Judicial review – application for planning permission for a large development at Sprucefield – application of article 31 of the Planning (Northern Ireland) Order 1991 to the application – decision by Minister to grant outline planning permission – whether the Minister had correctly considered question of public inquiry – whether Minister made effective decision – challenge to Notice of Opinion under article 31 – whether the Minister's and Department's decisions flawed by failing to consider conditions – centrality of proposal by John Lewis Partnership to occupy the proposed department store – whether conditions in the Notice of Opinion and the outline planning permission properly drawn to reflect that centrality – whether the Minister and the Department had acted reasonably in the investigation of the application – whether duty of enquiry fulfilled – whether the granting of planning permission constituted unlawful state aid – Article 122 of Roads (Northern Ireland) Order 1993 – whether Article 122 agreement gave department indemnity in respect of cost of mitigating works – whether agreement flawed – effect of Article 122 agreement on the validity of the outline planning permission - whether the applicant's environmental impact statement valid – whether the matters reserved and conditions imposed by the Department impacted on the adequacy of the environmental impact statement – whether the Department view on the adequacy of the environmental impact statement unreasonable – whether the Department had properly considered events subsequent to the Notice of Opinion prior to the issue of the planning permission – whether Minister and Department's conclusions otherwise flawed.

Neutral Citation No. [2006] NIQB 28

Ref: **GIRC5547**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered: **10/05/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY:

1. **BOW STREET MALL LIMITED**
2. **LISBURN CHAMBER OF COMMERCE**
3. **MULTI-DEVELOPMENT UK LIMITED**
4. **CENTRAL CRAIGAVON LIMITED**
5. **BELFAST CITY COUNCIL**
6. **BELFAST CHAMBER OF TRADE AND COMMERCE**

-and-

IN THE MATTER OF A PLANNING DECISION MADE BY THE DEPARTMENT OF THE ENVIRONMENT

GIRVAN J

Framework Of Judgment

Introduction

[1] Four separate applications for judicial review were brought challenging various decisions and actions of the Department of the Environment for Northern Ireland ("the Department") leading to the granting to Sprucefield Centre Limited ("SCL") of outline planning permission for a substantial development of a store and retail units at Sprucefield Shopping Centre, Lisburn, County Antrim ("Sprucefield"). The applicants Bow Street Mall Limited and Lisburn Chamber of Commerce were represented by Mr Horner QC and Mr Beattie. Multi-Development UK Limited (formerly

known as AM Development UK Limited) was represented by Mr Straker QC and Mr Orbinson. Central Craigavon Limited was represented by Mr Larkin QC and Mr Scoffield. Belfast City Council and Belfast Chamber of Trade and Commerce were represented by Mr Orr QC and Mr Scoffield. Mr McCloskey QC, Mr Elvin QC and Mr Maguire appeared on behalf of the Department. Mr Lockhart-Mummery QC and Mr Shaw QC appeared on behalf of SCL, a notice party to the application. The hearing took place over six days from 28 March to 4 April 2006.

The Planning Application

[2] In June 2004 SCL made an application for planning permission for a proposed store and retail units comprising 48,987 sq metres gross floor space, restaurants comprising 2,026 sq metres gross floor space and ancillary infrastructure including an access, multi-storey car parking, surface parking and recreational area. A considerable amount of detail was attached to the proposal which, however, excluded details of landscaping, some details in respect of the restaurants and one drawing showing an elevation of the main building. The location of the proposed development was at the Sprucefield site bounded by the A1 Hillsborough Road and the M1 motorway. The application accompanied by an environmental impact statement ("EIS") was received on 15 June 2004. The application was duly advertised. Detailed drawings were submitted with the application and thereafter supplemented. The drawings included a drawing showing the existing site within its development boundary, ground level plans, first floor level plans and second floor level site plans, plans of the retail units and plans of elevations and sections.

[3] A significant number of objections were received. The focus of the objections included:

(a) the claim that the proposal was contrary to various planning proposals including the Regional Development Strategy ("RDS") Planning Policy Statement PPS5, the Lisburn Area Plan 2001; and the Rural Strategy for Northern Ireland;

(b) alleged detrimental impact to Lisburn City Centre, Belfast City Centre and other centres;

(c) alleged increased traffic and associated traffic problems;

(d) the fact that the proposal was out of keeping with its semi-rural environment with detriment to the landscape; and

(e) prematurity on the ground that the decision was in advance of a redraft of PPS5 and the publication of the Belfast Metropolitan Area Plan ("BMAP").

The view was taken that given the scale and nature of the proposal and the impact of the various planning policies in play the proposal would impact on a number of centres within the catchment area. The site was technically still in a green belt zone as defined by the Lisburn Area Plan 2001 and the Belfast Urban Area Plan. Officials within the Department considered that the proposal was a substantial departure from the development plans for the area.

[4] On 1 October 2004 in exercise of its powers under article 31 of the Planning (Northern Ireland) Order 1991 the Department considered that the application would, if permitted,

(i) involve a substantial departure from the development plan for the area to which it related;

(ii) be of significance to the whole or a substantial part of Northern Ireland;

(iii) affect the whole of a neighbour; and

(iv) consist of or include the construction, formation, laying out or alteration of a means of access to a trunk road or of any other development of land within 67 metres of the middle of such a road or the nearest part of a special road.

By notice made under article 31 the Department applied art. 31 to the application.

[5] On 24 November 2004 the Planning Service sought additional information under Regulation 15 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 ("the EIA Regulations"). The additional information requested related to traffic impact and retail impact and the effects of the application on telecommunications including radio transmission, there being a telecommunications mast in close proximity to the site. The request for information stated that the EIS should consider alternative sites (referring to Schedule 4 paragraph 2(1)). Additional information was submitted on 31 January 2005 in the form of a lengthy response prepared by White Young Green, Planning Consultants. Its receipt was duly advertised in February and neighbour notification carried out. Letters were sent to all who had commented previously on the application drawing attention to the new information and relevant bodies with environmental responsibilities were re-consulted in February 2005. The

applicant made clear that it had not and would not consider alternative sites. In the course of consideration of the application some 76 letters of objection were received at different times as well as 4 letters of support.

The Departmental Opinion

[6] On 24 March 2005 a detailed assessment of the application was presented to the Planning Service Management Board. The author of the assessment was Ms Garvey the Planning Manager (Operations Director) who was charged with the responsibility of assessing the application. In her report a considered assessment of the application was made encompassing the representations made, the consultation process, the responses received and various evaluations concluded within the Planning Service.

The Garvey Report

[7] In the summary opening in her report Ms Garvey raised under the heading of "Environmental Issues" the fact that there was support for the proposal because of the potential inward investment and job creation. However, there was a considerable number of objections because of the likely detrimental effect on Belfast City Centre, Lisburn and other towns. Under the heading "timing" she recorded "routine". In the recommendation section of her summary she stated:

> "It is recommended that a Notice of Opinion to refuse outline planning permission should be issued on the grounds that
>
> (1) The proposal is contrary to the Joint Ministerial Statement of 31 January 2005 on the grounds of prematurity, and the Draft Belfast Metropolitan Area Plan has reached an advanced stage of preparation and the effect of an approval for this proposal at Sprucefield Regional Shopping Centre, because of its scale and nature, would be prejudicial to the outcome of the plan process by pre-determining decisions about the scale and location of new development which ought properly to be taken through the development plan process, particularly in view of the statutory obligation that development plans be in general conformity with the Regional Development Strategy.
>
> (2) The proposed development would be contrary to Planning Policy Statement 5 (PPS5):

> Retailing and Town Centres, in that the proposals would, if permitted, have an adverse impact on the vitality and viability of Belfast City Centre, Lisburn City Centre, Craigavon town centre and Banbridge town centre and thereby undermining their comparison shopping function."

[8] Attached to the summary was Ms Garvey's full report which analysed the nature of the proposal, recording that the applicant had a target opening date of 2006. She recorded that the applicant said that "the proposal is not severable and the scheme as a whole must proceed in order to be economically viable." John Lewis Partnership ("JLP") had been identified as the tenant for the department store. The report at paragraph 2.5 and 2.6 referred to the applicant's view that Sprucefield did not currently fulfil its role as a regional shopping centre because of its size and restricted consents in terms of goods that could be sold; that there was a qualitative need to improve Sprucefield to enable it to fulfil its role and extend the retail offered to residents in the province and in the Dublin/Belfast corridor; and that the proposed development would generate £100M of investment and approximately 2,000 jobs and act as a catalyst to attract inward investment. In section 5 of the report Ms Garvey analysed the nature and extent of the objections to the proposals. In section 6 she dealt with the consultation process which involved a range of bodies. Consultation with the Department of Regional Development Road Service ("the Road Service") showed that initially Road Service objected to the proposal on the ground (inter alia) that the applicant had not demonstrated that the traffic likely to be generated from the development could be accommodated on the road network without prejudicing the flow of traffic or the general safety of the network. In March 2005 following discussions to clarify technical issues the Road Service confirmed that it had no objection to the application subject to the implementation of the submitted package of highway infrastructure improvements. The Department of Finance and Personnel Landscape Service recommended refusal on the grounds that the development could not be integrated into the existing environment, represented an over-development of the site and would result in the loss of existing mature vegetation. Landscaping Service considered that the proximity of the buildings to the A1 and the Sprucefield roundabout left no room for the establishment of adequate planting. The Department of Social Development did not favour the application which in its view was not a legitimate extension to the existing Sprucefield site. The Planning Service Metropolitan Area Plan team considered that the draft BMAP was a material consideration and the proposal offended the Belfast Metropolitan Area retail strategy and policies R3 and R4 of that draft plan. The issue of prematurity applied in the context of the Joint Ministerial Statement.

[9] In section 7 of her report Ms Garvey referred to the principal planning policy and guidance relevant to the consideration of the proposal. The principal planning policy and guidance which was relevant to the consideration of the proposal was contained in the following publications – Regional Development Strategy for Northern Ireland 2025; Belfast Urban Area Plan; Lisburn Area Plan 2001; Draft Belfast Metropolitan Area Plan; Planning Strategy for Rural Northern Ireland; Planning Policy Statement 1: General Principles; Development Plans and Implementation of the Regional Development Strategy/Joint Ministerial Statement January 2005; Planning Policy Statement 2: Planning and Nature Conservation, Planning Policy Statement 3: Roads Consideration (May 1996) and Access, Movement and Parking (February 2005), Planning Policy Statement 5: Retailing in Town Centres; Planning Policy Statement 6: Planning, Archaeology and the Built Heritage, Planning Policy Statement 10: Telecommunications, Planning Policy Statement 13: Transportation and Land Use, Development Control Advice Note 4, Restaurants, Cafes and Fast Food Outlets, February 2002. The relevant policies were detailed in Annex 2 to her report and were considered by Ms Garvey in full as part of her assessment.

[10] In section 8 of her report she moved to the planning assessment having regard to the development plan context, relevant policies and guidance detailed in Annex 2, environmental information and other material considerations including the views of Lisburn Council (which was in favour of the proposal) and third parties.

[11] On the issue of the proposed development within the statutory green belt area under the Belfast Urban Area Plan the relevant policies in the Regional Development Strategy, the planning history of the site and the BMAP proposals establish the principle of development despite green belt designation in the statutory area plans.

[12] In section 8.4 to 8.13 Ms Garvey considered the position and role of Sprucefield in the light of the planning history and policies. She did not express any concluded view against the proposal in relation to that topic. She accepted the RDS policy ECON1 and TRAN support development at Sprucefield and the development was broadly compatible with RDS policies SRC2 and SRC3 but this had to be put into the context of RDS policy BMA which sought to create a thriving metropolis and BMA2 which sought to promote urban renaissance in the Belfast metropolitan area and policy RN1 and 32 which aimed to support the network of service centres based on the main towns in Northern Ireland. Proposals for Sprucefield should be prepared through the development plan powers according to the Lisburn Area Plan adoption statement. Relevant policies which had been included in the draft BMAP were policies on BMA retail strategy, policy R3 (Belfast Regional Shopping Centre), and policy R4 (Sprucefield Shopping Centre) all of which were detailed in the Annex. A significant number of wide-ranging

objections had been received in respect of elements of the plan proposed. Ms Garvey, however concluded that as such, considerable weight should not be attached to the relevant proposals in the draft BMAP as a material consideration at this stage.

[13] In section 8.14 et seq Ms Garvey considered the issue of retail policy and impact. She noted that the Lisburn area plan which appears to have been accepted as the relevant development plan stated that a retail development at Sprucefield would continue to be controlled in accordance with all prevailing planning policies on retailing and town centres and refers specifically to PPS5. The statutory Belfast Urban Area Plan aimed to maintain and strengthen the Belfast position as the regional centre for Northern Ireland. The Lisburn Area Plan sought to maintain, sustain and enhance the viability and role of Lisburn Centre. The proposals did not comply with various aspects of the draft Metropolitan Area Plan, viz point 1 of the BMA strategy relating to the promotion of Belfast City Centre as the leading shopping centre in the plan area and Northern Ireland; bullet point 4 of the Retail Strategy relating to the expansion of Sprucefield Regional Shopping Centre for bulky comparison goods only; policy R3 (Belfast Regional Shopping Centre) relating to the distinctive role of Belfast City Centre as the leading regional shopping centre; bullet point 2 of policy R4 Sprucefield Regional Shopping Centre relating to the type of goods to be sold being restricted to bulky comparison goods and bullet point 3 of policy R4 relating to Sprucefield Regional Shopping Centre relating to the floor space of any individual unit being a minimum of 6,000 sq metres nett floor space. Under PPS5 paragraph 35 Sprucefield was specifically referred to and the policy was supportive of further retailing at the regional centres subject to control over the scale and nature of the retailing particularly the impact on the environment generally, existing centres and traffic. Paragraph 38 of PPS8 gives a strong commitment to protecting the vitality and viability of town centres which would normally be the first choice for major new retail developments. The proposal should be considered in the context of paragraphs 38-40 and 57-60 of PPS5. The Department had concerns about the adequacy of the information provided in respect of the retail impact including methodology. Its detailed assessment of the retail impact was included in Annex 3 of the report. The impact assessment concluded that the proposal was likely to have a significant impact on other centres afforded protection by PPS5. She considered the likely impact in terms of reduced turnover to be:

(i) in Belfast City Centre 9% - 12%;

(ii) in Lisburn 13.69% - 14.66%;

(iii) in Banbridge town centre 12.56% - 13.4%;

(iv) in Craigavon town centre 10.67% - 11.9%; and

(v) in existing Sprucefield 6.2% - 11.54%;

Ms Garvey considered the degree of impact to be significant in the context of the information available on the vitality and viability of the centres.

[14] In terms of PPS5 paragraph 29 Ms Garvey considered the various tests therein adumbrated. The proposal would not be considered as failing the complementarity test. The proposal was likely to lead to a loss of investment in existing centres and accordingly failed that policy test. The proposal would have an adverse impact on the vitality and viability of existing centres within the catchment area and undermine their comparison function. That policy test was failed in her view. Refusal could not be sustained on the grounds of detrimental visual impact. The proposal did not infringe the other policy considerations in Ms Garvey's view.

[15] Under the heading of alternative sites for the proposal paragraph 8.53 noted the attraction of the site for the anchor tenant and confirmed by letter from JLP which was included in the addendum to the EIS. The availability of alternative sites had to be considered within the context of planning policies all of which focused on Belfast as the primary regional centre. The Department of Social Development considered that an additional retail space identified in the North West and North East draft master plan for Belfast offered viable and credible alternative locations to the development proposed at Sprucefield.

[16] Ms Garvey considered that the application fell within the terms of paragraph 20 of the Joint Ministerial Statement which superseded paragraphs 46 to 48 of PPS1) because the proposal would prejudice the ability of the Belfast Metropolitan Area Plan to achieve or retain general conformity with the RDS and prejudice the outcome of the plan process by pre-determining decisions which should probably be taken following full consideration of the relevant issues in the context of a public inquiry.

[17] Ms Garvey considered the issues of impact on broadcasting and telecommunication (because of the proximity of the radio and telecommunications mask); other environmental issues, restaurant uses, transportation, roads, traffic and sustainability issues. None of these would justify a refusal of the application. Road Service confirmed that it had no objections to the applications subject to the submitted package of highway infra-structure improvements and conditions which should be attached to the decision.

[18] On the issue whether a public inquiry was necessary in paragraphs 8.80 and 8.81 of her report Ms Garvey stated:

> "8.80 Article 31(2) empowers the Department to ask the Planning Appeals Commission to hold a public local inquiry for the purpose of considering representations on the application. The alternative is to serve a Notice of Opinion on the applicant indicating the decision which the Department proposes to make on the application.
>
> *8.81 The key test for the Department in deciding the process route is whether a public local inquiry is necessary to provide a forum for presentation and consideration of objections rising from the representations received and which need to be assessed to allow the Department to determine the application.* In this case, it is considered on balance that an article 31 public inquiry is not required to consider representations on the application and that a Notice of Opinion should be issued at this stage." (Italics added).

[19] In paragraph 9.5 of her report Ms Garvey concluded that this application had been dealt with in accordance with legislative requirements and procedures had been followed including the requirements of the EIA Regulations.

[20] In her conclusion Ms Garvey stated at paragraph 9.1 to 9.4:

> "9.1 It is accepted that the proposal complies with regional policy in relation to development along the Belfast/Dublin corridor and would result in a significant inward investment and job creation. It also is accepted that certain regional policies are supportive of development of this type and that the proposal does not fail all the tests in PPS5 paragraph 39 as detailed above.
>
> 9.2 However, determining weight must be given to the policy failures which also are detailed in section 8 of this report. The likely significant adverse impact on the proposal on the vitality and viability of Belfast City Centre, Lisburn, Banbridge and Craigavon and the undermining of their comparison shopping function leads to the conclusion that a refusal of permission should be issued.

> 9.3 The proposal is premature in terms of paragraphs 20(a) and 20(b) of the Joint Ministerial Statement and should be refused for this reason.
>
> 9.4 There are no other issues of concern arising from the consideration of the application to date. "

Planning Service's Management Board Assessment

[21] The Management Board considered the assessment on 24 and 31 March 2005 and agreed with the recommendation made in it that a Notice of Opinion to refuse the planning application should be issued. Mr Ferguson, the Chief Executive of the Planning Service, wrote to the then Minister, Angela Smith MP, on 31 March 2005 asking her to consider the detailed assessment of the Planning Service together with its Annexes. Due to the impending general election it was considered that the question should be considered by the Minister after the election. Following the general election Lord Rooker was appointed as the Minister of the Environment. In a first day brief his attention was drawn to the application in the following terms:

> "(iv) a major planning application for retail development (to include a John Lewis store) at Sprucefield near Lisburn."

[22] On 19 May 2005 Ms Garvey and Mr Ferguson met with the Minister at the site of the proposed development. Ms Garvey explained on site to the Minister the main elements of their proposal by reference to a site plan and various prospectives submitted with the application. She also briefly outlined to the Minister the main features of the Planning Services report and the planning application including those aspects of policy which supported the proposal which were reviewed by the Planning Service as policy failures. The Minister indicated to Ms Garvey and Mr Ferguson that he had read her report twice and he asked questions about third party objections. In the course of the site visit the Minister asked about the planning history of Sprucefield and the mix of uses on both parts of the site. He indicated that he was going to visit Phase I of Sprucefield (that is the Marks and Spencers part of the site on the other side of the A1). The Minister indicated that he intended to make an early decision on the application and by a date no later than Friday of the following week 27 May 2005. The Minister went to Phase I of Sprucefield unaccompanied by any member of the Planning Service. On 20 May 2005 all letters of objection to or support for the application were provided to the Minister.

The Ministerial Decision

[23] According to the affidavit of Mr Ferguson the Minister made his decision at some point between 20 and 22 May 2005, that is between a Friday and a Sunday. A note of 22 May 2005 from the Minister to the Secretary of State sets out the Minister's conclusions at that time. Having recorded that he had considered the advice and comments for and against the application and having visited the site and the immediate area and making clear that he had not met the applicants, objectors or supporters he went on to state:

> "The site is very substantial and contains several retail outlets and its use could by no means be classified as only being bulky goods.
>
> I have considered both the planning points and the clear under-performance of Sprucefield. There are economic and social development aspects to the application regarding its location, the future redevelopment of the Maze site as well as employment prospects which are positive.
>
> Given the applicant (the developer) is also a major developer in the city centre and the major proposed retailer (John Lewis) has clearly stated it is Sprucefield or no other site in Northern Ireland, it seems to me that the aims of the developer have to be consistent with seeking success of both city centre developments as well as Sprucefield.
>
> The site is clearly not isolated as the visit indicated. The site is the designated regional site in Northern Ireland and it deserves to succeed. To do this it needs to grow in users. Do we want a John Lewis store in Northern Ireland and would the location of Sprucefield be the best location for the store and is it consistent with the use of the site. John Lewis says yes to the first question I say yes to the second question.
>
> I presume the normal developer contribution to required infra-structure will be obtained to assist both in moving round the overall site as well as entering and leaving in an orderly fashion. It cannot be ignored that the developer is bringing to Sprucefield and hence Northern Ireland a major new entrant to retail which has attraction for both Northern Ireland

> and trade from the south. The new entrant will increase competition and choice in the retail sector for Northern Irish citizens.
>
> As for the other retail outlets planned as part of the application it is not for me as Planning Minister to stipulate, but for the whole ministerial team to highlight the desire in attracting as many other entrants into the retail sector in Northern Ireland as possible. That Sprucefield should have a broader base of outlets has clearly been agreed in the past given the mix there presently. I cannot ignore this as Planning Minister.
>
> Taking into consideration the wider issues in addition and supplementary to the planning issues relating to Sprucefield and those who have already invested there I genuinely believe it is in the interests of the people of Northern Ireland that this application be approved."

[24] On 23 May 2005 the Minister's conclusion was endorsed by his ministerial colleagues in the course of a meeting with the Secretary of State and the Ministers responsible for the Department of Social Development and the Department of Regional Development.

[25] On 24 May 2005 the Minister met senior officials of the Department including senior officials within the Planning Service to discuss future progress of the application. In this meeting the Minister confirmed that he had not discussed the matter with the ministerial team before he issued his note to the Secretary of State. In paragraph 2 and 3 of the note of the meeting made for the record it is stated:

> "2. The Minister stated that his main purpose in reaching his decision had been to seek the best decision for Northern Ireland and that he had done so by giving different weight to some of the aspects of the application compared to that attached by the Planning Service. He also referred to looking at wider aspects than could be considered by the Planning Service. He said that he would write to Stephen Peover to confirm his further thoughts.
>
> 3. Ann Garvey confirmed to the Minister how the application would now proceed to a Notice of Opinion and that third parties will be made aware

of the NOP. The only aspect of the application that is reserved is landscaping; Ann confirmed that further work will be carried out to the roads layout and discussed the car parking arrangements when the proposal is built. The final version of the NOP may take two weeks to prepare as the Roads Service will need to provide conditions for the NOP. After discussion, the Minister agreed to Brian Kirk's suggestion that a press conference would be required due to the level of interest."

[26] By letter of 24 May 2005 to Mr Peover the Minister stated:

> "I have read the planning reports in full and have carefully considered the advice and recommendation from Planning Service. While I fully understand and acknowledge the planning context in which that recommendation was formed as set out in the detailed reports, and while, in what is a finally balanced judgment, there are one or two instances where I would attach different weight, principally in the areas of under-performance of Sprucefield and the retail impact of the proposal, I consider that there are countervailing and overriding factors, as noted in my minute of 22 May to the Secretary of State which have led me to a different conclusion on the application. Ministerial colleagues endorsed this conclusion when we met on 23 May 2005.
>
> In addition to the planning considerations the overriding arguments turn on economic and social gains from the development and the benefit of attracting a greater range of choice in retailing into Northern Ireland even though I understand that the name of the high profile tenant for the department store cannot be given weight in terms of planning policy. In considering these arguments I am mindful of the policy context and of the matter set out in the Planning Service Report, particularly in relation to prematurity and the draft Belfast Metropolitan Area Plan. It is clear to me however, that there is a time limited opportunity to realise these benefits and it is my considered opinion that, exceptionally, a significant investment proposal of this nature should not be lost to Northern Ireland at

this time. As I have already said, therefore, I approve the application.

In doing so I recognise that it would be an option for me to have the issues considered at a public inquiry. The need for such an inquiry was addressed in the Planning Services submission which concluded, in the context of a recommendation to refuse, that it was not required. I have also considered the issue again in light of my conclusion and I am satisfied that a public inquiry is not necessary to inform my decision to approve."

The Minister's Announcement and Interview Comments

[27] It was decided that there should be a ministerial announcement on 1 June 2005 of the decision to approve the outline planning permission. In advance of that on 31 May 2005 the Minister was provided with briefing documents. The press release was in the following terms:

"Environment Minister, Jeff Rooker, today announced his intention to grant planning permission for a major development at Sprucefield, which is expected to include the John Lewis Department Store as anchor tenant.

Jeff Rooker said:

'I am convinced that a decision to approve is in the best interests of the people of Northern Ireland. There are very positive economic and social benefits associated with this proposal in the overall public interest. John Lewis is a major name in retailing and its entry into the Northern Ireland retail sector represents further choice for the Northern Ireland consumer and compliments the retail experience on offer in other centres.

I am also convinced that this proposal will allow the Sprucefield Regional Shopping Centre to better fulfil its regional role. It is uniquely situated in terms of the strategic transport network

> and will attract shoppers from a wide geographical area. I was also mindful of the broad base of outlets already approved at Sprucefield.'"

[28] An Annex to the document furnished to the Minister set out a list of anticipated questions and suggested answers, drafted by civil servants. In a document headed "Lines to take on wider issues – Advantages to Northern Ireland" bullet point 2 and 3 read:

> ● We have been able to secure John Lewis Partnerships involvement in Northern Ireland against stiff opposition from Dublin. Be under no illusions, if they had not come here they would have gone south and that would have been very bad news for us all.
>
> ● The JLP brand name will help us attract even more shoppers from across the border – we will be upgrading the road between Dundalk and Newry to a dual carriageway over the next three years to make it easier to get here. The road upgrade effectively gives us a motorway from Dublin to Belfast.

It was anticipated that the Minister would be pressed about Belfast's opposition to the further development of the Sprucefield area and that he would be accused of damaging Belfast City Centre and Lisburn City Centre. The bullet point lines to be taken were stated thus:

> ● We are offering shoppers more choice, just as the new Victoria Square development in Belfast City Centre will offer even more choice when it is complete, including House of Fraser, another major company giving us a vote of confidence. And let's remember, there are other exciting opportunities for Belfast, not least in the Titanic Quarter.
>
> ● Would the public really understand if we lost the JLP to Dublin. I find it hard to believe Belfast would want that instead of having to travel 100 miles to Dublin to visit John Lewis shops, the development is on their doorstep. Not only that with road improvements giving us what will be virtually a motorway from Dublin to Belfast

> we'll be able to attract shoppers not just to Sprucefield but to Belfast as well giving a boast to the overall economy here. Isn't that one of things we are all supposed to be working for.

[29] The transcript of the press conference on 1 June sets out the answers given by the Minister to various questions raised. In many instances the Minister did not keep to the text of the suggested answers prepared in the documentation prepared by the civil servants. Some particular parts of the press conference and statements made by the Minister were relied on by the applicants in the matter. The transcript show the ex tempore and unscripted nature of the Minister's comments. The passages include the following:

> (a) "I'll just state briefly just to make an announcement regarding a planning application, as has been said on one of the new ministerial teams that planning's in my remit amongst a host of other issues and one of the big issues that come on my desk following the general election was the issue at Sprucefield and the application for development there which contains a John Lewis store and I'm just taking the opportunity today to make the announcement that I've decided that that planning application should be approved and go ahead and I sincerely believe that it is in the wider interests of the people of Northern Ireland that we have that development bringing a major new entrant quality in both the goods and strapulations(?) (sic) a different kind of employment practice in many ways, it's the largest workers' co-op I think in the country although there may be others that might dispute that and John Lewis has got an excellent track record. Now the developer is an extremely large developer and of course he is also associated with developing in the centre of Belfast and has got economic imperative to make sure of every success in all their developments. There's an interest of course of a brand new entrant into the retail marketing in Northern Ireland which I think is important bringing greater consumer choice and a degree of competition which I think is always to be

welcome. There are many issues relating to the site itself, I visited the site, I'm not a expert either on planning or on retailing but basically the decision is there to be made and rather than sit on it it seemed to me overall an absolute no-brainer given the economic social implications of the possibility of as I say a major new entrant into Northern Ireland but it might possibly be lost if decisions were made in another direction. That wouldn't suit anybody…"

(b) "… The paperwork is quite voluminous, it's balanced, on balance I came down in favour of the decision to see that this entrant into the market in Northern Ireland had the opportunity to the site that they chose. I mean, this is their choice as it were, not the Government's, so there will be all kinds of assessments relating to other areas whether it be Lisburn itself or indeed Belfast itself. On the other hand, one can never be absolutely certain when you've got a brand new entrant into the market of such substance that John Lewis hopefully bringing in as the developer (sic) I think has made clear as well that their intention is to make sure they get as many new entrants into the retail market in Northern Ireland as possible on that site so it isn't a question of displacement so, all in all there is a big push for an environment in jobs, quality consumer choice and competition which far outweighs any of the possible downsides that can arise so these things have to be weighed up."

(c) "I freely admit the argument was in a narrow planning sense was not to go ahead, was to refuse it."

(d) "You've got to take it in the round on the one hand, you've got a developer with a customer and in that sense a large retailer that wants to come to Northern Ireland. No. 1, they have chosen a site to make a planning application for, that's the one that's on my

desk, it isn't another site that's on my desk, this one and they've made it as clear as they can that (a) they want a non-delayed decision, well it's been around since last summer, people you know how got to be assessed properly. It's been with ministers a short time so delayed by the general election but that's quite normal as would happen anywhere else but on the other hand also making it clear by the way that they've got an expansion programme that they want to fit Northern Ireland into and here's an opportunity of a site with a developer ready to go and this is the site they chose. You can't suddenly say well if I say no because of this they'll walk away that would be bad therefore I've got to say yes. That wasn't the argument that went through my mind because otherwise you would be charged with having a gun held to your …. you've got to take it in the …? I don't think the developer or the applicant are the kind of quality of developer but you know would operate at that unprofessional level in that sense. They've make it clear they've got a site, they've got a developer and they've put an application in for a site. They haven't put in for another site and I have to work on the basis that that's the site they've put in for …"

(e) In response to the question 'Is it possible for policies in England to curb the expansion volumes to town centres, it is likely this application would be approved in England is that your opinion that it would have been passed over there?' The answer given was 'Well, it would depend where it was in the sense that we're not talking about at Sprucefield a piece of green field land in the middle of nowhere with nothing on it. We're not talking about that. We've got to look at what we've got there and then you take that into account. If you were saying would this happen if it was on a green field site ten miles from the nearest development, no infra-structure, no road nearby you'd have

different considerations and you can't I'm no going against the arguments about would we have done this, England first of all it's different planning laws in England with different planning policies in England."

(f) "There is a uniqueness about this site that cries out for at least it being made to work. Now someone comes in a developer wants to put their money and a retailer wants to put their money and their massive investment creating hundreds probably jobs in four figures, a brand new entry that is not already here so it is not a displacement for that particular retailer well we've move out of that town because we don't like or the city whatever we'll go to this site. That isn't the case here. You've got something that's brand new and that's added value to the retailer element in Northern Ireland. You've got to take those factors into consideration."

(g) In relation to the question of a public inquiry the Minister said "Well there could be arguments but to be honest in what I've read in terms of the paperwork that came to Ministers and the extra paperwork I have to see and the visit I make to the site, I'm not convinced in my own mind and I have to say taking everything into consideration that a public inquiry would have brought out anything new that anybody didn't already know, would have changed the nature of the questions that you're asking this morning or indeed would have changed the nature of the decision at the end of the day and I thought given the timeframe we're working to and I'm not up against it you know I didn't feel as though I was up against a time frame but I can see it from what I had read that this had been around for a while. It had not been on Ministers' desks that long but it did cry out basically for a quick decision simply because the nature of the site, the programme of new sites or new expansions for the particular retailer concerned elsewhere and a window

of opportunity which was there to grab the people of Northern Ireland and I've been around as I say taking all the things into consideration, it seemed to me that that would be the best decision to make and to make it quickly as possible which is why I wanted to do you know as quick a visit to the site as possible."

(h) The question was put in the following terms:

"Angela Smith was asked in the Commons earlier this year about David Livington, what was her Department's policy for the proposed Sprucefield store, she said planning officials would be guided by the draft Belfast Metropolitan Area Plan which proposes that Belfast City Centre is promoted as the leading shopping centre in Northern Ireland. The draft planning blue-print also calls she said at the time for Lisburn City Centre and other town centres in the greater Belfast area be the main pulpit of retailing development. How can that be reconciled with what you've announced today?" The Minister's answer was:

"I don't think there's a difficulty about that. I think Belfast City Centre is the major retail centre in Northern Ireland but the fact of the matter is no decision had been made on this application. Sprucefield was there. The application ended up on my desk…

I spent 27 years as an MP in Birmingham and I am not claiming any great credit for that but I did over that period come across lots of issues where developers and constituents would make a case relating to planning applications which would raise some competition fears dressed up as planning arguments. Now you know I have to be mindful of that and in this case I'm not saying well I don't think anyone is saying all new retail developments should go to all one city and all one site and I wouldn't say that

whether it was Sprucefield or Belfast City Centre. No one's arguing that the major …"

In pointing out the improved Belfast to Dublin road the Minister went on to state:

"This will facilitate shoppers from all over the island of Ireland to Sprucefield which might not be the case if it was located elsewhere and that's one of the things of a magnet store. A magnet retailer bringing in others where the proof of the pudding will be in the eating. I accept that but the track record of this particular retailer is such that we know it's a magnet in places in England where they've developed and it will be equally so here I'm absolutely confident of that."

(j) Asked what guarantees there were that the 29 smaller stores would not be displaced they would not be coming out of Lisburn centre or Belfast centre the Minister said:

"No if I could do that I would but I think that would be something that would be beyond my legal powers but I think its implicit being some of the arguments of the developers that their intention is to use the magnet of the big entrant to get as many new entrants in those 29 as possible. Now it can be done, I mean much to my astonishment when the Bullring shopping centre redevelopment shopping was opened in Birmingham… and the big Selfridges arrived I saw this board there were 61 new retail entrants in the Bullring shopping centre new to Birmingham. I couldn't believe there were 61 that weren't already there. It is absolutely astonishing so the range of people all came in behind a new magnet developer in a if you like something that is prepared to put their money and their reputation of course into a development. The potential is enormous to drag in new entrants and its also in the developers interest to do that. Of course the developer being involved

in both Sprucefield and Belfast City Centre to be sure that one compliments the other rather than one does not damage the other. It's their commercial best interest to make sure both are a success.

(k) Asked why he had announced the decision before the new PPS5 proposals on retail planning had been published the Minister said:

"Well PPS proposals on retail planning had not gone through the system. The honest truth is, I'm trying to give you the honest truth anyway, it's arrived on my desk although I'm not essentially the Minister who would deal with that for reasons of responsibilities amongst the ministers and interest amongst the ministers. It's not sufficient in my view but I've to do a lot of work on it because it was literally only last week Thursday I think it was that it was agreed that it would come from one Minister over to me so I physically got it on my desk this morning of what I know about it. The fact of the matter is the wider considerations of what was involved in this planning application I don't think would have been outweighed by what's in the draft PPS5."

(l) Asked whether in the form that it was at the moment the new PPS5 was compatible with what the Minister was doing his response was:

"Well it doesn't matter cause I haven't first of all it hasn't been gone through. The fact of the matter is whatever is in PPG5 (sic) or whatever ends up in PPG5 would not be compatible (sic) and secondly the wider considerations I don't think would be negative (sic) by what's in the PPG5 either in draft or in its final form."

(m) In an interview on BBC Radio Ulster with David Dunseith Lord Rooker said inter alia:

"(i) The officials' advise and the Ministers decide and on balance, with the overriding social and economic issues at interest here and the possibility of a major new entrant into the retail market of a magnet nature, not just someone who's already here but someone who will also attract other new entrants into the market, this has to be good news for the people of Northern Ireland and those wider interests, if you like, have to be balanced against the other interests. Not say that one is more important than the other but when one looks at the overall package of plusses there are far more plusses for the people of Northern Ireland than there are minuses. That's why on balance I came down to that reason for the decision.

(ii) I'm not the developer, I'm not putting my money as it were there, but I, the decision has been made, the applicant has been informed and I hope and pray for the reasons I gave earlier this morning that they would be on site as soon as possible. The store opened I think its planned for 2007."

(iii) In response to the question that 'there was a feeling that a big department store like John Lewis saying that they want to come to Northern Ireland, people rub their hands together and say 'goody goody' lets do everything we can to get them in, everything else goes by the board so to speak', Lord Rooker's response was:

"I fully accept that people would say that and think that but that is not the case. Genuinely the case here, each application has got to be looked at on its merits, it is not a green light for anyone else. It is not as though there is no consideration given to the infra-structure network, it is the policy of having three regional centres and also to the desire of the applicant. Also one has to look at this, this is a flagship new retailer who is prepared to

> come and invest in Northern Ireland, wants to invest in Northern Ireland, so it is only right that we should look for reasons to help rather than hinder consistent with our overall policy framework and given the fact that Sprucefield was there, given that its there like it is now, its not as though there is only one shop on it. The road network is there, the road network is being developed in the next three years all the way to Dublin. It means that people will be coming to shop in Northern Ireland from the southern areas, that has got to be good, it is good for jobs, it is good for the people of Northern Ireland believe you me."

The Art. 31 Notice of Opinion

[30] Following the announcement made by the Minister approving the application for outline planning permission, the Department proceeded to issue a Notice of Opinion to approve pursuant to article 31 of the 1991 Order. The Notice of Opinion dated 17 June 2005 gave notice that the Department considered that outline planning permission should be granted subject to compliance with a number of conditions. The conditions therein were subsequently replicated in the outline planning permission actually granted on 22 February 2006. Paragraph 21 of the Notice of Opinion drew to the attention of the applicant the fact "that an agreement under article 122 of the Roads (Northern Ireland) Order relates to the agreement." This curiously worded provision appears to have been intended to make clear to the applicant that it would have to enter into an article 122 agreement. The applicant's agents on 15 July 2005 wrote to the Planning Service confirming that the applicant did not require a hearing to be arranged under article 31 and requested that the matter proceed to a final decision.

The Art. 122 Agreement

[31] On 10 February 2006 an article 122 agreement was made between the Department of Regional Development and the applicant. Under clause 10 the Department covenanted with the developer to carry out an assessment of the performance of all roads within 3.5 kilometres of the external boundary of the site by considering a survey of journey times on the roads of vehicles travelling along each of the roads at peak periods as assessed by the moving observer method. This assessment was to be carried out within the period no sooner than 4 months prior to and no later than 2 weeks prior to the predicted date of commencement of trading from the new area of retail floor space and to be constructed pursuant to the planning permission. This assessment was

to establish what is called the base case. A further assessment was to be carried out on the zone between 6 months and no later than 24 months after the date on which trading commenced from the new retail floor space. If the surveys detected an increase in journey times over the base case attributable to traffic generated by the development in excess of the traffic impact report prepared by the applicant's agents such that the Department reasonably considered to be sufficient material to warrant mitigation works the Department should so notify the developer. The developer was obliged to pay the sum of £1m described as a traffic management contribution after commencement of trading from the new retail floor space. The Department was obliged under clause 10.6 prior to five years after commencement of the trading to pay for the carrying out of the mitigation works or to allocate the traffic management contribution to a defined scheme of works within a 3.5 kilometre radius of the site which were reasonably required as a result of the development as identified to a developer in writing pursuant to clause 10.3. Provision was made for the repayment of any part of the £1m not used by the Department but the Department reserved to itself no right outline planning permission and regulation 34 Statement to recover from the developer any sum in excess of £1m.

[32] On 23 February 2006 outline planning permission was issued. On 2 March 2006 a statement as required by regulation 34 was inserted in the Downpatrick Divisional Planning Office Register containing the particulars specified in regulation 34(1)(c). Paragraph 2 of the Statement stated that the application was decided having regard to the Regional Development Strategy for Northern Ireland 2035, the statutory area plan, Belfast Urban Area Plan 2001, the draft Belfast Metropolitan Area Plan, the Lisburn area plan 2001, "the Planning Strategy for Rural Northern Ireland" and PPS1, PPS2, PPS3, PPS5, PPS6, PPS10, PPS13, the Joint Ministerial Statement on plan prematurity and DCAN4 as well as other environmental information. This included the EIS and comments made by statutory consultees and other persons about the likely environmental effects. The views of Lisburn City Council were also considered. The statement set out the main reasons and considerations on which the decision was based as follows:

- It is acknowledged that the proposal has some impact on Belfast, Lisburn, Craigavon and Banbridge in terms of the diversion of trade when judged against the relevant policy tests in PPS5. However when considered against other material factors listed below the balance of weight is in favour of approval.

- Other elements of planning policy support the proposal. PPS5 paragraphs 5 and 6 refer to maintaining an efficient, competitive and innovative sector assuring choice and flexibility in terms of retail provision. The proposal also complies with a number of other policy tests in PPS5. The RDS policy ECON1 related to the development of

the Belfast – Dublin corridor and TRAN1 relating to enhancing accessibility to regional facilities and services support development at Sprucefield. Similarly, development at Sprucefield is broadly compatible with RDS policy SRC2 which seeks to increase links with neighbouring regions and capitable on trans-regional opportunities in policy SRC3 which seeks to foster patterns of development supported to community cohesion by revitalising the role of town centres and other common locations well served by public transport as vocal places, centres and other common locations well served by public transport as vocal places for shopping services and employment.

- Sprucefield is designed as the other out of town regional shopping centre in Northern Ireland which services a wide catchment.

- In terms of current type and scale of retail development at this location it is considered the proposal is consistent with the use of the site.

- Sprucefield is currently under-performing in its role as a regional centre.

- New retailers locating at Sprucefield will allow the centre to fulfil it regional role and attract a greater number of shopper from a wide catchment.

- The location of Sprucefield on the strategic eastern seaboard (Belfast to Dublin) transport corridor is a further factor in allowing the centre to attract shoppers from a wide area in line with regional policy.

- Within Sprucefield fulfilling its regional role there would be increased competition and choice in the retail sector to the benefit of the Northern Ireland consumer.

- The proposal would represent a significant inward investment as well as offering significant new employment opportunities.

- Measures to off-set any significant adverse effects (sic) were stated as including.

- A satisfactory means of access to the development in the interest of road safety.

- Legally binding agreement to provide any necessary additional infrastructure improvements after the development is operational.

- The provision, establishment and maintenance of a high standard of landscaping.

- Any archaeological remains are properly identified and protected or appropriately recorded.

- Proper drainage and sewage disposal facilities will be put in place.

- Water course are protected.

Conditions were attached to the planning permission to ensure that the appropriate mitigation measures were taken during construction and also when the proposal had been implemented. The regulation 34 statement concluded:

> "The Department therefore considers that, on balance, planning permission should be granted for the development as proposed subject to the conditions attached to the grant of planning permission dated 22 February 2006. The development will allow Sprucefield to fulfil its true regional role extending competition and choice in the Northern Ireland retail sector. It also will have significant economic benefits."

[33] The outline planning permission referred to the application with its serial number and described the proposal thus:

> "Erection of 48,987 square metres gross external floor space for retail use and 2,026 square metres for restaurant use together with ancillary infra-structure, landscaping and carparking including multi-story carpark."

The introductory section of the outline planning permission referred to the drawings attached to the application by reference to their serial number and letters. The permission then stated that outline planning permission was granted for the development "in accordance with the application" subject to compliance with 36 conditions.

[34] As required by article 35 of the 1991 Order application for approval of reserve matters as defined by condition 2 should be made within 3 years of the date on which the permission was granted and the development should be begun by the exploration of five years from the date of permission or the exploration of two years from the date of approval of the last of the reserve matters. Conditions 2, 3 and 4 provided:

"2. The under-mentioned reserved matters shall be as may be approved in writing by the Department.

Elevations: detailing the proposed elevations for the buildings when viewed from the A1 link road round about north eastwards from Hillsborough direction.

Restaurants: the position, size and external appearance of the proposed restaurant.

Landscaping: the use of the site not covered by buildings and the treatment thereof including the planting of trees, hedges, shrubs, grass, the laying of hard surface areas, the formation of banks, terraces or other earthworks and associated retaining walls, screening by fencing walls or other means, the laying out of gardens and the provision of other amenity features.

Lighting: the position and design of all external lighting including flood lights, security lighting and illuminated signage.

Other ancillary work: the position, layout and design of all other incidental buildings and structures, shop fronts, plant and works.

Reason: To enable the Department to consider in detail the proposed development of the site.

3. Retail floor space.

The gross retail floor space of the development hereby approved shall not exceed 48,987 square meters together with 2,026 square metres for café/restaurant. Within this area no more than 32,061 square metres shall comprise the total net retail floor space [measured internally].

Reason: To control the nature, range and scale of retailing activity so as not to prejudice the vitality and viability of existing retail centres.

4. The floor space hereby approved for the individual retail unit shall be operated as single

> units and shall not be sub-divided into independent units or amalgamated into larger units without the prior consent of the Department.
>
> 5. No internal operations increasing the floor space available for retail use shall be carried out without the prior consent of the Department.
>
> Reason for 4 and 5: To enable the Department to retain control over the nature, range and scale of retailing activities so as not to prejudice the continued vitality and viability of existing retail centres."

Conditions 8 to 17 set out detailed conditions relating to the landscaping of the site. Conditions 18 to 30 set out detailed conditions relating to the highways. 18, 19, 20 and 21 provided that the development should not be commenced until detailed engineering drawings for the works affecting the public road as indicated on specified drawing had been submitted to and approved by the Department; the development should not be open for use until all the roadworks indicated on specified drawings had been fully completed in accordance with the details in engineering drawings to be submitted and approved in accordance with the previous condition; the development should not be commenced until the detailed drawings for the proposed arrangements for the accesses onto the A1 Hillsborough Road had been submitted to and approved by the Department. All work should comply with the requirements of the design manual for roads and bridges and other relevant standards and technical guidance and should be assessed in accordance with the Institution of Highways and Transportations guidelines for safety audit of highway schemes; the development should not be open for use until proposed access arrangements had been fully completed in accordance with detailed engineering drawings to be submitted and approved in accordance with the previous conditions.

[35] The remaining conditions related to protection of any affected archaeological remains within the site, nature conservation, drainage and sewage and the need to lay services under ground.

The Role of JLP

[36] The planning application was not made by the JLP but by SCL though underlying the application was the prospect that JLP would become the anchor tenant of the development. That prospect seems to have been central to the Minister's decision making. In a letter of 31 January 2005 to the Planning Service, Anne Humphreys, Director of JLP Retail Development, pointed out that:

> "I am writing to provide you a brief insight into the nature of the John Lewis business, explain why Sprucefield is the only location in Northern Ireland which would meet the company's requirements and demonstrate the economic benefits the proposed investment would bring to the Province.
>
> John Lewis unlike our competitors builds large, full range department stores, offering a range and depth (some of 500,000 lines) of products not available in most other stores. That is the nature of our business and is what differentiates us from other department stores, which tend to be much more focused on fashion.
>
> Such a development demands a very large strategic site capable of drawing from a truly regional catchment, with supporting regional infra-structure and direct immediate access. Good car parking is also important so that customers can take away the large items which form part of our wide range of household goods and make up an essential element of our offer and appeal."

The letter went onto point out that JLP had considered Belfast City Centre for a location but had ruled it out for economic reasons. The extension to Castlecourt would not meet the company's objectives either in terms of timescale or site availability and Cathedral Quarter could not physically accommodate their space requirement and other sites in Belfast had proven unacceptable. Sprucefield did meet all the criteria and the emergence of the site unlocked the opportunity for JLP to invest in Northern Ireland. The location offered a large site with existing planning designation as a regional shopping centre; a strategic site capable of drawing across a regional catchment, including from all of Northern Ireland and also from the south, a road network providing regional access without local access constraints and a development supported by a good car parking provision and associated complimentary retail uses. The letter went on:

> "Timing is also a critical consideration for John Lewis. The size and complexity of a John Lewis department store requires the best part of two years in construction and fitting out work. John Lewis and Westfield can deliver a shop at Sprucefield within our time parameters, but to enable this to happen we need a decision urgently. 2006 is a very

> significant date since we are not opening any other shop in that year. From 2007 onwards however we have a very busy pipeline delivering 12 new shops at the rate of two a year. If we lose this window of opportunity we will not be able to invest in Northern Ireland for some years if at all.
>
> In support of our market knowledge and experience as a retailer the research carried out in Northern Ireland has helped identify Sprucefield as the only commercially viable option for John Lewis in Northern Ireland. If we are unable to invest and locate in Sprucefield we will not invest in Belfast and therefore we will not invest in Northern Ireland."

[37] The Minister before making his decision was aware of the contents of that letter. He was not made aware of the contents of two other letters that were sent by the Chairman of JLP, Sir Stuart Hampson. In a letter of 15 February 2005 addressed to the then Secretary of State for Northern Ireland the Chairman stated:

> "My purpose in writing to you is now to express concern about the very tight timing since it is our understanding, if there is to be any chance of meeting our target opening date of 2006, this decision will need to be taken prior to the Easter recess and any subsequent announcement of Westminster elections. In addition there has been much media speculation and correspondence about planning approval for the John Lewis shop been granted only with agreement for a much reduced adjacent retail development. The Sprucefield planning application which was submitted in 2004 needs to be taken as a total package. Without the associated retail units in their original form and size the John Lewis shop will not be viable. Therefore a decision to approve a reduced retail offer at Sprucefield would prevent John Lewis investing in Northern Ireland."

Responding to that letter the Secretary of State pointed out that there were "some very complex planning issues raised by this application." As far as he was concerned the Planning Services contribution and commitment of the process so far had not been lacking. In a further letter of 18 May 2005 the Chairman wrote again to the new Secretary of State stating that the proposal

was to bring a full range John Lewis department store plus its associated distribution operation to Northern Ireland at Sprucefield. Such an operation would employ about 1,000 people and be "our first on the island of Ireland." He pointed out:

> "Our interest in Sprucefield has been based on a combination of factors – the viability of the location and associated retail space, its designation as a regional shopping centre and the unique chance to fit in an additional store at Sprucefield before we embark on existing plans for a major UK development programme of ten new shops starting in 2007.
>
> We discussed these circumstances fully with Paul Murphy and had hoped for a decision on the planning application before the election. Time is against us as we proceed to make the financial and operational commitments to other locations as part of our major pipeline of new shops in England and Wales. I believe that the credibility of all parties is better served by a decision soon rather than continuing uncertainty. I am sure you appreciate that a public inquiry or a refusal on Sprucefield will mean that we will not proceed with any investment in the province.
>
> We sense a great deal of political will to have a new John Lewis department store in Northern Ireland. For our part we remain fully committed to Northern Ireland and would prefer to draw trade from the south rather than to invest in Dublin. The timing is, however, very tight and I would therefore ask you to ensure that a decision can be reached as soon as possible. We are ready to do all we can to progress matters with you, your colleagues and officials."

Lord Rooker replied to the letter of 18 May 2005 in a letter dated June 2005 but apparently written on 1 June 2005. It appears from the evidence that he became aware of the contents of the two letters from the chairman of JLP after he had made his May decisions but before he made his public announcement in June 2005. In his reply to the chairman Lord Rooker stated:

> "I have carefully considered all of the arguments for and against this proposal and, taking into account the wider positive economic and social benefits that

> this proposal brings, I am pleased to be able to inform you that I decided that planning permission should be granted. My intention to approve the application will be announced publicly today and the decision notice will issue shortly."

Sprucefield's Planning History

[38] Sprucefield Centre first developed in 1988 – 89, the original outline approval for the regional centre being granted in July 1987 following a public inquiry before the Planning Appeals Commission. Reserved matters approval was granted in January 1998. The original application related to a Marks and Spencer store of 11,427 square meters and three retail warehouse units totalling 9,540 square meters. All the retail warehouse units were subject to a condition restricting sales to bulky goods. In February 1993 Snodden's Construction were granted planning permission following an appeal to the Planning Appeals Commission for two additional warehouse units totalling 4,831 square meters. These were again subject to bulky good conditions. In November 1995 Marks and Spencer were granted planning permission for an extension totalling 5,574 square meters. That application lapsed and a second application was made to include the extension and further 8,361 square meters of retail warehousing space. Following a public inquiry approval issued in November 2004.

[39] Planning permission was granted in 2001 for comprehensive mixed development to include a retail food store, retail warehousing, commercial, leisure, vehicle showrooms and associated uses on the site and adjourning lands together with a link road between the A1 and the M1 and associated junctions, civil engineering and landscaping works. Permission was granted following the Department's consideration of the Planning Appeals Commission report of the article 31 public inquiry held in October, November and December 1999. That permission has been partially implemented. The petrol station and food store (Sainsburys) together with the largest retail warehousing units (B&Q and Curry's) are trading. Planning applications have been received to vary conditions attaching to the smaller retail warehousing units which have been built in order to accommodate Boots the Chemist and Argos. Infra-structure improvements have been provided. The proposed development in the current application related to that part of the larger site which was to have been mainly developed for non-retail uses. It is some 26.3 hectors an area and is levelled land which is being cleared and effected by the construction of the adjacent lands. There is a redundant petrol filling station on the eastern part of the site. The application site which is now the subject of the outline planning permission in favour of the applicants is across the road from the Marks and Spencer store. Adjoining land to the north and west lies within the greenbelt and is used for recreational purposes and agriculture. According to the Garvey report the applicant's agents

statement that the previous approval established the principle of retail development on the application site was incorrect as the nature and scale of retail development which was considered acceptable under the relevant policies already had been built as approved. That approval established the principle of mixed use development in accordance with planning policy including appendix 7 of the draft Regional Development Strategy (now appendix 10 of the RDS). The applicant's proposal in effect meant that mixed use development would not proceed.

The Judicial Review Challenges

[40] In their amended applications the various applicants challenged the decision making processes of the Minister and the Department which led to:

(a) the ministerial decision made in late May 2005 and announced on 1 June 2005 to grant outline planning permission to SCL in respect of its application;

(b) the Departmental decision to issue the Notice of Opinion under article 31 on 17 June 2005 purporting to accede to the application subject to conditions; and

(c) the Departmental decision to grant the outline planning permission on 22 February 2006 in the terms in which it was issued.

The applicant's mounted their challenge on a wide number of fronts and by arrangement between the parties individual applicants focused the attack under particular headings, all supporting each other in their overall challenge although only Craigavon Centre Limited in their pleadings and argument relied on the purported breach of community law in respect of the decisions.

[41] Before turning to the individual issues raised it may be helpful to briefly outline the main thrust of the attacks made by the individual applicants:

(a) Mr Horner QC on behalf of Bow Street Mall and Lisburn Chamber of Commerce focused on:

    (i) The so-called "no brainer" approach to planning adopted by the Minister.
    (ii) The failure to give reasons and/or due weight to material planning considerations and taking into account irrelevant considerations.
    (iii) The treatment of the identify of JLP as a material consideration.

(iv) If the identity of JLP was a legitimate material consideration the failure to ensure that the planning permission gave effect to that material consideration.
(v) The ministerial treatment of the draft PPS5 affecting retailing and town and city centres.
(vi) The way in which the Minister and Department accepted at face value the proposition that the proposed development of 29 retail units in addition to the JLP store.

(b) Mr Straker QC on behalf of Multi Development UK Limited focused on:

(i) The failure of the Minister to consider the conditions to be properly imposed in any planning permission before making the decision to grant planning permission.
(ii) The failure to properly consider whether a public inquiry was appropriate.
(iii) The failure by the Minister to take account of the highways position before deciding to grant planning permission and thereby leaving out of account a relevant consideration.
(iv) The absence of a proper environmental statement and the breach of the EIA Regulations.
(v) Overlooking or ignoring the position of the Department for Social Development.

(c) In his domestic law challenge Mr Larkin on behalf of Central Craigavon Limited focused on:

(i) The failure of the Minister and the Department to appreciate that JLP was properly connected with the development.
(ii) The taking into account of JLP demands both in terms of location and timing of the development which were not proper or relevant considerations.
(iii) The taking into account of JLP threat to go to Dublin if planning permission at Sprucefield were not granted.
(iv) The Department's application of discretion in allowing itself to be dictated to.
(v) The Minister's misdirection to himself that Northern Ireland and English planning policies in this field were different.

In his community law challenge Mr Larkin contended that the Minister's decision constituted state aid contrary to article 87(1) of the EU Treaty; that it constituted unnotified state aid contrary to Article 88(3) of the EU Treaty; that it discriminated on the grounds of nationality contrary to article 12 of the Treaty; that it facilitated an anti-competitive agreement between JLP and the developer contrary to article 10 taken together with article 81 of the treaty.

The decision amounted to a measure having equivalent effect in offering or causing to be offered to JLP advantageous terms with the express purpose of ensuring that JLP established itself as a retailer in Northern Ireland contrary to article 28 and it offered advantages to JLP in establishing itself in Northern Ireland that it would not be available to a retailer from another member of State contrary to article 43 of the EU treaty.

(d) Belfast City Council and Belfast Chamber of Trade though Mr Orr QC focused their attack on:

(i) The failure of the Minister to make any or adequate enquiry into the availability of alternative sites for a development such as that arising in the present application.
(ii) The failure to properly taken into account the impact of the proposed development on existing city and town centre and in particular a failure to take account of the original development strategy, strategic planning guidelines, SPG-ECON1 and policy R4 of the BMAP containing specific policies formulated for the Sprucefield Regional Shopping Centre.
(iii) The failure to give any reasons purporting to justify the conclusion that the proposed development would bring social and economic benefits.
(iv) Reaching that conclusion without any supporting evidence.
(v) Failing to give clear reasons having regard in particular to the fact that the Minister was contravening the advice of officials, professional planners and other governmental agencies without the benefit of the open forum of a public local inquiry, the clear departure from stated policy, the fact that the decision was of very significant importance to the people of Northern Ireland.
(vi) The failure to provide any justification for the additional 29 units.

All the applicants argued that following the notification of the article 31 Notice of Opinion there had been a material change of circumstances requiring the Department to reconsider the position in the light of that change. The material change of circumstances relied on by them was that the JLP had let it be known in a statement recorded in the press that it was considering opening a JLP store in the Republic of Ireland which was contrary to the position it had taken before the ministerial decision and JLP did not appear to be maintaining the stance that it had to open its store in Northern Ireland by 2006 since it now appeared clear that it was prepared to work to a timeframe much longer than that.

The Statutory Framework

[42] Under article 3 of the 1991 Order the Department is required to formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development. Part IV embraces a series of provisions relating to planning control. Article 11 defines development as "the carrying out of building, engineering, mining and other operations in, on, over or under land or the making of any material change of use of any buildings or other land." Article 11(2)(a) is of some relevance in the present dispute. It provides that the carrying out of works for the maintenance, improvement or other alteration of any building, being work which affects only the interior of the building or which does not materially affect the external appearance of the building shall not be taken for the purposes of the order to involve development of the land. Under article 25(1)(a) the Department has three choices in relation to a planning application, to grant unconditionally, to grant subject to conditions as it thinks fit or to refuse the planning application.

Article 31 is of central relevance in the present case and it provides:

> Special procedure for major planning applications
>
> **"31.**
>
> (1) Where, in relation to an application for planning permission, or an application for any approval required under a development order, the Department considers that the development for which the permission or approval is sought would, if permitted—
>
> (a) involve a substantial departure from the development plan for the area to which it relates; or
>
> (b) be of significance to the whole or a substantial part of Northern Ireland; or
>
> (c) affect the whole of a neighbourhood; or
>
> (d) consist of or include the construction, formation, laying out or alteration of a means of access to a trunk road or of any other development of land within 67 metres of the middle of such a road, or of the nearest part of a special road;
>
> the Department may within two months from the date of the application serve on the applicant a

notice in such form as may be specified by a development order applying this Article to the application.

(2) For the purpose of considering representations made in respect of an application to which this Article applies, the Department may cause a public local inquiry to be held by the planning appeals commission.

(3) Where a public local inquiry is not held under paragraph (2), the Department shall, before determining the application, serve a notice on the applicant indicating the decision which it proposes to make on the application; and if within such period as may be specified in that behalf in the notice (not being less than 28 days from the date of service thereof) the applicant so requests in writing, the Department shall afford to him an opportunity of appearing before and being heard by the planning appeals commission.

(4) In determining an application to which this Article applies, the Department shall, where any inquiry or hearing is held, take into account the report of the planning appeals commission.

(5) The decision of the Department on an application to which this Article applies shall be final.

(6) In this Article "road " includes a proposed road and "special road ", "trunk road " and "proposed road " have the same meaning as in the M40 Roads (Northern Ireland) Order 1980."

It is clear that in any major application raising any of the matters listed in article 31(1)(a) to (d) the Department is bound to consider applying the article to the application. That happened in this case. Once article 31 is applied to the matter the Department has to turn its mind to consideration of the question whether a public local inquiry should be held by the Planning Appeals Commission. The issue whether the Department approached that question properly arises in this case. If the Department having directed itself properly and deciding within its proper margin of appreciation that a public inquiry is not necessary the Department must serve a notice indicating the decision which it proposes to make (its Notice of Opinion). Whatever the indication of its Notice of Opinion the applicant may proceed to the Planning

Appeals Commission whose report would be taken into account by the Department. The ultimate decision it makes will be final and therefore cannot be subject to the ordinary planning appeal route. If the Department's proposal is to reject the application the applicant may wish to take matter to the Planning Appeals Commission were the matter goes into the public domain. If the Department proposes to grant the application without conditions it will be hardly likely that the applicant take the matter to the Commission. If the conditions attached to the proposed planning permission are considered unacceptable the applicant may wish to challenge those conditions before the Commission.

Introductory Consideration of Relevant Legal Principles

[43] A number of clearly established principles of central relevance in the case emerged from the authorities and can be stated briefly as follows:

(a) The judicial review court is exercising a supervisory not an appellate jurisdiction. In the absence of a demonstratable error of law or irrationality the court cannot interfere. The court is concerned only with the legality of the decision making process. If the decision maker fails to take account of a material consideration or takes account of an irrelevant consideration the decision will be open to challenge. (per Lord Clyde in City of Edinburgh Council v Secretary of State [1998] 1 All ER 174).

(b) It is settled principle that matters of planning judgment are within the exclusive province as the local planning authority or the relevant minister (per Lord Hoffmann in Tesco Stores v Secretary of State [1995] 2 All ER 636 at 657).

(c) The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for those objectives to be set out in legislation, ministerial directions and in planning policy guidelines. The decision of ministers will often have acute social, economic and environmental implications. They involve the consideration of the general welfare matters such as the national and local economy, the preservation of the environmental, public safety and convenience of the road network and these transcend the interests of particular individuals (see R (Alconbury Limited) v Secretary of State [2003] 2 AC 327 per Lord Slynn, Lord Nolan and Lord Hoffmann).

(d) Policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts (per Lord Hoffmann in Alconbury at 327).

(e) In relation to statements of planning policy they are to be regarded as guidance on the general approach. They are not designed to provide a set of immutable rules. The task of formulating, co-ordinating and implementing policy for the orderly and consistent development of land may require the resolution of complex problems produced by competing policies and their conflicting interests. Planning polices are but some of the material considerations that must be taken into account by the planning authority in accordance with the 1991 Order (per Carswell LCJ in Re Lisburn Development Consortium Application [2000] NI JB 91 at 95( ) – (e), per Coghlin J in Re Belfast Chamber of Trade Application [2001] NICA 6.

(f) If a planning decision maker makes no inquiries its decision may in certain circumstances be illegal on the grounds of irrationality if it is made in the absence of information without which no reasonable planning authority would have granted permission (per Kerr LJ in R v Westminster Council ex parte Monahan [1990] 1 QB 87 at 118(b) – (d). The question for the court is whether the decision maker asked himself the right question and took reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly (per Lord Diplock in Tameside).

(g) Where the Department has issued an art. 31 notice indicating the Department's proposed decision the applicant is entitled to expect that it will be implemented in the absence of some good reason to the contrary. It is open to the Department to change its mind for sufficient reasons and give a different final decision on the application if it is desirable in the public interest to do so (per Carswell LCJ in Re UK Waste Management Application [1999] NI 183).

(h) In the context of planning decision the decision making process may take place in stages. Thus, for example, a resolution by a local authority proposing to permit or refuse a planning application may be later followed by a grant or refusal of planning permission. The decision of the planning authority passing the resolution does not grant the permission but it is susceptible to review as will be the later decision to grant or refuse planning permission. An applicant will not be precluded from challenging the latter if he acts timeously after the grant or refusal on the ground that he should have challenged the earlier step (R (Burkett) v Hammersmith & Fulham [2002] 1 WLR 1593 (I).

(i) The planning decision-maker's powers include the determination of the weight to be given to any particular contention. He is entitled to attach what weight he pleases to the various arguments and contentions of the parties. The courts will not entertain a submission that he gave underweight to one argument or failed to give any weight at all to another (per Forbes in Sedon Properties v Secretary of State for the Environment [1978] JPL 835).

The Public Inquiry Issue

[44] The applicant's case was that the Minister had failed to properly direct himself on the question whether a public inquiry should be held before a decision was taken. Ms Garvey had, it was argued, failed to direct the Minister correctly on the matter in paragraph 8.81 of her report (see para [18] above). There she said that the "key test" for the Department in deciding the process route was whether a public local inquiry was necessary to provide a forum for presentation and consideration of objections arising from representations received and which needed to be assessed to allow the Department to determine the application. She argued that on balance an Article 31 public inquiry was not necessary to consider representations on the application and that a Notice of Opinion should be issued recommending refusal. Focusing the Minister's mind on the fullness of the representations from the objectors diverted his mind from the question whether he had sufficient information from all the representations made for and against the proposal.

[45] The Minister's explanation for his decision not to direct a public local inquiry first found expression in his letter 24 May 2005 to Mr Peover:

> "The need for such inquiry was addressed in Planning Service's submission which concluded in the context of a recommendation to refuse that it was not required. I have also considered the issue again in the light of my conclusion and I am satisfied that a public inquiry is not necessary to inform my decision to approve."

In his interview on 1 June 2005 the Minister repeated that he was not convinced that a public inquiry would have brought out anything new that anybody did not already know about. Against the timeframe he was working to he concluded that there was a window of opportunity for the people of Northern Ireland which should be grabbed.

[46] It is clear that provided the decision-maker takes account of the relevant considerations a decision not to hold a public inquiry would be difficult to challenge on rationality grounds. (See Thallon v Department of

the Environment [1982] NI 53, 56). However, in this instance the question is whether the Minister did ask himself the right questions before deciding against a public inquiry. The statutory basis for a public local inquiry is to consider "representations." The statutory context is one where the applicant raises issues of public concern and importance. In this case the Department considered that each of the grounds in Article 31(1)(a) to (d) was in play, highlighting the importance of the issues raised by the application. Irrespective of whether there were objections the application raised matters of major importance. Ms Garvey's viewpoint in paragraph 8.81 was expressed against the background of her advice to refuse the application. She was, however, wrong to suggest that "key test" was whether a public local inquiry was necessary to consider the representations of objectors. Article 31(2) differs from Article 7 of the 1991 Order which empowers the Department to cause a public local inquiry to be held by the Planning Appeals Commission for the purposes of considering "objections" to a development plan or to the alteration repeal or replacement of such a plan. In Prest and Straker v Secretary of State for Wales [1983] JPL 112, speaking in the context of a public inquiry in relation to the vesting of land, Lord Denning pointed out:

> "A public inquiry is not a lis inter partes. It is a public inquiry – at which the acquiring authority and the objectors are present and put forward their cases – but there is an unseen party who is vitally interested and is not represented it is the public at large it is the duty of the Minister to have regard to the public interest … so also with the planning and development of land. It is the public at large who are concerned."

[47] The Minister appears to proceed it on the basis that since the Planning Service viewpoint was that it was unnecessary to have an inquiry in the context of their proposal to refuse the application he should proceed in the same way in the context of his decision which was to accede to the application. It would have been helpful for the Minister to have had his mind directed to the issues that needed consideration if he was minded to reject the advice to refuse. As it was, he not so directed. There was, however, a logical difference between the desirability of a public inquiry in the context of a proposed refusal and in the context of a proposed grant of the permission. If planning permission was going to be refused the applicant had a right to proceed to the Commission where the Department's viewpoint could be challenged. This provided a form of public forum for investigation of the issues. If the Department was going to go ahead and grant permission then a hearing before the Planning Appeals Commission would be less likely and there would be probably no public forum at which the issues could be reviewed.

[48] The way in which the Minister expressed himself in his letter of 24 May 2005 is open to the interpretation that in reaching his decision on 22 May the Minster had not directed his mind to whether there was a need for a public inquiry and that he considered the matter before he wrote his letter of 24 May 2005 for the first time. The Minister at the meeting of 24 May with civil servants indicated that he would write to Stephen Peover to confirm "his further thoughts". If, having reached his view on 22 May without addressing the question of the need for a public inquiry the Minister then looked at the question of the public inquiry before writing the letter of 24 May it was logically fallacious to start with the premise of his conclusion and proceed from there to the conclusion that a public inquiry was not necessary. If, on the other hand, prior to reaching his conclusion on 22 May he had considered and rejected a public inquiry, he may have looked at the matter again and remained of the same view that a public inquiry was not necessary. Such an approach would not have been flawed on the basis of an illogical analysis. For the reasons set out below it is not necessary to come to a firm view as to the proper interpretation of the ministerial documentation.

[49] The ultimate answer to the question whether the decision not to direct a public inquiry was flawed appears to me to be related to the question whether the decision to issue the Notice of Opinion and the grant of outline planning permission were flawed on the ground of lack of proper inquiry. The application related to a development which incorporated a department store and 29 retail units. The latter exceeded the area of the former and it was those units, it was argued by the applicants, which posed a particular threat to the other town and city centres, firstly, because of the fact that they would become magnets themselves because a John Lewis store would be the magnet store; they would increase the diversion of trade away from the centres with effect on the vitality and viability of the centres; and they would themselves potentially draw away tenants from existing centre stores. It is necessary to bear in mind that the proposed development would increase the existing retail floor space at Sprucefield by over 100%. The existing floor space is 47,075 square metres. A further 11,395 square metres have approval but are not yet built. When completed Sprucefield in total would measure 107,475 square metres. This must be seen in the light of the existing gross retail floor space in Belfast City Centre which is 118,000 square metres. This latter area will be increased when the Victoria Square development is fully occupied which will add a further 55,000 square metres of shopping to Belfast City Centre. With the planning permission granted to SCL Sprucefield would have 50% more than the combined retail area of Lisburn City Centre. The 29 retail units significantly exceed the area of the department store (26,679 square metres compared to 22,300 square metres in the department store). The interconnection between these units and the JLP store was an aspect of the application which appears to have received scant attention from within the Planning Service or on the part of the Minister. The applicant informed Planning Service and the Minister was informed that "the proposal is not

severable and the scheme as a whole must proceed in order to be economically viable." The JLP letter of 31 January 2005 did not claim that the scheme needed an additional 29 units. In his letter of 15 February the Chairman of JLP asserted that the application had to be taken as a total package. He alleged that "without the associated retail units in their original form and size the John Lewis store will not viable. Therefore a decision to approve a reduced retail offer at Sprucefield would prevent John Lewis investing in Northern Ireland".

[50] In his decision the Minister clearly focused on the benefits flowing from a JLP store at Sprucefield. As far as the other retail units are concerned he appears to have taken it as given that they were an inseparable part of the scheme. He hoped that they would attract outside investors not already in the market but clearly he was willing to accept that they might well be occupied by tenants moving out of existing centres, something which would affect existing centres' viability and vitality. He appears to have accepted that such a consequence, undesirable though it might be, would be a price worth paying for the prize of a JLP store at Sprucefield.

[51] In R v Westminster City Council ex parte Monahan [1990] 1 QB 87 the Royal Opera House Covent Garden Limited sought planning permission for a far reaching development, the central objective of which was to extend and improve the Opera House. Parts of the site were proposed to be used for the erection of office accommodation which would be a departure from the development plan. Permission was granted on the basis that the desirable improvements to the Opera House could not be financed unless the offices were permitted. The applicant sought judicial review of the decision on the ground that the fact that a desirable part of the proposed development would not be financially viable unless permission were given for that other part was not capable of being a material consideration. The Court of Appeal, upholding Webster J, held that since in reality financial constraints on the economic viability of desirable planning developments were unavoidable it would be unreal and contrary to common sense to exclude them from the range of considerations which could properly be regarded as material in determining planning applications. In deciding to grant planning permission for the erection of the offices the authority was entitled to balance the fact that the improvements to the Opera House would not be financially viable if the permission for the offices were not granted against the fact that the office development was contrary to the development plan.

[52] Kerr LJ at 111 (e)-(f) said:

> "Virtually all planning decisions involve some kind of balancing exercise. A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices

> in granting permission for developments which could or would in practice otherwise not be carried out for financial reasons. Another common no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, ie related in the sense that they can and should properly be considered in combination, where the realisation of the main objective main depend on the financial implications or consequences of others."

Later at 113 (c)-(f) Kerr LJ went on:

> "It is no doubt true that planning authorities must be particularly careful not to give way too readily to assertions of financial constraints as a ground for relaxing policies which had been formulated in the public interest. Suppose that an urban authority had a policy requiring use of green tiles – which are substantially more expensive than others, in areas of residential developments bordering on the countryside. If a developer who wished to erect an otherwise highly desirable housing estate claimed that this would be uneconomic if green tiles had to be used, then the authority would clearly not be bound to reject his application out of hand. It would be bound to consider it on its merits although it might well be highly sceptical about the assertion that the economic viability of the project would founder if green tiles had to be used but if, after proper consideration, this were indeed the conclusion reached on a basis which would not admit of a charge of irrationality, then there would be no question about the validity of a decision which permitted the use of red or black tiles in the circumstances."

[53] An issue raised in that case was whether the planning authority was entitled to conclude that but for the office accommodation the development of the Opera House would not proceed. The Court of Appeal accepted that Webster J was correct to say that if a planning authority makes no inquiries its decisions may in certain circumstances be illegal on the ground of irrationality if it were made in the absence of information without which no reasonable planning authority would have granted permission. The applicants then contended that the information put before the Planning

Committee was not such as to enable it rationally to conclude that the proposal was the only way of achieving the Opera House improvements. In the present case the applicants in effect contended that there was no information put before the Department or the Minister to enable them rationally to conclude that the proposal was the only way of achieving the opening of a JLP store (assuming that that was in itself the desirable object to be achieved). In Monahan the Court of Appeal on the evidence rejected the contention that the Committee had failed in its investigative functions. The Committee had made it clear that it "wished to be absolutely convinced that the commercial development of the site was the only way of achieving the Royal Opera House improvements." Kerr LJ pointed out that:

> "The degree of discussion, questioning and consideration which took place meant that the suggestion that the conclusion reached was manifestly unreasonable or based on inadequate information was untenable."

[54] The way in which the planning decision-makers in Monahan went about their investigative task was in marked contrast to the present case where the contentions of SCL and JLP on the issue of the need for the size and layout of the overall development were accepted at face value. Kerr LJ pointed out that planning authorities must be careful not to give way too readily to assertions of financial constraints as a ground for relaxing policies formulated in the public interest. Commercial entities intent on maximising profits and seeking to persuade planners to accept their proposals will seek to employ all arguments to their economic advantage and to present their case in its most compelling form. From the developer's point of view there is nothing wrong with such a approach. Planners, however, must approach their functions with due regard to the wider interests at stake and approach the ipse dixit contentions of planning applicants in a questioning frame of mind. If after proper consideration of the issues properly explored the decision is in favour of planning permission the decision maker could not be challenged as having acted irrationally or perversely. In the present circumstances, in the absence of any real exploration of the issues relating to the alleged financial imperatives of an overall development of this magnitude, the conclusion that it was an appropriate development was one which no reasonable planning authority properly directing itself could have reached having regard to the Departmental conclusions that the vitality and viability of other centres could be significantly affected by a development of this size.

[55] Viewing the matter in that way the conclusion by the Minister that a public inquiry was unnecessary because it would not have brought out anything new was Wednesbury unreasonable. A central aspect of the application had gone unexplored and unquestioned. Looking at the matter in another way, by wrongly assuming that the Department had all the

information and data it required to make a rational decision the Minister had left out of account a relevant consideration, namely that the information for the Department was insufficient to reach a proper decision. Accordingly, the Minister's decision not to hold a public inquiry was flawed. It would, of course, have been open to the decision-maker to carry out investigations and inquiries into the unexplored issues short of directing a public inquiry. Had the Department done so and obtained information which satisfied it of the inevitable need for the connection between the 29 units and the JLP store and, if the Department rationally considered that information adequate, then the need for a public inquiry might not have arisen. However, the Department did not take adequate steps to inform itself on a central issue either through the mechanism of a public inquiry or by investigation short of such inquiry.

The No Brainer Issue

[56] Mr Horner QC contended that the Minister in his comments that the decision was an "absolute no brainer" revealed an entirely flawed approach to the task with which he was charged. He contended that it was difficult to avoid the conclusion of a Minister parachuted into Northern Ireland and, asked at the last moment by a colleague to take over the task with the most cursory understanding of planning and retail policy in Northern Ireland, and making a decision within days of taking up his post. Rather than taking the time to properly and carefully consider the advice of his officials with planning and retailing expertise and before sharing with them his own thoughts the Minister had effectively bounced into a decision based on purported justifications that by his own admission were not planning considerations. He allowed the identity of John Lewis and its demands to dictate his decision. By dancing to John Lewis' tune he approved himself deaf to all other considerations and in particular had failed not only here but to heed the advice of his own officials.

[57] The term "an absolute no brainer" used by the Minister in the interview of 1 June 2005 taken on its own may have given the impression that the Minister had treated the issue lightly and had failed to consider the issues in sufficient depth. By no stretch of the imagination could it be suggested that the decision was one which did not recall for the most careful and scrupulous analysis. The phraseology was infelicitous and it did not do justice to the weight of the case against granting planning permission or the complexity and significance of the issues at stake. The phrase, however, must be read in the context of the whole interview. In the preceding documentation in his letter of 24 May to Mr Peover he acknowledged that the issue was one requiring a finely balanced judgment and that he reached a different conclusion from his advisors having regard to countervailing and overriding factors. In the interview itself he later stated that the paperwork was quite voluminous and was balanced. "On balance" he came down in favour of the decision. In the narrow planning sense the argument was not to go ahead but

he considered that viewing the matter with regard to the wider issues at stake planning permission was appropriate.

[58] The impression given by the ministerial papers and statements is that the decision was taken quickly. Depending on one's viewpoint a decision may be made promptly, quickly, speedily, expeditiously or hastily. The adverb one uses will colour one's approach to the quality of the decision-making process. Expedition without further will not call into question the legality of a decision. For the decision to be bad in law the decision-maker must have fallen into some legal error over and beyond the mere speed of the decision-making. Accordingly, for the applicants to succeed in their challenges they must demonstrate one or other of the usual grounds justifying judicial review. Excessive haste may provide an explanation why a decision maker fell into error in his approval but one must find an error over and above mere haste.

The Reasons Argument

[59] It was argued by Mr Orr QC that there was a strong obligation on the Minister to give clear reasons for his decision arising from the circumstances of the case. The fact that the Minister was departing from clearly stated policy which prima facie required the refusal of the application called for reasons. Mr Orr QC relied in particular on E C Gransden & Co Ltd v Secretary of State for the Environment [1986] JPL 519 and Carpets of Worth Ltd v Wyre Forest District Council [1991] 62 P & CR 334. In addition counsel relied on the fact that the Minister chose to overrule the advice of his officials, professional planners and other government agencies and did so without the benefit of an open forum which would have been provided by a public inquiry. All the applicants contended that the Minister's reasons were not apparent. Mr McCloskey QC on behalf of the Department did not concede that there was any duty to give reasons but argued that the Minister's reasoning was apparent from the memo of 22 May 2005, the note of the meeting of 24 May 2005, the Minister's letter of 24 May 2005, the briefing notice to the Minister in advance of the press conference, the Minister's answer to the press conference and in his interview.

[60] Mr McCloskey properly reminded the court that in the absence of any proof to the contrary credit ought to be given to public officers who have acted prima facie within the limits of their authority for having done so with honesty and discretion" (per Lord Lowry in IRC v Combes [1991] 2 AC 283). Ministerial pronouncements must be read in bonam partem.

[61] The applicants fastened on a number of comments and statements made by the Minister which they contended show lack of reasoning and showed that improper reasons were or could have been taken into account. Thus, in his minute of 22 May, he referred to "taking into consideration the

wider issues in addition and supplementary to the planning issues relating to Sprucefield." In the minutes of 24 May 2005 he referred to "looking at wider aspects than could be considered by the planning service". He referred in his letter of 24 May 2005 to considering "countervailing and overriding factors" as noted in his minute of 22 May. It is, however, important to read those statements in their overall context. Reading all the Minister's statements and comments it is reasonably apparent that what persuaded the Minister in favour of the granting of permission was what he considered were the economic and social benefits flowing from the proposal in terms of inward investment, of job creation, of increased competition, of increased choice for shoppers in Northern Ireland and promoting the development of Sprucefield as a regional shopping centre, and of attracting shoppers from south of the border with spill-over benefits for other centres such as Belfast and Lisburn. There is nothing in the ministerial documentation or comments to suggest that the wider issues taken into account were anything other than proper planning considerations. While his words might carry the suggestion that as a minister he thought that he could do things which the Planning Service could not (which is clearly not the position in law), read in context the Minister was making the valid case that a minister can in practice take a broader view of what planning policy should or could in the circumstances justify or require. Since ministers determine and lay down policy and officials implement them there is in fact nothing constitutionally or legally incorrect in the Minister's viewpoint.

[62] The extent to which reasons require to be spelt out is discussed by Lord Brown in South Buckingham District Council v Porter [2004] 1 WLR 1953:

> "The reasons need refer only to the main issues in dispute, not to every material consideration. This should enable disappointed developers to assess their prospects of obtaining some alternative development permission or, as the case may be, their unsuccessful opponents to understand how the policy approach underlining the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he had genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

The issue of whether the Minister gave an adequate indication of the reasons that motivated the conclusion he reached (which I answer in favour of the respondent) is a separate issue from the question whether the reasoning process itself was otherwise legally flawed.

JLP as a Material Consideration

[63] On any fair reading of the Minister's decision as evidenced in the ministerial documents and comments it is apparent that central to his decision was his understanding that JLP was to be the incoming anchor tenant. His memorandum of 22 May proceeds on the basis that JLP is the major proposed retailer. He posed the question whether we wanted a JLP store in Northern Ireland. This new entrant would increase competition and choice in his view. In his letter of 24 May he recorded that he understood that the name of the high profile tenant could not be given weight in terms of planning policy. This statement may well have been made on the basis of advice given to him after his memorandum of 22 May since the memorandum clearly gave weight to the identify of JLP. His draft press release clearly "sold" the decision to approve the proposal on the basis that John Lewis was coming to Northern Ireland "John Lewis is a major name in retailing and its entry into the Northern Ireland retail sector represents further choice for the Northern Ireland consumer and compliments the retail experience on offer at other centres." Suggested answer number 5 in the question and answer material provided to the Minister in advance of the press conference recorded that the Minister "made this decision because I firmly believe the entry of John Lewis into the Northern Ireland retail sector is a very positive step in the wider interests of the Northern Ireland community." In answer 14 the suggested answer was that the Minister saw the Regional Centre at Sprucefield as the right type of location for a John Lewis store. The comments of the Minister as actually delivered at the press conference were replete with references to John Lewis coming to Northern Ireland and Sprucefield. He referred to the application as being "a development which contains a John Lewis store."

[64] Mr Ferguson in his affidavit sworn on 23 March 2006 stated in para. 7 that in making the impugned determination the Minister did take into account the identity of John Lewis in the manner and to the extent set out in his memorandum of decision dated 22 May 2005, the note of the meeting dated 24 May 2005 and his memorandum dated 24 May 2005.

[65] I accept the argument presented by Mr McCloskey that the Minister was entitled to have regard to the identity of JLP as the proposed anchor tenant in making his impugned decision provided that John Lewis was indeed to be the anchor tenant. He was entitled to consider that as a permissible material consideration. In Re Wellworths Application [1996] NI 509 the Court of Appeal rejected the argument that the planning authority should have no regard to the identity of the applicant for planning

permission. Lord Scarman in Westminster County Council v Great Portland Estates [1985] AC 661 recognised that the human factor cannot reasonably be excluded from planning determinations.

[66] The very centrality in the Minister's decision-making of JLP's identity and perceived role in the development, however, raises another issue. It was that central fact that led to this decision which would or might well have been very different if JLP had not emerged as the proposed anchor tenant. The question arises as to why the Notice of Opinion and the subsequent planning permission did not reflect that very centrality. The applicants contended that the Minister's decision is flawed by the fact that he did not consider what conditions should be imposed in the grant of permission. They argued that since the identity of JLP was central the Minister should have considered whether there should be imposed a condition requiring the Department store floor space to be occupied by JLP and tying JLP into the overall development of the site.

The Conditions Challenge

[67] Mr Straker QC argued that the imposition of conditions affecting the grant of planning permission was an important matter on which representations were appropriate to be made. The submission made to the Minister recommended refusal and carried no discussion of a draft of suggested or possible conditions. When the Minister reached his conclusion on 22 May and discussed it with the other ministers it seems that he had did not know what conditions were either to be proposed or capable of being imposed. Following his decision to permit the development the Minister asked that the decision be taken forward to the next stage. This included a consideration of highway matters and a consideration to be attached to the Notice of Opinion and subsequently the planning permission. Counsel argued that conditions need to be taken into account not merely in reaching a decision as to whether planning permission is granted but also in relation to the adequacy of the EIA. The fact that the Minister reached his decision without consideration of conditions, it was contended, resulted in the decision being flawed by the failure to take into account relevant considerations.

[68] Ms Garvey's report addressed the question of appropriate conditions in relation to a number of matters (traffic and road safety, environmental matters, disabled access and telecommunications). The Minister's decision was informed, Mr McCloskey argued, by a consideration of a need to impose appropriate conditions on the outline planning permission to control a range of matters. There is nothing, however, to indicate that the Minister was aware of the need to determine what conditions were necessary to ensure that the development proceeded as anticipated and in the manner that justified the Minister, in his own mind, to grant the planning permission.

Mr McCloskey argued that it was wrong to consider that the Minister made his June decision in isolation. That decision was of no legal or binding effect in itself. It led on to the issue of the Notice of Opinion which did incorporate the conditions which the Department considered necessary and appropriate and the Notice of Opinion led on to the outline planning permission. In Mr Elvin QC's memorable phrase "there should be no salami slicing of the overall decision making process of the Department."

[69] There is force in Mr McCloskey's argument that the Minister's decision was not in itself the effective decision of the Department but that it was part of the process that led to the overall decision represented, firstly, by the Notice of Opinion and thereafter by the outline planning permission. Under article 31 the Department was required to formulate its proposals in relation to the application. The Minister's decision was not in itself that proposal but represented a decision in principle in favour of the application. The announcement by the Minister that he had "decided that the application should be approved and go ahead" was premature and was a legally incorrect way of explaining the position. What he had decided was that in principle the Department was minded to grant the application subject to the fulfilment of the necessary procedural requirements of article 31 which would necessitate the formulation of appropriate conditions. In principle there was nothing to prevent the Minister reaching a provisional conclusion in favour of permission subject to the outworking of necessary and appropriate conditions that give effect to the underlying rationale of his provisional conclusion. The perceived political imperative to be seen to be announcing a "good news story" may have resulted in the Minister incorrectly overstating the effect of his decision at that time. The question arises as to whether the way in which the Minister dealt with the matter had legal consequences invalidating the subsequent decision to issue the Notice of Opinion in the form in which it was issued.

[70] As a matter of general principle I can see no legal reason why the Minister could not leave it to departmental officials to draw up conditions to be attached to the Notice of Opinion provided those conditions gave effect to the underlying rationale of the ministerial policy decisions. The fact that the Minister had publicly taken a stance saying permission would be granted may have given the impression that it would be an unrestricted planning permission but his decision and statement could not legally inhibit the Department in relation to the formulation of conditions which it was bound to consider before the legally effective Notice of Opinion was issued. I can see no legal objection to the Minister leaving it to the officials to work out the details of matters such as conditions relating to roads, road safety, landscaping and so forth. Since he could reasonably be taken to be leaving those matter of detail to be worked out and included in the Notice of Opinion it could not be said that he had left out of account the question of conditions

to be attached to the Notice of Opinion pending the formulation of which there could in fact no legally binding decision.

[71] However, the outworking of the conditions by the officials raises separate legal issues. In relation to the conditions included in the Notice of Opinion none were included that in any way tied JLP into the development or set JLP's involvement as a pre-condition for the carrying out of the development or the opening and operating of the retail stores and department store. The culinary salami image put forward by Mr Elvin, attractive though it is, is not an apt metaphor in the circumstances. A different culinary image comes to mind. If a chef has decided on a dish to be prepared in his kitchen and starts the process of preparing that dish with the sous-chef being left to complete the dish the latter must know what the chef is truly intending to produce and follow through his intention. If the chef intends it to be a meat-loaf but the sous-chef thinks it is his job to produce salami the end product will not reflect the true intention of anyone. In this case the officials were left to complete the matter and issue the Notice of Opinion or, to use the analogy, to complete the dish. Looking at the express reasoning of the Minister the Notice of Opinion did not give effect to the underlying intention of the Minister which was to grant permission to the development on the basis that the proposed anchor tenant was to be JLP. The Notice of Opinion and the planning permission do not in anyway tie the development to JLP coming to Sprucefield. JLP is in no way committed to do so. Mr Lockhart-Mummery QC on behalf of SCL stated that if JLP did not come the development in reality would not proceed. It is argued that the Minister would have been aware that was likely to be the position. As a matter of planning law the permission as it stands permits a development comprising a department store and 29 units. Any company could occupy the department store and might use any part of it. The 29 retail units in themselves could be successfully developed on their own for all one knows. The timing and the staging of the carrying out of the development would be a matter for the developer. The proposal may or may not be financially viable without JLP. There was an added issue raised by the applicant namely that the department store internally could be divided since it was not a required condition of the planning permission that it should not be and such internal division would not require planning permission under article 11. The Notice of Opinion and the planning permission in condition 4 preclude the sub-division of the "individual retail units." The respondent contends that this included a prohibition on sub-dividing the department store which was in fact a unit. The drawings refer to 29 units as units and the department store as a department store and does not describe it as a unit. On balance, however, I consider that the true intent of condition 4 is to prevent sub-division of the individual portions of the development shown as separate units within the plan and the department store was one such unit. Deciding this point in favour of the respondent does not detract from the strength of the applicant's case that the Notice of Opinion fails to give true effect to the

underlying rationale of the Minister's decision. That decision justified departure from the other policies because of the centrality of the role to be played by JLP at Sprucefield, a centrality that in fact finds no effective reflection in the Notice of Opinion or the conditions attaching to the outline planning permission. In the result the decision makers who drew up the conditions attaching to the Notice of Opinion and hence to the outline planning permission failed to have proper regard to the logical requirement implied in the Minister's decision and, accordingly, failed to have regard to a relevant consideration.

[72] Mr Straker argued that when the Minister took his decision he did not know the character of any highway works which remained to be defined and took his decision on the absence of material information and a material consideration. This error, he argued, was compounded in two ways. The Minister precluded discussion or public involvement in a matter calling for public consultation. Article 31 envisages that when Notice of Opinion is issued there must be available all details of the prospective decisions so that a view could be taken whether there might be a hearing.

[73] As pointed out earlier the Minister's decision cannot be taken in isolation and the decision making process as a whole requires to be looked at. On the issue of highways the details relating thereto could be and were considered in detail after the decision had been taken in principle to grant planning permission. In the Garvey report it was clear that following discussion and consideration by the Road Service there was no objection to the application subject to the implementation of the submitted package of highway infrastructure improvements. (See in particular para. 6.9 et seq of the Garvey report).

[74] On the issue of the Minister precluding public involvement in the matter of highways which counsel said called for public involvement there had been a consultation process prior to and leading up to the ministerial decision and its transposition into the Notice of Opinion. Separate and different issues arise out of the article 122 agreement with which I shall deal later. On the highways issues as raised by Mr Straker, accordingly, I reject the applicants' argument and I accept Mr McCloskey's argument which is succinctly and correctly set out in para. 6.1 et seq of his skeleton argument.

Environmental Impact Issues

[75] Mr Straker further argued that the Department had breached the EIA (Northern Ireland) Regulations 1999 and he argued that the Department proceeded on the basis of a development materially different from that being sought and which came to be permitted. The application was for an outline planning permission reserving for subsequent approval siting, design, landscaping, means of access and external appearance. An environmental

statement was required. Planning permission could not be granted unless environmental information had been taken into account with a statement that such had occurred. The final decision had to be made publicly available with its contents and conditions, the main reasons for it and the description of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development. In this case there was no proper environmental statement because such a statement is defined as requiring information on the site, design and size of the development. This was lacking. Furthermore environmental information included representations about the environmental effects of the development. Since the Department considered that conditions were a matter between the Department and the developer the Department had precluded itself from receiving such representations.

[76] Mr Elvin on behalf of the Department submitted that the applicants' complaint on this issue was misconceived. The application in fact included full details of the site layout, access, car parking and buildings only omitting landscaping details and details of the restaurants, café court and children's play area. The information and drawings submitted (which were included in the Notice of Opinion and the planning permission) were not merely illustrative. The Department had been fully alert to the importance of the environmental statement and compliance with the environmental impact assessment. It had duly exercised its powers under regulation 15. Mr Ferguson and Ms Garvey's submission and report noted the fulfilment of environmental statement requirements and relative environmental agencies had no objections. The Department had taken into consideration environmental information prior to the grant of outline planning permission; had duly observed the publicity requirements; and had duly observed the determination requirements of regulation 34(1)(c). Issues concerning the adequacy of environmental information belonging to the realm of planning judgment. Irrationality is the applicable legal touchstone. The Department was clearly satisfied as a matter of judgment about the adequacy of the totality of the environmental information provided. The Department's judgment that the EIA Regulations were satisfied could not be condemned as irrational.

[77] It was not in issue that the application constituted an environmental impact development (being accepted to be a Schedule 2 development likely to have significant effects on the environment by virtue of factors such as nature, size and location). Regulation 4 prohibits the issue of planning permission for such a development unless the Department has first taken into consideration environmental information which is defined in regulation 2 as "the environmental statement, including any further information, any representations made by anybody required by these Regulations to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development." "Environmental statement" is defined as a statement which includes such of the information

referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile. It must include at least the information referred to in Part II of Schedule 4, namely:

> "1. A description of the development comprising information on the site, design and size of the development.
> 2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
> 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
> 4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
> 5. A non-technical summary of the information provided and of paragraphs 1 to 4 of this Part."

Under regulation 12 the developer is required to make the environmental impact statement available to the public and the Department must publish appropriate notices allowing the public to make representations. Regulation 15 empowers the Department to require the submission of further information and such information itself triggers a renewed need for publicity. When a decision is made the Department must inform the public of the decision and the reasons for it (see regulation 34).

[78] In Rochdale Metropolitan Borough Council v ex parte Tew [2000] JPL 54 the applicant submitted an application for outline planning permission for a business park with associated and complementary retail, leisure, hotel and housing with site design and external matters to be treated as reserved matters. An illustrative plan and an environmental statement were submitted. Local residents applied to quash the outline planning permission granted on the ground (inter alia) that the developers had failed to provide an adequate environmental statement. Sullivan J held that the generalised description of the development contained in the illustrative master plan and indicative schedule of uses was inadequate to satisfy the requirements to include a description of the development proposed. That must comprise at a minimum information as to the design, size and scale of the project as well as date necessary to identify the main effects which the development would be likely to have on the environment. The decision to grant planning permission had to taken in full knowledge of the projects likely significant effects on the environment. It was not sufficient that full knowledge would be obtainable

as some later stage as by then it would be too late to go back on the principle of development and the public would not have the same statutory right to be consulted and so to contribute to the environmental information which had to be considered before planning permission was granted. Sullivan J at 72 to 73 of his judgment stated that an environmental statement based on a bare outline permission could not be begin to comply with the requirements of the regulations. In that case the application did not contain any information as to the design, size or scale of the development. The incorporation of an *illustrative* master plan and *indicative* schedule of uses tacitly acknowledged that. If consideration of some of the environmental impacts or investigative measures is effectively postponed until the reserved matter stage the decision to grant planning permission would have been taken with only a partial knowledge of the likely significant effects. However that was not to say that full knowledge required an environmental statement to contain every conceivable scrap of environmental information.

[79] Following the decision in that case the developer submitted an amended application for outline planning permission. Only details of landscaping design and external appearance of the buildings were reserved. A new environmental statement accompanied its application. It contained much more detail and contained a schedule of development which set out the detail of the buildings and their likely environmental effects. Outline planning permission was further restricted so that the development that could take place would have to be within the parameters of the matters assessed in the environmental statement. Reserved matters would also be restricted to matters that had previously been assessed by the environmental statement. In R v Rochdale Metropolitan Borough Council ex parte Milne 81 C & PR 365 Sullivan J held that the application satisfied the requirements of the EIA Regulations. He considered that it was for the planning authority to decide whether it was satisfied, that, given the nature of the project in question, that under the Directive it had "full knowledge" of the likely significant impact of the proposal on the environment. One could "provide information about the site and design and size or scale of the development" without providing every available piece of information about them. Whether the information was significant was for the planning authority to decide subject to review on Wednesbury grounds. The planning authority was entitled to say that it had sufficient information about the design of the project to enable it to assess the reserved matters because it was satisfied that such details were not likely to have significant effect provided they were sufficiently controlled by conditions. Sullivan J at 384 - 385 said:

> "Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters; provided the environmental assessment has taken account of the need for

> evolution within those parameters and reflected the likely significant effects of such a flexible project in the environmental statement; and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed it is not accurate to equate the approval of reserved matters with modifications of the project. The project as it evolves with the benefit of approvals of reserved matters, remains the same as the project which was assessed…..
>
> The developers do not have an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has "full knowledge" of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail or refuse consent."

At page 387 Sullivan J went on to say:

> "It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to the review by the courts but the courts will defer to the local planning authority's judgment in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; 'environmental information' which has been provided pursuant to the assessment regulations."

Sullivan J went on to point out that the environmental statement does not have to describe every environmental effect, however minor, but only the main effects with likely significant effects. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation and the local planning authority in determining the application losing the woods for the trees.

[80] In Smith v Secretary of State [2003] EWCA Civ 262 the Court of Appeal had occasion to review these authorities, the reasoning of which it accepted. Waller LJ speaking in the context whether conditions imposed in an outline planning permission were sufficiently constrained stated at paragraph 33:

> "In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision-maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision-maker is not, however, entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision-maker will act competently, Constraints must be placed on the planning permission within which future details can be worked out and the decision-maker must form a view about the likely details and their impact on the environment."

In that case the applicant argued that the conditions imposed were so worded that the planning authority would be free to do many things that could have a significant impact on the environment and be free not to mitigate them. The question was whether the conditions allowed the plaintiff authority to approve a deviation from the plans which might have a significant impact on the environment or whether it was constrained when considering the landscape scheme to dealing with details within the parameters identified in the plans. Waller LJ considered that:

> "In my view the inspector having set the parameters of the planning permission including contours of the land and the provision of trees was entitled to consider how the local planning authority was likely to deal with the details and to conclude that the way the details would be dealt with would mitigate the adverse effect on the environment. In so doing he complied with the obligations under Regulation 4(2)."

Sedley LJ, with some apparent reluctance, accepted the views of Waller LJ and Black J in relation to the interpretation of the conditions. He said:

> "It is only what is left over is so defined that it cannot modify or disrupt the terms on which planning permission is being granted that in my judgment the handover of responsibility to the local planning authority is permissible … What is clear is that …… the condition cannot lawfully be so wide as to permit the subsequent renegotiation of an element of the planning permission of which it forms part."

[81] In this case the Department was satisfied that the application had been dealt with properly under the terms of the EIA Regulations. It received a revised site lay-out plan on 22 March 2005 indicating access arrangements to the A1 which were included in an addendum to the environmental statement. The Regulation 34 statement issued by the Department makes clear the Department considered that it had received an adequate environmental statement. Subject to any argument as to the effect of the conditions attaching to the planning permission the applicants have failed to demonstrate that the Department's conclusion on the adequacy of the environmental statement was Wednesbury unreasonable.

[82] The applicants argued that the wording of the conditions and the reserved matters were left in a form that did not sufficiently constrain the Department and the developer and that the Department could not reasonably say that the details of the reserved matters were not likely to have a significant environmental effect. It is clear that a great deal of information and detail was provided in the application documentation and supporting documents relating (inter alia) to the road layout. What was left for approval were the elevations of the buildings, restaurants, landscaping, lighting and ancillary works. Reserved matters were to be approved by the Department. Conditions 8-17 contained a number of fairly tightly worded conditions designed to give the Department a considerable control over the landscaping arrangements. Conditions 18-30 contained a number of fairly tightly worded conditions in relation to road works and layouts to give the Department considerable control to ensure compliance with acceptable road layout schemes. The other conditions relating to telecommunications, archaeology works, nature conservation, drains and sewage were of limited impact. The informatives at the end of the planning permission highlighted the environmental issues to be addressed. The room for negotiation and flexibility in relation to the matters was limited. One must also bear in mind Waller LJ's point that it is permissible for the decision-maker to contemplate the likely decisions that the Department itself would take in relation to the details, the Department having an overriding responsibility for the environment. Bearing all these factors in mind it cannot be said that the Department was acting irrationally in concluding that the reserved matters and the conditions attaching to the planning permission did not open the

door to an unacceptable impact on the environment. Accordingly, I have not been persuaded that there was anything in the outline planning permission that invalidated the conclusion of the Department that the environmental statement was adequate.

The Treaty Issues

[83] Mr Larkin QC argued that the advantages conferred SCL and JLP in contravention of planning policy amounted to state aid contrary to Article 87 of the EU Treaty. Article 87 provides:

> "Save as otherwise provided in this Treaty any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between member states, be incompatible with the common market."

Article 10(2) prohibits member states from facilitating a structure whereby undertaking to reach agreements or engage in conduct that is prohibited by Article 81 or 82. The permission granted for the department and the 29 additional units contrary to proper planning policy which discouraged out of town shopping centres permitted the SCL to offer a substantial inducement to JLP subsidised by the additional units in a scheme which would not normally be available and put JLP at a significant market advantage. By specifically favouring JLP in a way which would not have applied to other commercial entities the Minister discriminated on the ground of nationality contrary to Article 12.

[84] As Mr Elvin demonstrated the elements of unlawful state aid are:

(i) an aid in the sense of being a benefit or advantage;

(ii) which is granted by the state or through state resources;

(iii) which favours certain undertakings over others;

(iv) which distorts or threatens to distort competition;

(v) which is capable of affecting trade between member states; and which

(vi) has not been notified to the Commission.

The need to establish that the aid is granted by a state or through state resources is clear from Openbarr Ministerie v Van Tiggele [1978] ECHR 25 where Advocate General Capitorti opined that:

> "It is necessary that the state should grant certain undertakings selected individually or by categories an advantage entailing a burden on the public finances in the form either of expenditure or reduced income."

The ECJ agreed and stressed that for the state aid to be unlawful it must be granted directly or indirectly through state resources. Notwithstanding attempts to widen the concept, the ECJ has maintained this viewpoint (see Sloman Neptun Schiffaharts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffaharts AG [1993] ECR1 – 887). More recently in Preussen-Elektra SG v Schleswag AG [2001] ECR1 – 2090 Advocate-General Jacobs analysed the position and pointed out that:

> "Only advantages which are granted directly or indirectly through state resources are to be regarded as state aid …"

The ECJ fully accepted that approach and rejected the argument that a purchase obligation imposed by statute which conferred an undeniable advantage on certain undertakings had the character of state aid. Only advantages granted directly or indirectly through state resources are to be considered as state aid. In the planning context in AEESCA 2003/C112/81 the Commission refused to take action in relation to the exemption of certain hyper-markets in Spain from the requirement to obtain planning permission to vary planning restrictions in buildings and usage under Spanish law. The Commission held that there was no transfer of state resources and therefore no state aid.

[85] Subject to the question of the article 122 Agreement I accept Mr Elvin's argument that the granting of planning permission did not engage article 87(1) since there was no transfer, relinquishment or depletion of state resources.

[86] In relation to the allegation of breaches of articles 10, 12, 28, 81 and 43 these all lack evidential foundation. There is no evidence that the decision to grant planning permission was influenced by the nationality of JLP. There is no evidence or evidential or legal basis for the allegation of an agreement having an anti-competitive effect between undertakings. There is nothing in the nature of an quantitive restriction on imports for the purposes of article 28. The grant of planning permission could not undermine the right of establishment of other nationals under article 43.

The Art. 122 Agreement Challenge

[87] Mr Larkin contended that the article 122 Agreement unarguably fell foul of the state aid prohibition since the cap of £1m on the recovery of the costs of mitigation work precluded the Department from recovery of any excess of the cost in respect of such mitigation works. In the result he argued the state authorities were prepared in effect to subsidise to an unknown extent those mitigation works which would benefit the development and make it more attractive to cross border shoppers thereby having an impact on inter-state trade. He relied on the words of Lord Oliver in R v Attorney General ex parte ICIPLC [1987] 1 CMLR 72 at 103:

> "It is not, I think, in dispute, that an aid is a wider concept than subsidy and may include any form or assistance or advantage given by a member state often said resources to an undertaking which would not be available in the ordinary course… the concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits such as subsidies themselves but also interventions which in various forms mitigate the charges which are normally included in the budget of an undertaking and which without, therefore, being subsidies in the strict sense of the word, are similar in character and have the same effect."

[88] The Department's argument was that it was open to the Department to make an assessment of the outer anticipated limits of the cost of the mitigation works and to cap contribution at that outer limit on the confident assumption that the sum would not be exceeded. The nature and extent of mitigation works were a matter for the Department which would realise that the cap contribution was £1m. This being so there was no element of state aid in fact being provided. Invited by the court to indicate whether the developer would be prepared to meet any excess on the £1m if such an excess occurred, Mr Shaw QC on behalf of SCL indicated that it would not. The agreement had been worked out at arms length between the parties who had attempted to reach a bona fide agreement as to the outer limits of the anticipated costs of the works.

[89] The point being a new one the court gave the Department the opportunity to file any further affidavit it wished on the topic. In paragraphs 8 and 9 of her second affidavit Ms Garvey stated:

> "I was present at a meeting convened by me at which the developer and Road Service were both

represented to discuss the issue of roads in connection with the planning application. The meeting took place on 16 March 2005 and resulted in an oral agreement between the Road Service and the developer that a sum of £1m would be provided to the developer to the Road Service in respect of mitigation works. *These were matters not covered by the road traffic assessment as experience had shown that even with the best traffic modelling unforeseen problems may arise. The object is to ensure that the developer, not the state, bears the costs of such problems if they arise.* This oral agreement has been produced in writing and forms a part of the article 122 Agreement signed on 10 February 2006 between the developer and the Department of Regional Development. The figure of £1m was based on the judgment of the Director of Network Services of the Road Service as to the need to make provision for contingencies in the form of mitigation described in the agreement. The reference 'to contribution' is simply standard use of that term in this context and *is often used as here where the contribution is 100%*.

9. It is the case therefore that the cost of effecting roadworks in connection with the application will not fall on the taxpayer but such works in their totality will be paid for by the developer. There was no intention to provide any form of state subsidy to the developer and there is no element of public funding involved." (Italics added).

[90] What is clear is that under the agreement the Department cannot recover any excess over the capped £1m. If the cost of the works (including any necessary vestings) were to exceed that sum then the Department (and hence the taxpayer) would have to meet that cost. It is true that the mitigation works would benefit not merely the developer, JLP, and the traders in the new retail units but also the general travelling public and shoppers going to other units at Sprucefield. A rational argument could be made that the additional cost was not truly designed as an aid to the developer as such but a cost incurred in improvements to the road network in an expanding economy. However, the Department's intention, as set out in paragraphs 8 and 9 of Ms Garvey's affidavit, was to recover 100% contribution towards the cost of effecting the mitigation works in connection with the application so that the costs would not fall on the taxpayer and would be paid in their totality by the developer. The agreement as entered into did not in fact achieve that end which could have been achieved by an additional provision requiring the payment of any properly certified cost of

the works in excess of £1m. The intention of the Department was to avoid the possibility of any financial benefit to the developer. It considered that the agreement achieved that aim but on the wording used it failed to do so.

[91] The grant of planning permission was conditional on the developer entering into a binding and legally effective article 122 Agreement. In granting the outline planning permission the Department proceeded on the incorrect assumption that the article 122 Agreement achieved the end it intended, namely that the SCL would in all circumstances meet the full cost of the mitigation works. On that basis the outline planning permission must be quashed.

[92] In reaching this conclusion it is not necessary to determine whether the possibility of the state incurring costs in excess of £1m in respect of the mitigation works constituted in fact state aid for the purposes of the Treaty. It may be that only if such an additional cost was in fact incurred that the state would have breached article 87. There may be an argument that the incurring of that cost could be properly viewed as ordinary state expenditure on the road system consequent on normal development. The conclusion I have reached is that under ordinary domestic law the decision is flawed because the decision maker reached its decision on the incorrect assumption that the agreement achieved the purpose and end which it intended that is that the agreement precluded the possibility of the state authorities having to meet any excess cost. Central Craigavon Limited's Order 53 Statement will require amendment to cover this point which was fully argued before the court.

Alternative Sites Challenge

[93] Mr Orr QC argued that the Minister failed to make any adequate inquiry into the availability of alternative sites for the development. The Minister erred in accepting the bald assertion from the developer and JLP that no suitable alternative sites were available or would be considered. This was not tested. The Minister in justifying his decision inferred that there were no visible alternative locations in Northern Ireland largely as a result of John Lewis insisting that it would not go to another site. No robust assessment of alternative sites or opportunities was carried out in relation to the overall development proposed. The decision based on that perspective lacked rationality and was not supported by proper evidential foundations. Paragraph 39 of PPS5 states that:

> "Major proposals for comparison shopping and mixed retailing will only be permitted in out of centre locations where the Department is satisfied that similar town centre sites are not available."

[94] The Minister was aware that that was usual policy requirement and the question was addressed fully in the Garvey report at paragraph 8.53 et seq. Being aware of the usual policy requirements and being aware that JLP had clearly stated that only Sprucefield was acceptable the Minister arrived at a conclusion that, notwithstanding normal policy, planning permission should be granted. That lay within his power provided he had regard to material considerations including the normal policy which was in fact drawn to his attention.

[95] The applicants also called in aid the EIA Regulations which require that the EIS include an outline of the main alternatives studied by the applicant and an indication of the main reasons for its choice. This does not of itself require that alternative sites be studied nor is there an obligation as such to consider and report on alternative sites. In fact the Department did not and was not bound to require the applicant to consider alternative sites. In the circumstances I hold again the applicants on that issue.

Draft Planning Policy Statement 5

[96] Mr Horner argued that the Department was about to publish draft PPS5. This was to deal comprehensively with various planning matters relating inter alia to retail centres and retail developments in particular. The publication of draft PPS5 was postponed until after the election on 5 May. It was argued that this document was a material consideration. At the press conference the Minister was asked various questions about PPS5. His answers were:

> "Q– Why did you announce this before we had seen the PPS5 proposals on retail planning?
>
> A – Well PPS proposals on retail planning had not gone through the system. The honest truth is, I am trying to give you the honest truth anyway, it's arrived on my desk although I'm not essentially the minister who would deal with that for reasons of responsibilities amongst, the ministers and interest amongst the ministers. Its not sufficient in my view but I do a lot of work on it because it was literally only last week Thursday I think it was that it was agreed that it would come from one minister over to me so I physically got it on my desk upstairs this morning of what I know about it. The fact of the matter is the wider considerations of what was involved in this planning application I don't think would have been outweighed by what's in the draft at PPG5 which (sic).

> Q – The two are compatible? This is compatible with what's on your desk in the form of PPS5?
>
> A – Well, the PPS5 is in draft form, it's not yet been published it's not ready for publication, it won't be published until ministers are ready to do so.
>
> Q – Yeah but in the form it is in at the moment is it compatible with what you have been asked to do?
>
> A – Well it doesn't matter, cos I haven't first of all, it hasn't been gone through. The fact of the matter is whatever is in PPG (sic) or whatever ends up in PPG5 would not be compatible and secondly the wider overall considerations I don't think would be negatised by what's in the PPG5 either in draft or in its final form.
>
> Q – You will appreciate it that the specific view is that whatever PPS5 emerges of course it will be compatible to what we announced (tape inaudible).
>
> Still repeat, I think this is a good news decision for the people of Northern Ireland. It's not a negative decision it's a positive decision and I hope it will be embraced as such."

[97] What transpired at the press conference differed from the suggested answered carefully drafted by the civil servant officials advising the Minister. The Minister did not give the answers suggested. The suggested questions and answers were as follows:

> "Q9 – This decision is out of step with draft PPS5. Why are you ignoring PPS5?
>
> A9 – PPS5 is a draft which has yet to be published. *But I recognise that it would be a factor to take into consideration in coming to a decision on planning applications.* That said, in the case of this development at Sprucefield I am clear that the other factors would outweigh PPS5. (Italics added).
>
> Q10 – Have you deliberately delayed the publication of draft PPS5 to try to make this decision about Sprucefield easier to present.

> A10 – No. PPS5 has taken some time to produce because of the complexity of some of the issues involved. John Speller discussed those issues with officials on a number of occasions but was not in a position to complete his consideration of the draft PPS before the general election was called. It would not have been appropriate to take any public action on PPS5 in the run up to the election. I have now taken over responsibility for PPS5. This was only finally determined last week so I have not yet had the opportunity carry out the detailed examination of the papers which will be necessary before I can clear them for publication.
>
> Q11 – Is this decision not at odds with the recently published Joint Ministerial Statement?
>
> A11 – I do not believe this proposal should be refused on the grounds of prematurity. I believe there are clear reasons in relation to significant economic and social benefits in the overall public interest as to why this proposal should be granted planning permission at this time and the opportunity not lost to the Northern Ireland consumer."

[98] The solicitor for the respondent stated in a letter that PPS5 had not been considered before the Minister made the impugned decision.

[99] Mr Ferguson in his paper to the Minister dated 31 March 2005 stated that as the draft of the reviewed PPS5 has not yet been published "it cannot be a material consideration in relation to the application. The proposal is therefore not judged to be premature in relation to the publication of the revised PPS5." The statement that it was not a material consideration and suggestions in the suggested answer A9 in which the Minister was to recognise that PPS5 in draft would be "a factor to take into consideration in coming to a decision on planning applications" are out of line. Mr Ferguson's advice repeats paragraph 8.58 of the Garvey report. What paragraph 50 of PPS1 actually provides is:

> " (a) The Department's planning policy publications are material considerations and due regard will be paid to them. *Emerging policies, in the form of draft statements and strategies that are <u>in the public domain</u>, may also be regarded as material*

> *considerations, although less weight will be ascribed to them than to final publications.* Supplementary planning guidance may be taken into account as a material consideration in determining a planning application and the way to court such guidance will increase if it has been prepared in consultation with the district council and the public." (Italics and underlining added).

Paragraph 50 distinguishes between published policy (which will be material consideration) and emerging policies which remain material considerations if they are in the public domain although less weight will be ascribed to them.

[100] The contents of the draft PPS5 had not yet entered the public domain when the Minister made his decision and still has not entered the public domain. Accordingly, the Minister was entitled to make his decision notwithstanding that he had not considered the draft PPS5. Accordingly, I reject the applicants' argument on this point.

Miscellaneous Other Arguments

[101]

(a) In relation to the argument that there had been a failure to consult the DSD it seems clear the Department was consulted and that its views were documented and considered.

(b) In relation to the alleged failure to properly take into account the impact of the proposed development on existing city and town centres it is clear that the potential impact of the development on the other city and town centres was highlighted in the papers before the Minister and considered by him. It cannot be said that the Minister's decision to permit the development notwithstanding the known potential impact was Wednesbury unreasonable.

(c) The challenge to the Minster's viewpoint that the development should proceed for social and economic reasons cannot succeed. Social and economic considerations are relevant and material planning considerations. It was a tenable and rationale viewpoint on the part of the Minister that those considerations outweighed the arguments against the proposal. The challenge is essentially a merit's challenge and must be rejected.

(d) The argument that the Minister wrongly took account of JLP demands and threats is inter-linked to the argument that the Minister bowed to dictation by JLP and abdicated his discretion. JLP clearly exerted

considerable pressure on the Department by indicating that it would consider no other site, that the application was time constrained and that if a public inquiry were directed it would not proceed. The Minister clearly took account of the time constraint to expedite his decision and accepted the contention by JLP that it was only interested in Sprucefield. What weighed with him were the economic advantages of the development which he was entitled to take into account. The evidence does not establish that the Minister simply capitulated to JLP's pressure. He took and was entitled to take JLP's stance into account as a necessary background to the application and proceeded from there to decide that the planning permission was appropriate having regard to his weighing of the factors.

(e) The Minister was influenced by what he considered to be the desirability of Northern Ireland getting a JLP store ahead of the Republic. That was part of the economic attraction of the development and therefore a permissible consideration. The Minister as a reasonable decision maker would have known that the opening of a John Lewis store in Northern Ireland could not prevent JLP opening a store or stores in the Republic but he perceived the economic and social advantages in Northern Ireland being the site of the first John Lewis store in the island of Ireland.

(f) In relation to the argument that the Minister incorrectly proceeded on the basis that English policies could not simply be translated to Northern Ireland and that there were differences between the planning position in the two jurisdictions the comment must be read in context. There were differences between the policies, as counsel for the Department demonstrated. Significantly the position of Sprucefield as a regional shopping centre had no equivalent in England. The Minister's viewpoint, which he was entitled as Minister to reach, was that Sprucefield as a unique entity needed a development along the lines of the proposal. I conclude that his conclusion on that point cannot be challenged.

[102] None of those conclusions detract from the conclusions which I have reached in relation to the procedural and legal flaws in the decision to grant the outline planning permission discussed elsewhere in this judgment.

Events Subsequent to the Notice of Opinion

[103] On the issue whether the Department properly reconsidered the matter in the light of matters occurring after the Notice of Opinion and before the issue of the outline planning permission the applicants relied on two points, firstly, the press report suggesting that JLP was now considering opening a store or stores in the Republic or was minded to do so and,

secondly, that it was clear that the tight timetable to which JLP claimed to be working was more flexible than JLP indicated since they now appear to be prepared to proceed subsequent to 2006.

[104] In paragraph 5 of her second affidavit Ms Garvey said:

> "These matters were considered by us in the course of the process of further decision making in respect of the developers planning application. On the basis of inquiries made by my team these reports were not corroborated and in the course of ongoing consideration of the application we did not detect any credible sign that the developer's applications would not proceed as formulated. Our inquires included the check of websites in respect of planning authorities in Dublin and its environs and the website of JLP. Published planning applications in newspapers such as the Irish Times were also monitored. Such inquiries were conducted regularly throughout the period from August 2005 to March 2006. As at the present time we have been unable to discover any planning application for JLP store in Dublin or elsewhere in the Republic of Ireland. It seems clear to us that there has been none."

This passage indicates something less than a full and detailed inquiry directed to SCL and JLP to spell out clearly what concrete clear plans SCL and JLP had in relation to the development at Sprucefield and in relation to developments elsewhere in Ireland. In the course of the hearing neither the Department nor SCL spelt out any clear details of what exactly was planned in respect of JLP's involvement in the Sprucefield development or elsewhere in Ireland. The discussion earlier (paras [44] et seq) in respect of the duty of inquiry and investigation before the issue of the Notice of Opinion and on the inadequacy of that investigation is relevant in the present context. Developments, after the issue of the Notice of Opinion, highlighted the need for properly drawn conditions to give effect to the underlying logic of the Minister's decision which was to secure JLP as the anchor store. Checking the website of the planning authorities in Dublin and publications in newspapers is less than a full inquiry in the present context. The fact that this was done points to a lack of direct and clear inquiry directed to JLP or SCL on the state of actual plans for JLP involvement at Sprucefield and elsewhere in Ireland. The check referred to might well be meaningless since JLP may well not have been an applicant for such planning permission (just as JLP was not an applicant in the present case). What happened subsequent to the Notice of Opinion in this context confirms the view reached earlier that the Department

failed to carry out proper investigations and inquiries to inform itself in relation to relevant issues upon which it should have been properly informed before the Notice of Opinion and the subsequent outline planning permission were issued.

[104] If, having informed the Department that it had to carry out the proposed development by 2006, JLP subsequently made clear that this was not so and that it was prepared to carry out the development in 2007-2008 the earlier suggested deadline might well call into question the good faith of John Lewis in appearing to impose a time limit to which it did not genuinely intend to keep. There may, of course, have been unanticipated changes of plans within JLP. The new timeframe in itself would not mean that the planning permission should not be granted if JLP was truly intent on coming and was prepared to be tied into the development and the planning permission by appropriate conditions. The time point on its own would not be a ground for challenging the outline planning permission.

Conclusions

[105] The Notice of Opinion must be quashed on the following grounds:

(i) The Minister failed to properly consider the question whether a public local inquiry should be directed (see paragraphs [44] to [55] above).

(ii) The information before the Department relating to the non-severability of the development and to the justification for the linkage of the 29 units and the department store was inadequate and was not investigated by the Department. In the absence of any such exploration of the issues relating to the alleged financial imperatives of an overall development of this magnitude the conclusion that it was an appropriate development was one no reasonable planning authority directing itself could have reached (see paragraphs [44] to [55]).

(iii) The Minister's decision was motivated by the centrality of the role to be played by JLP at Sprucefield, a centrality which found no expression in the Notice of Opinion or the conditions attaching thereto or the consequent outline planning permission. The conditions attached to the Notice of Opinion and to the outline planning permission failed to reflect the centrality of that role and failed to tie JLP into the development. The decision makers drawing the conditions attaching to the Notice of Opinion and the outline planning permission fail to have proper regard to the logical requirement for such conditions implied in the Minister's decision. Accordingly, the Department failed to have regard to a relevant consideration. (See para [71]).

(iv) The outline planning permission was premised on the basis of a valid article 122 agreement. The article 122 agreement was flawed in that the Department incorrectly intended that the agreement should secure to the Department a full indemnity in respect of the costs of requisite mitigation works and assumed that it achieved that result whereas the cap of £1m precluded the recovery of any excess over the sum of £1m. (See para [87]–[92]).

(v) The Department failed to properly investigate and inform itself about the intentions and proposals of JLP and SCL after the issue of the Notice of Opinion and before the issue of outline planning permission. The Department could not rationally have been satisfied that the outline planning permission should be granted until it sought to inform itself properly in the new context which differed from the context in which the earlier decision had been made. (See para [103] to [104]).

[110] The functions of the court in the judicial review application in a case such as the present are strictly limited. Nothing in this judgment should be read as in any way reflecting on the desirability or otherwise of a John Lewis development whether at Sprucefield or elsewhere in Northern Ireland. The court cannot concern itself in any way with actual merits of the Department's planning decisions. As was demonstrated earlier in this judgment the court's function is limited to reviewing the decision-making process, its procedural propriety, legality and rationality. The quashing of the relevant planning decision does not in any way impede the Department in coming to a fresh conclusion, approaching the planning application in accordance with law and taking account of the legal and procedural shortcomings addressed in this judgment. The Department is bound to arrive at a fresh decision on the extant planning application which, following the quashing of the impugned decisions, falls to be reconsidered.