with the utmost expedition. The parties cannot dispense with this requirement and it is quite unsafe for an applicant to assume that slow progress of a leave application will not lead to trouble simply because the other side raises no objection.

Having weighed all these matters up, having taken into account the prejudice to the tenant if shut out from appealing and having taken into account the previous warnings to litigants about delay given in the authorities I have cited, as well as in *Mustill & Boyd on Commercial Arbitration*, I have come to the conclusion that this is a case where the court should in its discretion strike out the tenant's entire proceedings in the High Court under the inherent jurisdiction. I therefore order that the originating notice of motion herein dated 17 June 1992 be struck out for want of prosecution.

Order accordingly.

Solicitors: S. J. Berwin & Co.; Treasury Solicitor.

S. W.

[COURT OF APPEAL]

*REGINA v. INSPECTORATE OF POLLUTION AND ANOTHER, *Ex parte* GREENPEACE LTD.

1993 Sept. 1, 3 Glidewell, Scott and Evans L.JJ.

Judicial Review—Interim relief—Stay of proceedings—Minister's decision—Leave to apply for judicial review—Applicant seeking stay of decision under challenge pending determination of application for judicial review—Effect of stay preventing action by third party not party to proceedings—Principles applicable to grant of relief

In proceedings for judicial review, when considering an application for interlocutory relief, by way of a stay of a decision permitting executive action by a third party who is not a party to the proceedings, the court should apply the same principles, in the exercise of its discretion, as it applies when the third party has been made a party to the proceedings and the applicant seeks an interlocutory injunction against that party (post, pp. 573D–F, 576F–H, 577E).

Where therefore the applicant, having been granted leave to apply for judicial review of the decision of the responsible government bodies to issue to a third party a variation of an existing authorisation to operate premises reprocessing nuclear fuel, appealed from the refusal of a stay of the varied authorisations pending the full hearing of the application for judicial review:—

Held, dismissing the appeal, that, since the evidence before the judge was that the variation would allow for discharge of

radioactive material within authorised limits and the applicant had given no cross-undertaking in damages to compensate the third party for any financial loss it might suffer, the judge applied the correct principles on the balance of convenience to refuse the stay; and that (Evans L.J. dissenting) additional evidence available since the hearing of the application was not sufficient to render the refusal invalid (post, pp. 573H–574A, G–H, 576B–C, H–577A, C–D).

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 H.L.(E.) and dictum of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, 220–221, H.L.(E.) applied.

Decision of Brooke J. affirmed.

The following cases are referred to in the judgments:

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 1 All E.R. 1042, H.L.(E.)

Reg. v. Secretary of State for Education and Science, Ex parte Avon County Council [1991] 1 Q.B. 558; [1991] 2 W.L.R. 702; [1991] 1 All E.R. 282, C.A.

No additional cases were cited in argument.

The following cases, although not cited in argument, were referred to in the skeleton arguments:

M. v. Home Office [1993] 3 W.L.R. 433; [1993] 3 All E.R. 537, H.L.(E.)

Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd. [1991] 1 W.L.R. 550; [1991] 4 All E.R. 65, P.C.

Reg. v. Secretary of State for the Home Department, Ex parte Muboyayi [1992] 1 Q.B. 244; [1991] 3 W.L.R. 442; [1991] 4 All E.R. 72, C.A.

INTERLOCUTORY APPEAL from Brooke J.

The applicant, Greenpeace Ltd., sought leave to apply for an order of certiorari to quash the decision of the Inspectorate of Pollution and the Minister of Agriculture, Fisheries and Food on 25 August 1993 to grant applications by British Nuclear Fuels Plc. for variations of existing authorisations under the Radioactive Substances Act 1960 to enable that company to discharge radioactive waste from its thermal oxide reprocessing plant at Sellafield, Cumbria, and a stay on the implementation of the variations. At the hearing of the application on 1 September Brooke J. granted the applicant leave, with the date of hearing provisionally set for 14 September, but refused to grant a stay of the variations pending the full hearing.

Pursuant to leave granted by the judge the applicant appealed against that refusal on the grounds, inter alia, that (1) the judge erred in law in refusing to exercise his discretion to grant a stay since he was obliged to balance in respect of a period of only 13 days the speculative loss to the company, the interested party affected by the stay, against the irrevocable damage which would inevitably be caused to the environment by the discharge of radioactivity occasioned by the company's proposed activities; (2) the judge failed to take into account sufficiently or at all the fact that the financial loss which the company claimed it might suffer as a result of a stay being ordered was based on assumptions that it would be granted the main authorisations to run the plant in due course and that such a decision in its favour would be reached shortly after the conclusion of a period of public consultation in October; (3) the judge failed to take into

account sufficiently or at all the factors in favour of granting a stay, namely, that the reprocessing plant would become irradiated with radioactive material, the testing process would result in gaseous radioactive emissions, and that if the testing was in full flow by the time of the hearing for judicial review the object of allowing the judicial review to proceed, namely, protecting the environment from unlawful radioactive emissions, would be wholly or substantially defeated; and (4) there was fresh material relating to the testing procedure to be carried out which was not before the judge which had it been before him might have enabled him to grant a stay, alternatively a limited stay of the implementation of the variations.

The facts are stated in the judgment of Glidewell L.J.

Owen Davies for the applicant.

Kenneth Parker Q.C. for the Inspectorate of Pollution and the Minister of Agriculture, Fisheries and Food.

George Newman Q.C. and *Alan Griffiths* for British Nuclear Fuels Plc.

GLIDEWELL L.J. This is an appeal by the applicant, Greenpeace Ltd. ("Greenpeace"), against a decision of Brooke J. given two days ago on the afternoon of 1 September 1993, when, having granted to Greenpeace leave to apply for judicial review of the decision of the Inspectorate of Pollution and the Ministry of Agriculture, Fisheries and Food ("the departments") to issue a variation of an authorisation under the Radioactive Substances Act 1960 in relation to the premises of British Nuclear Fuels Plc. ("B.N.F.L.") at Sellafield, he then refused an application for a stay of the departments' decision to issue the variation. It is against the refusal to grant a stay that this appeal lies.

Put shortly, the position is that the application concerns the thermal oxide reprocessing plant which has been constructed by B.N.F.L. at Sellafield, formerly Windscale, in Cumbria.

The proposed construction of that plant was the subject of a lengthy inquiry in 1977, after which an unusual statutory process was followed by which planning permission was granted by Parliament for the construction of the plant. Construction then started and was completed in February 1992. So far the plant, which is designed for the reprocessing of nuclear fuel from certain nuclear power stations, has not operated.

There is already in existence an authorisation from the departments to operate the plant. It is, however, apparently common ground that, in the event, a new authorisation will be needed before the plant is operated as B.N.F.L. intend to operate it. Before that stage is reached, however, B.N.F.L. wish to go through a testing programme which will occupy approximately 10 weeks. The evidence before us says that it is the fourth phase of a five-stage testing programme, the fifth stage of which will come after the final authorisation has been given. Rather than applying for a specific authorisation for the testing programme, B.N.F.L. applied to the departments for a modification of the existing authorisation. It was that which was granted to them and which is the subject of the challenge by Greenpeace.

Before Brooke J. neither B.N.F.L., who were not, of course, parties to the proceedings as such, but who had been notified and were present at the hearing, nor the departments objected to leave being granted by the judge. At present, a date has been fixed for the hearing of that application in substance by Otton J. on 14 September. We are told by Mr. Newman for B.N.F.L. that they are still pressing for a slightly earlier date, but we

must work on the basis that the hearing will be on 14 September, with the judgment, presumably, shortly thereafter. While they have not objected to the grant of leave both the departments and B.N.F.L. are, I apprehend, going to argue strenuously that the substantive application should be refused. Indeed, Mr. Newman has now made it clear that they are going to argue that Greenpeace have no locus standi to make this application at all.

Those, however, are not matters that need concern us because leave has been granted. On the application for a stay Brooke J. was in this initial difficulty: first of all, until recently as a general principle stays against departments of the Crown were very rare creatures. The judge, basing himself upon the decision of this court in *Reg. v. Secretary of State for Education and Science, Ex parte Avon County Council* [1991] 1 Q.B. 558, concluded that he did indeed have jurisdiction to grant a stay. The matter has not been canvassed before us and the hearing has proceeded on the basis that the judge did indeed have jurisdiction, had he been minded to grant a stay.

That then, however, raised for the judge this difficult question, on which, so far as I know, there is no authority: where it is sought to stay a decision of a government department, and the effect of granting the stay will be to affect detrimentally the operations of a third party who are not parties to the proceedings, what is the proper approach for the court, from which the stay is sought, to adopt?

If the third parties are made third parties to the proceedings, as they could be, and if an interlocutory injunction were sought against them, then the answer to the question would be clear: the court would then apply the normal principles it applies when an interlocutory injunction is sought, those laid down in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396.

In this case that did not happen because B.N.F.L. were not made parties and no interlocutory injunction has been sought against them. It is quite clear, in my view, that Brooke J. treated this application for a stay, in a sense, as if it were an application for an interlocutory injunction against B.N.F.L., and he applied the principles he would have applied had he been considering such an application. In my judgment, he was entirely right to do so. If a third party would be affected by a decision on an application for a stay but is not made a party to the proceedings as a respondent to an application for an injunction, then, in my view, nevertheless, the same principles should be followed.

The matters which the judge took into account in exercising his jurisdiction on those principles were these: first, a major reason for not granting a stay is that it was the governmental body charged with the task of deciding upon whether this plant could properly and safely be operated which had issued the amendment to the authorisation, that is to say, the Inspectorate of Pollution and the Ministry of Agriculture, Fisheries and Food.

There was evidence before the judge, as there is before us, that the additional radioactive discharge from the plant which will result from this testing process taking place will not be uncountable, but will be very small indeed. Moreover, the evidence is that it will not require any alteration of B.N.F.L.'s existing authorisation to discharge radioactive material either into the air or in liquid form into the sea. Those discharges will be contained within the volumes permitted by those authorisations. Added to

that, the judge had evidence which clearly impressed him that if, as a result of a stay, the commissioning testing process is held up and, in the end, B.N.F.L. are permitted to go ahead with the operation of the reprocessing plant, there is at least a risk—they put it higher than that; they say it is probable—that they will suffer a loss as a result of the delay. They quantify that at approximately £250,000 a day. Presumably they are already suffering loss as a result of not having got the plant into operation since it was completed in February 1992. That is the sort of figure that they are claiming.

It is not, of course, entirely clear that they will necessarily suffer a loss if they are subjected to two weeks' delay, because the process of making a decision as to whether they can go ahead with the operation of the reprocessing plant after the testing procedure is still subject to decisions of ministers which, even if they come down in favour of B.N.F.L., will not necessarily be made in a timescale which would result in a delay for two weeks or so having any effect at all. Nevertheless, there was the evidence and it impressed Brooke J.

On the other hand, he had to balance that against the very real concern of members of Greenpeace. There was evidence, which Greenpeace are presumably going to adduce at the hearing before Otton J. and at any other hearings which are open to them, challenging the scientific evidence which was accepted by the departments. Put very shortly, if I understand it correctly, it is Greenpeace's stance that any additional emission of irradiated material into the atmosphere, is harmful and should not be permitted unless there is some clear benefit. They argue that the reprocessing plant has no beneficial effect. It exists purely to enable B.N.F.L. to make money.

Those are the battle lines and those are the points which the judge had to weigh. As I have said, he weighed them upon normal principles. In the end he made his decision on the basis of the balance of convenience. At the end of his judgment he said:

> "Balancing, as I must, all the arguments that have been brought before me, when I decide how to exercise my discretion to grant a stay, I am bound to say that I am very considerably influenced by the evidence which B.N.F.L. have put before the court as to the likely financial loss they will suffer, and as to Greenpeace's likely inability to pay for that financial loss, if B.N.F.L. can indeed show, about which I express no view at all, that a delay in operating the plant for a fortnight will incur losses of this kind, coupled with the expert view of the Inspectorate and Ministry as to the minimal effect of the level four commissioning of [the reprocessing plant]."

At the hearing before Brooke J. no offer was made by Greenpeace to give an undertaking as to damages suffered by B.N.F.L. should they suffer any; the sort of undertaking that would normally be required if an interlocutory injunction were to be granted. I bear in mind that the judge said that he was influenced by the evidence about Greenpeace's likely inability to pay for that financial loss, but he had earlier remarked that he had not been offered an undertaking. If we were dealing with this matter purely on the material which was before the judge, I would find no difficulty at all. This was essentially a matter for the discretion of the judge. On that basis there would be nothing which would entitle us to say that the judge was clearly wrong or failed to take into account any

A relevant consideration and thus we could not possibly differ from the exercise of that discretion.

It is, however, said that there are two related new matters which do entitle us to take a completely different approach. The first is that there was produced before us when we had a first initial hearing of this matter on the evening of the same day as the judge gave his decision, 1 September, a document produced at the request of Mr. Shuttleworth, representing B B.N.F.L., by a Mr. Hallington who is the commissioning support manager, which made it clear that the present testing process is going to be in three phases.

The first phase, what is called "initial activities," putting it shortly (and, I hope, not too inaccurately) involves charging vessels in the plant with uranium nitrate; that will occupy seven days. That process started C yesterday morning and so, presumably, on that timescale, will be completed by Thursday morning of next week. The second phase, which is expected to last some five weeks thereafter, up to the end of the sixth week, involves starting up the evaporator, which involves a more intensive use and testing of the plant. The initial phase, it is said, will create no liquid effluent and an infinitesimal level of aerial activity; the second phase will create some liquid effluent and an estimate of aerial discharge which D is given in the letter. I remind myself that they are still within the very small amount to which the evidence relates, but obviously the second phase is going to create relatively a greater quantity of discharge than the first.

It has been suggested to us by Mr. Davies that, even if we feel unable to disagree with the judge as to the totality of the stay, it would, E nevertheless, be possible and proper to adopt a halfway position by granting a stay which would take effect at the beginning of the second phase of this testing on Thursday of next week, to operate until Otton J. gave his decision which would, presumably, be over a period of five or six days in total. The basis of Mr. Davies's argument is that in that way the somewhat more detrimental discharges would be avoided and, at the same time, the total loss to B.N.F.L., if any, would obviously be substantially F less because of the delay: instead of being 14 days, it would be, as I have said, five or six. He urges upon us that that presents us with a new situation and creates new factors which we could properly take into account to enable us to exercise our discretion afresh without in any way trespassing upon the normal principles on which this court acts, when it is considering the exercise of a judge's discretion.

G To that Mr. Newman replies that the argument of Mr. Davies is simply, with respect to him, illogical. He submits that since the judge, taking into account whatever risk there was from a discharge over the period until Otton J.'s hearing, balancing the points made against granting the stay, decided that the balance of convenience did not favour granting a stay, we could not possibly conclude that for a lesser period of discharge and for a lesser amount of discharge, the balance of convenience did H justify granting a stay; if we did we should simply be tinkering improperly with the exercise of the judge's discretion. Mr. Newman reminds us of a passage from the speech of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 in which he said, at pp. 220–221:

> ". . . I cannot agree that the production of additional evidence before the Court of Appeal . . . is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise

> an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only if they do, is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief."

Mr. Newman submits that there was nothing in the fresh evidence which invalidates the reasons given by the judge for his decision. Having been swayed initially, I must confess, by Mr. Davies's persuasive argument to the contrary, I find myself in agreement with Mr. Newman's argument. For those reasons I conclude that we are not in a position, even if we wished to, to disagree with the exercise by Brooke J. of his discretion not to grant a stay and I would dismiss the appeal.

SCOTT L.J. I agree. At the end of the transcript of Brooke J.'s judgment there appears this note:

> "Leave to appeal was granted on the basis that the judge said he considered that the principles on which judges exercised their discretion in public law cases on interlocutory applications warranted the consideration of the Court of Appeal."

The application, now on appeal before us, that prompted that note was an application for interlocutory relief. The interlocutory relief in question is a stay of the decision of the Inspectorate of Pollution and the Ministry of Agriculture, Fisheries and Food made on 25 August 1993, to authorise B.N.F.L. to commence the commissioning of the Sellafield plant. The evident purpose of the application for interlocutory relief is to prevent B.N.F.L. from commencing the commissioning that, pursuant to the authorisation granted on 25 August, they are entitled to commence. The purpose is to prevent them commencing that commissioning, pending the determination of the question whether the decision is or is not tainted with some degree of illegality and ought to be set aside. This interlocutory purpose could as well, and in my opinion more straightforwardly, have been pursued by means of an application against B.N.F.L., who would first have had to be made a party to the proceedings, for an interlocutory injunction.

In my opinion, if the real purpose of interlocutory relief in a judicial review case is to prevent executive action by a third party being carried out pursuant to the decision under attack, the more suitable procedure would be to have the third party in question joined and then to seek an interlocutory injunction against that party, rather than to seek a stay of the decision. If, however, the purpose is pursued as it has been in the present case by an application for a stay of the decision rather than by an application for an interlocutory injunction against the third party, the courts should, in my opinion, look to the substance rather than to the form, and apply the same principles to the application as would have been applicable had the application been for an interlocutory injunction.

Brooke J. dealt with the application for a stay which was before him in a manner that seems to me to have been indistinguishable from the manner in which he would have dealt with an application for an interlocutory injunction. In dealing with the application in that way, the judge took into account the possible effect of the stay upon B.N.F.L.; he took account of the fact that no cross-undertaking in damages had been

A offered; he took account of the evidence as to the degree of contamination that commissioning might cause, and he took account of the opinion of the Inspectorate of Pollution. In applying himself in that manner to the matter before him, in my judgment, the judge acted correctly and applied the correct principles.

Mr. Owen Davies has argued that, where interlocutory relief in the form of a stay is sought in judicial review proceedings, a requirement that B an undertaking in damages be given as a condition of the grant of the interlocutory relief, is not in accordance with practice and is inappropriate. I make no comment on previous practice in this regard. Mr. Owen Davies may well be right. But if the purpose of the interlocutory stay is, as here, to prevent executive action by a third party in pursuance of rights which have been granted by the decision under attack, then, in my judgment, to C require a cross-undertaking in damages to be given is, as a matter of discretion, an entirely permissible condition of the grant of interlocutory relief and in general, I would think, unless some special feature be present, a condition that should be expected to be imposed. Therefore, I think that Brooke J. directed himself correctly in taking into account the matters regarding B.N.F.L.'s financial position and regarding the absence of a cross-undertaking to which I have referred.

D As to the additional material placed before this court and the question whether that material entitles this court to grant, either in whole or in part, the stay that the judge has refused to grant, I agree with and would not wish to add anything to what Glidewell L.J. has already said. I agree that the appeal should be dismissed.

E Evans L.J. I have the misfortune to differ from Glidewell and Scott L.JJ. on one point, but I should emphasise that otherwise I would adopt and gratefully acknowledge their analysis of the issues. The circumstances now are different from what they were when the matter came before Brooke J. only two days ago. The first difference is that details of the testing process are now known from a document which was produced to us on Wednesday evening by Mr. Newman, counsel for B.N.F.L., and F subsequently exhibited by Mr. Shuttleworth in his second affidavit. What the document shows which is relevant for present purposes is that phase one of level four of the commissioning process involves a straightforward process of transferring the uranium nitrate by road tanker to, what I will call I hope accurately, the "site tankage." The second change is that that phase one has now started. B.N.F.L. started it following their successful G resistance to the application for a stay pending the hearing of this appeal on Wednesday evening. Phase one is estimated to occupy seven days and will, therefore, on the face of it, be completed on Thursday 9 September. The issue before us now, for practical purposes, is whether B.N.F.L. should then proceed to phase two, which involves commencing the process of priming the evaporator. It seems to me that that involves the beginning of the process of introducting uranium into the machinery if, as I hope, H that is an accurate way of describing it.

Before Brooke J. the question was whether the start should be delayed for 14 days. There is no indication that he knew anything of the different stages which were involved. I respectfully agree that we cannot fault his decision and should not interfere with it. Now the question is whether on Friday 10 September B.N.F.L. should proceed to phase two or whether they should wait until the conclusion of the hearing before Otton J. on 14 September. The transition from phase one to phase two represents, as

I understand the evidence, a considerable threshold. At phase one there is said to be an infinitesimal level of emission, no contamination of the machinery and no effluent which will require subsequent disposal. It is at phase two that the risks which the applicant apprehend will begin. Moreover, the loss suffered by B.N.F.L., if any, as a result of a stay, will consist of four or five days' delay in about mid-November upon a number of major assumptions which I need not rehearse here.

Mr. Newman says that this issue is encompassed by Brooke J.'s decision. I respectfully disagree. I do not know what the judge would have said if he had been told that phase one could proceed without risk, or without any substantial risk, but had been asked to delay phase two by a mere four or five days. That is the present situation and, in my judgment, the court's discretion should be exercised in these circumstances in favour of the applicant to that extent. I would also feel that we were entitled to substitute our own answer to that different question in the circumstances which I have outlined.

Appeal dismissed with costs, including costs of interested party.

Solicitors: Solicitor, Greenpeace; Treasury Solicitor; Freshfields.

[Reported by ROBERT RAJARATNAM ESQ., Barrister]

[QUEEN'S BENCH DIVISION]

*REGINA v. MERSEYSIDE CORONER, *Ex parte* CARR

1993 May 14; 28 Neill L.J. and Mantell J.

Coroner—Inquest—Jury—Summoning of jurors—Jury empanelled from jurors from Crown Court—Jurors not summoned by warrant—Whether jury lawfully summoned—Whether proceedings nullity—Coroners Act 1988 (c. 13), s. 8(2)—Coroners Rules 1984 (S.I. 1984 No. 552), rr. 44, 45, 46, 48

In July 1990 the applicant's husband died at home shortly after returning from hospital treatment. An inquest was opened, evidence of identity was taken and the inquest was adjourned for further inquiries. In February 1991 the inquest resumed without a jury, whereupon the coroner acceded to a submission by counsel for the deceased's family that the case should be heard with a jury in accordance with section 8(3)(*d*) of the Coroners Act 1988.[1] Since no jury had been summoned and the coroner did not wish to adjourn because all the necessary witnesses were present, he swore in a jury of nine people obtained from the pool of jurors at the nearby Crown Court who therefore had not been summoned by warrant as prescribed by section 8(2)(*a*) of the Act of 1988 and

[1] Coroners Act 1988, s. 8(2)(3): see post, p. 583C–E.