Hilary Term
[2018] UKPC 1
Privy Council Appeal No 0002 of 2017

JUDGMENT

Beau Songe Development Limited (Appellant) *v* The United Basalt Products Limited and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lord Carnwath
Lord Hughes
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

22 January 2018

Heard on 6 December 2017

Appellant
Maxime Sauzier SC
Nandraj Patten
Heetesh Dhanjee
(Instructed by Blake Morgan LLP)

Respondent (1)
Eric Ribot SC
Yves Hein
Ruby Saha
(Instructed by Sheridans)

Respondent (2)
James Guthrie QC
(Instructed by Royds Withy King)

Respondents:
(1) The United Basalt Products Limited
(2) Minister of Environment, Sustainable Development and Disaster and Beach Management

LORD CARNWATH:

1. The central issue in the appeal concerns the legal effect, as it affects the appellant's proposed development, of a so-called "1km buffer-zone" shown in a map forming part of an approved Outline Scheme under the Town and Country Planning Act 1954 (the "1954 Act"). The dispute in short is whether (in words quoted by the Supreme Court) the 1km radius shown on the map was "indicative up to 1km extent" or "prescriptive of a 1km extent". The Environment and Land Use Appeal Tribunal ("the Tribunal") preferred the former interpretation. The Supreme Court disagreed. The issue now comes before the Board.

Background facts

2. On 29 June 2011 an Environment Impact Assessment licence ("EIA licence") was granted to the appellant ("BSD") by the relevant Minister, for the subdivision ("morcellement") of an area of 17.983 Ha at Beaux Songes into 305 residential lots ("the BSD site"). In December 2010 BSD had acquired the site from Medine Ltd ("Medine"). In September 2003 Medine (then known as Medine Sugar Estate Co Ltd) had been granted an EIA licence for a residential subdivision of the same site into 348 lots. However, in August 2010, the Minister informed Medine that the validity of the EIA licence had lapsed. Accordingly when BSD acquired the site it had to apply for a new EIA licence.

3. The respondent ("UBP") objected to the grant of the licence for BSD's development. It is a company principally involved in the manufacture and distribution of building materials within the construction sector. It has nine production units in Mauritius, including a stone-crushing plant at Bambous, close to the BSD site. UBP appealed against the Minister's decision to the Tribunal. UBP took issue in particular with the incursion of the proposed development into the 1km buffer zone, as shown in the Development Management Map of the Black River Outline Planning Scheme, approved in 2006 ("the 2006 Outline Scheme"). It referred also to objections it had encountered over recent years to its own modernisation programme from people who had previously moved into the area of the buffer zone.

4. The Minister was represented before the Tribunal as were BSD and UBP. Evidence was given by a planning witness from the relevant department about Ministerial practice in the administration of the planning system. Evidence about the preparation of the relevant planning documents was also given by one of BSD's expert witnesses, Miss Koo, a Chartered Planner. She had been Chief Planner with the Ministry

until her retirement in 2007, and had previously been involved in the preparation and submission for approval of the planning documents.

5. In its determination dated 13 January 2014, the Tribunal dismissed the appeal and upheld the Minister's grant of the licence. UBP appealed to the Supreme Court. By a judgment dated 7 July 2016, the Supreme Court (Peeroo Ag SPJ, Chui Yew Cheong J) allowed the appeal and quashed the determination of the Tribunal. BSD now appeals to the Board. The appeal is opposed by UBP. The Minister (represented before the Board by Mr Guthrie QC) has taken a neutral position.

The legislation

6. The operation and interaction of the relevant statutes is not straightforward, at least to someone unfamiliar with the "morcellement" regime in Mauritius, and its interaction with other legislative schemes. Fortunately, there is no disagreement between the parties as to the material principles as they apply to the appeal. The legislation can be considered under three headings: environmental protection, morcellement, and planning. The last category is the most directly relevant to the central issue in the appeal, and also the most complex.

Environmental protection

7. The requirement for an EIA licence and the applicable procedures are governed by the Environment Protection Act 2002. Section 15(2) imposes the requirement for an EIA licence before the commencement of certain categories of an "undertaking" (as defined by section 3). BSD's proposed development is such an undertaking. Section 18 provides for an application for an EIA licence, and the matters to be included in it. Section 23 provides for the decision of the Minister, following opportunities for public comment (section 20), and taking account of the recommendations of an EIA committee (sections 21-22).

8. Sections 53 and 54 provided for a right of appeal against the decision on an EIA licence to the Environment Appeal Tribunal. By the time of the consideration of this case this tribunal had been replaced by the new tribunal set up under the Environment and Land Use Appeal Tribunal Act 2012. The composition of the Tribunal is governed by section 3 of that Act, and may include non-legal members. (We were told that the membership in this case consisted of a magistrate chairman, sitting with an attorney-at-law and an environmental engineer.) By section 6 there is a right of appeal on a point of law to the Supreme Court.

9. There appears to be nothing in terms to link consideration of the EIA licence application with policies or schemes approved under the planning legislation. However, section 24(1) of the 2002 Act requires that regard be had to "such policy or environmental guidance as may be published in respect of an undertaking". As the Board understands, it is common ground (whether by virtue of that provision or otherwise) that the 2006 Outline Scheme had to be taken into account by the Minister and the Tribunal, before granting or confirming the EIA licence.

Morcellement

10. Brief mention must be made of the Morcellement Act 1990 (the "1990 Act"), although its provisions are not directly in issue. The 1990 Act governs the authorisation of "morcellement", defined as "the division of a plot of land into two or more lots" (section 2). The 1990 Act established a Morcellement Board (section 4), to which application has to be made for a "morcellement permit" under section 5. An application can only be made if the proposed morcellement is in conformity with the "outline scheme" for the planning area where the proposed morcellement is to be carried out, and if it is accompanied, where applicable, by an EIA licence (section 5(2)(a)(c)). "Outline scheme" has the same meaning as in the 1954 Act (section 2). Thus, although the 1990 Act is not itself in issue, there is a statutory link between the morcellement procedure, and the EIA licence and the planning scheme which are the subject of the appeal.

Planning

11. The 1954 Act established a comprehensive planning regime for the country. It provided (inter alia) for the declaration of "planning areas" by a newly established Town and Country Planning Board ("the Planning Board") (sections 3, 6), the grant of building and development permits by local authorities (section 7), and the preparation and approval of outline schemes in respect of those planning areas by the Planning Board (section 11).

12. A new system of planning control was enacted in the Planning and Development Act 2004 ("the 2004 Act"). This envisaged the eventual repeal and replacement of the 1954 Act in its entirety (section 73), but in the mean-time it allowed different provisions to be brought into effect at different times by commencement orders, with appropriate transitional provisions (sections 75, 76). As explained in the introduction to the 2006 Outline Scheme (para 1.5):

> "The new Planning and Development Act 2004 once fully proclaimed will comprehensively overhaul the Town and Country

> Planning Act 1954 and … provide new planning responsibilities for District Councils."

The consequence is, for the moment, a hybrid system of planning control in which (as will be shown below) the National Development Strategy (the "NDS") and Ministerial guidance under the 2004 Act take precedence, but much of the 1954 Act, including the provisions for Outline Schemes and their effect, remains in force.

13. The only provisions of the 2004 Act which need to be considered for the purposes of the appeal are those relating to the new NDS (section 12), and to Ministerial "planning policy guidance" ("PPG") (section 13). These provisions came into effect on 1 December 2004. Section 12 of the 2004 Act required the Minister to adopt and keep under regular review a NDS, which should "prevail over any other planning instrument to the extent of any inconsistency" (section 12(2)). Section 13 enabled him to issue "planning policy guidance" to any local authority on "any aspect of land use planning and development …" Again it was provided that relevant planning policy guidance should "prevail, to the extent of any inconsistency, over a development plan …" (section 13(3)).

14. The 2004 Act also provided for the eventual replacement of outline schemes under the 1954 Act with three new types of development plan - local, action area, and subject plans (sections 14-15). However, the introduction to the 2006 Outline Scheme (para 1.2) makes clear that it was prepared under section 11 of the 1954 Act (as was its successor in 2011). There is no dispute that the 2006 Outline Scheme, and with it the relevant Development Management Map, were duly approved under the 1954 Act. In interpreting the scheme and the map, therefore, it is necessary to do so against the background of the relevant provisions of that Act governing the content and effect of an Outline Scheme (subject to any inconsistency with the NDS or any applicable PPGs under the 2004 Act).

15. Under the 1954 Act the responsibility for preparing an outline scheme lay with the Planning Board, subject to the Minister's approval. (The title page of the 2006 Outline Scheme indicates that it was prepared by the Ministry's Planning Division "on behalf of" the Planning Board.) The contents of the scheme were defined by reference to the First and Second Schedules to the Act (section 11(1), (2)). The matters for which provision "shall" be made (under the First Schedule Part II) included -

> "3. Reserving or allocating any particular land or all land in any particular area for buildings of a specified class or classes, or prohibiting or restricting, either permanently or temporarily, the making of any buildings or any particular class or classes of buildings on any specified land.

> 4. Reserving or allocating any particular land or all land in any particular area for the purpose of any industrial or trade purpose or for any specified undertaking."

By section 11(3):

> "Every outline scheme shall specify and define clearly the area to which it relates and shall include a plan in which shall be shown the extent of the scheme and such other matters as can conveniently be included."

16. A copy of the outline scheme had to be placed on deposit, and a period of three months allowed for inspection and representations by members of the public (section 12). It was then required to be submitted for approval (with or without modifications) by the President (section 13). On publication of the notice declaring it to be in force -

> "… the scheme shall have full effect and no authority shall pass or approve any plans for building or development that contravene the scheme." (section 14(3))

Section 24 provided a procedure for the revocation or modification of an outline scheme by the President, on the grounds (in summary) of practical difficulties, subsequent events, or errors or omissions in the scheme.

The planning policy documents

17. Three categories of statutory planning documents require to be considered:

i) The NDS, adopted in 2005 under section 12 of the 2004 Act;

ii) PPGs issued by the Minister under section 13;

iii) The 2006 Outline Scheme, together with Development Management Map.

The National Development Strategy

18. According to Miss Koo the NDS was "approved in April 2003 and promulgated under section 12 [of the 2004 Act] in June 2005". In her words it advocated a departure from "the blueprint rigid type of prescriptive planning", previously used, in favour of "a proactive approach". That thinking is reflected in the Introduction to the NDS, which in a section headed "Key Outputs", says:

> "The … National Development Strategy … marks a change in direction and focus from the old style plan-making process which fixed on a prescriptive set of land use allocations; the new Strategy is designed to be more flexible and dynamic in response to fast-changing requirements. It identifies areas of growth and restraint as before but rather than prescribing specific land use allocations to each area, the revised Strategy aims to provide a flexible framework involving public-private and community partnerships within which a broad variety of uses can be implemented …" (para 1.2.2)

More specific policies for different categories of development are set out in later chapters. In each case there is introductory text, followed by a series of specific policies, each identified by a letter, number and title in bold type, and followed by a "justification" in ordinary type.

19. The Supreme Court quoted four short passages, which had been relied on by UBP, in support of the contention that the Tribunal had failed to give proper consideration to the 1km buffer zone. It is necessary to expand those references, both in order to see the passages in context, and also to highlight some apparent inconsistencies to which BSD draw attention. Taking them in order:

i) Chapter 5 ("Housing") includes an introductory section under the heading "Residential Land Allocation", which precedes the numbered policies. Housing policy, it is said, is to be consistent with "the general development principles" embodied in the NDS, which are summarised under five bullet-points, the last of which was quoted by the Supreme Court:

> "As a sensitive land use, new housing should not be permitted in close proximity to (ie within 1km of) 'bad neighbour' developments such as landfill sites, which would have a negative environmental impact on future residents, or on sites which would constrain future expansion of employment or leisure activities."

This is followed by Policy H1 (in bold type, with the title "Residential Land Allocation"). It provides for allocations to follow "a sequential approach", with a presumption against new housing, in areas "outside limits … identified in revised Local Plans", where such sites are located in various categories of land (eg classified agricultural land etc) one of which is -

> "In areas within 1km of 'bad neighbour' developments such as sewage treatment plants, landfill sites and civic amenity sites as defined in conjunction with the Ministry of Environment and specified in Policy ST3 and shown on revised Local Plans …"

Policy H4 ("Development within Settlement Limits") provides that, within settlement limits, housing proposals will normally be approved "provided that they do not conflict with the provisions of policy H1", and conform to "well-defined planning principles". Thus, even within settlement boundaries as defined, it seems, housing development may be restricted by reference to the specific constraints identified in policy H1.

Chapter 7 ("Industry and Commerce") has a Policy I7 ("Bad Neighbour Industries"):

> "Encourage, through a combination of incentives and penalties, the relocation of bad neighbour industrial activity. For new sites, consideration should be given to the establishment of buffer zones in accordance with Policy ST3."

The "justification" includes the following:

> "In identifying new sites for bad neighbour industrial developments, consideration should be given to the clustering of uses on a single well-accessed site and the establishment of a buffer zone up to 1km distant from sensitive land uses such as residential areas, schools and hospitals, where this is feasible. Reference should also be made in this connection to Infrastructure Policy ST3 for buffer zones around landfill sites, incinerators, civic amenity facilities and other bad neighbour uses. Buffer Zones should be identified in revised Local Plans in consultation with the Ministry of Environment."

(The Supreme Court quoted only the last sentence of this passage, omitting the earlier references to "new sites" and to "a buffer zone up to 1km".)

ii) Chapter 9 ("Agriculture, Forestry and Natural Resources") has a policy NR2 ("Buffer Zones around Rock Quarries and Crushing Plants"):

> "To identify buffer zones around existing and proposed rock quarries and crushing plants up to 1km within which the location of new sensitive land use development will be discouraged in accordance with Policy ST3."

The "justification" refers to a 2001 report of a Technical Advisory Committee on Rock Quarrying, which advised that the boundaries of a quarry site should be "at least 1km" from the limits of permitted development or the nearest residential building. It adds that the same should apply to "new crushing plants" in the interests of both operators and those proposing development in the vicinity, reference being made also to Policy ST3. It adds:

> "The precise extent and shape of such buffer zones will be determined in revised Local Plans and Action Area Plans in consultation with the Ministry of Environment."

(Again the Supreme Court quoted only the last sentence.)

iii) Chapter 12 ("Physical Infrastructure") has a policy ST3 ("Sites for Buffer Zones around Bad Neighbour Developments"):

> "In considering the location of new bad neighbour developments, including sewage treatment works, landfill sites and civic amenity sites and scrap yards, buffer zones up to 1km from sensitive land uses should be identified in consultation with the Ministry of Environment and shown in revised Local Plans. Acceptable uses within identified buffer zones can include agriculture, forestry, animal-rearing grazing and pastures."

The "justification" says that this should apply also to bad neighbour industries considered in policy I7, and that in selecting "new sites" such developments should be planned "up to 1km" distant from sensitive land uses, including residential areas. (The Supreme Court quoted only the phrase referring to identification of "buffer zones up to 1km", without noting that it related to "new" bad neighbour developments.)

Planning Policy Guidance

20. Planning Policy Guidance ("Design Guidance: Introduction, Approach and Design Principles") was issued dated November 2004. (Miss Koo confirmed that this was issued under section 13 of the 2004 Act.) The introduction indicates that the design guidance "does not prescribe rules and should be applied with a measure of flexibility" (para 2.5).

21. It has a section on "Industry Adjacent to Sensitive Uses". This includes a note on "Bad Neighbour Buffers", which calls for special consideration to be given to "particular requirements for buffer zones between sensitive land uses and bad neighbour industries", which "may need to extend up to 1km distance". There follows a table of "indicative distances" for various categories. They include "quarry, stone crushing plant …" ("Up to 1 kilometre"). A side-note "S" states (somewhat cryptically) that the guidance in the table is "considered to be the minimum/maximum acceptable and should normally be provided".

Black River Outline Planning Scheme 2006

22. As already noted, the 2006 Outline Scheme was approved in September 2006 under section 11 of the 1954 Act. It replaced an Outline Scheme approved in 2001. According to Miss Koo the 2001 scheme had brought the BSD site within the settlement boundaries. The 2001 scheme also had a specific policy in respect of Stone Crushing Plants (Policy 7.2), requiring a "minimum buffer zone radius of 1km" for the siting of a "proposed" stone crushing plant. There was no specific policy for existing plants, and no buffer zone was shown on the plan.

23. In the 2006 Outline Scheme, the contents page includes a list of maps, one of which is the "Development Management Map - Black River". The introduction explains the scheme's relationship with the NDS and PPGs under the 2004 Act. It indicates that the 2004 Act "refers to Outline Planning Schemes as Local Plans"; but that, pending the full proclamation of that Act, "existing Acts and terminology prevail", and "thus the terms District Council and Outline Planning Scheme have been retained for use in this document".

24. Chapter 2 ("Development Context") in a section headed District Development Characteristics (para 2.2) notes that there are several existing and potential bad neighbour developments, including a stone crushing plant, which "require buffer zones to be established" (para 2.2.6).

25. The following policies have been referred to in submissions as potentially relevant:

i) Policy SD1 ("Development Proposed within Settlement Boundaries") indicates that development other than bad neighbour development should normally be permitted "within settlement boundaries as defined on the Development Management map", following a "sequential approach".

ii) Policy ID4 deals with the location of "Bad Neighbour Development", defined as including stone crushing plants. Preference is given to proposals which enable such developments to be "clustered to share a buffer zone". "Acceptable uses within buffer zones" are defined as including agriculture and similar uses, and recreation, but also other uses such as storage and warehousing "at varying distances from a bad neighbour cluster". The buffer zone for particular uses should "form part of the EIA licence and be determined by the relevant statutory authority". The "justification" indicates that facilities such as stone crushers should "where practicable be planned up to 1km distant from sensitive land uses" such as residential areas.

iii) Reference has also been made in argument to the Glossary, which defines "Settlement Boundaries":

> "These usually contain the built-up area of a settlement and define the area within which there is a presumption in favour of suitable development."

26. The Development Management Map shows the settlement boundary as enclosing the BSD site. It shows a circle (marked "1km buffer") round the site of the UBP plant, for which the key indicates: "Stone Crushing Plant/Buffer Zone", and the "key policy number" is given as ID4. The circle intersects the settlement boundary and takes in part of the BSD site.

The disputed issues

27. The Tribunal had to deal with a range of issues - legal, policy and technical. But as they said "The thrust of the whole debate" was "essentially around the Buffer Zone". They noted the argument for the respondents that there was no such thing as a "prescribed" 1km buffer zone; a proper reading of the planning instruments referring to a distance of "up to one kilometre" gave room for "flexibility" within that distance. UBP by contrast called for "strict adherence to the requirements of the law". The Tribunal described the difference between the two perspectives as between "a legalistic

approach" and "an approach of practitioners of land planning", as exemplified by the emphasis on "flexibility" explained in the evidence of Miss Koo.

28. Their reasons for preferring the latter approach are apparent from the following passage:

> "… it is important also to note that the principle of flexibility is embodied in the NDS itself, … The 'flexibility' with which the indicative criterion of the 'up to 1 kilometre Buffer Zone' is to be assessed is explained by Miss Koo in her testimony, the relevant part which enlightens this issue is as follows:
>
> > 'In 2001, the Town and Country Planning Board brought the Morcellement site within settlement boundaries. Then when the Outline Planning Scheme was updated in 2006 and lately in 2011, the morcellement was still kept within settlement boundaries. But what has changed is the element of flexibility and pragmatism introduced in the new version of the Outline Planning Scheme as from 2006 ... As from 2006 and 2011, this minimum buffer zone requirement has been replaced by 'up to one kilometre' and qualified by other criteria ... We have introduced since 2006, a map called the Development Management Map. It's a Development Management Map. It's not a prescriptive map.'
>
> Basically therefore, what the new planning instruments advocate is an 'in concreto' assessment of the proposed project, taking into account the nature of the project, the indicative buffer zone (within the maximum of 1km buffer zone) and the specific criteria of pollution potential."

They found "ample evidence" that such an "in concreto" approach had been followed by the Minister.

29. The Supreme Court took a different view. They referred to the NDS policies noted above. They quoted in particular the passage from the Housing chapter, stating that new housing should not be permitted "in close proximity to (ie within 1km of)" bad neighbour developments. They commented:

> "It is therefore clear that the general development principle of the NDS is not to allow new housing within 1km of a bad neighbour."

They also noted that policies in the NDS envisaged buffer zones being identified in revised local plans. They thought significant BSD's acceptance that when it made its application for the EIA licence a radius of 1km was shown on the Development Management Map. It was clear to them that the designation of the buffer zone in that map was -

> "a relevant mechanism that was used in compliance with the NDS for the implementation of the aims and objects of the Act."

The Tribunal had erred in failing to give due consideration to the NDS policy that new housing should not be permitted within 1km of bad neighbour developments. They concluded:

> "When the appellant left its previous location to go and implant itself in the Black River area, there was no buffer zone prescribed in relation to new industrial site from the nearest residential building that existed there. It is obvious that following the NDS those authorities that were given the responsibility to look at the area in question to give effect to the objectives and policies of the NDS considered that there should be no new housing within the Buffer Zone of 1km in the area which they indicated on the Development Management Map of BROS [Black River Outline Scheme]. They must have taken into account the Chapter of 'Housing' of the NDS relating to Residential Land Allocation when identifying the Buffer Zone. If new residents are allowed to settle near the UBP the latter would risk that, in compliance with Policy I7 the authorities would finally cause its removal for relocation elsewhere, although UBP was at that site first and new residents would have been allowed to come near it. In all fairness and in compliance with the mechanism set up by BROS the new residents should not be allowed to come near it. We consider the fear of the UBP is quite legitimate in the circumstances and that in view of the NDS having been statutorily adopted setting the PPG relevant to housing and bad neighbour environment, it was not unreasonable for UBP to have expected that only light industries would be allowed to be located within the Buffer Zone in question."

30. Accordingly, the court ordered that the Minister's decision to grant the EIA licence should be quashed.

The Issues in the Appeal

The submissions

31. As already noted, the issue before the Board turns in short on the interpretation of the 1km buffer zone as indicated in the Development Management Map.

32. Mr Ribot SC, for UBP, generally supports the reasoning of the Supreme Court. For BSD, Mr Sauzier SC supports the Tribunal's interpretation. He submits that the Tribunal were entitled to accept the expert evidence, including that of Miss Koo who was directly involved in the preparation of the plans, as to the purpose of the buffer zone, and the intention that it was to be indicative rather than prescriptive. This was supported by the fact that a number of buffer zones had been shown for stone crushing plants around the island, all of the same diameter regardless of the capabilities of the plant in question. There was no evidence of any separate consideration of the factors relevant to determining the precise extent of the areas needing protection.

33. These, he submits, were issues of fact within the province of a specialist tribunal, whose views should have been given weight by the Supreme Court *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678, para 30). The Supreme Court was not entitled to overturn the decisions of a lower jurisdiction on such matters short of perversity or serious misdirection, which was not shown (*Société Blue Diamond v Registrar General* 2014 SCJ 64). Furthermore, the Supreme Court had relied on selective reference to parts of the policies, without regard to their effect as a whole. In particular they had relied on the fifth bullet point in the NDS Housing chapter, without taking account of all the relevant housing policies, notably the location of the site within the defined settlement boundary where under both the NDS and policy SD1 of the 2006 Outline Scheme there is a presumption in favour of housing development.

Discussion

34. The Board is unable to accept Mr Sauzier's primary submission. He argued that the critical issue was one of fact, properly determined by the Tribunal on the basis of the expert evidence, and that they were entitled in particular to accept Miss Koo's evidence about the genesis and thinking behind the planning documents. In the Board's view this submission fails to take account of the principles governing the interpretation of statutory planning documents of this kind, as explained by the UK Supreme Court in

Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; [2012] PTSR 983 and *Hopkin Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 WLR 1865. Mr Sauzier did not question the application of those authorities in Mauritius.

35. In the *Tesco* case Lord Reed, speaking of development plans under the Scottish planning system, made clear that there were no special rules for planning policy documents:

> "… in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context." (para 18)

He added that such statements should not "be construed as if they were statutory or contractual provisions":

> "Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse ..." (para 19)

36. That guidance was repeated in the *Hopkin Homes* case (paras 22-26), although the court also reiterated the need to remember that "these are statements of policy, not statutory texts, and must be read in that light". The court also drew an analogy between specialist planning inspectors (under the UK planning systems) and expert tribunals (considered in *AH (Sudan)*), so that the court should -

> "… respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly."

37. Mr Sauzier is right to submit that a similar approach should apply to the role of the Tribunal in the present case, as respects the application of issues of planning and policy judgement. However, the Tribunal were wrong, with respect, to regard the

interpretation of the approved policy documents in that light. It is not clear whether they were referred to the guidance in the *Tesco* case. It would or should have led them to understand that their first task was one of legal interpretation of the planning documents to be decided by reference to "the language used, read as always in its proper context", not on a choice (as they put it) between the approaches of lawyers and planning practitioners. It seems clear that they allowed themselves to be unduly influenced by the evidence of Miss Koo and others as to the supposed thinking within the Ministry, rather than the analysis of the documents themselves. The Supreme Court were right to hold that in this respect they had misdirected themselves, and that their reasoning could not be supported.

38. Turning to the judgment of the Supreme Court, the Board sees some force in Mr Sauzier's criticism of their selective approach to the policies of the NDS and the 2006 Outline Scheme. By so doing they may have allowed themselves to underestimate some of the difficulties resulting from inconsistencies and ambiguities in the planning documents.

39. As appears from the review attempted earlier in this judgment, the references to the 1km buffer zone are far from consistent. The bullet point on which the Supreme Court placed most reliance does indeed refer to the distance of 1km in unqualified terms, but that reference is in the introductory text rather than a specific policy. It would have been more relevant to refer to the policies themselves. As noted above, policy H1 uses the same expression to exclude from development areas related to bad neighbour development. But that policy applies principally to development outside settlement boundaries (unlike this proposal). More directly relevant is Policy H4 which applies a presumption in favour of housing proposals within settlement boundaries. That excepts proposals which "conflict with the provisions of policy H1", thereby, it seems, implicitly referring back to the excluded areas under the earlier policy.

40. Such an interpretation would be consistent with the introductory text on which the Supreme Court relied, and supportive of their interpretation. Further it would also explain how the buffer zone can be reconciled with the inclusion of the BSD site within the settlement boundary as defined in the 2006 Outline Scheme. (It is in any event accepted in the 2006 Outline Scheme that some forms of development, such as warehousing, may be accepted within buffer zones.) Accordingly, the NDS housing policies taken on their own can be read as supporting the Supreme Court's interpretation of the buffer zone as giving effect to a general NDS principle not to allow housing within 1km of a bad neighbour.

41. Against that, Mr Sauzier can reasonably point to other parts of the NDS and the Planning Policy Guidance as at least much less clear-cut. There are indeed plenty of other references in policies and supporting text to buffer zones of "up to 1km". Furthermore, it is not always clear whether the references are to existing or new

crushing plants. Most directly relevant might be thought NDS policy NR2, which deals in terms with buffer zones round "existing and proposed" rock quarries and crushing plants. That refers to the need to identify buffer zones "up to 1km"; but then, confusingly, in the justification quotes a technical report which advocates a distance of "at least 1km" for rock quarries, and explains why the same thinking should apply to "new crushing plants". The same uncertainty is found in the relevant Planning Policy Guidance.

42. The only other clear indication which emerges from the NDS is the expectation that more precise boundaries, where needed, would be defined in the revised local plans. The 2006 Outline Scheme, although made under the 1954 Act, was intended to fulfil the function of a local plan under the new regime. It is unfortunate that there is nothing in the text of the 2006 Outline Scheme to explain more precisely the purpose and effect of the buffer zone as shown in the map. Nor is its clarity helped by the link in the key to policy ID4, which is not directed to buffer zones for existing installations, such as the UBP plant. In terms it is directed to the location of new proposals. Furthermore, it speaks only of planning "where practicable" for new proposals to be "up to 1km distant" from sensitive land uses. It therefore provides no direct support for the 1km radius as shown on the plan.

43. However, the Board notes that the buffer zone for the UBP plant was shown for the first time in the 2006 Outline Scheme. The previous scheme had included a buffer zone for new proposals, but nothing had been shown for the UBP plant. That tends to support the view that it was intended, as the Supreme Court thought, to supplement the NDS by providing a more precise indication of the buffer zone. To treat it as purely "indicative", whatever that means, would seem to defeat the purpose of including it in the 2006 Outline Scheme at all. Indeed, it is not clear what is the practical utility of a buffer zone designation which implies nothing more precise than a protected area, which may be anything between 0km and 1km in radius.

44. It is also difficult to reconcile such imprecision with the relevant provisions of the 1954 Act, under which the 2006 Outline Scheme was prepared. As noted above, the First Schedule to that Act, which prescribes the contents of an outline scheme, requires the contents to be directed to allocating or imposing restrictions on "particular areas". It says nothing of purely "indicative" designations. Even if the 2004 Act was intended in due course to embody a more flexible approach, regard must be had for present purposes to the statute under which the 2006 Outline Scheme was prepared and approved.

Conclusion

45. The appeal has highlighted the need for attention to be given to improving the clarity and consistency of the statutory planning document, and in particular to clarifying the interaction of the 1954 and 2004 Acts pending full implementation of the latter. While the Board has found the resolution of the issues in the appeal more difficult than they apparently appeared to the Supreme Court, it ultimately agrees with their conclusion.

46. The appeal must therefore be dismissed with costs (subject to any submissions on costs received within 21 days of this judgment).