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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(Mr Justice Tucker)

OBCOF 97/0679 CMS4

Royal Courts of Justice
Strand, London WC2

Thursday, 12th February 1998

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B e f o r e :

LORD JUSTICE NOURSE
LORD JUSTICE PILL and
LORD JUSTICE THORPE

C.A.
COSTS

DIDO BERKELEY

Appellant

-v-

(1) SECRETARY OF STATE FOR THE ENVIRONMENT

(2) FULHAM FOOTBALL CLUB

Respondents

Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited
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(Official Shorthand Writers to the Court)

MR R McCracken and MR G Jones (instructed by Messrs Richard Buxton, Cambridge) appeared on behalf of the Appellant.
MR D Elvin (instructed by the Treasury Solicitor, London SW1) appeared on behalf of the First Respondent.
MR W Hicks QC and MR M Reed (instructed by Messrs Herbert Smith, London EC2) appeared on behalf of the Second Respondent.

JUDGMENT RE COSTS
(As Approved by the Court)
Crown Copyright

Thursday, 12th February 1998

A LORD JUSTICE NOURSE: Earlier this afternoon we dismissed Lady
Berkeley's substantive appeal against the decision of Mr Justice
Tucker. We have now heard argument on her appeal against the
B judge's orders for costs and also on the costs of the appeal.

The judge's reserved judgment dismissing Lady Berkeley's
application to quash the Secretary of State's decision was handed
C down on 26th March 1997. Counsel for the Secretary of State and
Fulham Football Club both applied for their costs, Mr Hicks QC,
for the Club, offering to outline his reasons at that stage.
D However, the judge, having indicated that he should first hear
the objection to the orders sought, invited counsel for Lady
Berkeley, Mr Jones, to address him first, followed by counsel for
the two respondents. When Mr Jones rose again, the judge said
E that he had had an opportunity of answering the applications, and
I think it is a fair reading of the transcript to say that
counsel was thereby discouraged, if not actually deterred, from
making further submissions, except to correct one, or perhaps
F two, points of fact. The judge then delivered a reasoned
judgment on questions of costs, his decision being that Lady
Berkeley should pay the Secretary of State's costs, including the
costs of two counsel. He also ordered that she should pay the
G Club's costs of the motion, except for those incurred in respect
of an application for joinder and expedition, to which I will
refer in due course, and those of junior counsel appearing before
the judge.

A Although I can understand how it was that the judge adopted the
B procedure he did, it is unsatisfactory that Mr Jones should have
been discouraged from making further submissions after he had
heard how the applications for costs were put. I think that the
C judge was thereby deprived of a full opportunity of considering
D everything which could have been said on Lady Berkeley's behalf.
E That is a sufficient ground for questions as to the costs below
to be considered afresh by this court.

C Today Mr McCracken, for Lady Berkeley, has submitted that the
D judge's orders should be discharged and that there should be no
orders as to costs either here or below. The Secretary of State,
E through Mr Elvin, submits that the order for costs in his favour
below should stand and that he should also have his costs in this
court. Mr Hicks, for the Club, seeks to uphold the judge's order
below and asks for the Club's costs of the appeal, save for any
costs at all in regard to the fees of junior counsel.

F In regard to the costs of the Secretary of State, Mr McCracken
starts by saying, correctly, that this court has clearly found
that he was in breach of his obligation to consider whether to
G require a formal environmental assessment in accordance with the
directive and, more particularly, regulation 4(2) of the 1988
Regulations. He also says, again correctly, that this court, in
contrast to Mr Justice Tucker, has found that it neither could
nor should rule that an environmental statement was not required.
He says that the breach of the Regulations was a serious matter.
H He then develops a wider argument, to the effect that the

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practice in this country to award costs to a successful party is in breach of article 5 of the Treaty.

In support of this wider argument, Mr McCracken has referred us to three European cases, the first of which is Emmott v. Minister for Social Welfare [1993] ICR 8. From paragraph 16 of the judgment of the European Court in that case he derives the principle that:

"... it is for the domestic legal system of each member state to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law."

Mr McCracken submits that that principle would be infringed if the Secretary of State was to be awarded his costs in this case, since that would render it virtually impossible for Lady Berkeley to exercise the rights given to her by the directive.

I cannot agree with that submission. I would observe, first, that neither Emmott nor either of the other two cases cited by Mr McCracken was a decision on costs. Emmott was a decision on time limits for bringing proceedings. Clearly, a time limit for bringing proceedings could have the effect of rendering virtually impossible the exercise of rights conferred by community law: not so, as it seems to me, a practice as to an award of costs. The time limit prevents the action being brought at all. The practice as to costs which is in point here does not and has not

A prevented Lady Berkeley from bringing these proceedings at either
stage. It has simply meant, if it is applied against her, that
she will have to pay the costs of the Secretary of State. In my
judgment there is nothing in any of the European authorities
referred to by Mr McCracken which affects the normal practice of
the court in regard to the costs of a case such as this.

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C So in my judgment the normal orders for costs ought to be made in
favour of the Secretary of State, subject to two points. The
first is an important one. I repeat that this court has held
that the Secretary of State was in breach of his obligation under
regulation 4(2) of the 1988 Regulations. Although in the end it
has not affected the outcome of the proceedings, it is a matter
of which it is proper the court should take account in
considering an award of costs. It is appropriate for the court,
which has its own interest in preserving the high standards of
civil administration which we expect in this country, to mark its
disapproval of that breach by depriving the Secretary of State of
a proportion of his costs, although only in the court below. I
would, therefore, in substitution for the order made by the
judge, order Lady Berkeley to pay two-thirds of the Secretary of
State's costs below.

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G The second point also relates to the order made by the judge. He
directed that the Secretary of State's costs should include the
fees of two counsel. In my view that is a matter which is better
left to the taxing master in the usual way. I therefore propose
that we should simply make an order that Lady Berkeley do pay

two-thirds of the Secretary of State's costs below and the whole of his costs in this court.

I turn to the costs of Fulham Football Club. This question depends on an application of the principles of discretion authoritatively stated by the House of Lords in Bolton Metropolitan District Council v. Secretary of State for the Environment [1995] 1 WLR 1176. I read the first paragraph of the headnote, which satisfactorily sets out the essence of their Lordships' decision:

"Although costs are in the court's discretion, in planning appeals, where the Secretary of State succeeds in defending his decision he will normally be entitled to the whole of his costs and should not be required to share them by apportionment. The developer will not normally be entitled to his costs unless he demonstrates a separate issue, not covered by the Secretary of State, on which he was entitled to be heard, or has an interest requiring separate representation. A second set of costs is more likely to be awarded at first instance than in the Court of Appeal or the House of Lords, and an award of a third set of costs will rarely be justified."

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

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

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

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I recapitulate by saying that I propose that we discharge the judge's orders for costs, substitute therefor an order that Lady Berkeley should pay two-thirds of the Secretary of State's costs below, with no provision as to two counsel, and that she should pay the whole of the Secretary of State's costs in this court. I would make no order in either court as to the costs of Fulham Football Club.

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LORD JUSTICE PILL: I agree.

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LORD JUSTICE THORPE: I also agree.

Order: judge's orders for costs discharged and replaced by an order that the appellant pay two-thirds of the Secretary of State's costs below, with no provision as to two counsel; the appellant to pay the whole of the Secretary of State's costs of the appeal in this court; no order in either court as to the costs of Fulham Football Club; the appellant to have her costs of the hearing today against both respondents.

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