, first, the conduct of the claimants. It seems largely to have been accepted - and in any event I have found - that, by bringing these proceedings, the claimants primary aim was to challenge earlier (unchallengeable) decisions in relation to the westerly access route. Furthermore, I also have to take into account that this case has not been pursued by the claimants on a consistent basis. The basis of it has indeed been evolving during the hearing itself.

188. Second, looking at the inter partes costs with the defendant, I take into account that Swindon too is a public body with civic responsibilities' and that Swindon as an authority covers a particularly poor area of the country, as was evidenced in this claim. For them not to recover their costs will detract from their other public functions.

189. Thirdly, I take into account the merits of the claimants' case, which, as will be clear from the judgment, I considered weak.

190. Fourth, I take into account the importance of not making environmental claims impossible to bring because of the costs burden. In considering that, I have taken into account the purpose of this charity - which includes bringing environmental claims such as this.

191. In all of those circumstances, and bearing in mind all of those factors as between the claimant and the defendant, I am firmly of the view that the appropriate order is that the claimants pay the defendant's costs of the application. I do not propose to impose any restriction upon that order.

192. I find the position with regard to the first interested party, Taylor Wimpey, more difficult. Bearing in mind the size of the development and the importance of this application to them as developers, it is almost inconceivable that they would not have had the greatest interest in this application. However, bearing in mind the guidance of Lord Lloyd in Bolton Metropolitan District Council v Secretary of State for the Environment [1995] 1 WLR 1172, I do not consider this is a case in which it would be appropriate to make a costs order that the claimants pay the interested party's (the Developer's) costs.

193. I have taken into account the importance of this issue to the Developer, and also the changing nature of the case that could have resulted in the position of the Developer changing during the course of the hearing. But, in the circumstances of this case, there was no separate interest here to the represented. Any material put forward by the interested party could have been put forward by or through the defendant.

194. In all of the circumstances, including the public nature of the first claimants, I do not consider that this is one of the exceptional cases falling within Bolton in which the claimants should be required to pay more than one set of costs. The other interested parties have of course played no part in the proceedings and make no application for costs.

195. That deals with costs. Any other applications?

196. MR POWELL: Indeed, my Lord. If I may, could I trouble your Lordship with an application for permission to appeal?

197. MR JUSTICE HICKINBOTTOM: Yes.

198. MR POWELL: I have had only a short amount of time to consider the detail of your Lordship's judgment. It is probably best in the circumstances if I restrict the grounds of my application that this is a matter which may interest the Court of Appeal, and would rightly attract their attention, on account of the safety grounds and the public interest, particularly in regard to the European points that have been raised.

199. MR JUSTICE HICKINBOTTOM: Any other grounds?

200. MR POWELL: No, thank you, my Lord.

201. MR JUSTICE HICKINBOTTOM: I will not give permission to appeal. For the reasons I set out in my judgment, I consider the safety ground of poor merit from the claimants' point of view. Given all of the reasons set out in the substantive judgment, including the expert evidence which I was free to give weight as I considered fit, and I do not consider that it is arguably wrong. Furthermore, I do not consider that it is in the public interest that the Court of Appeal considers those matters in any event.

202. MR POWELL: Very well, my Lord. Could I ask for one matter, if I may, relating to appeals? There is the somewhat tight time limit for lodging an appeal to Court of Appeal on paper. That is of course very difficult to do in advance of seeing the transcript of your Lordship's judgment. Could I ask that the time to make an application to the Court of Appeal runs from the date of receipt, or indeed the date of issue, of the court's written judgment. We will be applying at once for a transcript of your Lordship's judgment.

203. MR JUSTICE HICKINBOTTOM: It is probably a matter for you, Mr Lockhart-Mummery. Urgent finality is of course particularly important in this case, for both of you but for practical purposes particularly, I suspect, for the Developer.

204. MR LOCKHART-MUMMERY: Yes, my Lord, it is, and I think we have all been able to make the most copious notes of your Lordship's judgment, which I think is entirely clear. So I do not sympathise with this application.

205. MR POWELL: If I might raise one point, I was recently before -- well, not so recently -- before Sullivan J, and we asked for a similar order of that nature, and he thought this was entirely sensible and even ventured this might be the standard form of order. He thought it is such a sensible provision. Of course, the matter all catches up when one makes a paper application, one needs the transcript anyway in order to proceed further to the Court of Appeal. The matter is greatly facilitated if there is a printed and approved copy of your Lordship's judgment to take forward and consider, and may even result in no appeal at all.

206. MR JUSTICE HICKINBOTTOM: I am going to refuse the application. I think I can - and if I can I will - direct that the transcript be expedited. I will speak to the transcriber because there may be ways in which we can expedite it even more than usual, and I will turn the transcript around quickly. But if you want more than the provided time, you will have to get it from the Court of Appeal, I am afraid.

207. MR POWELL: That is very helpful, my Lord, thank you.

208. MR JUSTICE HICKINBOTTOM: Anything else?

209. MR POWELL: No, my Lord.

210. MR JUSTICE HICKINBOTTOM: Good. Thank you.