*615 R. (on the application of Friends of the Earth) v Environment Agency

Queen's Bench Division (Administrative Court)

11 December 2003

[2003] EWHC 3193 (Admin)

[2004] Env. L.R. 31

(Sullivan J.):

December 11, 2003

H1 *Nature conservation—judicial review—facility for dismantling ships containing toxic waste—waste management licence—screening decision that proposed modification to licence would not significantly affect neighbouring Special Area of Conservation protected under Directive 92/43 and implementing regulations—screening decision made on incorrect information—whether screening decision required where application for modification and not a new licence—whether modification of waste management licence a "plan" or "project" within the meaning of the Conservation (Natural Habitats &c.) Regulations 1994 and/or the Directive*

H2 The claimant ("FoE") sought to challenge a decision by the defendant ("EA") to grant a modification to a waste management licence, under Pt II of the Environmental Protection Act 1990, required for the dismantling of ships containing various toxic waste substances at Hartlepool. In a preliminary hearing the Administrative Court was asked by the interested party ("AUK") to consider whether EA had been correct to concede that it had erred in law in permitting the modifications, contending that EA's decision to make the concession be should quashed. The dismantling activities were intended to be undertaken at a site which was close to the Seal Sands wildlife site, which was protected as a Site of Special Scientific Interest, and a Special Area of Conservation. Thus the Seal Sands site was subject to protection under the Habitats Directive 92/43 and the Conservation (Natural Habitats &c.) Regulations 1994 (SI 1994/2716) (as amended). Article 6 of the Habitats Directive provided that:

> "(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities *616 shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

H3 Regulation 48 of the 1994 Regulations provided that:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

> Shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives."

H4 EA had given a screening decision under the 1994 Regulations that the proposed modifications, which would allow an increase in the total material processed within a dry dock from 24,500 tonnes to 200,000 tonnes, would not have a significant effect on the Seal Sands SAC. This screening exercise was based on dismantling taking place in a dry dock, and not a wet

dock, although there was nothing in the licence or conditions in relation to this. In fact, the licence contemplated dismantling in wet or dry dock facilities, and AUK reserved the right to carry out wet dock procedures if planning approval could not be secured for the necessary dry dock facilities. In correspondence with FoE, EA conceded that the dismantling could be carried out consistently with the modified licence in ways which had not been "screened" for the purposes of the Habitats Directive. Accordingly it consented to FoE's application to quash the modification decision. The preliminary issue was therefore whether EA had been correct to make this concession.

H5 AUK contended that EA had not been required to undertake a screening exercise at all as the application it had submitted was for a modification, not a new licence, which AUK submitted did not fall within reg.48 as it was not a "plan or project". FoE contended that a modification fell within reg.48 and that, in any event, the provisions of the Habitats Directive required assessment for modifications and were directly effective against EA.

H6 **Held:**

H7 (1) Regulation 3(4) of the 1994 Regulations was a catch all provision to ensure that no plan or project slipped through the net without its environmental effect being properly considered. It required EA to have regard to the requirements of the Directive in so far as they were relevant when exercising any of its functions, including the determination of applications for modification of licence conditions. In addition, modification to an existing licence could be a plan or project within Art.6(3) of the Directive. Whether this was the case was a matter of degree; EA's decision being subject to judicial review on ordinary *Wednesbury* ****617*** principles. The words 'plan or project' were not defined but should be given a broad interpretation, otherwise a licence might be granted in relation to an innocuous operation but later modified to a completely different operation with a different environmental impact, which would provide serious gap in the legislation. In any event, EA's decision had been flawed as it had been based on the false assumption that there was no possibility of the operation being carried out in wet dock conditions.

H8 **Legislation referred to:**

Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716), regs 2, 3, 6, 47, 48 and 54–85

Directive 79/409 on the Conservation of Wild Birds, Art.4

Directive 85/337 on Environmental Assessment

Directive 92/43 on the Conservation of Natural Habitats and Wild Flora and Fauna, Arts 3, 4, 6 and 7

Environment Act 1995

H9 **Cases referred to:**

Aannamaersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland Case C-72/95 [1996] E.C.R. I-5403; [1997] 3 C.M.L.R. 1; [1997] Env. L.R. 265

Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 1012; [2002] Env. L.R. 14

Commission of the European Communities v French Republic Case C-256/98 [2000] E.C.R. I-2487

Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89 [1990] E.C.R. I-4135; [1993] B.C.C. 421; [1992] 1 C.M.L.R. 305

R. v North Yorkshire CC Ex p. Brown [2000] 1 A.C. 397; [1999] Env. L.R. 623

Secretary of State for Education and Science v Thameside MBC [1977] A.C. 1014

World Wildlife Fund (WWF) v Autonome Provinz Bozen C-435/97 [1999] E.C.R. I-5613; [2000] 1 C.M.L.R. 149; [2000] Env. L.R. DG14

H10 **Representation**

Dr D. Wolfe, instructed by Friends of the Earth Ltd, appeared on behalf of the claimant.

Mr J. Howell Q.C. and Ms D. Rose, instructed by the Environment Agency, appeared on behalf of the respondent.

Mr R. Martin Q.C., Mr I. Pennock and Ms C. Patry, instructed by Ward Hadaway, appeared on behalf of the interested parties.

JUDGMENT

SULLIVAN J.:

***618**

Factual background

1 This is the determination of a preliminary issue that Maurice Kay J. ordered to be heard in a claim for judicial review brought by Friends of the Earth Ltd (“FoE”) against The Environment Agency (“the Agency”).

2 In its claim for judicial review FoE challenges the Agency's modification on September 30, 2003 of the conditions attached to a waste management licence originally issued to Able UK Ltd (“Able”) on October 31, 1997 (“the licence”). The licence permits Able to deposit, keep and treat controlled waste at the Teeside Environmental Reclamation and Recycling Centre (“TERRC”) in Hartlepool.

3 The licence was subject to a number of conditions. These included conditions relating to the types of waste that could be deposited at the site and the total quantity of waste that could be deposited at the site. The licence conditions were modified on June 18, 1999 and October 21, 2002. As modified in 1999 and 2002, condition 2.1 of the licence provided:

> “The only types of waste deposited at the site shall be:
>
> (A) Scrap metal.
>
> (B) Plant equipment and machinery including offshore structures.
>
> (C) Batteries, coolants, oils, fuels other chemicals or asbestos which are received as an integral part of wastes falling into (a) or (b) above.
>
> (D) Dredging spoils.

(E) Drilling muds/cuttings.

(F) Fridges and freezers containing ozone depleting substances."

The condition also contained a definition of what was included within the term "scrap metal".

4 Condition 2.4 provided:

> "The total quantity of waste deposited annually at the site shall not exceed 24,500 tonnes."

5 Conditions 1.2 and 1.3 required that subject to the conditions which would prevail in the event of any conflict, the site had to be operated in accordance with an approved working plan. The working plan had to be kept under review. An amended working plan was approved by the Agency in writing in 1999.

6 The notice of modification, dated September 30, 2003, modified condition 2.1 by adding "ships/vessels" to the types of waste that could be deposited at the site and modified condition 2.4 by increasing the total quantity of waste that could be deposited annually at the site from 24,500 tonnes to 200,000 tonnes.

7 TERRC is a large site occupying an area of 51ha on the north bank of the Seaton Channel which runs into the River Tees at Teesmouth, a short distance to the east. The site is located within a heavily industrialised area, between a power station to the east and a chemical plant to the west, southwest. To the north there is a railway line and an access to the A178 Tees Road. The southern boundary fronts onto the Seaton Channel.

***619**

8 The principal feature within the site is a 10ha flooded basin, formerly a dry dock. The basin is open to the Seaton Channel, the gates which formerly enclosed it were dislodged and damaged in a storm in about 1989, before Able acquired the site.

9 TERRC is located near to the Teesmouth and Cleveland Coast Special Protection Area (the SPA). The SPA has been classified by the Secretary of State under Art.4 of Council Directive 79/409 on the Conservation of Wild Birds (the Birds Directive). The SPA designation describes it as:

> "A wetland of international importance comprising intertidal sand and mudflats, rocky shore, saltmarsh, freshwater marsh and sand dunes. Large numbers of waterbirds feed and roost on the site in winter and during passage periods; in summer little terns breed on the sandy beaches within the site."

Part of the SPA, known as Seal Sands, is on the south side of the Seaton Channel, directly opposite the entrance to the flooded basin.

10 On July 31, 2003 Able made an application to the Agency for the modification of the licence conditions. The relevant provisions of the Environmental Protection Act 1990 (the Act) as amended by, in particular, the Environment Act 1995, are not in issue. It is a criminal offence to deposit, treat, keep or dispose of controlled waste, save in accordance with the terms of a waste management licence issued by the Agency (see ss.33, 35 and 36 of the Act). A waste management licence may be granted subject to such conditions as the Agency considers appropriate (see subs.36.3).

11 While the Agency has power to revoke a licence in certain circumstances (s.38) the Act does not give it power to modify the terms of the licence once granted. It does have power to modify the conditions imposed upon the licence, either upon its own initiative or on application of the licence holder (see s.37). If the licence holder is dissatisfied of the terms of licence itself (as opposed to the conditions) he may, of course, apply for a new licence. If an application for a licence, or for a modification of licence conditions, is refused by the Agency an appeal may be made to the Secretary of State (see s.43).

12 Able applied to have the licence conditions modified to include reference to ships/vessels and

to increase the total quantity of waste that could be deposited at the site each year, because it wished to dismantle and recycle a number of ships forming part of the United States' National Defence Reserve Fleet (NDRF). There are in excess of 150 obsolete ships in the NDRF which is under the control of the United States Maritime Administration (MARAD).

13 MARAD has been attempting to dispose of the ships in the NDRF for some years. It has obtained consent from the United States Environmental Protection Agency for 13 ships in the NDRF to be exported to the United Kingdom so that they may be dismantled and recycled by Able at the TERRC. Following modification of the licence conditions on September 30, the first four ships set off on their voyages, under tow, from the United States across the Atlantic to the United Kingdom. The remaining nine ships are prevented from leaving the United States ***620*** by (the equivalent of) an interim injunction granted by a court in the United States.

14 On October 3, 2003 FoE wrote a letter before claim to the Agency contending that the modification of the licence conditions on September 30 was unlawful on a number of grounds. By the time the Agency responded, on October 31, the arrival of the first two ships at the TERRC was imminent. The other two ships were due to arrive shortly thereafter. All four ships are now moored in the flooded basin, but Able may not carry out any work upon them (other than work that is necessary to make and keep them safe) as the result of orders made by Maurice Kay J. on November 5, in two other claims for judicial review, brought by local residents against the Agency on the one hand and Hartlepool Borough Council, the local planning authority, on the other.

15 The ships have been referred to as the “ghost fleet” or the “toxic fleet.” FoE contends that by reason of their very poor condition, scrapping them at the TERRC would pose a significant environmental threat to the nearby SPA. Able strongly disputes this description of the ships and contends that their condition is no different to that of many ships currently sailing on the high seas. It maintains that they will be recycled at the TERRC in an “environmentally friendly” way, under the most stringent controls, and that these operations will therefore pose no threat to the SPA.

16 It is not the function of this court to resolve that dispute between FoE and Able. Whether Able's proposals for dealing with the ships are environmentally acceptable is a matter for the Agency to decide. Provided it considers that issue in a legally acceptable manner its decision on the environmental merits (or demerits) of Able's proposals is final, subject to Able's right to appeal to the Secretary of State under s.43.

17 FoE's challenge in these proceedings is therefore concerned with the manner in which the Agency took the decision that the licence conditions should be modified and, in particular, with the manner in which the Agency dealt with the implications of Able's proposals for the SPA.

18 Council Directive 92/43 on the Conservation of Natural Habitats and of Wild Flora and Fauna (the Habitats Directive) recognised that there was a need to create, “a coherent European ecological network.” Article 3(1) accordingly provided that such a network should be established under the title “Natura 2000”, comprising Special Areas of Conservation (SACs) designated in accordance with Art.4 of the Habitats Directive and SPAs classified under the Birds Directive. Special protection is given to SACs by Art.6 of the Habitats Directive.

19 Articles 6(3) and 6(4) which apply to SPAs (see Art.7) provide that:

> “(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities ***621*** shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> “(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic

> nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

20 The Conservation (Natural Habitats, &c.) Regulations 1994 as amended (the Regulations) make provision for the purpose of implementing for Great Britain the Habitats Directive (see reg.3(1)). Regulation 3(4) provides:

> "Without prejudice to the preceding provisions, every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

21 The Agency is a "competent authority" for the purposes of reg.3(4) (see reg.2(1) and reg.6). Regulation 2(2) provides:

> "Unless the context otherwise requires, expressions used in these Regulations and in the Habitats Directive have the same meaning as in that Directive."

22 Regulation 48 contains general provisions for the protection of "European sites" (which include SPAs) (see regs 2(1) and 10(1)(d)).

23 Regulation 48(1) provides:

> "A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and.

(b) is not directly connected with or necessary to the management of the site,

> Shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives."

24 Regulation 48 is contained within Pt IV of the Regulations which deals with the adaptation of planning and other controls. Part IV is introduced by reg.47 which provides, in part:

> "47
>
> (1) The requirements of—

(a) Regulations 48 and 49 (requirement to consider effect on European sites) … apply subject to and in accordance with the provisions of regulations 54 to 85, in relation to the matters specified in those provisions."

***622**

25 Regulations 54 to 85 deal with a variety of permissions, orders, consents, authorisations, licences and permits granted, made or issued under different enactments.

26 Regulation 84 is concerned with licences under Pt II of the Act and provides so far as relevant:

> "84
>
> (1) Regulations 48 and 49 (requirement to consider effect on European site) apply in relation to—

(a) the granting of a waste management licence under Part II of the Environmental Protection Act

1990 …

> (2) Where in such a case the competent authority consider that any adverse effects of the plan or project on the integrity of a European site would be avoided by making any licence subject to conditions, they may grant a licence, or cause a licence to be granted, or, as the case may be, pass a resolution, subject to those conditions".

27 Because of the proximity of the TERRC to the SPA the Agency considered that Able's proposals to dismantle and recycle ships there, on the scale proposed, could potentially have an effect on the SPA. One of the Agency's bio-diversity technical officers, Mr Peters, was responsible for deciding, on its behalf, whether Able's proposals were likely to have a significant effect on the SPA.

28 It is convenient to describe the exercise carried out by Mr Peters as a "screening" rather than an "assessment". "Screening" is the term used in the European Commission's methodological guidance relating to the Assessment of Plans and Projects Significantly Affecting Natura 2000 sites. If, as a result of the screening, Mr Peters had concluded that a significant effect on the SPA was likely, then an "appropriate assessment" of a much more detailed kind would have been required.

29 An earlier screening had been carried out by another member of the Agency's staff. FoE had written to the Agency contending that this earlier screening was flawed because it had looked at the implications of Able's proposals in isolation and not in combination with other plans or projects. The Agency agreed to reconsider the matter.

30 Mr Peters became involved on September 22, 2003. He asked Able's consultants, RPS, for further information about noise, dust and toxic substances. RPS prepared a report, "Environmental Information Relating to Amending the Waste Management Licence" (the Report). The Report was received by the Agency on or about September 27. The Report considered the implications of Able's proposals for the SPA exclusively upon the basis that a bund or cofferdam would be constructed, the dry dock would be brought back into working condition and any dismantling of ships would take place within the dry dock. One extract from the Report will suffice. Under the heading "Water Pollution" the Report said this:

> "Able (UK) Limited is proposing to fit the dry dock with steel gates which will become a permanent feature of the facility. At the moment this ***623*** improvement is planned for the summer of 2004 and an alternative temporary procedure is necessary to permit work in the dock before then.
>
> The interim procedure will be that marine structures (vessels) will be towed into the flooded dry dock two or three units at a time and secured within the dock. Such vessels will have been surveyed previously to ensure there are no leakages. Entry of two or three units into the dock will take about 2–2½ hours upon completion of which an oil boom will be placed across the mouth of the dock. Should there be any leakage of hydrocarbons, these will be removed and the source identified and stopped up. This procedure will be repeated until all units have been placed and secured in the dock. A bund comprising 250,000 tonnes of stone will be constructed across the dock entrance and the dock pumped dry in accordance [with] Able's Working Plan, an extract of which is reproduced here."

31 In the light of that information and further discussions with Able and other bodies, including the local planning authority and English Nature, Mr Peters recorded his conclusions on an agency form, "Appendix 11, Form HRO1: Pro forma For New Applications Within Stage 2 Criteria." The Agency's internal guidance on implementing the requirements of the Habitats Directive describes a four stage approach.

32 Stage 1 simply asks whether the proposal is within a relevant distance of a European site. If it is, stage 2, described as "a coarse risk assessment" considers the question whether any activities at, or emissions from, the waste activity, could have an effect on the protected species/habitat which is neither negligible nor inconsequential. If the answer to this question is in the affirmative a more detailed assessment of the risks ("an appropriate assessment" for the purposes of reg.48) is carried out in stage 3.

33 The guidance states in respect of stage 2:

> "Stage 2—assessing likely significant effect … this simple risk assessment … should be recorded using Appendix 11 to ensure there is an audit trail of decisions. The assessment should be based on realistic worse case scenarios, data and assumptions."

34 Having carried out the stage 2 screening exercise Mr Peters concluded, on behalf of the Agency, that Able's proposals "will not have a significant effect, either alone or in combination upon the SPA."

35 It is unnecessary to set out the reasoning contained in the form Appendix 11, dated September 30, because Able does not now dispute that Mr Peters conducted the screening upon the basis of the following assumptions:

(a) ships would be towed into the dock and secured;

(b) a boom would be installed to prevent transfer of oil and chemicals from the dock to the estuary;

(c) construction of a cofferdam and bund would begin once the first batch of ships were secure;

(d) dismantling work was to be carried out in a dry dock environment, following the construction of the bund/cofferdam; ***624***

(e) all materials that were not recyclable would be sent to landfill;

(f) permanent dock gates would replace the temporary structure proposed but that until that was possible further consignments would enter the dock by removal of the central section; and

(g) the central structure would then be reinstalled.

36 In his witness statement Mr Peters confirms that:

> "… in reaching its decision, the Agency assessed the project solely on the assumption that the dismantling of any ships would take place in dry dock conditions following the construction of a cofferdam. Further, in considering the potential effects of dry dock working the Agency considered the possible release of toxic substances during de-watering, and took into account the use of an oil boom to restrict the movement of any substances that could be released before dismantling operations commenced. The Agency did not assess the likely significant effect of dismantling the ships in a wet dock with no bund in place, or of matters proceeding without an oil boom."

37 It is also unnecessary to set out the details of the licence, and the conditions as modified in 1999, 2002 and on September 30, 2003, or the terms of the working plan which was approved in 1997 and amended with the Agency's written approval in 1999, since it is common ground that there is nothing in the licence, the conditions, or the working plan which requires Able to dismantle the ships in dry dock conditions, or to construct a cofferdam.

38 Indeed, the licence conditions and the approved working plan specifically refer to both wet and dry dock operations. Condition 5.11 in the licence requires measures to be taken, "during the dismantling of structures in the wet dock … to contain any debris which may enter the dock as a

result of the dismantling operation." It does not require the provision of an oil boom to restrict the movement of any substances that could be released during de-watering operations, before dismantling operations are commenced.

39 Mr Stephenson, the Chairman and Chief Executive of Able, has made it clear in his witness statement that although Able still intends to decommission the ships in dry dock conditions, if, because of planning uncertainties (some of which may be resolved in a hearing next week of the local residents' claim for judicial review against the local planning authority and Able) it is unable to do so, Able reserves the right to carry out the wet dock procedures that are described in the working plan.

40 Able had earlier indicated such an intention to the Agency at a meeting at about 1.00pm on September 30, but Mr Peters explains that he, "did not pick up on it, and did not conduct any assessment of the effect such activity might have on the European site. I did not give any consideration to the question as to whether Able's licence and working plan would permit this," before signing off the Appendix 11 form later on that day.

41 It was against this background that the Agency wrote to FoE on October 31. FoE had contended that in considering Able's application for modification of ***625*** the licence conditions the Agency was bound to comply with reg.48 of the Regulations. The Agency disputed this saying:

> "As an application for the modification of the conditions of an existing licence, Able's application did not require the Agency to comply with regulation 48 of the Conservation (Natural Habitats et cetera) Regulations 1994 ('the Habitats Regulations'). By regulation 47, the requirements of regulation 48 apply subject to and in accordance with the provisions of regulations 54 to 85, in relation to the matters specified in those provisions. By regulation 84, the grant (but not modification) of a waste management licence is specified as a matter to which regulation 48 applies. Nevertheless, it is accepted that the Agency was required (by virtue of regulation 3(4) of the Habitats Regulations) to have regard in the exercise of any of its functions to the requirements of Directive 92/43/EEC as amended ('the Habitats Directive') so far as those requirements may be affected by the exercise of those functions. It is accepted, therefore, that the Agency was required to have regard to the requirements of Article 6(3) of the Habitats Directive insofar as the requirements of that provision would be affected by its decision on Able's application.
>
> The Agency considered whether Able's proposal was (or formed part of) a project which was likely to have a significant effect on a European site (alone or in combination with other plans or projects). The only European site on which Able's proposal might conceivably have any effect is the Teesmouth and Cleveland Coast Special Protection Area ('the European site'). The ornithological designation features for Teesmouth and Cleveland Coast Ramsar site are virtually identical to those of the European site, hence no separate assessment was deemed necessary within the Appendix 11 Form.
>
> The Agency did not consider that Able's project (either alone or in combination with other projects or plans) was likely to have a significant effect on the European site. On the contrary, on 30th September 2003 the Agency concluded that Able's proposal was not likely to have any significant effect (either alone or in combination with other projects or plans) on the European site."

42 The Agency's letter then proceeded to reject a number of arguments that had been advanced by FoE. But the letter continued:

> "However, the Agency recognises that there are discrepancies between the basis of the assessment that it made for the purpose of the Habitats Directive and the activities that are permitted or required under the WML as modified. In particular the Agency's conclusion that Able's project was not likely to have any significant effect on the European site was based on the understanding that ships would be dismantled at the TERRC in 'dry dock' conditions following construction of the cofferdam, as Able envisaged in accordance with its FEPA [Food and Environment Protection Act 1985]

> application made on 26th September 2003. Unfortunately, it has become clear since 30th September 2003 that Hartlepool Borough Council take ***626*** the view, disputed by Able, that Able does not have extant planning permission for the construction of the cofferdam. Able has indicated that, if it is unable to resolve this question in its favour, it may dismantle ships in "wet dock" conditions and on the ramp. Dismantling structures in such a manner is already permitted by Able's licence and working plan, but the potential effect of dismantling ships in this manner on the European site was not considered by the Agency as part of its assessment for the purpose of the Habitats Directive. The Agency also assumed for the purpose of that assessment that a boom would be provided that is not required under the terms of the licence as modified. The Agency now considers, that in any event, its decision to modify the WML cannot stand, since the project of dismantling ships at TERRC on the scale proposed could be carried out consistently with the WML as modified, in ways that have not been assessed for the purpose of the Habitats Directive. The Agency would not seek to resist an application to quash the modification to the WML if any such application was made."

43 When FoE's application for permission to apply for judicial review came before the court on November 5, the Agency was prepared to agree to a consent order quashing the modification of licence conditions dated September 30. Able, which had been served as an interested party, did not agree to the making of such an order and contended that the modification of the licence conditions was not unlawful. Maurice Kay J. therefore granted FoE permission to apply for judicial review of the modification and ordered that there should be a hearing of the following preliminary issue:

> "Whether the Defendant is correct to concede that the Decision cannot stand because the project of dismantling ships at the TERRC on the scale proposed by Able UK Limited could be carried out consistently with the waste management licence as modified in ways that have not been assessed for the purpose of Directive 92/43/EEC as amended."

The issue narrows

44 In Mr Stephenson's witness statement, and in a skeleton argument submitted on behalf of Able, it was contended that the Agency had, either in September 2003 or at some earlier time, carried out a screening exercise and/or a reg.48 assessment, based on both wet and dry dock working. Further evidence was put in on behalf of the Agency, and, having considered that evidence, Mr Martin Q.C. stated on behalf of Able, at the beginning of the hearing of the preliminary issue, that those contentions were no longer being advanced. Able's case was not that the Agency had considered both wet and dry dock working when carrying out the screening exercise, but that the Agency was not required to carry out such an exercise at all, so that the Agency's failure to consider the implications of wet dock working was of no consequence.

45 It is trite law that a public body, when exercising a statutory function, must take into account all relevant factors, exclude irrelevant factors from consideration, ***627*** ask itself the right question and take reasonable steps to acquaint itself with the relevant information to enable it to answer the question correctly. (See Secretary of State for Education and Science v Thameside MBC [1977] A.C. 1014, per Lord Diplock at p.1065).

46 It is common ground that *if* the Agency was required to carry out a screening exercise before deciding whether to modify the conditions on the licence, the exercise carried out by Mr Peters, as described in Appendix 11 and in his witness statement, was carried out on the basis of a false premise (see above). In consequence, the Agency's decision is legally flawed whether the error is treated as a failure to have regard to material considerations (that the licence conditions and working plan did not prevent dismantling in wet dock conditions, and if there was to be de-watering, did not require the provision of an oil boom during de-watering before any dismantling began); or a failure to ask itself the right questions (what would be the environmental implications of wet dock working or de-watering without an oil boom?).

The issue is further narrowed

47 In its amended grounds and skeleton argument FoE contended that reg.48 applies to both an application for a new waste management licence and an application to modify the conditions on a licence. It submits that reg.47, properly understood, simply makes specific additional provision in relation to the application of reg.48 to the particular situations it covers (for the purposes of the present case, applications for a waste management licence (see reg.84)).

48 Where a particular situation (such as the modification of licence conditions) is not covered by reg.47 that leaves reg.48 applying without more. Such an interpretation of reg.48 is said to be necessary if the Directive is to be properly implemented in the United Kingdom (the reg.48 point). Alternatively, Dr Wolfe submitted, on behalf of FoE, that reg.3(4) had to be given effect as requiring the applicability "without any dilution" of the obligation under Art.6(3) of the Habitats Directive (the reg.3(4) point).

49 In the further alternative FoE submitted that whatever duty was imposed by the Regulations, the Habitats Directive was of direct effect and binding upon the Agency in any event (the Art.6 point). The Agency and Able disputed FoE's reg.48 point. The Agency (but not Able) accepted FoE's Art.6 point if it was wrong in its interpretation of the requirements imposed by reg.3(4), as set out in its letter of October 31, 2003.

50 The Agency further contended that given its other duties relating to the protection of the environment from pollution, contained, principally, in the Environment Act 1995, and even in the absence of such specific duties, it was obliged, as a reasonable waste regulation authority, to have regard to the effect that the proposed modification of licence conditions might have upon the SPA in any event (the general duty point). FoE agreed with this aspect of the Agency's case, Able did not.

51 If the Agency is correct in its approach to the obligations imposed by reg.3(4) the Art.6 point and the general duty point do not arise. I appreciate that FoE's ***628** reg.48 point, if correct, would reduce the ambit of reg.3(4) in cases where the Agency is considering an application for a modification of licence conditions. However, it is unnecessary to resolve the dispute between FoE and the Agency in relation to the reg.48 point for the purpose of answering the preliminary issue, given that the Agency and FoE are agreed that (at the very least from FoE's point of view) the Agency was required, by virtue of reg.3(4), to have regard to the requirements of Art.6(3) of the Directive and was, therefore, required to carry out a screening exercise in order to ascertain whether an "appropriate assessment" was required before the licence conditions could lawfully be modified. I therefore indicated to the parties that I proposed to reach no view on the reg.48 point and, setting it aside, would confine submissions to the reg.3(4) point.

Able's submissions

52 Mr Martin's first submission was that the Agency was not required to undertake a screening exercise because an application to modify the conditions on a waste management licence was not a "plan or project" for the purposes of Art.6(3) of the Habitats Directive. The "plan or project" was the application for a Waste Management Licence. Once that was granted, following an "appropriate assessment", if one was required under reg.48, then the Habitats Directive had no further application.

53 In the present case the "plan or project" was the application for the waste management licence in 1997 to enable the TERRC to be established. The United Kingdom government had chosen to implement the requirements of the Habitats Directive in the manner set out in the Regulations. Regulations 47(1) and 84 treated the granting of a waste management licence, but not the modification of licence conditions, as a "plan or project" requiring "appropriate assessment" under reg.48. The Regulations applied what was, in effect, a "threshold" for the purposes of deciding what kinds of proposal amounted to a "plan or project". Adopting such a threshold approach was permissible (See Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 1012; [2002] J.P.L. 224).

54 Mr Martin acknowledged that an application to modify the conditions on the licence, for example, by altering the types or quantity of waste to be deposited, might be capable of having a

significant effect upon the European site. He submitted that Able's approach to what constituted a “plan or project” would not result in a lacuna in the implementation of the Directive in the United Kingdom, because in those cases where the Agency concluded that what was being applied for was materially different from that which had been approved in the waste management licence, and so amounted to a “plan or project”, it could and should insist upon the applicant proceeding by way of an application for a fresh waste management licence, rather than by way of an application to modify conditions on the licence.

55 Turning to reg.3(4), in his skeleton argument Mr Martin submitted that the word “they” did not refer to the requirements of the Habitats Directive (as ***629*** had been assumed by FoE and the Agency) but to “every competent authority”. Thus reg.3(4) should be read as follows:

> “Without prejudice to the preceding provisions, every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as [the competent authority] may be affected by the exercise of those functions.”

56 In his submissions Mr Martin suggested the addition of a qualification that reg.3(4) applied, “so far as the competent authority may be affected by the exercise, under the Regulations, of those functions.” Thus, properly construed, reg.3(4) did not require the authority to have regard to the requirements of the Habitats Directive because it was not required to carry out an “appropriate assessment” when exercising its functions under any other part of the Regulations (reg.48 not being applicable to applications to modify licence conditions by virtue of the combined effect of regs 47(1) and 84(1)).

Conclusions

57 I deal first with the proper interpretation of reg.3(4). FoE and the Agency are plainly correct in submitting that “they” is a reference to the requirements of the Habitats Directive. Regulation 3(4) requires the Agency, as a competent authority, to have regard to those requirements in so far as they are relevant (“so far as they may be affected”) when exercising any of its functions, including the determination of applications for modification of licence conditions. Even if the meaning of reg.3(4) was uncertain, which it is not, it would be necessary to construe it so as to impose such an obligation upon the Agency in order to give effect to the Directive (Case C-106/89) Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] E.C.R. I - 4135, p.4159, para.8.

58 Able's approach makes a nonsense of reg.3(4): how would the Agency be affected by the exercise of its own functions? Insofar as the addition of the qualification makes the regulation, as construed by Able, any more intelligible, it has the effect of rendering it otiose since the other regulations set out, in some detail, how the requirements of the Directive are to be implemented in the particular circumstances with which they are concerned.

59 In simple terms reg.3(4) is, and is intended to be, a “catch all” provision to ensure that no “plan or project” which is likely to have a significant effect on a Natura 2000 site slips through the net without its environmental implications having first been considered by an appropriate regulatory agency.

60 I do not accept Able's submission that an application to modify the conditions on a Waste Management Licence is not capable of being a “plan or project” for the purposes of Art.6(3). Although regs 47(1), 48 and 84 effectively treat the granting of a Waste Management Licence as an agreement to a “plan or project” (requiring an appropriate assessment), they do not purport to define “plan or project” for the purposes of the Regulations. That the words “plan or project” have an autonomous meaning, independent of the Regulations, is confirmed by reg.2(2) (see above). The words should be given a broad interpretation, consistent ***630*** with the underlying purpose of the Habitats Directive to protect the European ecological network known as Natura 2000 (see the European Court's approach to the interpretation of the Environmental Impact Assessment Directive (85/337) in the Kraaijveld (or “Dutch Dyke”) case (C-72/95), paras [39] and [40]; and WWF v Autonome Provinz Bozen (C-435/97) [2000] 1 C.M.L.R. 149, at pp.172–173, paras [38], [44] and [45]; and the Advocate General's opinion in Commission of the European Communities v French Republic (C-256/98) [2000] E.C.R, p.I-02487).

61 The last of these cases was concerned with the meaning of “plan” in Art.6(3) of the Habitats Directive, but there is no reason why the same approach should not be adopted to the meaning of “project.” The Advocate General said this in para.[33] of his opinion:

> “In the context of Article 6(3), the term plan must in my view be interpreted extensively. The sites likely to be affected by such plans are, by definition, sites of Community importance, which benefit from the protection regime established in accordance with Articles 6(1) and (2); the adoption of a narrow interpretation of the term plan would be contrary to both the wording of Article 6(3) ([any] plan or project), and the conservation objectives which the designation of SACs seeks to pursue. As the possible future development of a site depends primarily on the assessment, it seems to me that the obligation ratione materiae to carry out a site assessment must therefore cover all development activities with the exception of those which are unlikely to have any significant effect, either individually or in combination with other development activities, on the site's conservation objectives. This is consistent with the principle of Community law that exceptions to the general rule (here, development activities which do not require a site assessment) are to be interpreted restrictively.”

62 For much the same reasons a similarly broad approach was adopted by the House of Lords in R. v North Yorkshire CC Ex p. Brown [2000] 1 A.C. 397, when it considered the meaning of “development consent” in EEC Directive 85/337 (see the speech of Lord Hoffmann at pp.404 to 405).

63 Berkeley is clearly distinguishable because Directive 85/337 (as amended) specifically authorises Member States to determine whether Annex 2 projects shall be made subject to an environmental impact assessment by reference to either a case by case examination, “or thresholds or criteria set by the Member State.” As Schiemann L.J. explained in para.[28], having considered the approach of the ECJ in three cases, including the Bozen and Kraaijveld cases referred to (above):

> “The criteria and thresholds set by the Member State must be such that the excluded projects could when viewed as a whole be regarded as not ‘likely to have significant effects on the environment’.”

64 Thus even if the Habitats Directive did authorise the setting of a threshold, or thresholds, for the purposes of determining whether a proposal amounted to a “plan or project” for the purposes of Art.6(3), the United Kingdom could not ***631*** have adopted a threshold which excluded all applications for modification of conditions on waste management licences from the definition of a “plan or project” unless it had been satisfied that, viewed as a class, such applications would not be likely to have a significant effect upon any European site within the United Kingdom. There is nothing to suggest that the United Kingdom government was so satisfied or that it could reasonably have been so satisfied, given the very significant changes to the operation of a licensed site that are capable of being effected by modifying licence conditions.

65 Take this case as an example: condition 2.4 limits the total quantity of waste that may be deposited annually to 24,500 tonnes. It was proposed to increase this figure to 200,000 tonnes. If 200,000 tonnes, why not 245,000 tonnes, a ten fold increase? Why should it have made any difference if the original figure in condition 2.1 had been 2,000 tonnes, thus producing a hundred fold increase? The list of the types of waste that may be deposited at the site might have been limited by condition 2.1 to, for example, scrap metal only. An application could then have been made to vary condition 2.1 to include offshore structures and ships/vessels, enabling a wholly different business on a vastly increased scale to be established.

66 Considering the matter more generally, a Waste Management Licence might be granted for the use of a site for depositing, keeping and treating controlled waste, subject to conditions restricting the types of waste to those that are (relatively) innocuous, and the quantities to be deposited to a very small amount. An application to modify the licence conditions, so as to permit the deposit, keeping and treating of vastly increased quantities of far more noxious wastes (in effect a completely different business from the “low key” business originally permitted by the licence with the original conditions, and with very different environmental implications) would not

be dealt with as if it was a “plan or project” for the purposes of Art.6(3) if Able was correct in its submissions. Such an approach to the meaning of “plan or project” would leave a serious lacuna in the manner in which the Directive has been implemented in the United Kingdom.

67 During the course of his submissions Mr Martin recognised this difficulty, but his suggested solution would place Able in an even greater difficulty. Accepting that some applications for modification of licence conditions may amount, in effect, to a “plan or project”, he submitted that in such a case where the Agency considers that the application for modification of conditions is in substance a “plan or project” materially different from that which was approved in the licence, its proper course would be to decline to deal with the “plan or project” as an application for modification of the licence conditions and to insist upon the applicant making an application for a fresh licence.

68 There is no support for such an approach in either the Act or the Regulations. It is unnecessary once it is accepted that an application to modify licence conditions may fall within the meaning of any “plan or project” in Art.6(3). Not every application to modify licence conditions will amount to a “plan or project”. Whether the proposed changes to the existing licensed activities are of such a scale, character or significance as to amount to a “plan or project” will be a matter for the Agency to determine. Its decision on the facts, that a particular proposal is or is ***632*** not reasonably to be described as a “plan or project”, for the purposes of Art.6(3), will be susceptible to challenge by way of judicial review on normal *Wednesbury* principles. If the Agency's decision results in a refusal of an application to modify licence conditions then the applicant may appeal to the Secretary of State.

69 Moreover, if the submissions advanced on behalf of Able were correct, the Agency's decision to modify the licence conditions would have to be quashed in any event. It is clear that the Agency considered that Able's proposals were properly described as a “plan or project” for the purposes of Art.6(3), hence its instruction to Mr Peters to carry out a screening exercise to ascertain, on its behalf, whether the “plan or project” was likely to have a significant effect on the SPA. Once it is accepted that some applications for modification of licence conditions may amount to a “plan or project” for the purposes of Art.6, there has been no challenge to the Agency's decision that on the facts, set out above, these proposals by Able were properly described as a “plan or project”. Looking simply at the proposed increase in the quantity of waste permitted to be deposited annually at the TERRC, it is plain that the Agency was fully entitled to take that view.

70 The consequence of Able's submission would therefore be that its own application to modify the licence conditions would have had to have been refused by the Agency, because the Agency should have insisted upon Able making an application for a new licence instead.

71 For all of these reasons I answer the question posed in the preliminary issue in the affirmative. The Agency was right to concede that the modification of licence conditions cannot stand. The modification notice must be quashed. I will consider whether there should be a stay of the quashing order, to give Able an opportunity to regularise matters, so far as possible, after I have determined the local residents application for judicial review against the local planning authority next week.

72 Before leaving this case I should mention one aspect of the licence that has caused me some concern. In addition to limiting the total quantity of waste to be *deposited* annually at the site in condition 2.4, the licence itself specified the maximum quantities and types of waste to be disposed of. Maximum quantity which may be *received* at the site shall not exceed 24,500-tonnes per annum (my emphasis). The implications of this limitation being included in the licence itself were not relevant for the purpose of determining the preliminary issue, although they have been mentioned in correspondence between Able and the Agency.

73 Having heard no submissions on the point I express no conclusion, but merely pose the following questions which should be addressed before Able makes any further application under the Act to the Agency: does the Agency have power to modify the terms (as opposed to the conditions) of a licence; and if not, would it be lawful for the Agency to impose a condition which permitted more than 24,500 tonnes of waste per annum to be received at the TERRC? I raise these questions because I was told, during the course of submissions, that the combined weight of the four ships currently in the basin exceeds 24,500 tonnes.

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