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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY BELFAST CHAMBER OF TRADE AND COMMERCE, BELFAST CITY COUNCIL AND NORTH DOWN BOROUGH COUNCIL FOR JUDICIAL REVIEW

-AND-

IN THE MATTER OF A DECISION BY THE MINISTER FOR THE ENVIRONMENT FOR NORTHERN IRELAND TO APPROVE PLANNING PERMISSION SOUGHT UNDER PLANNING APPLICATION Z95/1088 ("D5") AND ANY SUBSEQUENT GRANT AND PLANNING PERMISSION ON FOOT OF THE MINISTER'S PRESS ANNOUNCEMENT

COGHLIN J

The applicants in this case are Belfast City Council, Belfast Chamber of Trade and Commerce and North Down Borough Council and they seek judicial review of a decision by the Minister of the Environment for Northern Ireland ("the Minister") dated 21 March 2000 when the Information Service of the Department of the Environment released a statement on behalf of the Minister announcing that "outline planning permission would be granted for the proposed new retail development on land within Belfast Harbour Estate known as 'D5' at Airport Road, Belfast".

On 14 November 1995 Aquis Estates Limited, Anglia and General Developments Limited and Belfast Harbour Commissioners submitted an application for planning permission to the Department of the Environment to develop the area known as D5. D5 comprises some 52.4 acres on the County Down side of the Belfast Harbour Estate and the main proposals were for a retail warehouse park (including a garden centre) of some 250,000 square feet, a retail food store of some 65,000 square feet and leisure buildings, including a multi-plex cinema, of some 150,000 square feet. Other elements included fast food outlets, an adventure playground, a petrol filling station, car parks, service yards and landscaping. D5 lies to the west of the main Belfast/Bangor Road between Tillysburn roundabout and Holywood.

A brief chronology of the planning application is as follows:

(*1*) The Department of the Environment ("the Department") designated the planning application as one of major importance and requested the Planning Appeals Commission to conduct a public local inquiry in accordance with Article 31(2) of the Planning (Northern Ireland) Order 1991 ("the Planning Order").

(*2*) In June 1996 the Planning Appeals Commission was already conducting a public inquiry into an application by Tesco Stores Limited for the development of a food store, petrol filling station and associated works at Knocknagoney Road, an area lying on the opposite side of the dual carriageway from D5. Accordingly, the Planning Appeals Commission ("PAC") decided to consider the reports from both inquiries in conjunction with each other.

(*3*) The public inquiry into the D5 proposals lasted for some 14 days between 3 December 1996 and 14 January 1997. The inquiry was conducted by a member of the Planning Appeals Commission and included representations from a number of objectors.

(*4*) On 22 May 1997 the Appointed Member reported to the PAC and the PAC reported to the Department on 29 July 1997.

(*5*) The Appointed Member, who presided over the inquiries, and the PAC recommended that outline planning permission should be granted subject to conditions and, after carrying out its own evaluation, the Department's Planning Service also recommended that approval should be granted.

(*6*) On 25 January 1998 the Northern Ireland Information Service issued a press statement announcing that the Environment Minister, then Lord Dubs, fully endorsed the views of the PAC and that he intended to grant planning permission in respect of D5 subject to appropriate conditions.

(*7*) On 13 April 1999 formal planning permission was granted.

(*8*) On 21 June 1999 the Belfast City Council and Belfast Chamber of Trade and Commerce applied for judicial review of the decision to grant the D5 planning permission and on 9 July 1999 the decision to grant planning permission in respect of the D5 proposals was quashed by Kerr J.

(*9*) Planning permission had been granted in respect of the Tesco Knocknagoney proposals on 28 November 1998 and work had commenced on that development on 7 December 1998. Subsequent to the quashing of the D5

permission Messrs Aquis Estates Limited, Anglia and General Developments Limited and Belfast Harbour Commissioners sought judicial review of the permission granted to Tesco at Knocknagoney, but this was refused by Kerr J on 17 September 1999.

(*10*) The D5 proposals have subsequently been reconsidered by the Department and it is the Minister's decision of 21 March 2000 to approve those proposals which is the subject of challenge in these proceedings.

Mr Deeny QC and Mr Fitzpatrick appeared on behalf of the applicants, the respondent was represented by Mr Morgan QC and Mr Maguire while Mr Weir QC and Mr Shaw represented Aquis Estates Limited and the other notice parties. I am grateful to all three sets of counsel for their carefully prepared and well constructed submissions from which I derived very considerable assistance.

Mr Deeny QC grounded the applicants challenge to the impugned decision upon three distinct grounds. In the first place, Mr Deeny QC argued that the decision had been reached in contravention of the Department's own policies, secondly, that the decision gave rise to a real danger of bias on the part of the Department and that, thirdly, there had been a failure to obtain essential information, namely, an up-to-date retail impact assessment in relation to the effects of the proposal on Holywood, Connswater and Dundonald.

Policy failures

I shall set out in full those policies of the Department upon which debate focused in these proceedings.

"Planning Policy Statement 5 (PPS5) – Retailing and Town Centres

Objectives and Approach

5. The Government's policy objectives for town centres and retail developments are:

- to sustain and enhance the vitality and viability of town centres;

- to focus development, especially retail development, in locations where the proximity of businesses facilitate competition from which all consumers are able to benefit and maximises the opportunity to use means of transport other than the car;

- to maintain an efficient, competitive and innovative retail sector; and

- to ensure the availability of a wide range of shops, employment services and facilities to which people have easy access by a choice of means of transport.

6. The Department is committed to allowing freedom of choice and flexibility in terms of retail development throughout Northern Ireland and to assist the provision of a wide range of shopping opportunities to which the whole community has access. It is not the function of land use planning to prevent competition among retailers or between methods of retailing nor to preserve existing commercial interests. However, the Department recognises the value and importance of established shopping areas in town, district and local centres, and is therefore committed to protecting their vitality and viability.

Development plans

9. This planning policy statement will take precedence over existing development plans, in relation to retail planning policy and policies for town, district and local centres. Future development plans will take account of and be consistent with the policies contained within this Statement. The Planning Policy Statement and development plans provide an important basis for deciding planning applications.

Planning for retail developments

38. Town centres will be the preferred location for major comparison shopping and mixed retailing development proposals. The availability of suitable sites within the town centre, in particular those which have been identified in the development plan, will be an important consideration where development is proposed outside the town centre. Applicants should be able to demonstrate that all potential town centre sites have been thoroughly assessed.

39. Major proposals for comparison shopping or mixed retailing will only be permitted in out-of centre locations where the Department is satisfied that suitable town centre sites are not available and where the development satisfies all the following criteria:

- complements or meets existing deficiencies in ` the overall shopping provision;

- is unlikely to lead to any significant loss of investment in existing centres;

- is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function;

41. Food supermarkets and food superstores often play a vital role as an anchor store in maintaining the quality and range of shopping in existing centres. In these locations they also provide an essential service for less mobile members of the community. Food

superstores however, rely on the close proximity of adequate car parking and for this reason locations within existing town centres may be inappropriate. Edge-of-centre sites may provide a preferred alternative in many towns and in the interests of maintaining and strengthening the adjoining town centre this may require the re-use of derelict land or the redevelopment of suitable sites. Proposals for food supermarkets and food superstores on sites outside town centres, including edge-of-centre sites, may be acceptable provided that the proposal satisfies all the criteria set out at paragraph 39. In addition, the availability of suitable sites, for the proposed development, within the town centre, in particular those which have been identified in a development plan, will be an important consideration.

43. Favourable consideration will, therefore, be given to proposals for retail warehouses of an appropriate scale on suitable sites in edge-of-centre locations. In exceptional circumstances, a retail warehouse proposal elsewhere in an out-of-centre location may be acceptable, where it cannot be practically or appropriately accommodated in either the town centre or on the edge of a town centre, provided that the proposal satisfies all the criteria set out at paragraph 39. In addition, the proposal must be of an appropriate scale for the location."

Belfast urban area plan 2000

"Policy S4 – Retail Warehouse Parks

Large retail park development in off-centre locations is not normally considered appropriate to the scale of Northern Ireland and will only be permitted in the most exceptional circumstances if:

- It provides a specialist facility that serves a wide area of Northern Ireland

- Goods sold are primarily to cater for 'roof rack' demand ie. Bulky goods not so readily purchased in the City Centre or local centres, such as furniture, 'white' goods or DIY materials and equipment;

- The retail warehouse park is not of a large enough scale or nature to impact seriously on the City Centre, nearby town centres or established local centres;

- Its form is not that of a local 'High Street' which might undermine an existing shopping centre."

Article 3(1) of the Planning (Northern Ireland) Order 1991 ("the 1991 Order") provides that one of the general functions of the Department with respect to the development of land shall be the formulation and co-ordination of policy for securing the orderly and consistent development of land and the planning of that development. Planning policy statements are issued by the Department from time to time in accordance with this statutory function.

Planning policy statement 1 entitled "General Principles" confirmed that the contents of such statements will be taken into account in preparing development plans and will also be material to decisions on individual planning applications and appeals. Thus, such policy statements are clearly material considerations which are required to be taken into consideration by the Department when dealing with planning applications in accordance with Article 25 of the 1991 Order. Paragraph 59 of PPS1 states that the Department's guiding principle in determining planning applications is that development should be permitted, having regard to the development plan and all other material

considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance.

The status of this type of policy statement was considered by Carswell LJ, (as he then was) in Re F A Wellworth and Company Limited Application (unreported NI 1996) in which he confirmed his view that they should not be regarded in the same way as legislation or lawfully binding conditions requiring mandatory compliance, but that rather they should be seen as setting out factors to which the Department must have regard in determining whether to grant planning permission.

In the Court of Appeal this approach was adopted by Kerr J who said, at page 537:

> "As Carswell LJ acknowledged, the policy is not to be construed as if it were a statutory provision carrying a precise and definite legal meaning. Its purpose is to describe the approach which the Department as Planning Authority will take to certain types of proposed development. It exists to guide planning officers, prospective developers and other interested parties. Its interpretation must be approached on this basis. It should not be regarded as akin to a statutory instrument bearing a single immutable meaning, irrespective of the circumstances in which it is to be applied." (Re FA Wellworth and Co's Application [1996] NI 509).

In the same Court of Appeal judgment Hutton LCJ referred to the well known remarks of Lord Hoffman in Tesco Stores Limited -v- Secretary of State for the Environment [1995] 2 All ER 636 when he said, at page 657:

> "The law has always made a clear distinction between the question of whether something is a material consideration and

> the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process. This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely, that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority of the Secretary of State."

These words were cited with approval by Lord Clyde in the course of his judgment in City of Edinburgh Council –v- Secretary of State s[1998] 1 All ER 174 and I also bear in mind the words of Lord Hope in the same case when he said, at page 177:

> "It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of Section 18A of the 1972 Act, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in Simpson –v- City of Edinburgh Corporation 1960 SC 313 at 318L:
>
> > 'Slavishly to adhere to it.'
>
> It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about control of development will be taken in accordance with what it has laid down. But some of its

> provisions may become outdated as national policies change, and circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between provisions on the one hand and other material considerations on the other which favour development, or which may provide more up-to-date guidance as the test which must be satisfied, will continue, as before, to be a matter for the planning authorities."

In the course of mounting his attack upon the impugned decision Mr Deeny QC focused upon three alleged contraventions of relevant policy.

(*a*) The policies relating to retail warehouses

The D5 application includes some ten retail warehouse operators occupying, in total, approximately 250,000 square feet. It appears that this is the largest application for retail warehouse space ever made in Northern Ireland. The application submitted by the Applicants referred to a "retail warehouse park" and, consequently, Mr Deeny QC submitted that the relevant policy was policy S4 of the Belfast urban area plan rather than paragraphs 42 to 44 of PPS5. He argued that neither the appointed member nor the Planning Service had dealt properly with the concept of "exceptional circumstances" and relied on the more restrictive test contained in the former policy of permitting retail warehouse parks only in "most exceptional circumstances". Mr Deeny QC submitted that, in order to satisfy this requirement the Applicant had to establish exceptional circumstances other than the location of the retail warehouses outside a town centre.

I have carefully read paragraphs 13.2.10 to 13.2.14 of the report of the Appointed Member together with paragraph 4 and paragraph 8 of the report from Anne Lockwood of the Retail Unit of the Planning Service to the Management Board dated 21 October 1999 ("the Lockwood Report") insofar as they deal with this policy issue and, having done so, I do not think that the approach adopted by the Department and subsequently communicated to the Minister can be condemned, in accordance with the principles established in the authorities cited above, as either Wednesbury unreasonable or Wednesbury irrational. Accordingly, I reject the submissions of Mr Deeny QC on this point.

(b) **Failure to comply with the "mandatory" requirements of paragraph 39 of PPS5**

A central element to the D5 proposal is a food superstore to be operated by Sainsburys which is to occupy some 65,425 square feet. This represents a net sales area of 40,000 square feet of which 32,000 square feet was proposed for convenient goods and 8,000 square feet for comparison goods. Mr Deeny QC drew my attention to the requirement in paragraph 41 of PPS5 that:

> "Proposals for food supermarkets and food superstores on sites outside town centres, including edge-of-centre sites, may be acceptable provided that the proposal satisfies all the criteria set out at paragraph 39."

He also referred me to the requirement in paragraph 39 of PPS5 that "major proposals for comparison shopping or mixed retailing will only (my underlining) be permitted in out of town locations … where the development

satisfies all (my underlining) the following criteria …". He submitted that this wording clearly indicated a mandatory policy and that such an interpretation was supported by the purpose and intention of PPS5 namely, the protection and enhancement of the vitality and viability of town centres. Mr Deeny QC reminded the court that at paragraph 3(b) of his affidavit of 2 July 1999 Mr Hugh McKay, then Director of Professional Services in the Department's Planning Service, recorded that:

> "At paragraph 5 of my first affidavit I dealt with the approach to the test in paragraph 39 of PPS5. For the avoidance of doubt I wish to make it clear that the approach to these tests requires the Department to be satisfied about each of the criteria."

Mr Deeny QC accepted that, depending upon the circumstances of a particular proposal, there might well be an inherent tension between the first two and the second two policy objectives set out at paragraph 5 of PPS5 but he submitted that, insofar as out of centre superstores were concerned, this tension was resolved by the requirements set out in paragraph 39. Mr Deeny QC noted the "countervailing factors" identified in the memorandum of 23 February 2000 from Mr McKenzie, Deputy Secretary to the Permanent Secretary and to the Minister but argued that any such factors would be taken into account during the course of a proper application of paragraph 39 of PPS5.

In re-assessing the D5 proposal the Lockwood Report considered that the original inquiry by the Appointed Member had misapplied retail policy in considering whether the applicants had satisfied the Department that the

development was unlikely to lead to a significant loss of investment in an existing centre namely, Holywood. Referring to the proposal to develop a supermarket at Marine Parade in Holywood which had not proceeded and, therefore, represented a potential loss of investment, Mrs Lockwood observed, at paragraph 7.15 of her report:

> "It is considered inappropriate to judge the loss of investment on the basis of the current convenience function of the town centre and in this instance the Appointed Member appears to have mis-applied retail policy in considering whether the proposal satisfies this criteria."

Mrs Lockwood concluded that the loss of the Marine Parade investment was significant to Holywood town centre and that, consequently, the proposal failed to satisfy the paragraph 39 criteria in this respect. Mrs Lockwood also considered that the D5 proposal failed another of these criteria insofar as it was likely to undermine the convenience shopping function of Holywood and, as a result, was likely to have an adverse impact on the vitality of the centre. Mrs Lockwood also considered the likely impact of the D5 proposal on the centres at Connswater and Dundonald and, at paragraph 7.25 of her original draft of her report, she expressed the conclusion that: "In view of the likely impact on Holywood, Connswater and Dundonald it is considered the proposal fails to satisfy this criteria". The report in the form in which it was ultimately presented to the Minister was substantially amended and in the amended version Mrs Lockwood referred rather to "concerns" about the impact of the proposal on the

centres at Connswater and Dundonald. I propose to deal with the Lockwood Report in further detail at a later stage in this judgment.

On 25 January 2000 Mr McKay, the current Chief Executive of the Planning Service forwarded Mrs Lockwood's report to Mr McKenzie, the Deputy Secretary, together with the views of the Planning Service. On 23 February 2000, in his turn, Mr McKenzie forwarded a number of documents to the Permanent Secretary and the Minister including the Lockwood report, the comments of the Planning Service Management Board, expressed by Mr McKay, together with his own views. Both Mr McKay and Mr McKenzie considered that the accepted failures to comply with paragraph 39 of PPS5 were "marginal" and fell to be considered in the context of a number of "countervailing factors". It is clear that these views were ultimately accepted by the Minister.

It seems to me that the emphasis laid by Mr Deeny QC in his submissions upon the "mandatory" nature of the criteria contained in paragraph 39 of PPS5 is inconsistent with the principles set out in the authorities cited above. Mr Deeny QC referred to a risk to the Rule of Law if there was a public perception that laws were not be observed and followed. However, in my view, it is important to bear in mind in the planning context that planning policies, in themselves, do not confer legally enforceable rights or duties. Rather, they provide guidance for planning authorities, applicants and interested members of public as to the approach that the planning authorities will generally adopt when considering various types of planning application. The circumstances in which planning

applications may arise are infinitely varying and the task of formulating, co-ordinating and implementing policy for the orderly and consistent development of land is both difficult and demanding and may frequently require the resolution of complex problems produced by competing policies and/or conflicting interests. Planning policies are but one of the material considerations that must be taken into account by the planning authority in accordance with the 1991 Order. Consequently, I reject Mr Deeny QC's submission that compliance with the criteria contained in paragraph 39 of PPS5 is mandatory to the extent that any failure to comply automatically prohibits the granting of this type of planning permission.

The "complements" test

As noted above, the first matter of which the Department must be satisfied in accordance with paragraph 39 of PPS5 is that the relevant proposal "complements or meets existing deficiencies in the overall shopping provision". During the case there was considerable debate as to the true interpretation of the "complements test" and it is clear that this is a concept about which the Minister expressed serious concern – see, for example, the memos of the Ministerial meetings on 6 March 2000 (Exhibit SQ2) and 13 March 2000 (Exhibit SQ3). I think that it is important to take into account the following matters in relation to this criterion:

(*1*) The criterion is disjunctive in that the proposal must either complement or meet existing deficiencies in the overall shopping provision. The Commissioner

conducting the original public inquiry into the D5 proposal considered that it did meet an existing qualitative deficiency and, therefore, she did not consider the "complements" limb of the criterion. No case for a quantitive deficiency has ever been made out.

(*2*) The then Chief Executive of the Planning Service who forwarded the report of the public inquiry to the Deputy Secretary under cover of his own report of 11 February 1998 concluded on behalf of the Planning Service that no qualitative deficiency had been established and that neither D5 nor Tesco proposal complemented or met any existing deficiency in the overall shopping provision.

(*3*) When reporting, in turn, to the Minister on 12 February 1998, Mr McKenzie, Deputy Secretary, took no issue with the opinions expressed by the Chief Executive.

(*4*) The Lockwood report was commissioned by Mr McKay, the current Chief Executive, for the purpose of providing a separate re-assessment of the D5 proposal and was prepared within the Specialist Retail Unit at Planning Service Headquarters. Mrs Lockwood noted that, during the original public inquiry, the Department had accepted that, in principle, the proposal could complement the existing shopping provision by increasing choice and competition. However, she noted that, with the advent of the Tesco superstore at Knocknagoney, the D5 proposal might simply represent duplication.

(*5*) When submitting Mrs Lockwood's report to Mr McKenzie, on 25 January 2000 Mr McKay noted Mrs Lockwood's conclusion that the D5 proposal did not meet a qualitative or quantative deficiency in overall shopping provision, but went on to observe, somewhat cryptically, "there is much less certainty as to whether the proposal fails the complements test". No further consideration or definition of this test was contained in this memorandum.

(*6*) No definition or discussion of the "complements" criterion appeared in the memorandum submitted by Mr McKenzie, Deputy Secretary, to the Permanent Secretary and the Minister on 23 February 2000.

(*7*) No consideration of the criterion was contained in the submission by the Permanent Secretary to the Minister on 1 March 2000.

(*8*) In view of the fact that the Department had concluded that D5 did not meet any existing deficiency in the overall shopping provision and that, therefore, unless the proposal satisfied the "complements" element, the proposal would fail the first criterion required by paragraph 39 of PPS5, I find the omission to include any analysis of this element in the written submissions of any of the senior department officials of the Planning Service surprising, to say the least. On the other hand, I do not think that it is at all surprising that the Minister clearly required further discussion of the "complements" test.

(*9*) The only guidance as to what the Minister may have been told about the meaning of this test appears to be contained at paragraph 15 sub-paragraph (*i*) of Mr McKay's affidavit of the 19 May 2000 in which he records that: "Following

discussion with the Minister regarding this particular test it was concluded that the proposal met the complements test as it offered a beneficial retailing opportunity providing choice and competition." This appears to indicate the basis upon which Mr McKay had resolved the "uncertainty" referred to in his memorandum of 25 January 2000. I note, in particular, that there was no reference to the problem of "duplication" raised by Mrs Lockwood.

(*10*) In view of the difficulties which seemed to exist with regard to obtaining a clear definition of the "complements" criterion from the Department, I asked for this point to be dealt with specifically by Mr Morgan QC. Mr Morgan QC referred me to some observations by the Department submitted in the course of an Article 31 inquiry relating to the NIE lands at Danesfort contained in Book C Item 10. Paragraph 1.12 of this document stated, in relation to that proposal, that the Department would accept that the proposal would be likely to complement the existing retail facilities "by broadening the range on offer to consumers in South Belfast thus providing quality of provision advantages". Mr Morgan QC did not suggest that any such definition was given to the Minister in the course of his deliberations on the D5 proposal. In answer to specific questioning, Mr Morgan QC accepted that there was no significant difference between the range or type of products provided by the Tesco and Sainsburys food stores, other than the identity of the operator, and he agreed that a tenable approach would be to consider that permitting the D5 proposal at this stage would be to duplicate the superstore facilities offered by Tesco at Knocknagoney. However,

Mr Morgan QC submitted that an equally tenable view would be that the Sainsburys facilities, by simply providing competition, would "broaden the range available". In essence, Mr Morgan QC informed the court that the decision of the Minister was that the introduction of a superstore competitor in the market "trading head to head" with Tesco would be to the public benefit.

As I have already indicated above, I accept that, generally, Wednesbury is the relevant level of intensity to be applied when considering judicial review of the interpretation and application of planning policies. However, it seems to me that where the specific point of interpretation at issue is the natural and ordinary meaning of words, it may be that the range of reasonableness is somewhat narrower in that there may be only one or a very limited range of reasonable construction for the words in question. I bear in mind the words of Auld J in Northavon DC –v- Secretary of State for the Environment [1993] JBL 761 quoted by Kerr J in Re F A Wellworth & Company's Application [1996] NI 509 at 539 in the following terms:

> "The question for the court was whether his interpretation [the Secretary of State's] was not within the ordinary and natural meaning of the words in their context and was wrong in law, or, put it another way was Wednesbury or Pulhofer unreasonable, or, put in yet another way, resulted from his failure to have regard to a relevant and material consideration."

It seems to me that the starting point must be the dictionary definition of "complement" which is something that "completes, perfects, fills up or makes up a whole". In the context of paragraph 39 of PPS5 the term is used as an

alternative to meeting "existing deficiencies". In this context it seems to me that the true interpretation is that, while there may be no deficiency, the out-of-centre proposal may, in certain circumstances, broaden or make complete a pre-existing range of shopping provision. In my view, applying the legal principles stated, the simple addition of a competitor providing the same range of shopping provision as a pre-existing operator would not be a tenable, literal or contextual, interpretation of the term. I have come to the conclusion that the Minister appears to have been given defective advice by his senior officials as a result of which he misunderstood this aspect of the policy. Failure to properly understand a policy renders a decision as defective as if the decision-maker pays no regard to the policy at all – see Woolf J, as he then was, in Gransden v Secretary of State for the Environment (1986) JPL 519. Since satisfaction of the complements test was clearly one of the major elements in the Minister's decision the decision must be quashed upon that ground. Mr Morgan QC, supported by Mr Weir QC, submitted that the D5 proposal "overall" could be considered to pass the "complements" test, even if the foodstore did not. I express no view on this submission save to say that it was not what was put before the minister by his advisers nor was it what he decided

The risk of bias

In support of his submissions under this heading, Mr Deeny QC focused upon the role played by the Deputy Secretary of the Planning Service, Mr McKenzie.

Before the judicial review application brought by Belfast Chamber of Commerce and Belfast City Council relating to the planning permission originally granted for the D5 proposal the Department successfully resisted an application for discovery of documents. However, immediately prior to the hearing, on 7 July 1999, the Department produced an affidavit exhibiting a submission by the then Chief Executive of the Planning Service to Mr McKenzie, dated 11 February 1998 and a subsequent submission by Mr McKenzie to the then Minister dated 12 February 1998. The memorandum produced by the Chief Executive identified a number of ways in which both the D5 and Tesco proposals appeared to contravene policy requirements and policy objectives and recorded that the acceptance of two food store proposals at this location would be inconsistent with planning policy. Nevertheless, the memorandum went on the recommend that planning permission should be granted. Despite this obvious non-sequitur, Mr McKenzie referred only to "reservations" as to the impact of the proposals on the shopping centres of Holywood, Connswater and Dundonald and went on to advise that, on balance, permission should be granted. The matter proceeded before Kerr J who referred to the recommendation made by the Chief Executive as both "difficult to understand" and "mystifying". In relation to the memorandum produced by Mr McKenzie for the Minister Kerr J observed that it could "… scarcely have been more dismissive of the Planning Service's views". Kerr J considered that Mr McKenzie had not only failed to highlight the Planning Service's views but he

had misrepresented them insofar as it was suggested that the Planning Service entertained "reservations" about the matter when they clearly thought that the development would have a detrimental effect on the relevant centres. He also observed the Mr McKenzie's memorandum "conspicuously failed to deal with the conclusions of the Planning Service that the proposals were in conflict with PPS5". Mr Morgan QC, who had also appeared for the Department on that occasion, conceded that it was impossible to contend that the decision to grant planning permission had been validly made.

Against this background, Mr Deeny QC was sharply critical of the decision by the Department to afford Mr McKenzie a central role in the reconsideration of the D5 application. As I have already noted above, Mr McKenzie, as Deputy Secretary, was once again an important part of the conduit by which the Department's views were ultimately conveyed to the Minister. Mr Deeny QC sought to support his case of bias against Mr McKenzie by reference to a number of other planning applications in which Sainsburys had been concerned and in relation to which Mr McKenzie had also played an important role.

In R –v- Gough [1993] AC 646 the argument before the Appellate Committee was presented on the basis that there were two rival alternative tests for bias to be found in the authorities. The first was whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial by the defendant was not

possible and the second was whether there was a real likelihood of bias. Lord Goff, who gave the leading speech, reviewed the authorities and concluded that it was both possible and desirable that the same test should be applicable in all cases of apparent bias whether concerned with justices or members of other inferior tribunals or with jurors or with arbitrators. Lord Goff did not think it was necessary, when formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man because, the court, in this type of cases, personifies the reasonable man and, in any event, the court has a duty to ascertain the relevant circumstances from the available evidence which might well be knowledge which would not necessarily be available to an observer in court at the relevant time. He went on to observe, at page 670:

> "Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; …"

In R –v- Secretary of State for the Environment ex parte Kirkstall Valley Campaign Limited [1996] 3 All ER 304 Sedley J, as he then was, applied the test in R –v- Gough to an urban development corporation fulfilling functions as a planning authority. In R –v- Inner West London Coroner ex parte Dallaglio

[1994] 4 All ER 139 Simon Browne LJ derived a number of propositions from the decision in R –v- Gough. In the course of doing so Simon Brown LJ referred to Lord Goff's reference to bias as "unfairly regarded with disfavour" and said that he took this to mean "was pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue". The learned Lord Justice also re-emphasised the point made by Lord Goff that bias was insidious and quite capable of unconsciously affecting the mind of a person who thought himself to be acting impartially and in good faith.

In the course of his submissions Mr Deeny QC accepted on behalf of the applicants that they must establish a real danger of bias which affected (my underlining) the decision-maker. In so doing, Mr Deeny QC based himself upon Simon Brown LJ's ninth proposition set out at page 152d of his judgment in Dallaglio. At page 152d Simon Brown LJ said:

> "What must be established is the real danger of bias having affected the decision in the sense of having caused the decision-maker, albeit unconsciously, to weigh the competing contentions, and so decide the merits, unfairly."

Therefore, I propose to approach this aspect of the case by ascertaining the relevant circumstances and then asking myself whether, in the light of those circumstances, there was a real danger of bias on the part of Mr McKenzie, which affected the impugned decision, in the sense that he might unfairly have regarded the D5 proposal with favour because it involved Sainsburys.

The circumstances which I take into account are as follows:

(*a*) There is no suggestion by the applicants that Mr McKenzie had a pecuniary or proprietary interest in Sainsburys.

(*b*) I have read with care the material placed before me relating to Mr McKenzie's involvement in the "Sainsburys" developments at Coleraine, Londonderry and Newry. His involvement in these applications has been closely scrutinised by the applicants but, having done so, the applicant's solicitor, at paragraph 21 of his affidavit of 6 June 2000, was unable to ascribe any particular motive to Mr McKenzie and accepted that he might well "sincerely believe that investment in Northern Ireland by Sainsburys is in the interests of the community." This, of course, could be quite consistent with some of the policy objectives detailed at paragraphs 5 and 6 of PPS5.

(*c*) The remarks made by Kerr J in the course of giving judgment during the judicial review of the first D5 application constituted strong public criticism of the way in which the matter had been represented to the Minister by Mr McKenzie. I have carefully re-read the memorandum from the then Chief Executive together with the submission from Mr McKenzie and, having done so, I find myself in agreement with Kerr J's observations. However, I bear in mind that not only was the then Chief Executive's memoranda "difficult to understand" and "mystifying", while the document furnished by Mr McKenzie was both dismissive of and misrepresented the views of the Planning Service, but that the current attitude of the Department is that both documents were "deeply flawed" in that they failed to properly interpret planning policy or to

identify any relevant "countervailing factors". In short, the present attitude of the Department seems to be that had these memoranda recommended refusal rather than the grant of planning permission the decision would probably have been overturned on judicial review. In such circumstances, it is hardly surprising that Mr McKenzie and his fellow senior officials appear to have adopted a somewhat different approach to this re-assessment of the D5 proposals. There was clearly much to do if their professional reputations were to be redeemed. I also bear in mind that the Department originally granted planning permission both to D5 and to Tesco development at Knocknagoney.

(*d*) I take into account the fact that while Mr McKenzie, as Deputy Secretary, undoubtedly occupies a senior position in the Planning Service, his submissions had to pass through the Permanent Secretary before reaching the Minister who was the ultimate decision-maker.

(*f*) Mr Deeny QC relied upon the fact that, despite swearing two affidavits in these proceedings, Mr McKenzie had never put forward a justification of or explanation for his memorandum to the Minister in relation to the first D5 proposal which was the subject of critical comment by Kerr J. In particular, Mr McKenzie had never sought to state that any "misrepresentation" was not deliberate but rather the result of mistake or inadvertence. It appears that Mr McKenzie relied upon the contents of a letter from the Crown Solicitor (Exhibit RM3) which recorded that, during the course of an argument relating to a judicial review in Newry Kerr J had "asserted that he had not sought to imply

that there was any deliberate attempt to mislead the Minister" when he had made his remarks in the course of giving judgment in relation to the first D5 application. Mr Morgan QC informed the court that the Department had relied upon this letter until the affidavit and exhibits from Mr Beattie were lodged in these proceedings.

(*g*) Mr Quinn, the Permanent Secretary of the Department of the Environment, has confirmed that he was aware of the comments made by Kerr J in relation to Mr McKenzie and that he had also seen a copy of the Crown Solicitor's letter RM3. In the circumstances, he saw no basis upon which to exclude Mr McKenzie from participating in the decision-making process and he advised the Minister both of Kerr J's comments and the contents of RM3. In turn, it appears that the Minister was satisfied that Mr McKenzie should continue to participate in the decision-making process.

Ultimately, after giving the matter careful consideration I am not satisfied that Mr Deeny QC has established a real danger of bias on the part of Mr McKenzie. It should not be thought that this conclusion in anyway endorses Mr Quinn's decision to include Mr McKenzie in the decision-making process in these circumstances. Indeed, in my view, his inclusion made this judicial review almost inevitable.

(3) Retail impact assessment

The Department accepts that the D5 proposal fails to comply with the third criterion set out in paragraph 39 of PPS5 insofar as the applicants cannot

show that the proposal is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function. However, Mr McKay, the current Chief Executive of the Planning Service formed the view that this failure was "marginal" and this view was accepted by the Minister and no doubt made a significant contribution to his deliberations when he came to balance this policy failure against "countervailing factors". On behalf of the Department, Mr Morgan QC accepted that the Minister did rely upon Mr McKay's assessment that the policy failure was marginal and that if this assessment was incorrect the Minister's decision could not stand.

During the course of the public inquiry conducted into the original applications in respect of D5 and the Tesco development at Knocknagoney the Appointed Member identified Holywood and the centres of Connswater and Dundonald as being the centres most likely to be affected by the proposals. Retail impact analyses were submitted to the public inquiry on behalf of Sainsburys, Tesco and Stewarts. A table was prepared showing the estimated impact of the proposals upon various shopping facilities in the centres likely to be affected although the Appointed Member remarked upon the difficulties inherent in dealing with this type of evidence which is heavily dependent upon assumptions and subjective judgments. The expert assessment of the cumulative impact of both food superstores varied between 115% and 125%. In relation to the Department's role in presenting evidence to the public inquiry the Appointed Member had this to say at page 245 of her report on the Tesco proposal:

> "Turning to the application of the appropriate policy tests to the evaluation of likely impact upon the centres identified, I must comment that more comprehensive evidence from the Department on this aspect would have been helpful. As Planning Authority, the Department has detailed knowledge of the developing proposals for centres and is better able than individual planning and retail consultants to comment on the health of the centre, past and developing commercial trends and its position in the hierarchy of shopping in the wider area. I note that paragraph 18 of the PPS indicates that the Department will undertake health checks as part of the preparation of development plans. Given the significance of possible impact of major proposals, I consider it imperative that such health checks are undertaken by the Department in advance of Area Plan Reviews and the necessary evidence presented to major inquiries."

At page 178 of her report into the D5 proposal the Appointed Member re-emphasised her views when she said:

> "The analyses presented relate to impact upon the bulk convenience goods sector, policy requires assessment of the impact upon the centre as a whole; considerable judgment is involved in this assessment; mere addition of the impacts estimated is inadequate. The PPS (paragraph 18) identifies 'health checks' to indicate the vitality and viability of town centres. As I stated in the Tesco report, comprehensive independent evidence from the Department to assist this assessment is imperative but was not available. The necessity for such information and analysis is increased by the possibility of two large food stores in the catchment."

Paragraph 60 of PPS5 confirms that the Department will normally require that applications for out-of-centre or out-of-town retail development of over a 1000 square metres should be accompanied by information on, inter alia, its likely trading impact on existing centres including consideration of the cumulative effects of the proposal, recently completed retail developments and

outstanding planning permissions for retail development, where appropriate. The Appointed Member referred specifically to paragraph 18 of PPS5 which provides as follows:

> "Vitality is a measure of how busy a centre is and viability is a measure of its capacity to attract ongoing investment for maintenance, improvement and adaption to changing needs. Although no single indicator can effectively measure the health of a town centre, the use of a series of them can provide a view of performance and offer a framework for assessing vitality and viability. Some or all of the indicators below can be used to carry out a 'health check' of the town centre and the Department will undertake such health checks, where feasible, as part of the preparation of development plans. These health checks also provide information which the Department will take into account in assessing the impact of out-of-centre developments;"

The paragraph then continues by identifying a number of factors to be used by the Department when compiling such "health checks".

Whatever its shortcomings may have been there is no doubt that detailed expert material was placed before the appointed Commissioner by the parties concerned in the original public inquiry. That evidence and the information upon which it was based is now some 3½ years old and related to a theoretical assessment of the impact of two food superstores.

Since that time the Tesco development has been constructed at Knocknagoney and has been in full operation for some period of time. In such circumstances, it becomes of vital importance to examine the foundation for Mr McKay's assessment that the additional impact of granting the D5 proposal would be "marginal".

Clearly Mr McKay appreciated the significance of the new situation and I note that he stated at paragraph 3 of his affidavit of 19 May 2000 that a fresh report should be prepared which "separated the consideration of the D5 proposal from the Tesco store's application". This is one of the reasons which led Mr McKay to commission the report from the specialist retail unit at Planning Service Headquarters which was prepared by Mrs Lockwood. However, while Mrs Lockwood's report did review the approach of the Appointed Member at the public inquiry to the issues of adverse impact on the vitality and viability of Holywood, Connswater and Dundonald and the undermining of their convenience and comparison shopping function, she did not, nor was she commissioned to, consider any material relating to such impact obtained subsequent to the date of the public inquiry or, in particular, subsequent to the opening of Tesco at Knocknagoney. In fact, Mrs Lockwood differed from the Appointed Member in concluding that the proposal was likely to undermine the convenience shopping function of Holywood and, in doing so, could have a "knock on" effect on the comparison function with resulting adverse impact on the vitality and viability of the centre as a whole. Mrs Lockwood also expressed concern about the impact of the proposal on Connswater and Dundonald, although she noted that the opening of Woolworths in the former and Safeways in the latter could increase the ability of these centres to withstand a loss of trade resulting from the proposal.

Before leaving the Lockwood report I think that it is important to make some observations about its history. During the course of the proceedings it became clear that the document exhibited by Mr McKay to his affidavit as HMcKay 1 was not the original version of the report produced by Mrs Lockwood on 21 October 1999. That original differed from the version exhibited in a number of very significant ways. For example, in the original document, after reviewing the issue of adverse impact on the relevant centres, Mrs Lockwood had concluded as follows:

> "7.25 In view of the likely impact on Holywood, Connswater and Dundonald it is considered the proposal fails to satisfy this criterion."

In the version of the report exhibited to Mr McKay's affidavit this paragraph has been entirely omitted and the reference to Connswater and Dundonald reduced to "concerns". The exhibited document contained a number of other significant changes from the original perhaps the most fundamental being the complete removal from the first page of the words "recommendation: that the application be refused planning permission". It appears from a further affidavit furnished by Mrs Lockwood that the changes to this document were affected subsequent to the meeting of the Planning Management Board on 15 November 1999 and as a result of "various suggestions from colleagues within Planning Service by way of comment". In her affidavit dated 20 June 2000 Mrs Lockwood confirmed that a number of issues had been discussed at the meeting of the Management Board on 15 November 1999 and that she had been specifically requested to clarify the

position with regard to zoning in the Harbour Estate in the draft Regional Strategic framework. When this matter was being debated Mr Morgan QC assured the court on behalf of Mrs Lockwood that the version of the report exhibited to Mr McKay's affidavit represented her views and I accept entirely this honourable attitude on her part. However, I am afraid that I cannot accept the assertion made at paragraph 5 of her affidavit of 20 June 2000 that the amendments to the report did not alter the substance of it or the conclusion other than the addition of the reference to the Regional Strategic framework. In my view the report exhibited to Mr McKay's affidavit was a substantially different document from that which had been originally produced by Mrs Lockwood. This has serious implications for the Department since I am satisfied that when Mr McKay who, as Chief Executive, chaired the Planning Management Board, purported to convey to Mr McKenzie on 25 January 2000 the Board's views of Mrs Lockwood's "independent professional report" he was in fact commenting upon a report which had already been significantly amended at the suggestion of the Board and "other colleagues within the Planning Service". It is clear that Mrs Lockwood's report played a significant role in the Minister's deliberations and I note that she herself was present during the site visit and meeting held by the Minister, Mr McKenzie, Mr McKay and other officials on 13 March 2000. Indeed, Mr Quinn's minute of that meeting indicates that, apart from the debate which took place in relation to the complements test, the Minister accepted that his "principal concern" should be Holywood town centre. While I appreciate

that Mrs Lockwood has indicated that the final version of her report did reflect her own final views, I think that it would be unrealistic to suggest that the Minister's concerns and questions would not have taken a different course had he been presented with the original Lockwood report. If, as Mr McKay asserts, the intention was to obtain an independent report from the specialised Retail Unit I simply do not understand why the Planning Management Board adopted this course rather than simply present the Minister with the original report, the Board's views and, if it was felt appropriate, any change of view which Mrs Lockwood entertained as a result of discussion with the Board and her colleagues. Taking into account the history of late discovery and strong judicial criticism this was a case, if ever there was one, in which "transparency" should have been the watchword.

Apart from the Lockwood report the only other additional piece of material referred to by Mr McKay was what he described as a "positive health check" on Holywood. This was a document exhibited to Mr McKay's affidavit of 19 May 2000 which seems to be a paragraph from a document furnished to the "Bloomfield Inquiry" in 1999. During the course of the proceedings the Department conceded that this document was compiled prior to the opening of the Tesco development at Knocknagoney.

In the course of his affidavit on 19 May 2000 Mr McKay emphasised that, whether as a matter of policy or otherwise, there was no obligation on the Department to obtain independent evidence on retail impact and that the

Department considered it was appropriate to re-assess the retail impact on the basis of the retail information submitted to the original public inquiry. As I have already pointed out, this evidence is now some 3½ years old and, since the public inquiry, the Tesco food store has opened at Knocknagoney and has been trading for a significant period of time. I have earlier referred to the criticism by the Appointed Member at the public inquiry of the lack of "comprehensive independent evidence" from the Department and to the absence of a "health check" compiled in accordance with the detailed requirements of paragraph 18 of PPS5. Mr McKay's response to this criticism was to assert, at paragraph 10 of his affidavit of 19 May 2000, that he was not aware of any case in which the Department undertook its own independent retail impact study. While that may be so, I have no doubt that Mr McKay, as Chief Executive of the Planning Management Board, did not fail to appreciate the significance of the Appointed Members reference to the need for a "health check" carried out in accordance with the detailed requirements of paragraph 18 of PPS5. An independent study or report might or might not have supported Mr McKay's judgment but it would at the very least have provided the court with some assistance in reconciling the apparently conflicting claims made by Mr McKay and Mr Singleton as to the retail health of Holywood town centre. Given the history of this application and the intense public interest which it has generated, together with the criticism articulated by the Appointed Member, the passage of time and the advent of a trading food superstore at Knocknagoney, to fail to commission a

comprehensive health check specifically in relation to this proposal and at the same time to exhibit to his affidavit a health check in respect of Holywood town centre compiled for the purpose of a totally different inquiry in 1999, before Tesco started to operate, is in my view quite inadequate and almost verges on arrogance, particularly in respect of the citizens of Holywood.

I have come to the firm conclusion that, given the history of this application and the accepted failure of the proposal to comply with the third criterion specified in paragraph 39 of PPS5, in order to properly assess the significance of that failure it was essential that the Department should, at minimum, obtain up-to-date "health checks" on the relevant centres in accordance with the requirements of paragraph 18 of PPS5. It is clearly a matter for the Department to ensure that the proper investigations are pursued and reasonable steps taken to obtain the relevant information – see Tameside Metropolitan Borough Council –v- Secretary of State for Education and Science[1977] Appeal Cases 1014. Indeed, while it is not for this court to direct the Department's course of action, in the circumstances of this particular application, consideration might well be given to the commissioning of a suitable independent expert to carry out the appropriate checks. I am satisfied that in the circumstances there was no adequate basis for Mr McKay's judgment that the failure to comply with policy was "marginal" and since it is common case that this was a vital material factor taken into account by the Minister I propose to quash his decision also on this ground.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY BELFAST CHAMBER OF TRADE AND COMMERCE, BELFAST CITY COUNCIL AND NORTH DOWN BOROUGH COUNCIL FOR JUDICIAL REVIEW

-AND-

IN THE MATTER OF A DECISION BY THE MINISTER FOR THE ENVIRONMENT FOR NORTHERN IRELAND TO APPROVE PLANNING PERMISSION SOUGHT UNDER PLANNING APPLICATION Z95/1088 ("D5") AND ANY SUBSEQUENT GRANT AND PLANNING PERMISSION ON FOOT OF THE MINISTER'S PRESS ANNOUNCEMENT

JUDGMENT

OF

COGHLIN J
