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HCAL184/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO.184 OF 2002

BETWEEN

SHIU WING STEEL LIMITED — Applicant

and

DIRECTOR OF ENVIRONMENTAL PROTECTION — Respondent

AIRPORT AUTHORITY OF HONG KONG — Interested Party

Before : Hon Burrell J in Court

Dates of Hearing : 5, 8-11, 15-17 September 2003

Date of Judgment : 30 September 2003

JUDGMENT

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1. The Hong Kong Airport Authority ("HKAA") needs a new permanent air fuel farm ("PAFF"). During the late 1990's many possible sites were considered. The result was that a site known as Tuen Mun 38 was chosen as the most suitable. Accordingly, they commenced the numerous procedures necessary to embark on such a project. If all the

procedures are successfully completed they have estimated that the PAFF would be operational by 2006.

2. One of the many procedures is compliance with Cap.499, the Environmental Impact Assessment Ordinance ("EIAO"). The EIAO sets out a number of steps to be followed by the proposed developer. As part of their purported compliance with the EIAO the Director of Environmental Protection ("the Director") has made decisions which have permitted the continuation of the project. Two of his decisions are now the subject of judicial review by the applicant ("SWS") in these proceedings. The first decision was made on 2 August 2002. That was a decision to approve an EIA report submitted by the HKAA in relation to the PAFF for the Airport under section 8(3) of the EIAO. The second was on 28 August 2002. This was the decision under section 10(2) to grant an Environmental Permit with conditions (pursuant to section 10(5)) to the HKAA.

STATUTORY FRAMEWORK

3. The EIAO is a relatively new, relatively short but very important ordinance. It is clear from an overview of the whole enactment that it has a dual objective. The "overview" reveals a number of steps that a developer must take, each of them has a specified time limit. The result is a fairly tight timetable to which both the developer and the director must conform. The dual objectives strike a balance. The EIAO's primary concern is the protection of the environment. Its framework provides a regime in which, and this is the second objective, important projects may be completed in a timely and efficient way, provided all the requirements of the EIAO are complied with. The

Tribunal's report in the recent "Long Valley" appeal (*KCR Corp. v. Director of Environmental Protection*; EIA Appeal Board 2 of 2000) helpfully commented as follows :

> "... The Ordinance gives the EIA process a legal structure. It is not a process which lies comfortably within a detailed legal framework. Much of its success depends therefore upon the manner in which it is implemented within the outline structure provided assisted by the Technical Memorandum. The consequence is that all involved are learning how best the various steps required can be implemented. ... There are two main matters of public interest involved. Both are important. The first is the public interest in the protection of the environment upon which the quality of life in Hong Kong will increasingly depend. The second is the public interest in ensuring that major designated projects are brought to fruition in a timely and efficient manner. The time constraints put upon the Director for steps in the process and for his decisions show that the Ordinance aims to satisfy both interests."

4. The key provisions in the ordinance which demonstrate this step by step approach and dual objectives are these :

(1) By section 4 certain projects (such as the PAFF) become "designated projects".

(2) By section 5 the developer applies to the Director for a study brief ("SB") and at the same time submits and advertises a project profile. The Director also informs the Advisory Council on the Environment ("ACE"). ACE is an independent advisory committee comprising 23 members. It is a sort of watch-dog and is peculiar to Hong Kong in environment impact regimes. ACE and the public have 14 days within which it may comment on the project profile. The Director must issue the SB within 45 days.

(3) By section 6 HKAA prepares an EIA report in accordance with the SB (section 6(1)) and delivers it to the Director.

Within 60 days thereafter the Director decides if the report meets the requirements of the SB and the technical memorandum ("TM") (section 6(3)). If he does, the report is then made available for a 30-day public inspection.

(4) By section 7(5) ACE may give its comments within 60 days.

(5) By section 8(3), within 30 days after the public inspection the Director either approves, or approves conditionally or rejects the EIA report.

(6) By section 10 HKAA may apply for the environmental permit for the project which the Director may grant (under section 10(2)).

(7) By section 16 the Secretary for the Environment Transport and Works may issue TM setting out principles, procedures, guidelines, requirements and criteria for whether the EIA report meets the requirements of the SB.

5. In the present case SWS's key complaint is that the Director's decision to approve the report (section 8(3)) and grant the permit (section 10(2)) were either unlawful and/or *Wednesbury* unreasonable because the report did not meet the requirements of the SB and TM. SWS in this framework has no right of appeal against the Director's decision. Only a party to the project itself has such a right. The SB and the TM are key documents. The TM is the framework of criteria out of which an SB is created. The SB is the template of objectives and obligations against which the EIA report is prepared. They will both be considered in more detail later in this judgment.

BACKGROUND

6. The background to the issues in this judicial review is best understood by reference to a chronology of key events.

7. In April 2001 HKAA applied with a project profile for an SB. On 31 May 2001 the Director issued the SB and HKAA engaged Mouchel to prepare the EIA report (in June 2001). The report took nearly a year to produce. It is 480 pages long. The "Hazard to Life" section, with which this judicial review is concerned, runs to 55 pages.

8. The report was submitted to the Director for his consideration under section 6 on 3 May 2002. It had been signed as a complete report on 26 April 2002. The day before, 25 April, an important meeting had taken place between representatives of the Director and HKAA. At this meeting a decision was made that one of the particular hazards to life that the report had identified, namely an instantaneous loss of 100% of the contents of a fuel tank, need not be quantitatively assessed. It was decided that it was sufficient to assess such a scenario qualitatively. This decision lies at the heart of this judicial review.

9. In short, a quantitative assessment requires a statistical analysis. It results in a numerical representation of the likelihood of deaths occurring from a particular type of accident occurring and at what frequency and in what numbers. A qualitative analysis, on the other hand, is more subjective. It does not require an input of statistical data. It is an assessment made by experts in the field. It is the report's failure to carry out a quantitative assessment ("QRA") of the 100% instant loss scenario upon which SWS relies as the lynchpin to their case. They

submit that failure rendered the report deficient so that the Director's approval of it was unlawful.

10. During May, June and July the various provisions of the EIAO were complied with. The report entered the public domain. SWS wrote its letter of complaint on 13 July 2002. The key extracts from that letter, which summarize SWS's opposition to the project which pre-date the Director's decision are as follows :

> "'... SWS believes that the EIA report on the proposed PAFF has not addressed adequately the impact of the PAFF on the Mill as an existing user of a high temperature operation.'
>
> 'Spillage
>
> The effects of a major spillage incident on water at both the Castle Peak Power Station in the proximity and the Mill would be catastrophic. Both facilities use seawater intakes for cool-down process, but no reference is made in the EIA report as to how the location of the jetty, the discharge of the fuel and anchoring of tankers will affect these. Besides, the impact of an oil spill on adjacent industries have not been considered in respect of the seawater intake.'
>
> 'Risk of Fire
>
> In the EIA report, several references are made to the potential emissions from both the transfer (working losses) and storage (standing storage losses) of the aviation fuel. Yet the total volume of the likely emissions is not discussed. The more important shortcoming is that the EIA Report has not made references to the fact that the Mill is sited immediately adjacent to the proposed PAFF and will engage in processes which involve very high temperatures (up to 1300°C). The siting of a facility which discharges aviation fuel vapours immediately adjacent to a facility of very high temperature processes and furnace operations is unsafe. In this case, any spillage incident would be catastrophic.'"

11. ACE met to consider the report and all public comments on 29 July 2002. It declared that it was satisfied that the risk was within acceptable levels and endorsed the report.

12. On 2 August 2002 the Director approved the report under section 8(3). The section 10(2) permit was granted on 28 August, with conditions.

13. At some stage during this process SWS had commissioned its own report. That report (the "MacInnis" report) is dated 16 October 2002. It was sent to the Director on 21 October. The accompanying letter summarizes the report's conclusions as follows :

> "(1) The EIA Report does not meet the requirements of the Technical Memorandum.
>
> (2) All reasonable hazardous scenarios have not been considered, and certain assumptions/methodologies used in the EIA are questionable and/or inaccurate.
>
> (3) Construction of the Proposed PAFF at Area 38 may produce hazardous conditions that would result in a greater hazard to life than intended by the EIA Ordinance.
>
> The points raised have been put to the Town Planning Board and the Airport Authority. Given the nature of the risks Shiu Wing have decided that it would be in the interest of all concerned to make the report available in its entirety. The Airport Authority have been asked to confirm that it has thought of these risks and that it has adequate measures in place to safeguard safety.
>
> Safety
>
> As stated above, this is obviously a very special situation, and strict compliance with all required procedure and technical memoranda is vital. Shiu Wing have no wish to be obstructive, but we clearly have a major interest in the outcome of your decision. The Macinnis Report confirms that the proximity of the Steel Mill's operations is not discussed in the EIA report but may be of importance if there was a fuel spill inside or outside the bund area, and that there are a number of possible ignition

> sources which have not been considered. In all the circumstances, you should not hesitate to suspend, vary or cancel the permit if you are in any doubt regarding the information previously provided, or the safety of the project. Notwithstanding the importance of the project, we would suggest that you cannot be too cautious in these circumstances."

14. After a brief exchange of correspondence between the various parties SWS issued its notice of application for judicial review on 1 November 2002. Leave was granted by Hartmann J on 13 November.

15. Since the granting of leave further reports from all sides have been prepared. In response to MacInnis the HKAA filed a report by AEA Technology ("AEAT report") on 5 February 2003, and the Director filed a report from Shell Global Solutions ("Shell") on 12 February. AEAT concluded that :

> "(a) None of the issues raised by Macinnis identify errors or omissions in the EIA Report which AEAT consider would significantly affect the predicted risk levels, which lie within the acceptable region of the criteria established in Annex 4 of the Technical Memorandum; ...
>
> (d) AEAT consider that the EIA Report identifies and discusses all reasonable hazardous scenarios associated with the PAFF. In particular, AEAT do not consider it was necessary for the EIA Report to consider specifically the scenarios suggested by Macinnis in which : (a) hot surfaces within the Steel Mill could ignite a release from the PAFF; (b) smoke carrying inflammable vapours could ignite on reaching the Steel Mill; and (c) hot gases emitted from the Steel Mill could lead to ignition of Jet A-1 at the PAFF. AEAT consider that these potential scenarios are reasonably covered within the general scenarios adopted by the EIA Report; and
>
> (e) AEAT consider that the assumptions and methodologies used in the EIA Report are reasonable within the scope of the assessment. In particular, AEAT consider that the thermal impact criterion used in the EIA Report is a reasonable approximation for the PAFF, which will not

> significantly affect the predicted risk levels compared with the criteria established in Annex 4 of the Technical Memorandum, when compared to other reasonable calculation methods.'
>
> Based on this review, AEAT consider that none of the issues identified by Macinnis would change the key conclusion in paragraph 10.9.7 of the EIA Report, namely that 'Based on the analysis presented in this section, including the recommendations, it can be concluded that the offsite individual and societal risks posed by the activities at the PAFF tank farm and associated marine environment are acceptable according to the criteria set out in Annex 4 of the EIAO-TM (ie the Technical Memorandum)."

16. Shell concluded that :

> "The EIA for the PAFF at Tuen Mun Area 38 has been challenged for not taking sufficient account of the neighbouring Shiu Wing Steel Mill. Although the presence of the mill and its workforce is specifically mentioned, Macinnis claim that the effect modelling described in the EIA is not sufficiently conservative, and that worse case scenarios deemed incredible by the authors of the EIA should have been included.
>
> It has been shown in this report that the extra scenarios mentioned by Macinnis are indeed incredible, and that the scenarios and assumptions in the EIA Report are comprehensive and robust. The worst-case scenario addressed in the EIA (tank overfill) is the worst foreseeable, and was modelled conservatively in that the assumed damage was significantly worse than is observed in practice. The hazard to life assessment in the EIA remains sufficient, and retains its validity.
>
> Even if the extra hypothetical scenarios postulated by Macinnis after the EIA was published were to be included as a sensitivity study, they do not pose a risk to the people in the steel mill or to its structure, and the total risk for the PAFF is still acceptable.".

17. SWS were clearly not satisfied with these conclusions. As a result, their notice of application was re-amended and a further report filed — the "HSL" report (Health & Safety Laboratory, a much respected

UK organization) written by Mr Marc McBride. A summary of that report's findings are :

(1) The Hazard Assessment is fundamentally flawed because it fails to identify and assess the risk associated with a catastrophic failure of one of the aviation fuel storage tanks, i.e. instantaneous loss of 100% of the tank contents. This is contrary to common practice for Hazard Assessment studies in Hong Kong and published international good practice. Furthermore, there have been past occurrences of catastrophic tank failure relevant to the PAFF.

(2) The Hazard Assessment fails to comply with the requirements of the EIA Study Brief because it does not identify all hazardous scenarios, in particular the catastrophic tank failure scenario.

(3) HSL's assessment is that this scenario could cause almost 200 fatalities at the SWS site, due to the significant fraction of aviation fuel which would overtop the bund (as demonstrated by theoretical models, large scale experimental studies and past incidents), together with the strong likelihood of ignition associated with activities at the steel plant.

(4) The Hazard Assessment grossly underestimates the risk associated with the proposed PAFF. Using the figure contained in section 10.5.2 of the Hazard Assessment on the frequency of catastrophic tank failure, the overall risk for the PAFF (2040 case) is calculated to lie with the upper 'ALARP' region of the Risk Guidelines, rather than in the "acceptable" region as the EIA report would suppose (ALARP stands for As Low As Reasonably Practicable).

(5) There is a significant off-site risk associated with the proposed PAFF. Compliance only with minimum separation distances does not provide an acceptable basis for the siting of the PAFF. Good practice would require that the decision as to its siting be risk-based, having regard to the location and surroundings of the installation, irrespective of separation distances.

(6) The proposed PAFF design does not comply with relevant international standards, namely the Institute of Petroleum Model Code of Safe Practice, Part 2 : Design, Construction and Operation of Distribution Facilities.

SWS acknowledge that (1) and (2) are inaccurate. The EIA report did identify the 100% instantaneous loss scenario and it did assess it. What it did not do is assess it quantitatively. The report had concluded that the worst case scenario was a 10% loss when it said "The catastrophic failure of the tank is therefore assumed to result in a release of 10% of tank contents (i.e. about 3,900 m^3) on to the bund".

18. There is no complaint that the assessment of the "10% worst case scenario" was not fully addressed in considerable detail in the report. The conclusion that the QRA be confined to the 10% scenario is preceded by a wealth of scientific data.

19. I have set out the conclusions to these reports for two reasons. Firstly, to demonstrate one of the few things about which there is agreement between the parties in this case, namely that there is a difference of opinion between the experts. (In passing, it is also agreed that the scientific or technical debate between the experts cannot be and is

not to be resolved by the court. The parties are unanimous that the court should not get involved with the debate between the experts). Secondly, the filing of these reports (together with two affirmations on behalf of SWS from Mr T. Maylor and Libor Rostik which provide, *inter alia*, evidence about the workings of the steel mill) prompted a preliminary hearing which was heard in this court on 24 July 2003 in which SWS applied for leave to re-amend the notice of application and file the HSL report and the two affirmations. The application was opposed. At the end of a relatively short hearing, which only scratched the surface of the issues and the reports, I granted leave to re-amend and admitted the fresh evidence relied on by SWS *de bene esse*. One reason for admitting it *de bene esse* was to give the court an opportunity at the full hearing to consider the report and its relevance in greater depth. This has now happened and I consider the matter more fully later in this judgment.

20. Throughout the above events, many affirmations and affidavits have been filed. 12 deponents have filed 18 affirmations totalling 177 pages.

THE ISSUES

21. SWS on the one hand and the Director and HKAA on the other do not agree what the issues to be resolved by the court are. The prime reasons for the disagreement are that :

(a) there is no consensus as to the legal boundaries set by judicial review proceedings. SWS submit they are changing and widening,

(b) the admissibility of the HSL report remains an issue. Without it the issues are narrower.

22. Defining the issues is a highly significant exercise. In some ways it goes a long way towards determining the outcome of the judicial review itself.

23. Erring on the safe side all counsel have addressed the court on all issues, that is, those advanced by SWS. Counsel's submissions have been comprehensive. Mr Charles Haddon-Cave, QC and Mr Nigel Pleming, QC leading Mr Anthony Chan, SC have appeared for SWS. The Director has been represented by Mr Benjamin Yu, SC leading Mr Anthony Ismail and Ms Gladys Li, SC has represented HKAA. Their instructive and helpful skeleton submissions run to 250 pages. The research of all three legal teams has been impressive. Whether the court proceeds therefore on the wide list of issues contended for by SWS or the more conservative list proposed by the Director is a very important decision. Mr Haddon-Cave's list of issues and consequential issues pose 24 questions to be answered. Mr Yu lists five issues.

24. As will be seen from what follows in this judgment, and after anxious deliberation, I have preferred the narrower approach submitted by the respondent and HKAA. I will not, therefore, set out all the issues as advanced by SWS. Mr Pleming, an acknowledged and respected expert in administrative law commenced his submissions as follows :

> " This is, I hope your Lordship will accept, a very important case for environmental law in Hong Kong. Your Lordship's judgment will no doubt significantly assist in a number of ways, apart from assisting the particular parties.

> Could I respectfully suggest what those ways might be. First of all, it will be the first opportunity for the court in Hong Kong to express its view as to the meaning, if it has a view, and can express one, on the language and the purpose -- and I emphasise the purpose -- of the ordinance and the technical memorandum.
>
> The second area of significance is that your Lordship's judgment will provide an opportunity for the determination of the true role and expectations of the public. By 'the public' I also include the advisory council as the representative of the public, in what Mr Haddon-Cave has described so far as, and I here add as part of my submissions, a tripartite process.
>
> The third area of importance is that your Lordship's judgment may be a step in the direction of determining the standards to be applied in the approval process. I cover by that all stages in the ordinance, from compliance through approval to permit, the degree of rigidity or laxity that is involved."

25. The view of this court is that first instance judgments should be primarily, if not solely, directed towards the decision which the parties want to know. Should that decision necessitate matters of statutory construction or applications of principle then so be it. However, such determinations should be confined to only those which are necessary for the court to carry out its primary task which in this case is to apply the Hong Kong law of judicial review to the two decisions under challenge and decide if any grounds have been made out to review them.

26. It seems to me therefore that the respondent's issues better reflect the task of this court in this case. They are :

(1) Whether the evidence in the form of expert reports are admissible in judicial review proceedings by way of exception under *R. v. Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584?

(2) Whether the Director acted lawfully in approving the EIA report and allowing the project proponent not to carry out a quantitative risk assessment on instantaneous release of 100% of a tank content?

(3) Whether the Director acted reasonably in the public law sense in approving the EIA report and allowing the project proponent not to carry out a quantitative risk assessment on instantaneous release of 100% of a tank content?

(4) Whether the challenge that the EIA report does not comply with the SB and the TM is out of time?

(5) Whether the court in the exercise of discretion should grant relief having regard to :

(a) delay;

(b) prejudice to the Airport Authority;

(c) prejudice to good administration.

27. It will be noted that the first issue concerns the admissibility of the HSL report. I therefore deal with this as a preliminary issue next. Before doing so I should add that SWS's list of issues has not been shredded. On the contrary, they remain a useful guide to structure this judgment. The 24 questions have been helpfully grouped under the six heads of challenge contained in the re-amended notice of application. I propose to deal with each of those challenges separately, although in many instances, briefly. Before, therefore, I turn to the important question of the admissibility of the HSL report, it is convenient to set out, in summary form, SWS's six heads of challenge.

SWS'S GROUNDS OF CHALLENGE

28. SWS's case is that the EIA report is deficient in that it failed to comply with the legal requirement of EIAO, in particular the requirements of the SB or TM. If that proposition is correct the Director's approval of it, under section 8(3) was unlawful because it was not a proper or valid report under section 6. For the same reason the section 10(2) permit was not lawfully granted either.

29. Six separate grounds are identified. In truth, grounds 2 to 6 flow from ground 1. Ground 1 is the crux of the matter. Ground 1 depends on how the ordinance is construed. Counsel for SWS acknowledge that there is considerable overlap between the various grounds. In spite of submissions to the contrary I am not persuaded that any of grounds 2 to 6 can be freestanding.

(a) Ground 1 is described as the Quantitative Risk Assessment argument ("the QRA argument"). Paragraph 3.3.10 of the SB states :

> **"3.3.10 Hazard To Life**
>
> 3.3.10.1 The risk to the life, including the workers of nearby plants, due to marine transport, jetty transfer, tank farm storage and pipeline transfer of aviation fuel shall be assessed. The Applicant shall follow the criteria for evaluating hazard to life as stated in Annexes 4 and 22 of the TM in conducting hazard assessment and include the following in the assessment:
>
> (i) identification of all hazardous scenarios associated with the marine transport, jetty transfer, tank farm storage and pipeline transfer of aviation fuel, which may cause fatalities;
>
> (ii) execution of a Quantitative Risk Assessment expressing population risks in both individual and societal term;

(iii) comparison of individual and societal risks with the Criteria for Evaluating Hazard to Life stipulated in Annex 4 of the TM; and

(iv) identification and assessment of practicable and cost effective risk mitigation measures as appropriate."

In short, having identified a 100% instantaneous loss as a scenario under (i), they were required to execute a QRA in respect of it. Once identified the TM required that a QRA must be done in respect of all identified hazards.

(b) Ground 2 is described as the *Material Facts argument*. It is submitted that prior to making his decision the Director failed to acquaint himself with the nature of the works at the steel mill and the number of people who worked there.

(c) Ground 3 is the *Applicant's letter argument*. It is submitted that the Director disregarded SWS's letter of complaint dated 13 July 2002.

(d) Ground 4 is the *25 April 2002 meeting argument*. The decision not to carry out a QRA in respect of 100% instantaneous loss was taken at a meeting between the Director and HKAA just prior to releasing the report. It is submitted that the effect of this decision was to remove a key issue, namely 100% catastrophic failure, from public debate and consideration.

(e) Ground 5 is the *Safeguards argument*. It is submitted that the Director should not have relied on the various safeguards that were incorporated into the design and operation of the PAFF when deciding not to do a QRA for the 100% loss scenario.

(f) Finally ground 6 is the *Conditions argument*. It is submitted that a condition which was imposed on the granting of the

permit ("Permit Condition 3.9") was unlawful as it fell outside Schedule 4 of the EIAO.

30. Before considering these grounds in more detail, I now turn to the preliminary issue of the admissibility of the HSL report.

THE HSL REPORT — ADMISSIBILITY

31. The quality and expertise of the HSL report, together with independence and excellent reputation of HSL itself is not doubted.

32. The report has been admitted *de bene esse*. The court has now had a full opportunity (as opposed to a superficial opportunity at the preliminary hearing on 23 July) to consider the purpose and content of the report in the light of issues to be determined.

33. Counsel for SWS submit that the report and the fresh evidence is admissible as an exception to the general rule. Authorities and learned texts have been cited in support of the general proposition that the circumstances in which post decision materials can be admitted is widening. Bearing in mind the importance and complexity of this case, it is submitted that the court should lean in favour of including it rather than excluding it.

34. The general rule can be found in *R. v. Secretary of State for the Environment ex parte Powis* [1981] 1 WLR at p.595 :

> "Finally there was an application on behalf of the tenant to admit fresh evidence which the Divisional Court had refused to admit. Like the Divisional Court we considered the evidence de bene

> esse. What are the principles on which fresh evidence should be admitted on judicial review? They are (1) that the court can receive evidence to show what material was before the minister or inferior tribunal : ... (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact or where the question is whether essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error : ... and (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. Examples of such misconduct are bias by the decision making body, or fraud or perjury by a party. In each case fresh evidence is admissible to prove the particular misconduct alleged : ..."

35. There are many examples of the application of the general rule in Hong Kong. For example in *Nguyen Ho v. Director of Immigration* [1991] 1 HKLR 576, Cons VP said :

> "From that exposition alone I am satisfied that unreasonableness as a factor by itself, what might be termed the second limb in *Wednesbury*, can only be judged with regard to what was known to the inferior tribunal at the time."

36. In *Yu Chee Yin v. Commissioner of ICAC* [2001] 2 HKC 91 at 104, Hartmann J said :

> "It is common cause that the evidence contained in the affirmations was not before the Commissioner when he made his decision. Indeed, that is the foundation of the applicant's third challenge. But a claim of unreasonableness in the 'Wednesbury' sense is judged in light of the information that was before the decision maker when he made the decision. It is not judged in the light of information that has only become known after the event."

37. SWS submits there are four reasons to treat the HSL report as an exception to the general rule. I consider it sufficient to simply recite

those four reasons without reviewing the many authorities to which I was referred in the course of submissions.

38. First, where it is alleged that the decision maker failed to take account of a relevant fact, evidence can be admitted to show (a) why it is relevant and (b) the significance of the disregarded material in the decision-making process.

39. Second, this case falls within the second head of *Powis* : Where the jurisdiction of the decision maker depends on a question of fact evidence is admissible to challenge the fact and to show that he had no jurisdiction or authority to do what he did.

40. Third, there is an "emerging" category for admission of material not before the decision-maker. Where a decision is made in ignorance of or contrary to the true facts, evidence is admissible to demonstrate the true facts upon which the decision should have been based, provided that it is shown that the facts placed before or found by the decision maker were "plainly wrong".

41. Fourth, where it is alleged that the defendant has failed in its duty to acquaint itself with relevant information, it will often be essential for the applicant to demonstrate (in a case such as this by reference to both factual and expert evidence) that there was material with which the decision maker should have been acquainted at the time of the relevant decisions but was not. Here, that category covers the true factual situation at the steel mill described by Maylor and Rostik.

42. In short it is argued that HSL establishes that a QRA on the 100% loss scenario could have been carried out, but was not, and had it been the Director's decision could have been different.

43. I have considered the authorities relied on by SWS and in particular the passage from *Fordham Administrative Law* under the heading "Fresh evidence in Judicial Review". For the reasons which follow I have come to the conclusion that the report is not admissible because the grounds for categorizing it as an admissible exception to the general rule have not been made out. Any apparent inconsistencies between the reasons for excluding it now and the reasons for admitting it *de bene esse* on 23 July stem, quite simply, from the full nature of the argument in this hearing compared with the brief nature of the argument in the former hearing. It is worth mentioning also that SWS's primary argument, namely that the section 8(3) decision was unlawful because the EIA report was deficient is a question of construction and remains in tact with or without HSL.

44. I agree with the general argument advanced by the Director and HKAA that, in reality, the HSL report is an expert opinion in support of SWS's latest case (I deal later with the point that SWS's latest case is significantly different from its original case upon which leave for judicial review was granted). As such, it merely reinforces the undoubted truth that expert opinions differ. The fact that a QRA was not being done on the 100% loss scenario was known from 3 May 2002. The alleged deficiency, which is the crux of the HSL report, could have been placed before the Director before he made his decision but was not. SWS submit, as they must do, that the report contains fact not opinion which should

have been before the Director. To separate fact from opinion in this particular report is almost impossible. Taken as a whole its conclusions plainly attract the label of opinion rather than fact. In its own summary the report states that its purpose is to establish whether the Hazard Assessment complies with the requirements of the SB and TM. The author gives his opinion on this issue. That question was the question the Director had to decide. It was his judgment call. Whether or not that decision was made at the time unlawfully or irrationally is for the court to determine. The answer to that question does not require a consideration of the subsequent competing opinions as to whether the 100% loss scenario is credible or not, whether a QRA on such a scenario is feasible or necessary or not, or whether the result of such a QRA, had it been done would have been acceptable or not. It does not constitute "true facts upon which the decision should have been made" nor does it contain matters which "the decision maker should have acquainted himself with, but did not."

45. Having applied the basic legal principles to the issue and having decided, as a result, that HSL is not admissible, further analysis of the report becomes unnecessary.

46. Two final points require mention. Firstly, one of SWS's arguments is that because no challenge was made to the MacInnis report, which also post dates the Director's decision, the respondent cannot now challenge other post decision material. I disagree for two reasons. As a statement of principle it is wrong. Simply because they did not challenge one report does not act as a waiver of a right to challenge subsequent reports. Also, the MacInnis report did contain factual matters which were

relevant to SWS's original complaint as set out in their 13 July letter. Secondly, it was submitted at the preliminary hearing that the HSL report merely confirms and enlarges upon the MacInnis report. Having now considered them both I think this understates the true position. I agree with Ms Li counsel for the Interested Party that a fairer reflection on the matter is that MacInnis on its own, in the light of the AEAT and Shell reports could not establish that the Director's decision was either unlawful or irrational. SWS therefore side-lined MacInnis. HSL focused on the matter differently, namely on the failure to execute a QRA on the 100% loss scenario. SWS's focus shifted accordingly.

THE CONSTRUCTION ARGUMENT

47. I turn now to the competing submissions on how the EIAO is to be constructed in answer to the question — was it mandatory for the EIA report to contain a QRA on all hazards to life that had been identified?

48. Where the meaning and effect of a statutory provision is the subject of legal argument the court should construe the provision purposively. The court's interpretation should be consistent with the objects of the legislation as a whole. I have already set out what the dual objectives of the EIAO are. The key provisions which are under scrutiny are sections 6(1), 6(3), 8(3) and 10(2). They should be read together as integral parts of an overall regime.

49. Section 6(1) requires the EIA report to be "*in accordance with*" the SB and TM. Then, section 6(3) requires the Director to decide if the report "*meets the requirements*" of the SB and TM or not.

50. The section 6(3) decision comes before sections 8 and 10. It is a decision to be made by the Director at a time when there is no public involvement. It has been argued by SWS that the whole EIA regime is a tripartite process involving the government, the developer and the public. In fact, the regime is not tripartite throughout. At the time the section 6(3) decision is made the first public window has closed (advertising the project profile) and the second public window has not yet opened (public comment on the signed EIA report).

51. This is perhaps an appropriate moment to deal briefly with the complaint about the 25 April meeting, which immediately preceded the section 6(3) decision, at which it was decided that the 100% loss scenario did not warrant a QRA. It was suggested that this somehow circumvented public involvement. In my judgment this complaint does not stand up. The decision taken at the 25 April meeting was a clarification of, not a dilution or variation of, the criteria. The EIAO provides that the report is prepared at a non public involvement stage in the regime. Any decision about its content will be without public consultation. The public consultation may later affect its approval but not its substance. After the section 6(3) decision the absence of a QRA on a 100% loss scenario is open to debate and comment. In support of SWS's case that an important part of the section 6(3) decision cannot be "surrendered to a private agreement" Mr Pleming cited two authorities from the UK (*Gillespie v. First Secretary of State and Bellway Urban Renewal Southern* [2003] EWCA Civ 400 and *Smith v. Secretary of State for the Environment* [2003] EWCA Civ 262.) Whilst these cases are instructive, their particular facts are wholly different and the UK statutory regime about which they are concerned is also very different.

52. Like all decisions, section 6(3) requires judgment. Whether the answer is "Yes" or "No" does not depend on a robotic or check-list approach. Whether or not it "meets the requirements" of the SB and TM naturally depends on what the requirements of the SB and TM are. Those documents are not to be read as a strict list of things which must be done before it can be decided that its requirements have been met. It is now necessary to consider those two documents in a little detail.

The Study Brief

53. Section 3.3.10 has been set out at page 16 of this judgment. The key parts are that when conducting a Hazard Assessment the applicant shall "follow the criteria for evaluating hazard to life as stated in Annexes 4 and 22 of the TM". Included in the assessment is to be (a) identification of *all* hazard scenarios and (b) execution of a quantitative risk assessment.

54. SWS submit that the TM must be followed rigidly and completely and that the word *all* in (a) should be read into (b) as well.

55. I do not agree.

56. The SB requires an "assessment". An assessment is defined as "an evaluation or an estimate of the nature of". A QRA is a tool to be used in making the assessment. Section 3.3.10.1(ii) does not require a QRA for *all* hazardous scenarios. It is sufficient to execute a QRA for all those scenarios, which in the Director's judgment, need to be addressed and assessed. Mr Yu points out that the next section of the SB, section 3.3.11 "Risk Assessment on Fuel Spillage" deals with the point

specifically. (i) says "identification of all fuel spillage scenarios … and (ii) says "quantification of the impacts … due to fuel spillage scenarios *identified in (i)*". Section 3.3.10 could very easily have said the same thing but did not. Mr Haddon-Cave submits that sections 3.3.10 and 3.3.11 differ because section 3.3.11 does not have the same preamble as section 3.3.10 (in which the TM is specifically mentioned). This is correct but, in my judgment, does not diminish the point that if *all* scenarios in section 3.3.10 had to be quantitatively assessed it would have said so. (The reliance on the TM as being the document which says that all hazards require a QRA is dealt with in the following section.)

57. To require a QRA for all scenarios would include all incredible scenarios and scenarios which it is known will not occur. For illustrative purposes it is permissible to dip into the HSL report to support the Director's decision that this cannot be the requirement. HSL accepts that certain hazards can be eliminated qualitatively, such as those described as "boil over" and "brittle failure" because they have no possible relevance to this project in this location. Moreover, HSL does not explain why 100% instantaneous loss scenario could be a credible event. It does not answer the conclusions in the Shell and AEAT reports that it is not credible for a Jet A-1 storage tank to split from top to bottom when one takes into account the actual design features and standards of construction and testing being applied in this particular project. In short, HSL says, it would be possible to do a QRA for the 100% loss scenario but does not go on to say that such a scenario is a credible event.

58. In the course of argument reference has been made to to SRAG — the UK Safety Report Assessment Guide. I refer to it to extract

one passage only. The entire document has only a limited value in the present case because it relates to Potentially Hazardous Installations (PHIs) whereas the PAFF is not so designated and also it relates to "Highly Flammable Liquids" whereas Jet A-1 fuel in the PAFF is not classified as *highly* flammable. The passage which, in my judgment, describes a correct approach in our case is :

> "Proportionality will influence the type and level of analysis detail that Assessors might expect to underpin the various demonstrations in the safety report. .... It is important for Assessors to realise that QRA does not mean that a detailed and full numerical analysis resulting in iso-risk contours and F/N societal risk curves is needed. Rather the extent of the quantification and the form it takes will depend on the site specific circumstances determining the level of proportionality that applies."

In other words, it is expected that the decision of expert assessors will be founded on professionalism and common sense.

59. SWS's answer to the question — why should a QRA be done for *all* scenarios is because the TM says so. I move on therefore to a consideration of the TM.

Technical Memorandum

60. The first point to establish about the TM (and indeed, the SB also) is that it is not legislation. Section 16(12) of EIAO makes this clear :

> "16. Technical Memorandum ....
>
> (12) A technical memorandum is not subsidiary legislation."

61. Mr Pleming's submission advances theories as to why that particular subsection may have been included. He submitted that at the very least the TM had legal effect. He said that the TM certainly looked like subsidiary legislation. In my judgment, the reason section 16(12) appears is plain. It is to put the matter beyond doubt lest anyone (here SWS) might think otherwise.

62. The fact that it is not subsidiary legislation provides the starting point for how it is to be treated. It is a guide. The TM itself, at paragraph 1.2.2 says so :

> "The Technical Memorandum on the Environmental Impact Assessment Process is a *guide* for the Director in deciding on matters under sections 5, 6, 8, 10, 12, 13 and 14 of the Ordinance. The Director is the Director of Environmental Protection. He will follow this technical memorandum *as appropriate according to the circumstances of a case*." *(emphasis added)*

Words and phrases such as those emphasized do not appear in legislation. There are many other examples which illustrate that, whilst an important document, it provides for a degree of flexibility and common sense. It is not a straightjacket to be slavishly and mechanically followed, in which discretion and judgment play no part.

63. Other examples of the language of the TM providing a pointer to how it should be used can be found in part 4 which sets out the criteria for the EIA report.

64. 4.1.1 states :

> "An EIA report shall comprise a document or series of documents providing a detailed assessment in quantitative terms, wherever possible, and in qualitative terms of the likely

> environmental impacts and environmental benefits of the project. The requirements for the EIA report shall be set out in accordance with this technical memorandum. The EIA report shall be produced in accordance with the EIA study brief issued by the Director to the applicant."

65. SWS relies on the words "wherever possible". They submit that as a QRA on the 100% loss scenario was possible (in support of which they rely on HSL) it should have been done.

66. However, this must be read in context. The whole sentence suggests that both quantitative and qualitative assessments will be done. They will be done in respect of the *likely* environmental impacts. The word "likely" appears in the next section also (objectives and contents of the report) :

> "to identify and describe the elements of the community and environment *likely* to be affected by the proposed project(s), and/or *likely* to cause adverse impacts to the proposed project(s), including both the natural and man-made environment and the associated environmental constraints;..." *(emphasis added)*

67. The same section reminds the compiler of the report of the purposes and objectives of the report :

> "The contents of an EIA report shall fully meet the purposes and objectives set out in the EIA study brief issued by the Director, and shall adequately address all the issues set out in the EIA study brief."

68. The general approaches and methodologies are set out in section 4.3. SWS point to 4.3.1(vi) :

> "predicting the *likely* nature, extent and magnitude of the anticipated changes and effects such that an evaluation, *in*

> *quantitative terms as far as possible*, can be made with respect to the criteria described in Annexes 4 to 10 inclusive." *(emphasis added)*

69. This should be read together with the section dealing with the review of the report (section 4.4) which again illustrates that the reviewer of the report is permitted to use his judgment subject to the guidance set out :

> "Quality of the EIA Report: The quality of the EIA report shall be reviewed having regard to the guidelines in Annex 20 and in Section 4.3. The report shall be considered as adequate if there are no omissions or deficiencies identified which may affect the results and conclusions of the assessment. ..."

70. Both counsel have helpfully referred the court to several authorities on the issue of the construction of the TM. I refer to just four and very briefly. The purpose is not to either follow or distinguish a particular decision but to borrow some apposite phrases which illustrate the correct approach to how the TM guide should be applied.

71. *R. v. Rochdale Metropolitan Borough Council ex parte Tew* [1999] 3 PLR 74 was a planning case in which Sullivan J held that the regulation under discussion should be interpreted purposively rather than literally :

> " While regulation 3 of the applications regulations is expressed in mandatory terms — an application for planning permission 'shall' include the particulars specified in the form provided by the local planning authority — I do not accept that failure to include one or more of those particulars means that the application is invalid, so that the local planning authority is unable to grant planning permission even if it wishes to do so. The mandatory terms of regulation 3 are addressed to a practical problem and are intended to ensure that the local planning

> authority is able to require that certain particulars are provided as part of the application for planning permission. ...."

72. He later went on to say that to interpret in any other way would be "an unduly literal reading of the regulation".

73. Similarly, the conclusions reached by Mackay J in *R. v. Dorset County Council* [2002] All ER (D) 68, another planning decision, are to point :

> "The adequacy of environmental information contained in an Environmental Statement is a matter for the judgement of the planning authority, with which the Court will only interfere if it is proved to have been exercised irrationally.
>
> ....
>
> It is not 'every scrap of information' which has to be considered .... (a flexible attitude to compliance with a given paragraph's requirement may be appropriate, ...
>
> I was not in the result persuaded by the decisions that Part II paragraphs 1, 2 and 3 have to be approached in the rather *mechanistic, sequential and discrete* way contended for by Mr Fordham ...." *(emphasis added)*

74. The same theme is expressed by Jowitt J in *R. v. Wakefield Metropolitan District Council ex parte Pearl Assurance plc (QBD) 1997* : The document under scrutiny was a planning policy guide (PPG). Jowitt J said :

> ".... PPGs are not delegated legislation and do not have the force of statute. They are *guidance and not tramlines*. They do not purport to deal definitively with every situation which may arise. ....
>
> .... Whether a piece of guidance amounts as a matter of law to a material consideration has to be judged by reference to the content of the guidance seen in the factual context of the

> particular case. Moreover, there is an important distinction between having regard to guidance and being bound to follow it." *(emphasis added)*

and quoting Lord Hoffman from an earlier decision :

> "This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other it is that matters of planning judgement are within the exclusive province of the local planning authority or the Secretary of State."

75. Adopting such an approach to the present case makes SWS's task an uphill one. In my judgment, it is simply not sensible to extract the two words "wherever possible" from paragraph 4.1.1 of the TM and conclude that because HSL said that a QRA on the 100% loss scenario was "possible", then the failure to carry it out renders the entire process unlawful. That would be "unduly literal", "mechanistic" and not in accordance with the objectives and purposes of the ordinance. Rather, it should be read in its context in 4.1.1 which anticipates both quantitative and qualitative assessments as part of the guidance.

76. Of course, this does not mean that the TM or any other similar guideline is to be treated in a cavalier way. It is to be applied responsibly and with care, but not unduly literally and with blinkers. Failure to comply with every requirement will not automatically render it invalid (as submitted by SWS). The court's decision in the present case is that the particular non-compliance alleged is not to be construed as a non-compliance and thus the complaint that it was an invalid report fails *in limine*. What remains therefore is a possible challenge that the decision

not to assess the 100% instantaneous loss scenario quantitatively was *Wednesbury* unreasonable.

Annex 4

77. Before considering the case under "*Wednesbury* unreasonableness", Annex 4 should not go unmentioned (although, absent HSL, its significance is diminished). Annex 4 provides the criteria for carrying out a QRA should it be deemed appropriate. Annex 4 states "The criterion for hazard to human life is to meet the Risk Guideline as shown in Figure 1. Figure 1 is in two parts :

(1) Individual risk guideline for acceptable risk levels.

Maximum level of off site individual risk should not exceed one in 100,000 per year, i.e. 1×10^{-5}/year.

(2) Societal risk guidelines for acceptable risk levels.

The societal risk is in the form of a graph. The horizontal axis is the number of fatalities (N) from one to 10,000. The vertical axis is the "frequency of accidents with N or more fatalities per year with one in a billion at the bottom and one in a hundred at the top. Roughly speaking the graph has three regions. If, statistically, a risk is in the top right hand region it is "unacceptable", if it is the bottom left it is "acceptable". If it is in a band between the two it is in the "ALARP" region, namely "as low as reasonably practicable". This means that an ALARP risk should be mitigated to as low as reasonably practicable. The QRA done in the EIA report was all in the "acceptable" region. HSL's assessments entered into the ALARP region. Thus no risks, even those

considered by HSL 10 months after the Director's decision, were shown to be quantitatively unacceptable.

THE DIFFERENCES BETWEEN SWS'S CASE IN 2002 AND THE CASE NOW PRESENTED IN THIS JUDICIAL REVIEW HEARING

78. As I have come to the conclusion that there are material differences between the case as first put and the case now, it is important to highlight those differences even though their primary relevance is towards the admissibility issue of the HSL report with which I have already dealt. It is useful however to contrast the two cases as a prelude to the next section which deals with each of the heads of challenge based on the information which was before the Director at the time of the decisions.

79. In the original notice of application it was stated that Jet A-1 fuel was a "highly volatile substance". The case was that the *proximity* of a storage depot of such a fuel to SWS's steel mill posed an unacceptable risk because of the nature of the fuel and the nature of the works carried on in the mill and the number of people employed there. Leave to apply for judicial review was granted on this basis.

80. In the case as now presented however, it is accepted that Jet A-1 fuel is correctly categorized on "a flammable liquid" and not highly volatile and that by complying with all safety requirements in the design, operating and testing of the PAFF it is safe in normal working conditions. The original focus of SWS's case was addressed, in evidence, by an affirmation form Dr J. Wrigley, a Senior Environmental Protection

Officer, in February 2003. That affirmation dealt exclusively with the case being advanced at that time. A summary of his evidence was :

> "HS/APG approved the Study Brief for the Hazard Assessment which relates to risk to life. Other types of risk, such as personal injury or property damage are outside the scope of the Hazard Assessment (paras 6-9).
>
> The Hazard Assessment has been carefully reviewed by HS/APG (para 10). The PAFF containment and drainage systems are key safety features which ensure that accidental spills of aviation fuel are contained on the PAFF site and then drain to sea (para 10v). HS/APG advised EAND that the Hazard Assessment meets the requirements of the Study Brief and EIA TM from risk point of view (para 12).
>
> HS/APG and EAND have reviewed public comments including SW comments on ignition sources at the Mill, 'JW-2'. HS/APG conclude that ignition sources at the Mill have no impact or relevance to the Hazard Assessment due to adequate separation distance between PAFF and the Mill (paras 13-18)."

(HS/APG is Hazard Section of Air Policy Group).

81. The simple point is that virtually the entire focus of SWS's amended case, the 100% loss scenario, had not been mentioned. Mr Yu submits that had it been raised at the public consultation period it would have been considered and responded to in the same way as the concerns which were raised.

82. What is new is not the fact that no QRA was done but the emergence of the issue that it should have been.

83. In a recent 2nd affirmation Dr Wrigley reinforces the Director's stance that, from the outset, the 100% loss scenario was regarded as incredible.

> " ... when the Environmental Protection Department took the view that the Environmental Impact Assessment Report did not have to present a QRA on the instantaneous loss of 100% tank content scenario, that was made on the basis that such an event was incredible. According to the experience that I and my team have, it would not have made any difference to the risk assessment whether one attempts to set out some sort of quantitative assessment.
>
> Based on the meeting discussions, it was agreed that the '100% instantaneous tank failure' was incredible and could be assessed qualitatively in the EIA. The '10% instantaneous tank failure' was regarded as the worst credible event for the QRA process, as explained in EIA para 10.5.2.8."

By implication therefore, we see that it was decided that by "all" was meant "all credible events" and by "credible" was meant all those from a realistic worst case scenario basis downwards. It was that decision which in my judgment cannot be impugned.

84. 10.5.2.8, which is a key passage in the report, is as follows :

> "The tank vapour space could be in the flammable range due to vent opening to atmosphere and therefore ignition of tank vent due to lightning could result in a tank fire and subsequent failure at the roof to shell connection (API 650 tanks are provided with a weak roof to shell connection which will fail preferentially to any other joint). Such failures could also occur in the event of fire impingement to relieve excess vapours. It may be assumed that in the event of roof failure, the top most plate of the shell connecting to the roof may also fail resulting in spill onto bund. Each plate is about 3m high which is about 10% of the tank height. The catastrophic failure of the tank is therefore assumed to result in a release of 10% of tank contents (ie about 3,900 m^3) on to the bund. Aircraft crash is the only conceivable incident that can result in more than 10% of tank contents but this can be discounted, as the proposed site does not lie near to the flight path."

SWS's original case was based on the proximity of a highly volatile fuel farm. What remains is the proximity of a flammable liquid farm should an incredible event occur.

85. Another difference in SWS's case is that, it now seeks to introduce a new ground of complaint based on the concept of "legitimate expectation". The basis of the argument, in outline, is that as the EIA report was not in full and complete compliance with the requirements, the Director's approval of it may have constituted an abuse of power. Put more mildly, if the Director did not understand the requirements that he had to comply with he misused his power in allowing it to be approved.

86. I accept that this argument is not at the forefront of SWS's case and that it is included not so much as a separate argument but within the principle that arguments based on unfairness, unreasonableness and abuse of power can be intermingled (a note from *Wade's Administrative Law*, 8th edition, p.385).

87. It can nonetheless be answered shortly. The leading Hong Kong case of *Ng Siu Tung v. Director of Immigration* [2000] 5 HKCFAR 1 deals comprehensively with the doctrine of legitimate expectation. In our case it has been advanced very late in the day, it was not in the notice of application, it is unsubstantiated and it falls outside the criteria in the *Ng* case, namely where :

> "... the legitimate expectation arose from a promise or representation, the expectation being that the promise or representation would be honoured, should be properly taken into account in the decision-making process so long as to do so fell within the power, statutory or otherwise, of the decision-maker ..."

It is difficult to understand what clear promise has been ignored in the present case in the context of the guidelines which the Director is required to follow in a non mechanistic and purposive manner.

WEDNESBURY UNREASONABLE?

88. Having decided the issues of the "admissibility" of the HSL report and the "construction" issue in the respondent's favour all that remains is to examine SWS's six heads of complaint in the context of *Wednesbury* unreasonableness.

89. The basic legal principles to be applied in each case are :

(1) The court is not concerned with the correctness or otherwise of the decision.

(2) The court will examine the unreasonableness (*Wednesbury*) on the basis of the material before the Director.

(3) A challenge to the decision should be made promptly.

(4) Remedies under judicial review are discretionary.

(a) No QRA done on 100% loss scenari

90. Having decided that neither TM nor the SB requires a QRA for every identified risk it cannot, in my judgment, be argued that a decision not to do a QRA for an incredible scenario was unreasonable, let alone *Wednesbury* unreasonable. The decision concerned technical matters, the report was compiled by experts, the Director was advised by experts.

91. To reach the high threshold at which a decision will be regarded as *Wednesbury* unreasonable is an uphill task for an applicant. As Sir Derek Cons VP in *Nguyen Ho v. Director of Immigration* [1991] 1 HKLR at p.583 put it :

> "I would most respectfully suggest that this approach must be in accordance with basic principles, for if the Court may properly interfere when the inferior tribunal has not taken into account some matter which it should have done, the Court must also be able to do so when the inferior tribunal has got that matter wrong. But it must be something that is plainly wrong or, as the judge below put it, 'established unassailably to be erroneous'. Courts must in no circumstances allow themselves to be enticed into the evaluation of a fact which is properly within the exclusive jurisdiction of the tribunal."

The appropriate test for the court to adopt is as stated by Keith J in *Tran Van Tien v. Director of Immigration (No.1)* [1996] 7 HKPLR at p.177 :

> "... The test is not whether the evidence upon which the applicants seek to rely is capable of demonstrating that the facts on which the decisions were based were plainly wrong. The test is whether the evidence demonstrated in fact that the facts on which the decisions were based were plainly wrong. ..."

In 1996, Lightman J in *R. v. Director General of Telecommunications ex parte Cellcom* (unreported) said :

> "If (as I have stated) the Court should be very slow to impugn decisions of fact made by an expert and experienced decision-maker, it must surely be even slower to impugn his educated prophesies and predictions for the future. ...
>
> The Court may interfere with a decision if satisfied that the Director has made a relevant mistake of fact or law. But a mistake is not established by showing that on the material before the Director the Court would reach a different conclusion. The resolution of disputed questions of fact is for the decision-maker, and the Court can only interfere if his decision is perverse eg if his reasoning is logically unsound. ... The Court may interfere if the Director has taken into account an irrelevant consideration or has failed to take into account a relevant consideration. But so long as the Director takes a relevant

> consideration into account, the weight to be given to that consideration and indeed whether any weight at all should be given to that consideration is a matter for the Director alone, so long as his decision is not perverse: ..."

In our case the attempt to impugn the Director's decision is precisely as described by Laws J in *R. v. Secretary of State for Transport ex parte Richmond L.B.C.* "a disguised through elegant plea upon the merits".

92. With these principles in mind I turn to the remaining heads of challenge of which, as I have already found, none are truly free-standing and all are closely linked to the "main" challenge. I have concluded that none of them can survive the fact that ground 1 has failed on all grounds — unlawfulness, unreasonableness and irrationality.

(b) The material facts argument

93. The facts known to the Director at the relevant time were that there was a steel mill next to the proposed site where approximately 300 workers worked in 2001 and that the number would be substantially the same in 2016. The precise distance of the mill boundaries and the PAFF were also known. The expert assessment, based on the hazards which were quantitatively assessed (i.e. all those that it was necessary to do) was that the risk to life was contained within the PAFF site.

94. I reject the argument that such a decision is rendered *Wednesbury* reasonable, or invalid, by virtue of the decision maker's failure to visit the steel mill and consider what goes on inside the mill. To be told that the steel mill contained molten metal, sparks, very high temperatures, many workers and frequent site traffic would not take

anyone by surprise. Moreover, no survey of the mill was required by the SB and it is not suggested that the SB should have required one.

(c) The applicant's letter

95. SWS's case at trial is quite different from its case as set out in its 31 July 2003 letter. This particular ground can only have substance if it can be shown that the Director disregarded SWS's concerns as set out in the letter. To be *Wednesbury* unreasonable the Director would have to be shown to have turned a blind eye to their proper concerns. The reality of the situation is that SWS's complaint is not that their complaints were not addressed but that the Director disagreed with them. There is ample evidence that the concerns were addressed. The following are selected references to this issue from the affirmation evidence :

> "... The comments discussed at that meeting included the concerns set out in Shiu Wing's letter to the EIA Ordinance Register Office dated 13 July 2002 referred to by Mr Pong at paragraph 6.8 of his Affirmation on behalf of Shiu Wing. The main purpose of the meetings was for the Airport Authority, with its consultants, to show the EPD where in the EIA Report each comment was addressed. I and my colleagues, with our consultants Mouchel and their sub-consultant, considered carefully all the comments raised, included Shui Wing's concerns. The EIA Report was considered to have covered all the comments." (Mr W.O.W. Roberts, the Civil Engineering Manager for HKAA)

> "HS/APG have reviewed and commented on EAND response to public comments including SW. There is now produced and shown to me a copy of the comments marked exhibit 'JW-2'. I will now give further explanation of the important technical issues ..." (Dr J. Wrigley)

> "During the public consultation period between 14 June 2002 and 14 July 2002, a total of 13 sets of comments were received by the EPD. The comments included comments from Shiu

> Wing Steel Limited ('SWS') contained in a letter dated 13 July 2002... During this period, the public comments received were made available to the Secretary for the EIA Subcommittee though there was no obligation on the part of EPD to do so. At the end of the consultation period, I conducted a preliminary review of the comments and considered there were potentially major concerns expressed by the public. I therefore alerted all senior staff of the EPD including the Director, the Deputy Director of Environmental Protection ('Deputy Director') and the Assistant Director of the concerns expressed, highlighting the major issues including those raised by SWS...
>
> After the public consultation period, staff of the EPD carried out a thorough review of the issues raised by the public, collated them under different categories, discussed them with the HKAA and checked them against the EIA report. The staff of EPD including myself were satisfied that the concerns appeared to have been fully addressed and, a set of detailed responses were subsequently drafted ..." (Mr Hui Yat Ming, a Principal Environmental Protection Officer)

(d) 25 April meeting

96. This issue has been addressed earlier in this judgment. I do not consider there to be merit in the complaint that a decision was made behind closed doors and therefore to the disadvantages of the public. As already stated the EIA report is prepared in a "non public" period in the whole process. The basis of the risk assessment became public (namely the 10% loss of tank content scenario) and therefore open to scrutiny the moment the report was published. It is wrong to describe the Director as making a "belated admission" to this effect in August 2003. The consequence of the decision has been in the public domain since May 2002, and was affirmed to by Dr Wrigley in February 2003. Neither the TM nor the SB require disclosure of all the circumstances, considerations, deliberations and reasons which led up to any particular judgment or decision being made.

97. In short it is suggested that because a decision concerning the content of the EIA report was made between the Director and the HKAA, (at the highest level and by acknowledged experts) at a time when there was no provision for public involvement, was *Wednesbury* unreasonable because it "surrendered the process to private agreement". I consider this submission to be circular and illogical.

98. In any event, it is worthy to note that this complaint is not set out in SWS's notice of application. The respondent and interested party have therefore not had an opportunity of filing evidence about it.

(e) Safeguards and conditions

99. SWS's complaint is that the Director has granted environmental approval and permission without ensuring that the full details of the project are fixed with certainty.

100. Section 10(5) of the EIAO permits the granting of a permit with conditions. Section 9 makes the conditions enforceable and section 14 provides for the suspension of the project if the conditions are not complied with.

101. SWS refers to an extract from Mr Hui Yat Ming's affirmation as the basis of the complaint :

> "[w]here the particular [mitigation] measure is complex, difficult to express, or contain details not readily available during the EIA stage, further submissions may be required to ensure that the project will be designed in line with the assumptions in the EIA while providing the necessary flexibility for minor project changes."

102. It is argued that this amounts to an admission that the Director did not have sufficient information on which to base a decision that the qualitative assessment was sufficient and that the Director allowed HKAA to delay providing important technical information about the project.

103. To interpret Mr Hui's evidence in this way reads too much into it. No complaint can be made that the Director in acting in accordance with his powers acted unreasonably in the *Wednesbury* sense. That it could have been unlawful and outside his powers is unsustainable.

104. The role of conditions was considered and commented on in the "Long Valley" appeal :

> "... Where a report is approved and permit granted, however, important steps in the process follow. These are:-
>
> a. The Director will often impose conditions on both the report and the permit (see Schedule 4 of the Ordinance). These are to ensure (for example) that Habitat Creation and Maintenance Plans and Environmental Monitoring and Audit Programmes outlined in the Report are later approved; that mitigation measures and the like are in place and satisfactory before the project proceeds.
>
> b. The report will be placed in the register under section 8(5). This is available for public inspection and if relevant may be relied upon for the granting of a permit for other projects without a further EIA study and report.
>
> c. The Director continues to monitor compliance before, during and after construction and will if necessary use his considerable powers under the enforcement provisions of the Ordinance.
>
> There is a difference in emphasis between conditions to the approval of a report, which usually are to ensure that matters dealt with in the report are completed. The Director's approval of a Habitat Creation Plan for example. The conditions to a permit are related to the construction work and are to ensure that the report is complied with before, during and after construction.

> For example a condition that a mitigation area is functioning before construction begins."

Conditions enable matters of detail to be dealt with at a later stage.

105. Before I turn to the final section of this decision (namely the issue of discretion), I think it appropriate at this stage to deal briefly with an important point, hitherto unmentioned. The exhaustive EIA process, starting with the project profile, going through the SB, TM and report stage, on to the approval, permit and conditions stage is but one statutory control and safeguard in the construction of this important but sensitive installation. The Buildings Department, the Fire Services Department, the Marine Department and the Lands Department are others who exercise stringent statutory control over the project. The approval of the report and the granting of the permit under the EIAO is just one of a number of approvals to be sought. This court's decision that the Director's decision should not be reviewed is one piece in a bigger picture. That is not to say that because there are other statutory schemes in place anything less than the highest standards of expertise and competence will do when the crucial decisions are made. It merely serves to show that these same tanks, bund wall, fuel properties and so on, will be scrutinized from a variety of different viewpoints.

DISCRETION

106. For the sake of completeness only, I make brief reference to the question of discretion. Remedies in judicial review are discretionary. In view of the decisions made I do not have to consider whether I should exercise a discretion not to grant any remedies even though a ground of judicial review has been made out.

107. However, had I found in favour of SWS on any one of the grounds of complaint, I address the issue of whether or not I would have exercised my discretion to decline to grant any relief. It would have been a difficult decision.

108. At the end of the day I would have exercised the discretion in the Director's favour. The outline reasons being :

(a) that there was delay in commencing the proceedings. It is very arguable that the first decision which SWS submit was wrong was the section 6(3) decision. However no proceedings were commenced in relation to that decision although SWS's original complaints plainly stem from the content of the EIA report regardless of whether it was accepted or not. The section 6(3) decision was in June 2002, the section 8 and section 10 decisions were August. SWS's letter of complaint had been in July but their original notice of application was not until 1 November 2002.

(b) the crux of SWS's case as presented at the hearing was largely technical in nature. It attacked the technical soundness of the EIA report based on expert opinion produced in the summer of 2003. Had the report been admitted and had the court decided a strict compliance with the letter of the TB and SB was required the outcome would have been that the judicial review would have succeeded on the basis that it had been unlawful for the Director to carry a QRA on a scenario which was, based on the information available to the Director at the time, considered to be incredible.

(c) In any event the case, as put in 2003, could have been made at the time of the public consultation but was not.

(d) It is the court's view that the sum of the evidence supports the submission that the same decision would be made now as was made in August 2002 notwithstanding the additional material which has been submitted.

109. In short this court's view would have been that the balancing exercise would have tilted in the respondent's favour so that this particular major designated project would have been allowed to continue in the interest of the public at large and in the interest of good administration.

110. All considerations concerning discretion are academic in view of the court's primary conclusions.

111. To conclude :

(1) The Director's decisions have been considered on the basis of the materials before him.

(2) SWS's challenge that the decisions were unlawful based on the alleged failure to meet the requirements of the SB, the TM and the Ordinance have not been made out.

(3) That challenge has been based, to a large extent, on the opinions in the HSL report which is inadmissible.

(4) Were the post decision materials admissible they would have resulted in a difference of expert opinion which itself would not have altered the fact that the Director was acting within his power when he decided that the EIA report should be approved as it complied with the SB and TM and that decision was not *Wednesbury* unreasonable.

The answers to the five questions posed on pages 14 and 15 of this judgment are :

(1) No.

(2) Yes.

(3) Yes.

(4) Not addressed as a separate issue.

(5) Had the answers to (2) or (3) been different the discretion to, nonetheless, grant no relief would have been exercised.

112. This application is dismissed. The respondent's and interested party's costs are to be paid by the applicant.

(M.P. Burrell)
Judge of the Court of First Instance,
High Court

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