Berkeley *v* Secretary of State for the Environment and another

COURT OF APPEAL
Nourse, Pill and Thorpe LJJ
February 12 1998

Environmental assessment – Planning application – Council directive – Whether planning permission granted without environmental statement should be quashed – Whether court can exercise discretion not to quash where environmental information available in non-statutory form

The second respondent football club sought planning permission and listed building consent for development consisting of improved accommodation at their football ground and 142 flats with associated basement parking near the River Thames. The Secretary of State for the Environment directed that the application be referred to him for decision. Following a public local inquiry and the submission of his inspector's report recommending that planning permission be granted subject to conditions, the Secretary of State granted the consents by a letter dated August 15 1996. The appellant's application under section 288 of the Town and Country Planning Act 1990 and section 62 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to quash those decisions was dismissed in the court below. The appellant appealed contending that: (1) by reason of a policy in the development plan (EN27) protective of nature conservation areas – one area being the River Thames – the inspector failed to apply the presumption the policy contained against development, and therefore adopted the wrong approach to the development plan; and (2) the proposed development was, or could have been, an "urban development project" requiring an environmental statement pursuant to council directive 85/337/EEC, and the football club had not been required to provide such a statement.

Held The appeal was dismissed.

The development plan contained a policy specific to the subject site. On a reading of the development plan as a whole, with its many overlapping policies, the inspector was entitled to reach the conclusion he did; he was right to give primacy to the policy specific to the site: see p45. There was a breach of regulation 4(2) of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 and, had the point been considered, there was a real prospect that the Secretary of State would have required an environmental statement: see pp49–50. The court must be satisfied that the objectives of the EEC directive are met. However, the court retains a discretion to decline to quash a decision if the objectives are in substance achieved by the procedure followed. While an environmental statement should be provided in the form required by the regulations, it is

A legitimate upon an application under section 288 of the 1990 Act to have regard to all the circumstances. Community law does not require the elimination of the discretion available to an English court under section 288(5)(b): see p52. On the facts, a vast amount of information was available in a comprehensive form. There was in substance almost certainly a better compliance with the objects of the directive and the 1988 regulations than
B if a statement had been supplied or required at the planning application stage. The absence of an environmental statement in the form required by Schedule 3 to the 1988 regulations was of no significant practical importance in the circumstances: see pp52–53.

Cases referred to in the judgments

C *Aannamaersbedrijf PK Kraaijveld* v *Gedeputeerde Staten Van Zuid-Holland, Dutch Dykes Case* C–72/95 [1997] Env LR 265
Andrea Francovich v *The Italian Republic* [1991] ECR I–5357
City of Edinburgh Council v *Secretary of State for Scotland* [1997] 1 WLR 1447; [1997] 3 PLR 71
Commission of European Communities v *Federal Republic of Germany* [1995] ECR I–2189
Factortame Ltd v *Secretary of State for Transport (No 2)* [1990] ECR I–2433
D *Main* v *Swansea City Council* (1985) 49 P&CR 26; [1985] JPL 558, CA
R v *Poole Borough Council, ex parte Beebee* [1991] 2 PLR 27; [1991] JPL 643
Van Schijndel v *Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I–4705
Wychavon District Council v *Secretary of State for the Environment* [1994] Env LR 239

Appeal against the judgment of Tucker J

This was the hearing of an appeal by Lady Berkeley against a decision of
E Tucker J, who had dismissed her application under section 288 of the Town and Country Planning Act 1990 challenging a decision made by the Secretary of State for the Environment to grant planning permission on an application made by Fulham Football Club.

Robert McCracken and Gregory Jones (instructed by Richard Buxton, of
F *Cambridge) appeared for the appellant, Lady Berkeley.*
David Elvin (instructed by the Treasury Solicitor) appeared for the first respondent, the Secretary of State for the Environment.
William Hicks QC and Matthew Reed (instructed by Herbert Smith) represented Fulham Football Club.

The following judgments were delivered.

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PILL LJ:

Application

Fulham Football Club (the second respondents) play at a ground alongside the River Thames known as Craven Cottage. The Stevenage Road grandstand at the ground and Craven Cottage itself are listed
H buildings. The second respondents sought planning permission and listed building consent for a development providing improved accommodation at the ground, together with 142 flats and associated basement parking between the ground and the river and a riverside walk. By letter dated August 15 1996, the Secretary of State for the Environment (the first respondent) granted the consents.

Lady Berkeley (the appellant) applies to the court under section 288 of the Town and Country Planning Act 1990 (the 1990 Act) and section 62 of the Listed Buildings Act 1990 to quash those decisions. The applications stand or fall together. Lady Berkeley's standing to make the challenge is not in dispute. This is an appeal from the decision of Tucker J declining to quash.

Planning background

There is a long history of planning applications to develop or redevelop the site and it need not be stated comprehensively. The Fulham Football Ground Planning Brief was published in 1988 and examined options for the redevelopment of the site, retaining facilities for football. A preferred option was illustrated. Having considered the inspector's report following a public local inquiry, Hammersmith and Fulham London Borough Council adopted, on December 17 1994, a unitary development plan for the borough. That comprised general policies, including environmental policies, and also a series of proposals for specific sites. It is stated in the plan that site proposals would "take precedence" over policies included in other parts of the plan, including those in the chapter headed "environment". Among the site proposals is a proposal for "Site 19 Fulham Football Ground". It provides:

> (a) Retention and enhancement of listed buildings in association with a football or other spectator sports or entertainment use appropriate in this location;
> (b) Provision of a public riverside walk with links inland as appropriate; and
> (c) Residential development reasonably necessary to enable the achievement of these objectives and in accordance with normal housing and environmental policies.

The policy for site 19 is followed by an explanatory note that refers to a "rare group of listed buildings" and "a need to have a use (preferably the sports use for which they were designed) that will preserve them largely intact and in an appropriate setting. Achieving this in a viable and satisfactory way is likely to entail the incorporation of an enabling development within the site; and, for this, a residential use is proposed as being the most appropriate." The note remarked upon the difficulty in balancing the competing demands of the residential and the sports/entertainment use, which were together likely to underpin the future of the listed buildings. The needs of the enabling residential development would have to be met "as far as practicable to ensure a viable and acceptable scheme". The last paragraph of the explanatory note reads:

> The site is in a conservation area and in a prominent riverside location – and the setting of the site should therefore be protected as far as possible given the other demands on the site. In balancing all these demands, the need to preserve the listed buildings in an appropriate use and setting including provision for spectator safety, will be paramount. In the circumstances of this case, it may be necessary to allow some relaxation of normal policies and

A standards applying to other aspects of the development, but in such a case, the Council will seek to ensure that its impact on the site's surroundings is kept to the minimum necessary to enable the future and appropriate setting of the listed buildings to be secured.

As a footnote, "principal policy references in other chapters" are itemised, including a number of environmental policies. It is clear from the B note that, in the redevelopment, some compromise of other policy objectives in the plan was contemplated.

The proposals map, a part of the unitary development plan, shows site 19 as within a conservation area and as an area of special character. The Thames Path National Trail is shown running along the river bank with a proposed alteration to show a walk between the football ground and the C river, in accordance, that is, with the proposal for site 19. That part of the river bed within the borough is shown as a nature conservation area and covered by Policy M31. The unitary development plan became the borough's development plan for the purposes of section 54 and section 54A of the 1990 Act.

When the second respondents applied to the borough for planning D permission, the first respondent directed that the application be referred to him for decision instead of being dealt with by the borough as local planning authority. He indicated that the following issues would be "particularly relevant to his consideration of the application":

a. The density of the proposed housing.
b. Traffic and associated parking.
E c. Impact on the River Thames.
d. Effects on the short and long distance views.
e. Impact on the conservation area and listed buildings.
f. Design of the proposed development.
g. Any other matters the inspector considers relevant.

The inspector conducted a public local inquiry which began on F February 27 1996 and lasted eight days. He submitted a comprehensive report, to which I will refer, to the first respondent, recommending that planning permission be granted subject to conditions. In his decision letter, the first respondent stated that he agreed "with the Inspector's conclusions and subject to the residential development being in accordance with normal housing and environmental policies, the scheme G would appear to meet with the provisions of the development plan". He granted planning permission, subject to comprehensive conditions.

On behalf of the appellant, Mr Robert McCracken makes two criticisms of the decision to grant planning permission. The first is that, in reaching his conclusions, the inspector adopted the wrong approach to the development plan and, in particular, to the encroachment into the River H Thames that the proposal involved. The second is that no environmental statement was required of the second respondents, and the proposed development was, or could have been, an "urban development project" requiring such a statement pursuant to council directive 85/337/EEC, because it was likely to have significant effects on the environment.

Impact on the River Thames

It is common ground that the proposal did involve an encroachment onto the river. An agreed plan shows that along one part of the river frontage there is a small gain in water surface area, but there is a loss in water surface area on other parts of the frontage. A sloping river wall above meant the high water level would disappear. The inspector's conclusions were:

> 14.13 The river wall would be a 197m long vertical structure in place of the present sloping river boundary. There are vertical river walls to the north and south of the site. The river walk would be cantilevered beyond the line of the wall by up to 0.5m for a length of 70m at the northern end and tapering for 35m from a maximum of 0.7m at the southern end. The wall would encroach onto the river bed at the northern end for 40m of frontage and by an average of 1.5m (say 60m²) and would increase the river bed by an average of 1.0m for 80m near the centre of the river frontage (say 80m²). My estimation of the net effect would be a marginal gain in the extent of the river bed. However, there would be a loss of the sloping wall. It was strongly argued at the inquiry by a number of objectors that any form of cantilever or encroachment or loss of river space should be resisted on safety and ecology grounds. That is not the view of the National Rivers Authority or the Port of London Authority. The NRA consider that, subject to the formation of a wetland shelf at the foot of the new wall, no encroachment beyond 0.5m and safety measures to the cantilevered sections, any loss of habitat from the sloping wall or encroachment would be mitigated.
>
> 14.14 Although the sloping wall has an unkempt neglected appearance, it seems probable from the evidence that it provides a habitat for intertidal flora and fauna which would be lost. However, it seems to me that the provision of a 197m² wetland shelf or reed bed would provide a similar intertidal surface for plant and invertebrate support. Although disruption would be caused to the present river bank habitat, I consider that, in view of the assessment by the NRA, the proposed wetland shelf would ameliorate that loss to a sufficient degree.

In his summary at para 14.32, the inspector stated: "River ecology would be disturbed but measures could be taken to offset this disruption". The inspector referred to environmental policies in the development plan, but not to policy EN27, "Nature Conservation Areas" on which Mr McCracken relies. That provides:

> The Council has identified several nature conservation areas. These are listed in Appendix 4.5 and shown on the Proposals Map and in Figure 4.2. On sites within these areas development which would demonstrably harm the nature conservation interest will not normally be permitted. Development proposals for sites near to nature conservation areas should not adversely affect the nature conservation value of the designed areas. The potential for designation of existing or further nature conservation areas as Sites of Special Scientific interest or as Local Nature Reserves will be considered by the Council, in consultation with English Nature, the Countryside Commission and the London Ecology Unit.

In the explanatory note, it is stated that there are only three nature

A conservation areas of metropolitan importance in the borough, as recommended by the London Ecology Unit. One is the "River Thames and its inlets". In appendix 4.5, under the heading "Areas of Metropolitan Importance", which is the highest level of importance, the entry "The River Thames with its foreshore . . ." duly appears. The note also states that "it is unrealistic to prevent development on all sites of some nature conservation B importance, so those sites where development will not normally be allowed have been identified and graded according to their importance".

Mr McCracken accepts, as he must, that considerable attention was given at the inquiry and in the inspector's report to the impact of the proposals on the River Thames. The proposed development extends beyond site 19 and encroaches on to the river. That being so, his submission C is that, in failing to take account of policy EN27 and the presumption it contains, the inspector has adopted the wrong approach to the evidence. A presumption against development should have been applied as it is, for example, to proposals for development in a green belt. It is submitted that the inspector did find that the development would demonstrably harm an area of metropolitan importance, namely the River Thames with its D foreshore, and, by virtue of policy EN27, there was a presumption against development. The evidence should have been considered on the basis of that presumption and, had the inspector considered it in that way, he is likely to have recommended refusal of permission.

Mr McCracken relies on the statement of Lord Clyde in *City of Edinburgh Council* v *Secretary of State for Scotland* [1997] 1 WLR 1447 at E p1459D:

> it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to F interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it.

G Had the inspector applied the correct test, the evidence of the London Ecology Unit, who were formally consulted by the borough and recommended refusal of permission, might have been accepted by the inspector, submits Mr McCracken. He also submits that it is fanciful to argue that the inspector had policy EN27 in mind. He failed to refer to it in his report. He may have been led to do so by the absence of a cross- H reference to EN27 in that section of the plan dealing with site 19.

For the first respondent, Mr David Elvin, and for the second respondents, Mr William Hicks QC, advance a number of reasons why the inspector must have had policy EN27 in mind. The site 19 description in the plan includes references to policy G8, which, *inter alia*, requires "all

riverside developments to respect the environment and enhance the special character of the river and riverside . . .", and to policy EN41, which includes a cross-reference to EN27. A "summary of relevant policies" was placed before the inspector and is mentioned in his report. Policy EN27 was set out in the summary. Moreover, there is a cross-reference in the note to site 19, alone of the site specific proposals, to EN37, which provides criteria for developments "in the river". Some encroachment on to the river from site 19 must have been contemplated, it is submitted, as it had been in earlier planning proposals for the football ground.

Mr Elvin also advances broader reasons why the decision should not be quashed on this ground. He relies on Lord Clyde's recognition in the *City of Edinburgh* case that "the pursuit of a full and detailed explanation of the [inspector's] whole process of reasoning is wholly inappropriate. It involves a misconception of the standard to be expected of a decision letter in a planning appeal of this kind."

I am satisfied that the inspector adopted a proper approach to the substantial evidence placed before him by many parties at the inquiry as to the impact of the proposed development upon the River Thames. He was entitled to find that the proposals complied with the provisions of the development plan for the purposes of section 54A of the 1990 Act. The plan provided that site proposals, including those for site 19, would take precedence over other policies. The encroachment of the proposed development beyond the site, as identified on the small-scale "proposals map" with the plan, was small and does not appear to have been the subject of comment in the course of an inquiry at which many objectors made representations. The inspector considered the impact of the proposal upon the river in considerable detail. He plainly had in mind policies that he set out in his report, and those included policies EN31, EN37 and EN38 concerned with the impact of developments on the river. As to the alleged presumption in EN27, I do not read the inspector's findings upon the impact on the river as bringing the presumption into operation so as to require the different approach to the entire proposal that Mr McCracken advocates. In my judgment, the inspector was entitled to make the findings of fact he did and, upon a reading of the plan as a whole with its many and overlapping policies, to reach the conclusion he did. He considered the proposal in relation to the justification for site 19 in the unitary development plan. He was right to give primacy to the policy specific to the site, and was entitled to conclude that the proposed design "presents an innovative solution to this much considered development problem" and was acceptable. His proposal to include a planning condition (condition 17) that made provision for a wetland shelf, notwithstanding objections from the residents' group and the sailing clubs, demonstrates the significance he attached to the riverine habitat. He stated: "I have found it to be a necessary measure to counteract any loss of intertidal habitat caused by the development".

Mr McCracken makes a subsidiary point in relation to the consultation document "Strategic planning guidance for the River Thames", issued in June 1996, that is, after the inquiry but before the first respondent's

A decision. The document was a consultation draft setting out issues and seeking views, for example, as to the "extent to which the encroachment of development into the river should be discouraged". Bearing in mind the status of the document and its contents, the decision of the first respondent, in my view, cannot possibly be impugned on the ground that the draft has been given insufficient weight.

B *Environmental assessment: the regulations*

The appellant's second ground of challenge is based upon the absence of an environmental statement as contemplated in council directive 85/337/EEC and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (as amended) ("the 1988 Regulations"). On behalf of the first respondent, it is conceded that C consideration should have been given, and was not given, to requiring an environmental statement from the second respondents before the application for permission was determined. No real explanation has been offered, save that the failure was not deliberate. It is common ground that the court need not be concerned with whether the directive has direct effect, that is, be regarded as conferring rights on individuals directly. That D is because the 1988 Regulations, made pursuant to the directive can, Mr Elvin specifically concedes, be construed in a manner consistent with the directive. Reference has been made to the directive, without objection, as a means of considering the effect of the regulations. Mr Elvin referred to the obligations in the regulations as community-derived obligations.

One of the preambular paragraphs to the directive provides:

E

> Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after proper assessment of the likely significant effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be F supplemented by the authorities and by the people who may be concerned by the project in question;

Article 2.1 provides:

> Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effect on the environment G by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.
>
> These projects are defined in Article 4.

Article 4 provides that certain projects (identified in annexes 1 and 2) shall be made subject to an assessment in accordance with Articles 5 to 10, where member states consider their characteristics so require. Article 5.1 H provides that "member states shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III . . .", and I shall return to that annex later. Article 6.2 provides that:

Member States shall ensure that:
any request for development consent and any information gathered pursuant to Article 5 are made available to the public,
the public concerned is given the opportunity to express an opinion before the project is initiated.

Article 6.3 provides, *inter alia*:

The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned . . .
determine the manner in which the public is to be consulted, for example by written submissions, by public enquiry . . .

Regulation 4(2) of the 1988 Regulations provides:

The local planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration and state in their decision that they have done so.

Regulation 25 provides that for the purposes of Part XII of the Act (validity of certain decisions), the references in section 288 to any action of the Secretary of State that is not within the powers of the Act shall be taken to extend to a grant of planning permission in contravention of regulation 4.

Regulation 4 applies, *inter alia*, to Schedule 2 applications. A Schedule 2 application is defined in regulation 2 as "an application for planning permission . . . for the carrying out of development mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location". One of the developments mentioned in Schedule 2 is "an urban development project". Regulation 10 provides the procedure whereby the Secretary of State may require an environmental statement when an application for planning permission is referred to him for determination. Regulation 13 makes provision for publicity where an environmental statement is submitted in the course of planning procedures, and regulation 21 empowers the Secretary of State when dealing with an application to require further information from the applicant.

Regulation 2 provides that "environmental statement" means such a statement as is described in Schedule 3 in the regulations, which states:

1. An environmental statement comprises a document or series of documents providing, for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out, the information specified in paragraph 2 (referred to in this Schedule as "the specified information").

2. The specified information is –

A (a) a description of the development proposed, comprising information about the site and design and size or scale of the development;
(b) the data necessary to identify and assess the main effects which that development is likely to have on the environment;
(c) a description of the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its
B possible impact on–
human beings;
flora;
fauna;
soil;
water;
air;
C climate;
the landscape;
the inter-action between any of the foregoing;
material assets;
the cultural heritage;
(d) where significant adverse effects are identified with respect to any
D of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects; and
(e) a summary in non-technical language of the information specified above.

Para 3 provides that the statement may include, by way of explanation or amplification of any specified information, further information on a
E number of other specified matters.

The format and contents of Schedule 3 are somewhat different from those of Annex III of the directive, which, it can be assumed, they were intended to implement. It has not been submitted on behalf of the appellant that the differences are significant and, for the purposes of this appeal, it is the contents of Schedule 3 to the regulations that can be
F considered. Upon the concessions made by the first respondent in this case, it is not necessary to consider those parts of the decision of the European Court of Justice in the *Dutch Dykes* case (Case C–72/95)[1] in which the compatibility of the directive with national criteria and the direct effect of the directive are considered.

G *Non-compliance and its effect*

It is submitted on behalf of the appellant that had the first respondent considered the question of whether an environmental statement was required in this case, there is a very real chance that he would have decided it was. Mr McCracken submits that the proposal was an urban development project that had a substantial effect on the environment, within the meaning of the regulations, and an environmental statement
H ought to have been submitted to or required by the Secretary of State. At

[1] *Aannamaersbedrijf PK Kraaijveld* v *Gedeputeerde Staten Van Zuid-Holland*

the least, there was a very real prospect that the first respondent would have required an environmental statement. In granting permission without putting his mind to the question, he was in breach of regulation 4(2).

I agree that there was a breach of regulation 4(2), and I also agree that, had the point been considered, there is a real prospect that the first respondent would have required an environmental statement; that is, such a statement as is described in Schedule 3. It is not a case in which the court could or should rule that an environmental statement was not required, and I respectfully disagree with the judge on that issue.

Mr McCracken has to accept that the planning permission is not a nullity (*Main* v *Swansea City Council* (1985) 49 P&CR 26). It is, however, liable to be quashed. Section 288(5)(b) provides in so far as is material that:

> On any application under this section the High Court –
>
> (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action.

It is submitted that by reason of regulations 4 and 25, the decision was not within the powers of the Act. Even if it were, the interests of the appellant have been substantially prejudiced by the first respondent's failure to comply with relevant requirements, and the permission should be quashed on that ground. The English courts are under an obligation to nullify the unlawful consequences of a breach of community law (*Andrea Francovich* v *The Italian Republic* (ECJ Joint Cases C–6/90 and C–9/90))[1]. In the *Dutch Dykes* case (ECJ Case C–72/95), the court stated (para 31) that "the wording of the directive indicates that it has a wide scope and a broad purpose", and concluded (para 42) that the directive covered not only new dykes but "all projected work relating to dykes along waterways", including relocating, reinforcing, widening and replacing dykes. That goes to the type of project covered by the directive rather than the procedure to be followed. At para 62 the court stated that "Member States must investigate whether the projects mentioned in Annex II are likely to have significant effects on the environment and where appropriate must ensure that these effects are subjected to an environmental impact assessment in accordance with Articles 5 to 10 of the Directive". Mr McCracken submits that even if the English courts retain a discretion by virtue of the presence of the word "may" in section 288(5)(b) of the 1990 Act, the discretion not to quash is, by reason of the directive and the regulations, a very narrow one. It could not properly be exercised in this case because there is no Schedule 3 statement. Even if that omission could be remedied by making alternative provision, there is a difference in substance between what was done and what should have been done, and substantial prejudice has resulted.

[1][1991] ECR I–5357

A For the respondents, it is submitted that because the information specified in Schedule 3 was available in a series of documents prepared for the purpose of assessing the likely impact of the proposal upon the environment, and the defect was only of form, the permission was granted within the powers of the Act, and that substantial prejudice would have to be shown by the applicant under the second limb of section 288(5)(b). There B was no such prejudice and the discretion not to quash should be exercised.

Discretion

Mr Elvin relies on the decision of Schiemann J in *R* v *Poole Borough Council, ex parte Beebee* [1991] 2 PLR 27, where the borough council had granted themselves planning permission for a housing development without considering whether an environmental impact assessment should C be carried out. Schiemann J stated, at p35H:

> In my judgment, this point can be disposed of when one remembers that the purpose, in circumstances such as the present, of any environmental assessment is to draw to the attention of the authority material relevant to the coming to a decision. In the present case, it seems to me that the appropriate D bodies, the NCC and the BHS, drew the significant factors to the attention of the authority, and so the authority had in their possession the substance of what they would have had if they had applied their minds to the 1988 regulations and had prepared such an environmental statement. The substance of all the environmental information which was likely to emerge from going through the formal process envisaged by the regulations had already emerged and was apparently present in the council's mind. In those E circumstances it would be wrong to quash either of their resolutions on the basis of this submission.

Turner J in *Wychavon District Council* v *Secretary of State for the Environment* [1994] Env LR 239 stated at p251:

> F As the argument in this case was developed by the applicants, it became apparent there was material available to the Inspector which although not put in the form of environmental impact assessment, covered all the matters that such a statement would have provided. If such were proved to be the case, of necessity this Court would refuse to grant the application as a proper exercise of its discretion.

G Mr Elvin submits that the discretion recognised in those decisions has not been nullified by subsequent decisions of the European Court of Justice. In *Commission of European Communities* v *Federal Republic of Germany* (Case C–431/92)[1] the court was emphatic on the need to subject certain projects to an assessment of their effect upon the environment, as it was in the *Dutch Dykes* case, but recognised a degree of flexibility as to H the way in which the obligation is discharged. Under the heading "Obligation to carry out an assessment in accordance with the directive" the court stated:

[1] [1995] ECR I–2189

37. Germany submits that Articles 2, 3 and 8 of the directive, which it is alleged to have infringed, are not so clear and precise as unequivocally to lay down a specific obligation and thus for their application by the national authorities to be mandatory. A

38. That argument cannot be accepted.

39. Article 2 of the directive lays down an unequivocal obligation, incumbent on the competent authority in each Member State for the approval of projects, to make certain projects subject to an assessment of their effects on the environment. Article 3 prescribes the content of the assessment, lists the factors which must be taken into account in it, and leaves the competent authority a certain discretion as to the appropriate way of carrying out the assessment in the light of each individual case. Article 8 furthermore requires the competent national authorities to take into consideration in the development consent procedure the information gathered in the course of the assessment. B C

40. Regardless of their details, those provisions therefore unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an assessment of the effects of certain projects on the environment.

The question whether there has been a failure to fulfil the obligation to carry out an assessment D

41. Germany submits, finally, that an assessment of the effects of the project at issue on the environment was carried out by the competent authority on the basis of the national legislation then in force, namely the Bundesimmissionsschutzgesetz of 15 March 1974 (Federal German Law on the protection of the environment). Although that assessment was not formally based on the directive, it is said by Germany to have complied with all its requirements. E

42. The Commission does not deny that there was an assessment of the effects on the environment of the project at issue. However, that assessment does not satisfy the present requirements of the directive, which are stricter than the national legislation then in force. In particular, it did not comply with the obligation to take account of the interaction between the factors referred to in the first and second indents of Article 3 of the directive (human beings, fauna, flora, soil, water, air, climate and the landscape), an obligation which requires an overall assessment of those factors. F

43. According to the documents before the Court, an environmental impact assessment was carried out in the course of the procedure for the grant of consent for the project by the Regierungspräsidium Darmstadt. The developer provided in particular information on the environmental impact of the project which was considered by the Commission itself as sufficient from the point of view of the requirements of Article 5 of, and Annex III to, the directive. That information also concerned the interrelationship between the factors referred to in Article 3 of the directive. Finally, it is common ground that the information was made available to the public concerned who had the opportunity to express an opinion. In those circumstances, the objective of making the public aware of the environmental implications of a project on the basis of specific information provided by the developer was attained. G H

44. It is also apparent from the disputed decision of the Regierungspräsidium Darmstadt of 31 August 1989 and its report of 11 November 1991 drawn up in response to the reasoned opinion that the authority in question integrated the information gathered and the reactions

A of the sectors concerned in the consent procedure, and took that into account in its decision approving the project.

45. In the light of those considerations, the Commission should have specified on what specific points the requirements of the directive were not complied with during the procedure for consent for the project at issue and should have provided appropriate evidence of non-compliance. Its application does not include such details backed by specific evidence. It must
B therefore be dismissed as unfounded.

There was no suggestion in the *Dutch Dykes* case that this approach was erroneous. In *Van Schijndel* v *Stichting Pensioenfonds voor Fysiotherapeuten* (Cases C–430/93 and 431/93)[1] the court, applying *Factortame Ltd* v *Secretary of State for Transport (No 2)* (Case C–213/89)[2], held that "it was for
C national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law".

The court must be satisfied that the objectives of the directive are met. However, the court retains a discretion, notwithstanding the absence (which I assume without deciding) of a Schedule 3 statement properly so called, to decline to quash a decision if the objectives are in substance
D achieved by the procedure followed. These objectives include: the provision of appropriate information in a comprehensible form; making the public aware of the environmental implications of a project; giving an opportunity to the public to express opinions about it; and the decision-maker taking account of opinions expressed and making an overall assessment when reaching a conclusion.

E While an environmental statement should, of course, be provided in the form required by Schedule 3 of the regulations, it is legitimate upon a section 288 application to have regard to all the circumstances. I am satisfied that community law does not require the elimination of the discretion available to an English court under section 288(5)(b) of the 1990 Act.

F *Facts*

In considering whether the decisions should be quashed, it is necessary to consider the procedure as a whole and the information available to those concerned with the proposed development. I have referred briefly to the history of planning proposals upon the site. The issues are likely to have been well known not only to decision-makers, such as borough councillors,
G but to amenity associations and the general public. A local inquiry had earlier been held into the unitary development plan, and proposals specific to site 19 had been considered before the plan was adopted. The second respondents were required to disclose the evidence on which they proposed to rely 21 days before the public local inquiry concerned with the present proposals, and there is no reason to doubt that there was advance
H disclosure. A "library" of numerous relevant documents was made available at the inquiry for reference.

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[1] [1995] ECR I–4705
[2] [1990] ECR I–2433

Moreover, the inspector's report reveals that the issues were fully considered at the inquiry. Detailed evidence was given by the second respondents and by the borough. The Bishops Park Co-ordinating Group appeared by counsel to oppose the proposals. They made representations on the impact of the proposals on the River Thames and called four expert witnesses, including an ecological and environmental consultant. Other interested groups and individuals gave evidence both in support of and against the proposals. The appellant gave evidence and cross-examined other witnesses. The inspector's report demonstrates the detail in which evidence was given and considered. The river bed, the sloping wall and the habitat were all subject to debate. It does not appear to have occurred to anyone at the inquiry to request an environmental statement in Schedule 3 form, and that omission does not surprise me.

On behalf of the appellant, it is submitted that those concerned with the proposal for planning permission were deprived of a systematic and comprehensive assembly of information prepared at an early stage and in a form accessible to the public. There was insufficient opportunity for public comment and the inquiry took place in the wrong form and at the wrong time to achieve compliance with the directive. Had the correct procedure been followed, alternative proposals, which did not encroach onto the river bed, could have been considered, as contemplated in the directive, Annex III. One object of the environmental statement is to permit consideration of different options. Moreover, better consideration of measures of mitigation would have been possible, as would consideration of the cumulative impact on the river of this development and others for which there will be pressure in future. The effects of the process of construction have not been considered. Had a Schedule 3 statement been provided before the inquiry, further submissions could have been made which might have affected the ultimate decision. The information available to the public was not in the non-technical and systematic form that the regulations require. There was insufficient opportunity to comment on the proposed agreement between the second respondents and the borough under section 106 of the 1990 Act.

Conclusion

I regret that I am quite unpersuaded that the provision of a Schedule 3 statement when the Secretary of State called in the application for his decision could have had any effect on the course of events or was prejudicial to objectors or the quality of the decision. A vast amount of information was available and available in a comprehensible form. Some of the evidence both for and against the project was of a technical nature, as will often be the case, but no convincing specific suggestions have been made as to how in fact the information could have been more simply presented. There was in substance almost certainly a better compliance with the objects of the directive and the regulations than if a statement had been supplied or required at the time of the application for planning permission, but the application had not been called in by the first respondent for his decision. I do not find in any way convincing the

A suggestions made as to what was not available but should have been in an environmental statement and what difference it would have made to the course of the procedures or their outcome.

The inspector's report, in which the cases presented by all concerned are summarised, does not suggest to me any lack of understanding of the issues involved, though it does suggest strong and informed differences of
B opinion. The report was sufficiently considered by the first respondent before decisions were made. I regard the absence of a statement in Schedule 3 form as of no significant practical importance in the circumstance of this case and agree with the judge's conclusion.

I do not consider that a reference of any issue in the present case to the European Court of Justice is required or appropriate.

C For the reasons given, I would dismiss this appeal.

THORPE LJ: I have had the advantage of reading in draft the judgment of my lord, Pill LJ, and I am in agreement with its conclusion and reasoning.

In my judgment, Mr McCracken successfully demonstrated blemishes in the procedures by which the planning consent was achieved.

Although the failure to take into account or make any reference to
D policy EN27 is regrettable, I conclude that its consequence was insubstantial. It is simply implausible to conceive that the inspector would have ended with the conclusion to refuse had he expressly considered the application of EN27 to the very limited extension of the development beyond site 19.

The failure of the Secretary of State to consider the need to prepare an
E environmental statement in compliance with the directive and the regulations is, in my judgment, more substantial. I agree with my lord that Mr McCracken has demonstrated a breach of regulation 4(2). The judge made light of this complaint and, in my opinion, he was wrong so to do.

What then are the consequences? I agree with my lord's analysis of authority leading to the conclusion that the discretion derived from
F section 288(5)(b) of the 1990 Act is there to be exercised. The existence of the discretion necessarily entails some review of the probable outcome had the proper procedures been observed throughout. On the facts of this case I am left with the clear conviction that the procedures adopted, though flawed, were thorough and effective to enable the inspector to make a comprehensive judgment on all the environmental issues affecting the
G Thames and, particularly, the likely adverse impact of the slight expansion of the proposed development beyond its existing boundary.

A good deal was made in the court below of the fact that the substantial points raised in this court were not taken before the inspector. In the circumstances, particularly the fact that the appellant was guiding herself through legal territory of some obscurity and considerable technicality, I
H consider that the judge was wrong to allow that submission to weigh against her.

NOURSE LJ: I agree.

Appeal dismissed.

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