# Regina v Cornwall County Council

**Positive/Neutral Judicial Consideration**

**Court**
Queen's Bench Division

**Judgment Date**
22 September 2000

CO 4784/1999

High Court of Justice Queen's Bench Division (Crown Office List)

**2000 WL 1421266**

Before: Mr Justice Harrison

Friday, 22nd September 2000

**Representation**

Mr R McCracken (Instructed by Earthrights , Springfield, Kilmington, Axminster, Devon, EX13 7SB) appeared on behalf of the Applicant.
Mr T Straker QC (Instructed by County Legal Services , St Clement Building, Old County Hall, Truro, Cornwall, TR1 3AY) appeared on behalf of the Respondent.

Judgment

Mr Justice Harrison:

Introduction

1.

2. This is an application, made with the permission of Keene J., for judicial review of the grant of planning permission by the respondent, Cornwall County Council, dated 25th October 1999 for an extension of the United Mines landfill site for the disposal of various kinds of waste at United Downs, St Day, Redruth in Cornwall. The three applicants were Gwenapp Parish Council, **Jill** **Hardy** and Gladys Sidebottom. Following the grant of permission by Keene J., Gwenapp Parish Council and Gladys Sidebottom withdrew for reasons unconnected with the merits of the case, leaving **Jill** **Hardy** as the sole applicant.

3. A previous application for planning permission for extension of the landfill site had been made in January 1998. That application had been accompanied by an environmental statement. The application was refused in December 1998. In May 1999, a revised application, again accompanied by an environmental statement, was made in order to address the reasons for refusal of the previous application. That was the application which was granted planning permission on 25th October 1999, which is the subject of this application for judicial review.

4. The environmental statement was submitted pursuant to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the Regulations”). Those Regulations implement the requirements of Council Directive No 85/337 , as amended by Council Directive No 98/11 , dealing with the assessment of the effects of certain public and private projects on the environment. It is common ground that the proposed development in this case is an

 

EIA development, as defined in the Regulations, and that an environmental statement was therefore required to be submitted with the application for planning permission. The environmental statement submitted with the application consisted of six volumes, one of which contained a section dealing with ecology. The ecological assessment referred to systematic surveys of the habitat, flora and fauna present within the site which had been undertaken in 1995, 1996 and 1997 in connection with the previous application for planning permission. Those surveys identified firstly, a nationally scarce liverwort close to the southern boundary within the site but outside the area to be filled in an area which could be affected by the routing of surface water and sewer pipelines; secondly, an infrequently used outlying badger sett on the southern edge of the site but just outside the area to be filled, and, thirdly, preliminary surveys of mine shafts for roosting bats were undertaken in September 1995 but none were found. The ecological survey stated, however, that it was possible that the open shafts in Arsenic Works Wood support bats but more detailed underground surveys were required. There is known to be a roost of lesser horseshoe bats of international conversation importance to the south-west of the site. They are protected species under Annex IV(a) of the Habitats Directive , Council Directive No 92/43 .

5. The applicant's main ground of challenge to the grant of planning permission in this case is that the respondent council, when granting planning permission, failed to take into account the full "environmental information", as defined in the Regulations, because there was at that time inadequate information about the impact of the proposed development on the bats, the badgers and the nationally scarce liverwort. In order to deal with that ground of challenge it is necessary first to refer to the relevant Regulations and, secondly, to the way in which the respondent council dealt with this matter.

The 1999 Regulations

6.

7. Dealing first with the Regulations, Regulation 3(2) states:—

"The relevant planning authority … 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 they shall state in their decision that they have done so."

8. The expression "environmental information" is defined in Regulation 2(1) as follows:

"'Environmental information' means the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development."

9. The expression "environmental statement" is defined in the same Regulation as follows:

"'Environmental statement' means a statement —

"(a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but

"(b) that includes at least the information referred to in Part II of Schedule 4."

 

10. Part II of Schedule 4 to the Regulations includes the following three items of information:—

"1. A description of the development comprising information on the site, design and size of the development.

"2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

"3. The data required to identify and assess the main effects which the development is likely to have on the environment."

11. Regulation 30 provides that a grant of planning permission by the Secretary of State in contravention of Regulation 3 is to be taken as not being within the powers of the Town and Country Planning Act under section 288 of that Act.

12. I will have to return to those provisions of the Regulations when dealing with the submissions made by both sides, but it is necessary next to consider the material that was before the respondent and how they dealt with it.

Factual Background

13.

14. The ecological assessment, carried out by independent environmental consultants, stated at paragraph 8.19 that no part of the site was considered to be of international, national or county nature conservation significance. In paragraph 8.26, it was stated:—

"Most habitats within the landfill extension site will be lost during construction. The restored grassland, arable and the smaller areas of plantation woodland, scrub, heath and mine shafts will be excavated to create new areas for waste. In addition, small parcels of land outside the landfill extension boundary may be used for soil storage during the construction phase or for the installation of a settling pond, pipelines and ditches. The location of these features has not yet been determined."

15. Dealing with species, paragraphs 8.30 and 8.32 of the assessment stated:—

"8.30. The social group of badgers which use the site will lose part of their foraging territory and may suffer from disturbance at the outlying sett. The impact of construction on this species is considered to be minor but, as badger setts are legally protected, special working practices may be required. If further underground surveys find that bats roost in the mine shafts, these legally protected species will be affected if the mine shafts are excavated or capped and covered over.

"8.32. The nationally scarce liverwort may be lost depending on the precise siting of the pipelines and ditches along the southern boundary of the site."

16. Under the heading "Avoid sensitive areas", paragraphs 8.42 and 8.43 of the assessment stated:—

"8.42. Within the current boundary, the landfill extension affects almost all the habitats and there is little scope to avoid sensitive areas. However, provision will have to be made for legally protected areas such as the badger sett or the possible bat roosts. If it is not possible to create a 30 metre buffer zone around the sett to avoid disturbance, it will be necessary to exclude badgers from the sett under a licence from English Nature before work can proceed. Similarly, if bats are

 

found to be roosting in the mine shafts and it is not possible to avoid these shafts, English Nature will be consulted so that the impact of construction on the bats and their roosts is mitigated for under licence.

"8.43. The landfill extension may impinge on the nationally scare liverwort, depending on the siting of the associated drainage ditches and pipelines. If feasible within the design of the scheme, these features will be sited to avoid the liverwort. However, if the plant cannot be avoided, it will be relocated to a suitable area off-site."

17. Finally, under the heading "Environmental consequences", paragraph 8.56 stated:—

"There may be limited effects on some species, including badgers, bats and breeding birds. Mitigation measures will reduce disturbance and provide alternative breeding sites and habitats."

18. A further report before the respondent dealt with a comparative assessment made on behalf of the developer of all the sites, including the application site, which had been considered. Three coloured notations were given for the rating of each site on various issues as well as for a site's overall rating. A green notation indicated an issue assessed as having a potentially insignificant impact reflecting a high level of confidence that the issue would not represent a major hurdle to development. A blue notation indicated an issue as having a potentially minor impact, or a paucity of data, leading to a low level of confidence over a potential impact. It was stated that:—

"The issue will either require mitigating measures to be undertaken or alternatively further information is required before the significance of the issue can be properly assessed."

19. A red notation indicated an issue assessed as having a potential major impact representing a major hurdle to development likely to lead to refusal of planning permission. The assessment for the United Mines site included a green notation for planning policy and for nature conservation. It was the only site to have a green notation for its overall rating. Three other sites had an overall blue notation and all the other sites had a red notation. The site assessment summary for the United Mines site, when dealing with the green notation for nature conservation, stated:—

"Limited nature conservation interest. No protected species to be affected. No objection by English Nature."

20. There was also a Non-Technical Summary which, under the heading "Ecology", stated:—

"The site has been designed to ensure that areas containing legally protected species such as bats and badgers are to be avoided wherever possible."

21. Under the heading "Conclusions", the Non-Technical Summary stated, in paragraph 52:

"The Environmental Impact Assessment process is an objective assessment of the likely environmental effects of the proposed development, and has been undertaken by independent environmental consultants. Its findings conclude that there will be no significant adverse environmental effects that should prevent the proposals from gaining planning permission. Through careful site design and incorporation of appropriate mitigation measures, the potential for adverse effects has been reduced to the minimum practicable level."

 

22. Next, it is necessary to consider the consultation replies received by the council on this issue. Both English Nature and the Cornwall Wildlife Trust relied on the replies they had sent in relation to the previous application as there was no significant difference between the two applications so far as this aspect of the matter is concerned.

23. English Nature, in a letter of 6th March 1998, stated that they did not object to the proposal but they recommended, inter alia, firstly that further bat and badger surveys should be carried out to ensure that those protected species would not be directly adversely affected and secondly, that the locations of the nationally scarce liverwort should not be affected, that is to say that the development should work around them. In a letter of 1st September 1998, they stated that they had been asked to look again at the wildlife impacts, particularly whether further survey work should take place before any further permission is granted. They stated that they remained content for their recommendations to remain as conditions on the understanding that some of them must take place before any development takes place and that they may require changes to the design.

24. Cornwall Wildlife Trust, in a letter of 11th March 1998, stated that they did not consider that there were strong nature conservation grounds for an outright objection but that any outstanding concern could be dealt with by appropriately worded conditions on any planning permission that was given. They requested a further survey to establish what course of action was necessary to safeguard the outlying badger sett. So far as bats are concerned, they stated that, although bats were not detected at the time of the survey, it was possible that they may have been present but dormant. The most likely bats were greater and lesser horseshoe bats both of which are present in the vicinity and which are closely associated with mine shafts, the greater horseshoe bat being on the UK Biodiversity short list requiring immediate action for conservation. The Trust recommended further surveys by a trained bat worker of the open shafts within the proposed landfill area, failing which the shafts should be left open but secured with bat castles.

25. The Trust also sent to the County Council correspondence between them and the Cornwall Bat Group. They told the County Council that the Trust's views corresponded with the Bat Group's views, which they summarised as follows:—

> "1. Bat surveys of the underground workings are required
>
> 2. However, we recognise that because of the technical difficulties these are best carried out after determination of the application
>
> "3. Conditions should therefore be placed on any planning consent to ensure that appropriate surveys are carried out and mitigation measures are put in place."

26. In their letter to the Bat Group, the Trust explained that the technical difficulties related to the stability of the shafts and the possibility of landfill gas which would have necessitated specialist equipment to survey the underground workings which in turn would have necessitated clearance and removal of substantial areas of woodland to facilitate access. They considered that it would be wrong to clear the woodland before the application was determined because there was no guarantee that planning permission would eventually be granted. They therefore thought that any permission should be conditional on appropriate underground surveys being carried out and mitigation measures put in place if required.

27. Those consultation replies were duly summarised in an appendix to the Planning Director's report to the County Planning Committee, as were the objections of the Gwenapp Parish Council and the Carharrack Parish Council, both of whose objections included ecological concerns. The Gwenapp Parish Council's objection was attached at the end of the appendix.

 

28. As can be imagined, there were many and varied important matters relating to the proposed development which had to be dealt with by the Planning Director in his report to the County Planning Committee. The nature conservation aspect formed only a small part of the whole picture. The report of the Planning Director ran to 24 pages covering a great many matters, and it was accompanied by a number of appendices. When dealing with nature conservation in his report, the Director of Planning stated:

> "79. The proposal does not affect any known or proposed areas of designated or indicated nature conservation interest. The woodland which would be felled as part of the proposal is not an ancient woodland.
>
> "80. However, the Environmental Assessment prepared by CES raised a number of issues of nature conservation concern relating to protected and/or uncommon species. These include bats, badgers and a nationally sparse liverwort. English Nature and the Cornwall Wildlife Trust have indicated that these aspects would require further study by the applicant before the development was commenced and appropriate mitigation required as part of any subsequent consent. This can be achieved by appropriate planning conditions.
>
> "81. The application therefore raises no significant nature conservation issues and further mitigation can be required by planning condition. The proposed restoration will, in my view, add to the nature conservation value of the entire landfill/raising site in the long term. This application is not significantly in conflict with the policy framework provided by Policies W2 and ENV5 of the Structure Plan…"

29. In his affidavit, the Planning Director added that the Cornwall Wildlife Trust had since repeated and stressed their view that it was imperative that surveys be undertaken immediately prior to the execution of works because the creatures have an itinerant nature and their exact habitat position must be confirmed at the time of working rather than at any earlier time which would not show an up-to-date position. At that stage, he said, mitigation measures could be finalised in accordance with the conditions of the planning permission.

The Decision

30.

31. On 20th October 1999 the County Planning Committee resolved to grant planning permission for the proposed development. The planning permission was granted on 25th October 1999. It included a large number of conditions, only two of which are relevant to this case.

32. Condition 5 provided:—

> "This planning permission shall only relate to the site edged red on Figure 1.2 (Volume 4 dated May 1999) and the development hereby permitted shall only be carried out within the site in accordance with the details in the submitted application form dated 10th May 1999, Environmental Statement Volumes 1–6 dated May 1999, except where modified by other accompanying conditions, or as may otherwise be agreed with the CPA."

33. Condition 8 provided as follows:—

> "Unless otherwise agreed with the CPA, no development, including preliminary groundworks, shall take place within the new extension area [i.e. that land hatched in purple on Figure 1.2 (Volume 4 dated May 1999)] until the applicants have undertaken additional badger, bat and bryophyte surveys in accordance with details to be agreed with the CPA

 

in consultation with Cornwall Wildlife Trust and English Nature. The applicants shall submit for approval by the CPA appropriate mitigation measures to cater for these protected species in addition to those mitigation measures included in the Environmental Assessment Chapter 8 Volume 3 [dated May 1999] prior to the commencement of development, in the abovementioned extension area including preliminary groundworks."

Submissions

34.

35. Having dealt with the statutory provisions, the factual background to the decision and the decision itself, I turn next to the submissions that were made. They really fell into two main areas. Firstly, the legality of the decision itself and, secondly, alleged procedural breaches of the Regulations following the decision. I turn firstly to deal with the submissions relating to the legality of the decision to grant planning permission.

*a) The legality of the decision*

36.

37. Mr McCracken submitted on behalf of the applicant that the planning permission was not lawfully granted because there was not the material before the respondent required by Regulation 3 before planning permission could lawfully be granted. It was accepted for the purposes of this hearing that the adequacy of the environmental information was a matter for the local authority rather than for the court, although Mr McCracken wished to reserve the right to argue on appeal that it was a matter for the court. It was submitted that, when considering the adequacy of the environmental information, the respondent had failed to take into account Article 12 of the Habitats Directive ( Directive No 92/43 ) or the question of derogation under Article 16 of the Directive.

38. Article 12(1) provides:—

"Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:—

"…(d) deterioration or destruction of breeding sites or resting places."

39. In this case, the bats, which it was thought the surveys might reveal were present in a mine shaft on the site, are Annex IV(a) species which, it is said, are afforded a system of strict protection under the Directive which prohibits the destruction of their roosts or resting places.

40. Article 16(1) of the Directive states:—

"Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Article 12…

"(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment."

41. Mr McCracken submitted that the respondent had failed to take into account, when considering the adequacy of the environmental information, the strict protection afforded to the bats by Article 12 or the relevant tests for derogation provided by Article 16 .

 

42. The Conservation (Natural Habitats etc) Regulations 1994 , transpose the Directive into domestic law. Annex IV(a) species are called "European protected species" and Regulation 39 makes it an offence, inter alia, to damage or destroy a breeding site or resting place of such an animal. Regulation 40(3)(c) , however, provides that, a person shall not be guilty of an offence by reason of any act made unlawful by Regulation 39 if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided. Regulation 40(4) provides that a person cannot rely on that defence in relation to anything done to bats unless he had first notified the appropriate nature conservation body of the proposed action or operation and allowed them a reasonable time to advise him whether it should be carried out and, if so, the method to be used.

43. It follows, therefore, that it would not be unlawful to destroy the bats' roosts when carrying out the planning permission provided that the provisions of Regulation 40 were observed and provided that it was not contrary to such mitigation measures as may be imposed pursuant to condition 8 of the planning permission.

44. Mr McCracken submitted that it was perverse for the respondent to have concluded, in accordance with paragraph 8 of the report of the Planning Director, that the application raised no significant nature conservation issues when the surveys may reveal the existence of bats and/or their roosts in a mine shaft which, according to paragraphs 8.26 and 8.30 of the ecological report, will or may have to be excavated or capped and covered. Similarly, paragraphs 8.32 and 8.43 of the ecological report show that the nationally scarce liverwort may be lost depending on the precise siting of the associated pipelines and ditches. Mr McCracken submitted that any change in the layout of the pipelines and ditches would be contrary to condition 5 of the planning permission. It was also contended that the conclusion in the site assessment survey that no protected species would be affected was perverse. It was suggested that the green notation for the nature conservation and planning policy aspects of the site should, on any reasonable assessment, have been blue, which may have affected the comparative assessment of sites. The Planning Director had stated in paragraph 8 of his report that the application was not significantly in conflict with Structure Plan policy ENV5. That policy provides, inter alia, that development should not adversely affect to a significant degree any protected species or its habitat. If surveys revealed bats or their roosts in a mine shaft, the appropriate notation for the nature conservation and planning policy aspects of the site, it was said, would then be a red notation.

45. Mr McCracken submitted that, until the surveys had been carried out, there was not the necessary data required by paragraph 3 of Part II of Schedule 4 to the Regulations, nor was it possible to say what measures should be taken to avoid or reduce significant adverse effects as required by paragraph 2 of Part II of Schedule 4 to the Regulations. All of those matters had to be contained in the environmental information considered by the respondent pursuant to Regulation 3 before they could grant planning permission.

46. I was referred to the case of *R v Rochdale Metropolitan Borough Council, ex parte Tew (1999) 3 PLR 74* , which was a case decided under the 1988 Assessment Regulations rather than under the 1999 Regulations. It involved a bare outline planning application for a business park accompanied by an environmental statement based on a illustrative plan. It was held that such an environmental statement did not comply with Schedule 3 of the 1988 Regulations. Sullivan J. dealt in his judgment with the suggestion that it was sufficient to leave some of the "specified information", as it was called in the 1988 Regulations, to the reserved matters stage. He said at page 97E:—

> "It is no answer to say that some of the specified information will be provided in due course at the reserved matters stage. This, no doubt, reflects the role of an outline planning permission under the 1990 Act. Once outline planning permission has been granted, the principle of the development is established. Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding.

47. "Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions, it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in paragraph 2(c) of Schedule 3 , and the reference to mitigation measures in para 2(d), that it is intended that in accordance with the objectives of the Directive, the information contained in the environmental statement should be both comprehensive and systematic, so that a decision to grant planning permission is taken "in full knowledge" of the project's likely significant effects on the environment. If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a "full knowledge" of the likely significant effects of the project. That is

 

not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The Directive and the Assessment Regulations require likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms in Schedule 3 , would conflict with the public's right to make an input into the environmental information and would therefore conflict with the underlying purpose of the Directive.

> "That is, in effect, what has happened in the present case. There may well be scope for argument in some cases as to the extent to which details of mitigation measures may be left for subsequent approval. I do not suggest that an environmental statement must contain every detail, provided the mitigation measures are described."

48. Mr McCracken submitted that in this case it was not permissible to leave the information arising from the surveys to the reserved matters stage, pursuant to condition 8 of the planning permission, because it was too late to prevent the development at that stage and there was no requirement for publicity or public consultation on the impact arising from the surveys or the mitigation measures that may be required.

49. In the Tew case, Sullivan J. held that it was for the local planning authority to judge the adequacy of the information to be supplied pursuant to Schedule 3 of the 1988 Regulations. The planning permission in that case was quashed. The local planning authority subsequently granted a planning permission which was again challenged by way of judicial review. Once again, it came before Sullivan J. One of the issues was whether the adequacy of the information was a matter for the local planning authority or a matter for the court to decide. Judgment was given on the last day of the hearing in this case. A transcript of Sullivan J's. judgment was not available at the time of preparing this judgment. In those circumstances, the parties provided me with an agreed note of what Sullivan J. held on that particular issue. Sullivan J. held that the adequacy of the environmental information was a matter for the local planning authority to decide; it was not a matter for the court to decide as a matter of primary fact.

50. Mr Straker QC submitted on behalf of the respondent that no bats had been found on the site and that the nationally scarce liverwort and the badger sett were only on the edge of the site. Bats were itinerant creatures and it had been agreed that there were only two mine shafts within the area to be filled, one choked and one open. There had been no objection from English Nature or from Cornwall Wildlife Trust, both of whom were satisfied that those aspects could be dealt with by appropriately worded conditions with the surveys being undertaken before the development commenced. Neither of them had requested that the surveys should be carried out before planning permission was granted. The environmental consultants and the Planning Director were satisfied that there were no significant adverse effects and there was no objection from the Environment Agency. With the exception of Gwenapp and Carharrack Parish Councils, the public debate on this aspect was said to be all one way. As a result, Mr Straker submitted, it was not perverse for the respondent to take the view that those matters did not constitute "main effects" or "significant adverse effects" within the meaning of paragraphs 3 and 2 respectively of Part II of Schedule 4 to the Regulations and that condition 8 would provide protection if contingencies occurred.

51. So far as the bats and their roosts were concerned, it involved, he said, contingency upon contingency. Firstly, that the bats or their roosts were there and secondly, if they were there, that it could not be dealt with by mitigation measures under condition 8. If those contingencies were satisfied, he accepted that the bats and/or their roosts would have to go, albeit legitimately. He accepted that the words "mitigated for" in the last sentence of paragraph 8.42 of the ecological survey meant that they would have to go. The contingencies so far as the liverwort is concerned is that the pipes and ditches may not be able to avoid the plant. If that were so, it would either be lost or transported elsewhere.

52. Mr Straker submitted that the adequacy of the environmental information was a matter for the respondent and that the staged procedure of the Regulations envisaged that not all the information would be available at the first or subsequent stages. He contended that paragraph 3 of Part II of Schedule 4 to the Regulations did not require all data to be included in the environmental statement, only such data as is required to identify and assess the main effects of the development. The mitigation measures referred to in paragraph 2 of Part II of Schedule 4 , could, he said, include future control; it was not necessary to put off a description of likely significant effects because the Regulations allowed for contingent circumstances.

53. Overall, Mr Straker submitted that the respondent was entitled to conclude that the nature conservation aspects did not constitute "main effects" or involve "significant adverse effects" and, if that were right, it was the end of the matter.

*b) Procedural breaches of the Regulations*

 

54.

55. I turn next to the submissions that were made relating to alleged procedural breaches of the Regulations following the decision.

56. It was alleged on behalf of the applicant that the respondent had failed to comply with Regulation 3(2) and Regulation 21 . Both of those allegations were made late in the day. The alleged breach of Regulation 3(2) was not raised until 6th July 2000 and the alleged breach of Regulation 21 was raised for the first time at the hearing. I offered Mr Straker an adjournment if it was necessary to obtain the relevant material to deal with the latter point, but he was able to obtain the relevant material without an adjournment.

57. I have already set out the terms of Regulation 3(2) earlier in this judgment. It requires the relevant planning authority not only to take the environmental information into consideration but also to state in their decision that they have done so. It is accepted on behalf of the respondent that they did not state in their decision that they had taken the environmental information into consideration. Mr Straker submitted that I could properly deal with the matter either by accepting an undertaking from him that the respondent would state in their decision that they had taken the environmental information into consideration or by the court ordering them to do so. It would, he said, be strange if the planning permission had to be quashed for that omission if the respondent had otherwise gone through the procedure legitimately.

58. Mr McCracken, on the other hand, submitted that the purpose of the requirement in Regulation 3(2) was to ensure that the environmental information was taken into consideration. It was not, therefore, superfluous to the requirements of the Directive. It is, he said, for the respondent to decide whether they can state that they have taken the environmental statement into consideration, and the statement has to be made simultaneously with the announcement of the decision.

59. Secondly, it was submitted on behalf of the applicant that there had been a breach of Regulation 21(1)(c) which provides as follows:—

> "21 -
>
> (1) where an EIA application is determined by a local planning authority, the authority shall…
>
> "(c) make available for public inspection at the place where the appropriate register (or relevant section of that register) is kept a statement containing —
>
> "(i) the content of the decision and any conditions attached thereto;
>
> "(ii) the main reasons and considerations on which the decision is based; and
>
> "(iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development."

60. The statement which the respondent had made available for public inspection in this case recited the three requirements of Regulation 21(1)(c) and then stated:—

> "To provide information on the above, attached to this Statement are the following:—
>
> "(a) copy of Agenda report and update sheet that was considered by the County Planning Committee at the meeting on 20th October 1999
>
> "(b) copies of a Section 106 Legal Agreement and a Unilateral Undertaking referred to in the abovementioned report
>
> "(c) copy of Decision Notice and approved plans (dated 25th October 1999)."

61. Mr Straker submitted that that statement complied with the requirements of Regulation 21(1)(c) . Alternatively, if that were not so, he said that the matter could and should properly be dealt with either by accepting an undertaking from him

or by the court ordering the respondent to make available a statement that complies with the Regulation. Such a course of action would, he said, satisfy the requirement for publicity which is the purpose of the Regulation. There would then be compliance with the Regulation. It would, he said, be wrong to quash a perfectly proper planning permission on account of such a procedural failure.

62. Mr McCracken, on the other hand, submitted that the respondent's statement only informed the public of some of the material that was before the respondent. It failed to inform the public of the main reasons and considerations on which the decision was based. There was nothing in the minutes which recorded the resolution of the Planning Committee to say, whether by reference to the report of the Planning Director or otherwise, what the main reasons or considerations were on which the decision was based. I was referred to Article 9 of Directive 85/337 which requires the competent authority granting planning permission to make available to the public the three matters now specified in Regulation 21(1)(c) . Mr McCracken therefore submitted that there was a failure to comply with the requirements of Regulation 21(1)(c) which are not superfluous to the requirements of the Directive. He contended that it was not possible to remedy the failure in the manner suggested by Mr Straker. One of the reasons for the requirement of the Regulation was to enable a potential objector to challenge the decision, but, if the reasons for the decision were now to be given, such a potential challenger would be out of time to make his challenge by virtue of Order 53, rule 4. It was therefore submitted that there is an obligation to quash the planning permission on account of the failure to comply with Regulation 21(1)(c) .

Conclusion

63.

*a) Legality of decision*

64.

65. In dealing with the submissions that I have summarised, I deal first with the issue of the legality of the decision to grant planning permission. In considering that issue, the starting point must be Regulation 3 , which provides that the relevant planning authority shall not grant planning permission for an EIA development unless they have first taken the environmental information into consideration. By virtue of Regulation 2(1) , environmental information includes the environmental statement which itself has to include the information referred to in Part II of Schedule 4 to the Regulations. I agree with Sullivan J. that it is for the relevant planning authority to judge the adequacy of the environmental information, subject of course to review by the courts on the normal Wednesbury principles, but information that is capable of meeting the requirements of Part II of Schedule 4 to the Regulations must be provided and considered by the planning authority before planning permission is granted.

66. Paragraphs 1 to 3 of Part II of Schedule 4 are not, it seems to me, in a logically correct sequence. Firstly, the environmental statement must contain a description of the development (paragraph 1). Secondly, it must contain the data required to identify and assess the main effects which the development is likely to have on the environment (paragraph 3). Thirdly, it must contain a description of the measures envisaged to avoid, reduce and, if possible, remedy significant adverse effects (paragraph 2). The requirement to provide the paragraph 2 information relating to the measures to be taken does not arise if, in the planning authority's view, there are no “significant adverse effects”. Similarly, the requirement to provide the paragraph 3 information relating to the data does not arise if, in the planning authority's view, it is not required to identify and assess the “main effects” of the development.

67. Applying those principles to the facts of this case, if the nature conservation aspects relating to the bats, badgers and liverwort did not involve “significant adverse effects”, there would be no requirement for the environmental statement to contain the measures envisaged to deal with them and no duty on the respondent to consider those measures before granting planning permission. Similarly, if those nature conservation aspects did not amount to “main effects” there would be no requirement for the environmental statement to contain the data to assess them and no duty on the respondent to consider that data before granting planning permission. It is therefore necessary to consider whether the respondent could rationally conclude that those nature conservation aspects did not amount to “significant adverse effects” or “main effects”

68. The non-technical summary of the environmental statement stated that there would be no significant adverse environmental effects which should prevent the proposal from gaining planning permission, and the site assessment summary, when dealing with nature conservation, stated that no protected species would be affected. That was, of course, information

 

supplied by the environmental consultants responsible for compiling the environmental statement. However, the Director of Planning also advised the Planning Committee in his report that there were no significant nature conservation issues and he advised them that there was no significant conflict with Structure Plan policy ENV5 which provides that development should not adversely affect to a significant degree any protected species or its habitat.

69. It is difficult, however, to see how the Planning Committee could have accepted that advice in the light of their acceptance of the advice from English Nature and Cornish Wildlife Trust that further surveys should be carried out to ensure, inter alia, that bats would not be adversely affected by the development.

70. The bats are European protected species. They and their roosts, or resting places, are subject to strict protection under the Habitats Directive . There was evidence in the ecological report that bats or their resting places may be found in the mine shafts if surveys were carried out. The strong advice of English Nature, Cornish Wildlife Trust and the Cornwall Bat Group was that those surveys should be carried out. The respondent concluded that those surveys should be carried out. They could only have concluded that those surveys should be carried out if they thought that bats or their resting places might, or were likely, to be found in the mine shafts. If their presence were found by the surveys and if it were found that they were likely to be adversely affected by the proposed development, it is, in my view, an inescapable conclusion, having regard to the system of strict protection for these European protected species, that such a finding would constitute a "significant adverse effect" and a "main effect" within the meaning of paragraphs 2 and 3 of Part II of Schedule 4 to the Regulations, with the result that the information required by those two paragraphs would have to be contained in the environmental statement and considered by the Planning Committee before deciding whether to grant planning permission.

71. Having decided that those surveys should be carried out, the Planning Committee simply were not in a position to conclude that there were no significant nature conservation issues until they had the results of the surveys. The surveys may have revealed significant adverse effects on the bats or their resting places in which case measures to deal with those effects would have had to be included in the environmental statement. They could not be left to the reserved matters stage when the same requirements for publicity and consultation do not apply. Having decided that the surveys should be carried out, it was, in my view, incumbent on the respondent to await the results of the surveys before deciding whether to grant planning permission so as to ensure that they had the full environmental information before them before deciding whether or not planning permission should be granted.

72. I appreciate that the advice of English Nature and of the Cornish Wildlife Trust was that the surveys should be carried out before the development started rather than before planning permission was granted. However, that advice was not, in my view, consistent with the requirements of the Directive and the Regulations, however understandable the reasons for the advice may have been, because the results of the surveys could have contained information which, under the Regulations, would have to be in the environmental statement which had to be considered by the respondent before deciding whether to grant planning permission. If it is thought that bats are, or may be, present within the area to be filled, the fact that they are itinerant creatures cannot excuse a failure to ascertain their presence as part of the environmental statement before planning permission is granted because that is the time at which the information has to be provided. The technical difficulty of carrying out the survey in the woodland area was not a matter relied upon by the Director of Planning in the body of his report, nor was it relied upon by Mr Straker on behalf of the respondent and, in any event, as Mr McCracken suggested, there could, if necessary, be a "minded to grant" resolution to overcome that aspect.

73. In my judgment, the grant of planning permission in this case was not lawful because the respondent could not rationally conclude that there were no significant nature conservation effects until they had the data from the surveys. They were not in a position to know whether they had the full environmental information required by Regulation 3 before granting planning permission. I would therefore quash the planning permission dated 25th October 1999.

74. Having based that decision on the surveys relating to the bats whose importance is recognised at the European level, it is not necessary to reach a concluded view on the liverwort or on the badgers. All I would say is that there was no evidence of significant adverse effects on the badgers. So far as the liverwort is concerned, it seems to me that it was open to the respondent as a matter of judgment to conclude that the liverwort need not be significantly affected by the ditches or the pipelines.

*b) Procedural breaches of Regulations 3 and 21*

75.

 

76. In view of my decision to quash the planning permission it is not necessary for me to express a concluded view relating to the alleged procedural breaches of Regulations 3 and 21 .

77. In fact, the breach of Regulation 3 , by not stating in the decision that the respondent had taken the environmental information into account, is admitted. Had I not decided to quash the planning permission for the reason stated, I would have been inclined to agree with Mr Straker that the breach of Regulation 3 could have been appropriately dealt with by the court by way of a mandatory order.

78. The breach of Regulation 21 is not admitted. There was, however, in my judgment, a clear breach of Regulation 21 . All that the respondent did was to attach to the statement the report of the Planning Director, the Section 106 agreement and the decision notice with the approved plans. Whilst that would have satisfied Regulation 21(1)(c)(i) relating to the decision and conditions attached to it, the statement did not contain the main reasons and considerations on which the decision was based. As Mr McCracken rightly said, the statement simply referred to some of the material that was before the respondent. There was no attempt to inform the public what the main reasons and considerations were on which the decision was based.

79. The question of what relief ought to be afforded in respect of the breach of Regulation 21 is not so straightforward, but as I am quashing the permission in any event, it is not necessary or desirable for me to express an opinion as to whether that breach could have been dealt with by a mandatory order or whether it would have necessitated the quashing of the permission.

Relief

80.

81. I was referred to the *House of Lords decision in Berkeley v Secretary of State for the Environment (2000) 3 WLR 420* on the question of discretion whether to grant relief in a case involving a failure to comply with the Directive and Regulations relating to environmental assessments. However, Mr Straker did not suggest that I should not quash the planning permission if I were to find against him on the legality of the decision to grant permission. His submissions on the question of relief were confined to the procedural breaches of Regulations 3 and 21 . I have already indicated that, in the light of my finding that the grant of planning permission in this case was not lawful, it would be appropriate to quash the planning permission. I would therefore grant an order of certiorari to quash the planning permission.

82. Yes, Mr McCracken.

83. MR McCRACKEN: My Lord, I am much obliged to your Lordship for that judgment. My client is legally aided and I would therefore ask both for an order that her costs be paid by the respondent and for the appropriate Legal Aid taxation.

84. MR JUSTICE HARRISON: Thank you. Mr Straker, can you resist that?

85. MR STRAKER: My Lord, I do not think I can and therefore I do not.

86. My Lord, can I mention one or two consequential matters?

87. MR JUSTICE HARRISON: Yes.

 

88. MR STRAKER: The first is a minor point for the transcript which is this, that your Lordship indicated that there is no transcript of the most recent decision by Sullivan J. in the *Rochdale* case available.

89. MR JUSTICE HARRISON:Yes.

90. MR STRAKER:In fact at the moment there is and it may be that your Lordship, when reviewing the transcript, might care to indicate that it was not available at the time of the preparation of the judgment.

91. MR JUSTICE HARRISON:Yes, I see. I understand that, thank you very much.

92. MR STRAKER:My Lord, I should just confirm to your Lordship that the note we tendered to your Lordship at the end of last term coincided, I do not say word for word, but coincided substantially with the official transcript.

93. MR JUSTICE HARRISON:Thank you very much.

94. MR STRAKER:My Lord, as far as the other consequential matter which I raise, it is this, I seek from your Lordship permission to appeal. Permission for appeal requires to be supported either by my submitting that there is a real prospect of success or that there is some other pressing reason for an appeal, some matter of principle, for example.

95. I, if I may, elide both those points so as to make this submission to your Lordship, that your Lordship ought properly to grant permission to appeal because I would respectfully contend there is what can be described as a real prospect of success together with a point of some significance by way of principle, where one has this situation: namely, as your Lordship observed in the judgment, advice being tendered, that the present position was no significant effects, with of course a situation where there were contingencies which could arise which might lead to that, whether in six months time, a year's time or subsequently over the life of a planning permission being different. In that circumstance I would respectfully contend there is scope for consideration of the Regulations to the effect that that situation which I have just described can be catered for and is catered for by the construction to allow permission to be given in such circumstances with the contingencies being met in the way they were here.

96. As I say, I elide that with the other more principal point, which is a matter of significance to local authorities, generally that when one has an application for planning permission with current information to give an effect, with a request for a grant of planning permission which will have a 5-year life or longer, the Rochdale permission, for example, was at least double the 5-year ordinary life of a planning permission, how is this matter to be catered for so as to enable that to occur which ought to occur, namely, here the disposal of waste in this sort of way, other circumstances no doubt valuable development, without impeding upon or overlooking the proper environmental and habitat consequences which are spoken to by the Directive and the Regulations?

97. My Lord, that is the application that I make and as I say, I elide two bases in, I think, a reasonably intelligible way to support the submission that permission to appeal ought to be granted by your Lordship.

 

98. MR JUSTICE HARRISON:Thank you very much. Mr McCracken.

99. MR McCRACKEN:My Lord, may I just mention one point. Of course my response would be that your Lordship's judgment was a straightforward application of ordinary public law principles to ordinary principles relating to planning permission. But there is a recent decision of the European Court of Justice which might conceivably support an appeal, and I emphasise "might conceivably support an appeal". If I can just explain the effect of it so your Lordship can decide how important it is in your Lordship's judgment.

100. It is a decision in a case involving Luxembourg, reported a couple of days ago in New Law Digest and available on the internet, to the effect that where terms are used in Directives then they normally have an autonomous meaning which is to be construed harmoniously—

101. MR JUSTICE HARRISON: Could you just give me — where terms are used in Directives—

102. MR McCRACKEN: — they are normally to have an autonomous meaning to be construed harmoniously throughout the Community, and they should only be understood in a domestic law sense if there is a specific incorporation of domestic law.

103. MR JUSTICE HARRISON: Only to be considered in a what?

104. MR McCRACKEN: Only to be construed in accordance with the domestic law of the Member States if that domestic law construction specifically incorporates it into the Directive.

105. My Lord, that decision—

106. MR JUSTICE HARRISON: What does all that mean?

107. MR McCRACKEN:My Lord, yes. I can tell your Lordship the practical effect. It comes simply to this, that that decision may well make the decision of the Court of Appeal, delivered your Lordship will remember by Mr Justice Singer in the Hammersmith and Fulham case, wrong because that was a decision to the effect that reserved matters approval did not constitute a development consent for the purpose of environmental assessment. I emphasise this decision is just, as it were, conceivably arguable. If and in so far as your Lordship's decision was much affected by the difficulties of requiring formal environmental assessments, publicity and so on, at a stage after the initial grant of planning permission, it is conceivable that the Luxembourg case would have an effect on that. I am not in any sense conceding that the Luxembourg decision would have an effect—

108. MR JUSTICE HARRISON:I think I am going to have to ask you to spell that out again. The Hammersmith case, you say, said that approval reserved matters was not a—

 

109. MR McCRACKEN: Not a matter that was subject to the Directive. Your Lordship will remember the issue in the Hammersmith case was where environmental assessments had not been carried out at the argument stage.

110. MR JUSTICE HARRISON:Yes.

111. MR McCRACKEN:Could a challenger say that there was an error in approving reserved matters without requiring a formal environmental assessment? The Court of Appeal decided that according to English law the development consent was the grant of planning permission and that was the outline consent.

112. MR JUSTICE HARRISON:Yes.

113. MR McCRACKEN:It is arguable that the Luxembourg decision, to the effect that terms such as development consent must be understood in the same way throughout the whole of Europe, is inconsistent with that. I do not think in any sense it is conceded it is, but it is parable whether it is inconsistent with it. If it were inconsistent with that then it might be said, well, just as you can require formal environmental assessment at the reserved matter stage, you could require formal environmental assessment in relation to those matters that are reserved for subsequent approval by way of condition.

114. If, and this in a sense is contingency upon contingency upon contingency, if that were the case, it might be said that adequate publicity could be obtained at the stage where one is looking at the details of a scheme that are being approved subject, by reason of a condition, to reserve matters for subsequent approval.

115. MR JUSTICE HARRISON: Are you saying that if it is going to be right that because of this case one can look at the development consent being at the reserved matters stage then the requirements of publicity and consultation could be relevant to that stage whereas at the moment under the Hammersmith case that would not be so?

116. MR McCRACKEN: My Lord, that is the extent of the point that could conceivably be open to Mr Straker as a result of the Luxembourg case. In my submission, it would not actually deal with the fundamental point which underlies your Lordship's judgment, which is that once you granted planning permission that is it you have granted planning permission. Therefore, if it turns out that the bats are in the mine you cannot do anything about it. Therefore, my submission would be that the Luxembourg decision does not actually help Mr Straker on the facts of this case, but so far as one element of your Lordship's reasoning relates to the absence of publicity at the reserved matters stage, it is probably fair for me to concede that it would be open to Mr Straker to argue on the basis of the Luxembourg case that the Court of Appeal got the Hammersmith decision wrong.

117. MR JUSTICE HARRISON: Of course that was a matter referred to by Sullivan J. in the Tew case, was it not. The extract that I quoted about public consultation at the reserved matters stage.

118. MR McCRACKEN: My Lord, that is right. It is only because that is one of the things your Lordship referred to. One of the points that I make is I feel it right, in accordance with my duty to the court, to concede that it is conceivable on the basis of the Luxembourg case that the Hammersmith decision would be held to be wrong as a result of the Luxembourg decision. But it does not of course go to the other point which is that once you have granted permission you cannot, by way of approval

 

of reserved matters, derogate from that permission. Therefore, in so far as you have said you can put waste in the area where there may prove to be a bat roosting place, there is nothing you can do about that at the later stage because it was conceded that there was no practical way once you have taken it into the area that you could protect them. So I apologise if I have, during the long vacation, complicated matters by reference to the Luxembourg case but I felt it right as it had come to my attention not to leave the court in ignorance of the existence of a conceivable, possible argument that Mr Straker might want to run in relation to one of the strands of Sullivan J's. judgment.

119. MR JUSTICE HARRISON: Yes, thank you. Is there anything you want to say about that?

120. MR STRAKER: My Lord, save this, that the reference indicates the difficulties that attain perhaps generally in the application into the English planning system of the Directives from the European Union and therefore tend to support, rather than run against, the point that I was making as far as general principle is concerned. But beyond that I say nothing, my Lord.

121. MR JUSTICE HARRISON: Thank you very much. With some slight hesitation I am prepared to grant leave to appeal in this case. The respondent will pay the applicant's costs and there is to be a Legal Aid assessment.

122. MR STRAKER: I am much obliged my Lord. There was one matter which occurs to me and it is this, and it may be that it simply can be left hanging in the air and does not matter in the light of what has happened, but as far as the last two matters that your Lordship referred to in the judgment, the procedural points that my learned friend took, no formal amendment was ever tendered to your Lordship, although your Lordship gave permission for an amendment to be made and therefore I raise the point. As I say, it may be unnecessary for me to do so but I thought I ought to. I raise the point against the possibility that my learned friend wants to put in an amendment so at least there is a document as a matter of form. Plainly I would not stand in the way and I would not suggest any particular time constraint for that to be done, but as a matter of form it might be appropriate for it to be done.

123. MR JUSTICE HARRISON: That seems to me to be right, Mr McCracken.

124. MR McCRACKEN: I am obliged to my learned friend Mr Straker for raising the point. It would be appropriate before the appeal that they should have the benefit of a written formulation of those points.

125. MR JUSTICE HARRISON: I think that is right. Would you do that within the next seven days?

126. MR McCRACKEN: Mr Straker has very kindly indicated no particular time constraint, I wonder if your Lordship would, as it were, recognise the long vacation at least to this extent, to make it a matter to be dealt with within 14 days of the start of next term

127. MR JUSTICE HARRISON:I have no objection to that. Do you, Mr Straker?

 

128. MR STRAKER:My Lord, I have no objection at all. Cornwall County Council plainly know the point which has been taken and it is a matter of form, I suspect, rather than substance, as your Lordship indicates, that it ought to be met.

129. MR JUSTICE HARRISON:Yes. Is it something which ought to be seen by me and approved by me?

130. MR STRAKER:My Lord, I suspect it is. The only point I would make as far as timescale is concerned, and I am not resiling from what my learned friend described as my generosity, is this, that now, of course, the procedure for an appeal is rather speedier than once was the case and I believe that the notice has to be put in within 14 days. It may therefore be more satisfactory in terms of the timing if my learned friend were able to do the amendment within that period of time and then your Lordship could approve it and matters can then be tidied up, so to speak, as a matter of formality by the time we reach the documentation being lodged with the Court of Appeal.

131. MR JUSTICE HARRISON: I think I ought to—

132. MR McCRACKEN:Your Lordships' initial suggestion of 7 days are it seems, with the benefit of further reflection by Mr Straker, to be more appropriate than the time that I had suggested.

133. MR JUSTICE HARRISON: So if I say the applicant is to submit the amendments to the Form 86A for my approval within 7 days.

134. MR McCRACKEN: My Lord, yes.

135. MR JUSTICE HARRISON:Yes, because there is a further complication that beyond that period I will not be in London for 6 weeks, so it should be done within 7 days, for their convenience as well, I think.

136. MR McCRACKEN:My Lord, yes.

137. MR STRAKER:I am much obliged, my Lord.

138. MR JUSTICE HARRISON:Thank you both very much.