R. v. SECRETARY OF STATE FOR TRADE AND INDUSTRY, ex p. GREENPEACE LIMITED

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

(Laws J.): February 11, 1998

Nature conservation—Directive 92/43/EEC on the protection of Habitats—applicability of the Directive to the United Kingdom Continental Shelf—alleged failure to undertake an assessment of the environmental impact of projects which would disturb a species protected under the Directive—application for leave to move for judicial review—whether the application was made "promptly"

On April 7, 1997 the Secretary of State for Trade and Industry ("SSTI") awarded licences under the Petroleum (Production) Act 1934 and the Petroleum (Production) Areas Regulations 1988 and 1996 to a number of oil companies to "search and bore for, and get, petroleum" in areas in the "Atlantic Frontier" within the United Kingdom Continental Shelf ("UKCS") and mainly west of the Shetland Islands. The Applicant ("G") perceived that, as a result of the award of these licences, grave damage would be done to a coral, Lophelia pertusa ("LP"), a species which was protected under Annex I of the Habitats Directive 92/43/EEC ("the Directive"). G considered that the U.K. Government had failed to implement the Directive on the basis that the domestic law which implemented the Directive, the Conservation (Natural Habitats, etc.) Regulations 1994 applied the Directive only to U.K. territory and territorial waters. G took the view that the Directive also applied to the UKCS. In particular G considered that if the Directive were to be applied to the UKCS, the presence of LP would mean that some or all of the licensed areas would have been designated as Special Areas of Conservation ("SACs") under the Directive. Consequently the licensing system would have to have included an assessment of the likely significant effects of the operations under the licences as required under Article 6(3) of the Directive. G applied for leave to move for judicial review of the decision of SSTI to award licences on June 30, 1997.

SSTI argued that G should have brought any challenge well before the award of the licences on April 7, 1997. Moreover, it was argued that even if April 7, 1997 was the true date from which time ran for the purposes of the judicial review application, the application should be refused on grounds of delay. In both cases SSTI argued that G had not brought the application "promptly" as required by Order 53, r. 4(1) of the Rules of the Supreme Court. SSTI put forward a number of dates which were

the alternative commencement dates which should have triggered any challenge from G.

The first suggested date was October 30, 1994, which was the date when the Regulations which purported to implement the Directive were brought into force. The second date was March 31, 1995, which was the date when the first draft list of potential SACs was sent to consultees. This document made it plain that the U.K. Government did not plan to designate any sites on the UKCS. The third date was November 21, 1995, when the announcement was made giving details of the offer of licences to search for petroleum. The fourth and final date was December 24, 1996, which was the date that official notification was published inviting applications for licences to search for petroleum.

Held, refusing leave:

(1) There was ample evidence to mount a challenge by way of judicial review after November 21, 1995. Such an application would have rested on the following foundations (a) the Directive had not been properly implemented; (b) the government, wrongfully, had no intention of proposing any SAC on the UKCS; (c) licences were to be offered for oil exploration operations which would certainly amount to "plans" or "projects" under the terms of the Directive; (d) the areas on offer contained or probably contained reefs of LP potentially subject to protection under the Directive, and it was the government's duty to investigate and in due course consider whether on that account any such areas should be nominated as potential SAC sites. Everything necessary to demonstrate such a case was or should have been available to G at that time. Accordingly, the failure to bring the challenge at that time meant that G had not applied "promptly" as required by Order 53.

(2) In respect of the date of the decision which was the subject of the application, G had not moved with any urgency in the light of the interests of the oil companies. The companies had committed and continued to commit vast sums on the faith of the decision of April 7, 1997, and did so also before that date as applicants for licences. It behoved G to recognise that the court would require that damage to the interests of the oil companies be minimised so far as was consistent with the administration of justice and the proper ventilation of G's case as to the Directive. This damage would be minimised by the court insisting upon very great promptness. The question of whether the application was prompt was inevitably coloured by all that had gone before the date of the

decision which was the subject of the challenge. There was a conspicuous lack of urgency or promptness which ought to have been the first characteristic of the application for leave.

(3) There was no sufficient countervailing public interest which would allow G to proceed despite the failure to apply promptly.

Cases considered:

R. v. IRC, ex p. Federation of the Self-Employed [1982] A.C. 617.

R. v. Customs and Excise Commissioners, ex p. Eurotunnel [1995] C.L.C. 392.

R. v. Avon C.C. ex p. Terry Adams [1994] Env. L.R. 442.

R. v. Cardiff C.C., ex p. Gooding [1996] Env. L.R. 288.

Legislation considered:

Directive 92/443/EEC on the protection of Habitats, Art. 6.3.

Supreme Court Act 1981, s. 31(6).

Rules of the Supreme Court Order 53, r. 4(2).

Mr N. Pleming Q.C. appeared on behalf of the applicant.
Miss Harding appeared on behalf of the respondent.
Mr D. Ouseley Q.C. appeared on behalf of interested third parties.

JUDGMENT

LAWS J.:

Introduction

This is an application for leave to move for judicial review, in which there is no contest, save in one respect which is entirely discrete, but that the applicants have an arguable case. The essential ground on which it is submitted that leave should be refused consists in the assertion, put in a number of different ways, that the applicants are guilty of delay. Pursuant to directions given by Tucker J. on July 27, 1997, the hearing for the leave application was fixed with a time estimate of two days. Five days have been set aside in November for the *inter partes* hearing if leave is granted. I have been troubled by the very notion of a leave application taking two days (in fact the hearing lasted nearer three), with leading as well as junior counsel acting for all parties (though I emphasise that counsel were of the greatest possible assistance), and an examination of issues so detailed and meticulous as to resemble the depth of scrutiny which it is the court's duty to undertake at a final *inter partes* hearing. I have had in mind Lord Diplock's admonition in *Ex p. Federation of Self-Employed* [1982] A.C. 617 at 643H–644B:

"The whole purpose of requiring that leave should first be obtained to

> make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

This is, if I may respectfully say so, most certainly the general rule, and nothing in the course of these proceedings have taken, nor anything in this judgment should be taken, to detract from that important fact. However, cases occasionally arise where the question whether leave should be granted involves substantial issues of principle, even though the applicant would pass Lord Diplock's threshold test as to the potential legal merits of his application. Most cases where the prospective respondent asserts delay as a basis for refusing leave will not fall into this category; but in my judgment the present case is exceptional.

The challenge mounted by the applicants, Greenpeace, is to the decision of the respondent Secretary of State taken on April 17, 1997 to award licences under the Petroleum (Production) Act 1934 and the Petroleum (Production) (Seaward Areas) Regulations 1988 and 1996 to a number of oil companies to "search and bore for, and get, petroleum" in areas in the "Atlantic Frontier" within the United Kingdom Continental Shelf ("UKCS") and mainly west of the Shetland Islands. The licences were for a term, or an initial term, of three years to run from April 29, 1997, and were subject to a series of conditions and certain other measures relied on by the respondents as providing significant environmental protection. The decision was taken in what is called the 17th Round of Offshore Production Licensing. It is to be noted, for it is material to the issues I must decide, that further Rounds will follow: at least an 18th and a 19th. The licences were awarded in respect of 25 "tranches" covering a total of 114 "blocks". The meaning of these terms is given in the 1988 and 1996 regulations. They relate essentially to a grid system by which the relevant part of the ocean is divided up; a "block" is an area to which a reference number has been assigned on the map. A "tranche" is a group of contiguous blocks. The oil companies have been served with the judicial review papers and have appeared, alongside the Secretary of State, to resist the grant of leave.

The applicants' most specific concerns in these proceedings have been focused upon their perception that grave damage may be occasioned to a type of coral, Lophelia pertusa ("LP"), by operations conducted under the licences. It is said that LP is of global significance, for reasons to which I will refer later. But their overall anxieties in connection with the getting of oil in the Atlantic run much wider. As is of course very well known, they are a respected campaigning body whose core objective is the protection of the natural environment. Lord Melchett's affidavit in these proceedings states:

> "The purpose of Greenpeace making this application is to protect the marine environment in the Atlantic Frontier region from the likely impacts upon habitats and species, such as corals and wild birds, from activities arising out of certain licenses (*sic*) granted by the U.K. Government."

Yet more fundamentally they are of the view, as most conveniently appears in a detailed report written by a senior director of Greenpeace, "Putting the Lid on Fossil Fuels", that there should be no further exploration for hydrocarbons in the Atlantic Frontier at all. The reason is their conviction that such operations pose a wholly unacceptable threat to the natural habitats and marine and bird life of the region and have very damaging climatic effects. So their interest is by no means limited to the protection of LP. I should emphasise, though I hope it is plain, that the applicants' being motivated by this deeper and more drastic agenda could not of itself be any cause for complaint, and indeed none is made on any such score. It is, however, relevant to my task, for reasons to which I will come. I should also underline at this stage the important (but again obvious) fact that the applicants' standing to sue is as a public interest plaintiff; they have no private axe, economic or otherwise, to grind. Their standing is, rightly, not called in question by the respondents and in that sense is uncontentious. But its nature has considerable significance for the judgment I must make. Again I will deal with these matters later.

The applicants' legal ground of challenge has at its core an issue concerning the true interpretation of the E.U. Habitats Directive 92/43/EEC, Art. 2.1 which provides:

> "The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."

Article 3.1 provides for the establishment of a network of "special areas of conservation" ("SACs"). The network is called "Nature 2000". Articles 3.2 and 4.1 require Member States to propose lists of sites as prospective SACs, which lists are to be transmitted to the Commission; and the Commission (Article 4.2) establishes a draft list of sites of Community importance drawn from the Member States' lists. The draft is then adopted as definitive through a committee procedure (Article 21), and each site so adopted is to be designated as a SAC by the relevant Member State (Article 4.4). Article 6.3 then provides that where any "plan or project"—which would include operations under the licences—is "likely to have a significant effect" upon the site of a SAC it shall be subject to an assessment of its implications for the site, and the national authorities

> "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."

Article 6.4 requires the Member State to take compensatory measurers to protect the overall coherence of Natura 2000 if, despite an adverse assessment, it is a case where the plan or project must go ahead "for imperative reasons of overriding public interest".

Annexes to the Directive make specific provision as to the habitats, flora and fauna which will require the designation of SACs. Annex I names "reefs" of certain kinds, which it is not disputed would include reefs of LP.

The applicants say that this Directive has not been properly transposed into domestic law. The municipal implementing measure was The Conservation (Natural Habitats, etc.) Regulations 1994. It is common ground that these Regulations applied the Directive only to U.K. territory and territorial waters. The applicants assert that the Directive applies also to the UKCS. Whether or not they are right depends on the sense to be accorded to the phrase in Article 2.1 "the European territory of the Member States to which the Treaty applies". This is the issue which the respondents (I include the oil companies) accept is arguable, although they urge that the applicants' case is weak. Given the scope of the regulations and the government's view that the Directive has no application to the UKCS, the licensing regime under which the decision of April 7, 1997 was made, and therefore of course that decision itself, were not subjected to the Directive's procedures, in particular the strictures of Article 6.3. The applicants say that they should have been. And they have gathered evidence which it is asserted shows the likely presence of reefs of LP in many or most of the tranches licensed by the decision of April 7, 1997; so that, were the Directive applied to the UKCS, some or all of these areas would or probably would be designated as a SAC or SACs, the operations under the licenses would be "likely to have a significant effect" on the site or sites, and the Article 6.3 assessment procedure would have to be undertaken. It is important to notice that it is only the presence of LP that the applicants say, on the evidence presently available to them, potentially engages the Directive's regime in the UKCS.

In addition to this essential case and there is also an entirely separate debate relating to St Kilda; this is the discrete aspect which I mentioned at the outset.

The respondents' arguments as to delay

I turn to describe the arguments as to delay. The applicants lodged their judicial review papers on June 30, 1997, which is of course very close to the end of the three month period mentioned in RSC Order 53, r. 4(1):

> "An application for leave to apply for judicial review shall be made

> promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

And I should refer to Order 53 r. 4(2), which provides:

> "Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding."

It is convenient also to set out at this stage the provision in main legislation which bears on issues of delay in judicial review proceedings. Section 31(6) of the Supreme Court Act 1981 provides:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
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> (a) leave for the making of the application;
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> or
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> (b) any relief sought on the application,
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> if it considers that the granting of the leave sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

The respondents' submissions take two forms. They say first that the applicants should have brought any challenge based on the substance of their complaint well before April 7, 1997; and so did not apply "promptly" within the meaning of the RSC Order 53, r. 4(1). They say secondly that even if April 7, 1997 is the true date from which time ran for the purposes of a judicial review application, still the applicants did not move promptly. In either case, they submit that there is no good reason for extending time, and the grant of leave would cause substantial hardship or prejudice to the oil companies, and be prejudicial to good administration.

Within the first of these two forms of argument the respondents take a number of alternative positions as to the date when time should be taken to have started running against the applicants. (1) October 30, 1994. This was the date when the regulations implementing, or purportedly implementing, the Habitats Directive came into force. The respondents say that plainly the applicants knew then that the government construed the Directive as not applying to the UKCS; so they could and should have sought to bring their challenge at that time. (2) March 31, 1995. This was the date when a draft list of sites as candidates for SACs was sent to a number of consultees including the applicants. The document made it plain that the government, conformably with its interpretation of the Directive carried through the 1994 regulations, did not propose any sites on the UKCS for

designation as SACs. (3) November 21, 1995. On this date an announcement was made giving details of the 275 blocks which were to be offered for licensing in the 17th Round. This is the date upon which Mr Ouseley Q.C. for the oil companies especially fixes. (4) December 24, 1996. On this date a notice was published in the Official Journal of the European Communities (as was required by Article 3 of the Hydrocarbons Licensing Directive 94/22/E.C.) inviting applications for licences in the 17th Round, providing, so the respondents say, an unequivocal indication of the blocks which might be licensed, and of which at least some certainly would be.

The respondents' second argument, that even taking the April 7, 1997 date the applicants did not move promptly, points to the fact that their judicial review papers were not lodged, as I have said, until just before the expiry of three months. I certainly accept (and Mr Pleming Q.C. for the applicants did not contend the contrary) that it should now be regarded as elementary that a judicial review applicant can by no means sit on his hands for three months. The primary requirement is to apply promptly; the three month period is in the nature of a backstop. The respondents say that having regard to (a) the history before April 7, 1997, (b) the history after that date and before June 30, 1997, and (c) the grave economic effects for the oil companies of any delay at all after April 7, the applicants did not fulfil the primary requirement, (c) is relevant also to their first argument, that the challenge should have been brought well before the April date, as of course is (a).

Before proceeding further it is convenient to make some observations about the conceptual nature of the respondents' first argument. It is, I think, beyond contest that the decision of April 7, 1997 is a distinct executive act susceptible in principle to the judicial review jurisdiction. That is the decision which the applicants have chosen to challenge; so it might be said that if the court were to accede to the respondents' first argument, that would amount to a judgment that the applicants were not entitled to challenge the April 7, 1997 decision at all—even if they moved the next day. And this is indeed the respondents' position. Their submission is that on a proper interpretation of Order 53, r. 4(1) the requirement to apply promptly is to be measured not necessarily by reference to the specific decision which the applicant impugns in his pleading, but by reference—as the rule says—to the date when grounds for the application first arose. In most cases no doubt the dates will be the same. But there will be instances, of which the respondents say this is one, where the real substance of the case consists in something done before the date of the decision which the applicant chooses to assault. In that event the court should look at the earlier act in deciding whether the application is brought promptly or not. The respondents might seek support for this approach to Order 53, r. 4(1) from the terms of 53, r. 4(2), which I have set

out, on the basis that that sub-paragraph (which does not as such apply to the present application) necessarily contemplates that there will be cases where the date of the decision and the date when the grounds first arise will be different. It may be, however, that 53 r. 4(2) implies only that but for its provisions there might be situations, in the kinds of case to which it applies, where the grounds could be said to arise after the decision in question.

In *R. v. Customs and Excise Commissioners, ex p. Eurotunnel* [1995] C.L.C. 392, the applicants named in Form 86A as the subject-matter of their judicial review the "continuing practices" and a "continuing failure" of the Customs and Excise, but their real assault was on the validity of certain E.C. Council Directives and of orders which were based on them. The Divisional Court held (400E) that the identification of the "practices" and "failure" as the target of the judicial review was:

> "at best a disingenuous attempt to disguise the fact that Eurotunnel's real attack is on the validity of the orders and directives. In any event the "practice" stems from, and depends on, the orders."

However a challenge directed at such a thing as a "practice" or a "failure" does not, it may be said, seek to assault a concrete decision at all; so that, with respect, it is unsurprising that the Division Court concluded that the real objects of assault were the earlier orders. In *R. v. Cardiff C.C., ex p. Gooding* [1996] Env.L.R. 288, Owen J. had to consider a challenge to a local authority's decision to award a contract to a company which had not tendered for it. He held that the real substance of the judicial review related to a different decision taken five months earlier. I need not go into the details. The judge concluded that the applicant should have moved against the earlier decision, and so was barred on time grounds. In *R. v. Avon C.C., ex p. Terry Adams* [1994] Env.L.R. 442, the applicants sought to challenge the award of a contract by the Avon Waste Disposal Authority to another company (which was a joint venture in which Avon itself had an interest). In the Court of Appeal Ralph Gibson L.J. said at page 478:

> "With reference to this ground of complaint [sc. undue discrimination in the terms and conditions of what was called contract (b)], of which the applicant has known the relevant facts throughout the history of the dispute, there was plainly delay. The advertisement was in February 1992 and the applicant was told of the change in the contract terms in July 1992. The application to the court was not made until the May of 1993 [the contract having been awarded in February 1993]. It was open to the applicant to apply for relief ... from the date when the advertisement was first published in February 1992 ... There is much importance in the principle that, if objection is to be made by an objector to the conduct by a public authority of a continuing administrative process, in which costs will be incurred by the authority and by other intended parties, application should be made promptly."

The other members of the court agreed. In fact, for reasons which do not matter for present purposes, the court did not in the event bar the applicants on time grounds.

In *Gooding* and *Adams* there were concrete decisions, not just a "continuing practice", which were undoubtedly susceptible to the judicial review jurisdiction and which on the face of their pleadings the applicants sought to assault. Yet in each case the court held there was delay arising out of the applicants' failure to challenge an earlier executive act or acts. These authorities do not enter into any analysis of the proper construction of Order 53, r. 4(1), but as it seems to me they lend implicit support to the approach urged by the respondents, and I would construe the rule accordingly. In my judgment, however, even if Order 53, r. 4(1) is to be interpreted more conservatively, so that "the date when grounds ... first ar[i]se" is never earlier than the date when the impugned decision is taken, *Eurotunnel*, *Gooding*, and *Adams* exemplify a common principle, whose nature is not dependent upon an appeal to the rules relating to delay. It is that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late. Mr Pleming did not seek to deny that there exists a discretion to refuse leave, or relief, in such a case whether or not it falls within the terms of Order 53, r. 4(1) or section 31(6). This is an inevitable function of the fact that the judicial review court, being primarily concerned with the maintenance of the rule of law by the imposition of objective legal standards upon the conduct of public bodies, has to adapt a flexible but principled approach to its own jurisdiction. Its decisions will constrain the actions of elected government, sometimes bringing potential uncertainty and added cost to good administration. And from time to time its judgments may impose heavy burdens on third parties. This is a price which often has to be paid for the rule of law to be vindicated. But because of these deep consequences which touch the public interest, the court in its discretion—whether so directed by rules of court or not—will impose a strict discipline in proceedings before it. It is marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage. The rule of law is not threatened, but strengthened, by such a discipline. It invokes public confidence and engages the law in the practical world. And it is administered, of course, case by case; where there is bad faith, or a real instance of *Wednesbury*

perversity, a respondent's argument based on delay is likely to get a little shrift. But there is nothing of that here.

I think that these considerations apply with special force to proceedings brought by a public interest plaintiff such as the applicants. Such a litigant, as Mr Pleming accepted, has to act as a friend of the court; precisely because he has no rights of his own, his only locus is to assert the public interest. Litigation of this kind is now an accepted and greatly valued dimension of the judicial review jurisdiction, but it has to be controlled with particular strictness. It is a field especially open to potential abuse, though I emphasise that that is not a charge which is or could be levelled against Greenpeace. Strict judicial controls, particularly as regards time, will foster not hinder the development of such litigation in the future. Where the principle that an applicant's substantive complaint must be brought promptly before the court is invoked against a public interest applicant, there is by definition no right of the individual citizen—something which the courts are supremely concerned to protect—which might press against it. The only question, and it is the question I must decide in this case, is where the public interest lies; and any delay is a function of the public interest. The court will first have to consider whether it is in truth a case where the applicant ought to have moved sooner in order to bring forward his real complaint in proceedings. If the answer is that he could and should have done so, that will be a powerful reason for giving the proceedings their quietus. Of course the court will still look at the strength and importance of his case; but in my judgment delay will be tolerated much less readily in public interest litigation.

In this context there is a further consideration which I ought to canvass which bears particularly on the circumstances of this application. I have already made it plain that the applicants' determined opposition to the getting of petroleum in the Atlantic Frontier is no subject for criticism, and it is certainly no reason to support a refusal of leave to bring their challenge on the arguable grounds which they have put forward. Equally, it cannot assist them in these proceedings, which very obviously assert nothing which might lead to a judicial conclusion which would outlaw exploration for hydrocarbons. The applicants' ambitions on that score, vital as they see it, form no part whatever in the public interest equation which it is my duty to consider. Otherwise, I would be taking into account the applicants' motive in bringing the case; and that is generally irrelevant to any issue arising on a leave application unless it is engaged in a respondent's allegation of bad faith, which is by no means the case here. The only public interest legitimately asserted by Greenpeace is the upholding of the rule of law which, they assert, required the application of the Habitats Directive to the UKCS. Save to recognise that this is no mere trivial or technical issue, and that it concerns the public generally, it is of course no part of my task to

take any view about the merits of the Directive's provisions or the possible consequence of its application.

If I conclude that the applicants could and should have moved the court before April 7, 1997, still I must form some view of the strength of their legal case, however superficial, in order to ascertain whether this is a rare instance in which a public interest plaintiff should be allowed to go ahead despite his unjustifiable delay.

Should the applicants have moved the court before April 7, 1997

With these considerations in mind, I turn back to the respondents' first argument. Should the applicants have moved the court before April 7, 1997, and if so, when?

I may say at once that they are not in my judgment to be put out of court for failure to challenge the implementing regulations which as I have indicated came into force on October 30, 1994. I think that this date as the *terminus a quo* for any potential challenge was but faintly persisted in by the first respondent and barely at all by the oil companies, at least in Mr Ouseley Q.C.'s oral submissions on their behalf. The single argument for such a date is that the regulations made it plain that the U.K. government did not construe the Habitats Directive as applying to the UKCS; and the burden of the legal challenge now put forward by the applicants is of course that these regulations did not properly transpose the Directive. It might no doubt be inferred from the terms of the regulations that any sites proposed as SACs would be confined with U.K. territory and territorial waters, but the first respondent's own skeleton places much more emphasis on the time, at the end of March 1995, when the government issued a draft list of sites for consultation. And it is possible that the applicants harboured a reasonable hope that the government might after all be persuaded to nominate sites on the UKCS notwithstanding the territorial limits of the regulations. No doubt the applicants might have sought relief in 1994 for certiorari to quash the regulations, or for a declaration. But such an application would in reality have been made in a vacuum. While (as Miss Harding for the first respondent testifies) work had begun in May 1992 to select a list of sites proposed to the Commission would be. And although there was some very generalised information available as to the broad likely whereabouts of the blocks which would form the tranches to be offered for licensing (on November 22, 1994 the first respondent announced a closing date of March 8, 1995 for nominations for the 17th Round and stated that the Round would cover ". . . frontier areas to the far west of Britain"), there was nothing remotely amounting to hard facts such as should reasonably have alerted the applicants to the

possibility that forthcoming operations on the Atlantic Frontier might constitute a specific threat to specific habitats which would or might require the protection offered by the Directive. It is true that as early as September 1994 a letter was written to the first respondent by an environmental consortium known as "Joint Links" asserting that "there are important reef forming communities and deepwater sponge communities off the west coast of the Shetland Islands" (and the applicants were one of the consortium's constituent organisations). The letter was concerned, in fact, with the 16th round, in which the blocks to be offered for licensing had by then been nominated, and urged the government to exclude a number of individual blocks from the 16th Round on environmental grounds. The letter contains no reference to LP as such, nor to the Habitats Directive. The particular information now available to the applicants as to the possible or likely whereabouts of LP was gathered much later. In my judgment what was said by Joint Links in September 1994 does not amount to anything which, as it were, might give concrete form to a challenge to the regulations which were made the following month.

In these circumstances I accept Mr Pleming's submission that in late 1994 no particular consequences, flowing from the announcement of the 17th Round in November and the limited scope of the October regulations, had been identified which ought to have prompted the applicants to apply to the court at that time. A bare challenge asserting that the regulations had not properly transposed the Directive, with no or tenuous evidence as to the whereabouts of likely SACs (assuming proper transposition) or as to the likely impact of particular operations on relevant habitats, might well have been held to be premature and theoretical. It is important to bear in mind both the several stages in the procedure which by the Directive must be undertaken before any SACs are finally adopted, and the lengthy consultation process which must take place before there is any finality as to what tranches, would be put on offer for licensing. If October 30, 1994 is the relevant date for the purposes of Order 53, r. 4(1), failure by the applicants then to act promptly would on the argument I am addressing have put them out of court irrespective of all the later events which happened. In my judgment that cannot be right. Something a good deal more specific in the way of a potential threat posed by the limited scope of the regulations must have arisen before the applicants' duty, not least as a public interest plaintiff, to come to court promptly would be engaged.

I turn to the next putative date: March 31, 1995. It was then that a consultation package was issued by the first respondent containing a list of 280 possible SACs, and also a brochure explaining the Habitats Directive. It was sent to the applicants. Having looked at the material it is clear to me that any informed reader must have realised that it was not then the government's intention to nominate any sites beyond U.K. territorial

waters, even if that had not been clear from the terms of the regulations themselves. I do not think that the applicants can be heard to say that at this time they still harboured a reasonable hope that UKCS sites might be included in any list sent to the Commission. Miss Tripley's first affidavit denies that the applicants knew by March 1995 that the government did not intend to propose any candidate sites beyond territorial waters. If they did not know, in my judgment they should have done. It is true, of course, that consultation was envisaged: indeed that was the point of the March 31, 1995 documentation. But it must have been obvious that such consultation was embarked upon so as to refine the choice of sites within territorial waters and on land. As it happens, the government submitted 136 land-based sites as prospective SACs to the Commission on June 20, 1995, and 10 marine sites (all within territorial waters) on January 9, 1996. And the balance of the evidence shows, though it is not an agreed fact, that the applicants had not responded to the consultation process initiated on March 31, 1995.

But if by March 31, 1995 it should have been plain that there would be no UKCS nominations to the Commission for potential SACs, the position as to the precise impact of the 17th Round was by then much less clear. It is important to have in mind that these two processes—SAC nomination and the choice of blocks for the 17th Round—were, chronologically if in no other sense, running in tandem. On March 14, 1995 the first respondent issued a press release identifying some 691 blocks which had been put forward by the oil companies, of which 431 were located to the west of Scotland. Here too there was a consultation process. The press release was sent to the applicants (and to a large number of others) asking for comments on the suggested blocks by June 30, 1995. The purpose of the consultation was to seek advice as to what blocks should, and should not, be offered for licence, and also whether conditions should be attached to licences to take account of environmental concerns in relation to individual blocks. Joint Links recommended that 54 blocks be deleted from the list. The Joint Nature Conservation Committee ("JNCC"), which is established under statute and comprises English Nature, the Countryside Council for Wales and Scottish Natural Heritage, recommended the deletion of a number of blocks including those closest to St Kilda. The very process demonstrates, of course, that it was far from clear in March 1995 what blocks would finally be included in the tranches to be put out for licensing in the 17th Round.

In my judgment the applicants are not to be refused leave on account of their failure to move promptly after March 31, 1995. I consider that they were entitled to wait before approaching the court at least until it was plain what blocks in the UKCS were to be offered for licensing in the 17th Round. Only then would they know precisely what areas in the Atlantic Frontier

would be exposed to the possible grant of licences to the oil companies. Before then, although it was as I have held clear that the government would not put forward any sites on the UKCS as potential SACs, still the first respondent might have been persuaded (as indeed happened) to exclude this or that area from the 17th Round. The earliest date when it was known as a matter of hard fact what blocks would be put out for licensing was November 21, 1995, the next terminus a quo suggested by the respondents as starting the judicial review clock. There is a good deal of evidence of events between March and November 1995, but I need not go into it. On November 21, 1995 the first respondent identified 275 blocks to be offered, divided into 68 tranches, of which the great majority lay on the UKCS. (The figure of 275 is striking, being so much less as a result of the consultation process, than the number of blocks – 691 – which had been nominated by the oil companies.) It was done by way of answer to a Parliamentary Question and the issue of a press notice, to which maps were attached which clearly indicated the blocks' location. The closing date for applications for the tranches was set at November 27, 1996. In the event this was extended. The Hydrocarbons Licensing Directive required the U.K. to publish in the Official Journal a formal invitation to apply for licences no less than 90 days before the closing date for receipt of applications in the 17th Round. Because of a delay in the making of amended regulations implementing the Directive's relevant provisions, as I understand it, the closing date for receipt of applications was put back to March 25, 1997.

Should the applicants have moved promptly after November 21, 1995? The respondents submitted with considerable force that they should. They rely on the facts, which I have rehearsed, that it was clear by then that there would be no SACs on the UKCS and that the blocks to be put out for licensing were precisely identified. They say that these facts were quite sufficient to give concrete form to any challenge that might be brought, extinguishing any risk that the court might consider the challenge premature or theoretical; it was unlikely to an extreme degree that no blocks would be licensed. They submit also that the applicants must have known from the press release of November 21, 1995 that the oil companies would, or almost certainly would, carry out seismic soundings during what has been called the "weather window" in 1996 in order to obtain necessary data to enable them to decide what licences to apply for. The press release stated:

> ". . . companies will have a year in which to prepare their applications. This gives them the opportunity to acquire seismic data during the "weather window" next summer. . . ."

And seismic sounding had taken place during the 16th Round. The

likelihood of seismic soundings is significant for two reasons. First, the applicants now complain that it is itself a damaging process in environmental terms. Secondly, it means that they must have appreciated that the oil companies would be committing heavy expenditure during 1996; although it is plain that they had access to earlier seismic studies. The oil companies more generally point to the very substantial evidence adduced by them in order to demonstrate the enormous costs which they have incurred, both before and after April 7, 1997. A table annexed to Mr Ouseley's skeleton argument, and drawn from the evidence, indicates expenditure before April 7, 1997 amounting to £39,334,305, and between April 7, 1997 and June 30, 1997 amounting to £18,237,650. There is no detailed breakdown of costs incurred before and after December 24, 1996 (which of course is the next terminus a quo put forward by the respondents), but I think it is clear not least from Mr Deeley's affidavit sworn on behalf of Mobil (see paragraphs 22–26) that a very considerable portion of the £39 million must have been expended before the announcement in the O.J. on December 24, 1996. However the evidence as to the incidence of the oil companies' expenditure is, I think, primarily relevant to the question whether I should extend time for the applicants if I find that they have been guilty of undue delay.

Although Mr Ouseley was at pains to identify November 21, 1995 as the true terminus a quo for any proper challenge to be brought by the applicants, it is enough for the respondents' case if I were to hold that any judicial review application must at least have been brought promptly after December 24, 1996. There are arguments favouring either date. Once I have rejected, as I have, the submission that the applicants should have moved earlier, it is enough for the respondents' case if I were to hold that any judicial review application must at least have been brought promptly after December 24, 1996.

In relation to the November 21, 1995 date I should at this stage record a submission made by Mr Pleming in reply, which was that if was "difficult to see" that the announcement of November 21, 1995 constituted a reviewable decision at all. He said that it was no more than an act publicising the government's intention to consider applications for licences. In my view this argument is misconceived. Quite aside from the fact that (pace Sir William Wade) we are long past the stage when judicial review bites only on a distinct executive decision itself having direct consequences upon affected persons' rights, the announcement of November 21, 1995 was a specific act by government—not a piece of advice, as might be contained in a circular—when at once affected third party rights: the oil companies could bid only for the tranches them promulgated.

Mr Pleming's substantive argument to the effect that his clients cannot be said to have been guilty of undue delay by failing to move at any time

before April 7, 1997 possesses, on analysis, three aspects. The first is that the decision of April 7, 1997 is beyond question subject to the judicial review jurisdiction, and once his clients choose to challenge it they ought not to be non-suited for failure to challenge something done earlier. So far as this was a submission of principle, I have already rejected it; and in fairness, as I have indicated, Mr Pleming accepted that the court enjoys a discretion to refuse relief in light of events happening before the impugned decision, whatever the correct construction of Order 53, r. 4(1). But in the course of his oral submissions he advanced what might be said to be a variant of this aspect of his case. It was that if the applicants had acted promptly after April 7, 1997 so that judged from that date there had been no undue delay, section 31(6) of the Act of 1981 would not be engaged, since the premise of its application is that there has been undue delay in bringing judicial review proceedings. But if section 31(6) does not bite, I ought not to put the applicants out of court by reference to hardship or prejudice or detriment to good administration (arising because Greenpeace did not move before April 7, 1997), because that would be to apply to strictures of section 31(6) when *ex hypothesi* they did not apply at all.

This argument is ingenious but wrong. It is inconsistent with the effect, if not always the explicit reasoning, of *Eurotunnel*, *Gooding* and *Adams*. It is also inconsistent with Mr Pleming's correct concession that the court enjoys a discretion, free-standing from the rules (and it must be free-standing from statute), to refuse relief having regard to the impact of foregoing events. It would deny the existence of a power in the court to refuse leave where in substance the applicant should have gone against an earlier executive act than the one he has chosen to assault, and the denial would be based only on the fact that the applicant moved promptly when he did choose to go. In such a case it would thus prevent the court from looking at the substantive merits of a respondent's arguments as to delay, however well-founded. It would clothe the judicial review jurisdiction in what, in another context, I think Lord Wilberforce called a procedural austerity—an austerity wholly incompatible with the just and practical operation of our public law system.

The second aspect of Mr Pleming's argument is that the applicants were entitled to wait until they knew which blocks were actually going to be licensed; only then could they reasonably gather evidence, and put forward a specific case, in order to persuade the court that the government's failure to make regulations applying the Habitats Directive to the UKCS had practical consequences for a habitat identified in Annex I to the Directive. This is closely connected with the third aspect, which is to the effect that until June 1997 the applicants lacked hard evidence as to the geographical incidence of LP, and upon such issues as to the geographical incidence of LP, and upon such issues as whether it was

reef-forming. The reports of Dr Rogers and Dr Wilson, received in that month, constitute the principal factual material upon which the applicants' concrete challenge is said to be based.

In these two aspects, as it seems to me, is to be found the nub of the matter. The difference from the applicants' point of view between the position between November 21, 1995 (or December 24, 1996 and April 7, 1997 and the position after that date consists essentially in the fact that it was only by the decision of April 7, 1997 that the applicants (and anyone else outside government) knew what blocks would actually be licensed. In seeking to refute the submission that his clients ought to have moved before April 7, 1997 Mr Pleming's skeleton argument (paragraph 15) asserts:

> ". . . Greenpeace seeks to challenge a particular decision which has been taken without proper regard to the Habitats Directive—until that decision was announced, and explained, there remained the possibility that the U.K. government had had proper regard to EIA [Environmental Impact Assessment] and Habitats Directives before making the decisions to award licences."

And paragraph 28:

> "It only then [April 7, 1997] became incumbent upon Greenpeace to obtain its own evidence when it was finally apparent that the government did not intend to act upon Greenpeace's representations and that Greenpeace's only remedy was to apply for judicial review."

But on the facts this is unreal, for reasons I have already given. It was clear well before April 7, 1997 that the government would not apply the Habitats Directive, but would not apply the Habitats Directive, but would license blocks in the 17th Round, to and on the UKCS.

In his oral submissions Mr Pleming advanced a different but related argument (foreshadowed in paragraph 22 of his skeleton). It was that the very basis for his clients' application arose only to the extent that they could show that there existed a habitat, potentially capable of protection under the Directive, in or near the licensed tranches; and that was not apparent until the reports of Dr Rogers and Dr Wilson had been obtained in June 1997, nor could it, logically, have been ascertained before the April 7, 1997 decision. This argument does not depend on the submission, which I have rejected, that until April 7, 1997 the applicants might reasonably have hoped that the government would apply the Directive to the UKCS. Rather it asserts that the applicants could not (or not properly) have mounted the substance of their present challenge before the April date: the identification of the sites actually to be licensed is said to be critical to the judicial review application.

Mr Ouseley submitted roundly that the applicants' case does not in

reality depend upon identification of the licensed tranches at all. He says that Dr Rogers' report is not, as he put it, "tranche-specific", and Dr Wilson's report covers all the tranches that were on offer for licensing. So there was no reason why these reports should not have been obtained before April 7, 1997; indeed the applicants had Dr Wilson's provisional report in March 1997. Thus the evidence now sought to be deployed would have been no less apt to a challenge brought before the April decision. It is convenient to refer to some of the contents of the reports at this stage.

Dr Rogers indicates that LP is a reef habitat, and gives reasons (paragraph 2.3) why that is so. He says (paragraphs 2.2(B), 3.2.1) that it appears to be more common in the North East Atlantic that anywhere else in the world, so that any damage to it in that region is likely to have global significance. LP's importance is not only intrinsic but arises especially because it supports a large number of other life-forms: 841 species are associated with it in the region (paragraph 2.4(B)). He gives some data (paragraph 3.2.3) as to the presence of LP in blocks already allocated for oil exploration. He refers to 24 blocks. Of these, if I have accurately compared paragraph 3.2.3 with the schedule of tranches of blocks announced on November 21, 1995 and confirmed on December 24, 1996, only five are among those announced as open for licensing in the 17th Round. I assume that the rest had been allocated or actually licensed in earlier rounds. Of these five, I think only one (164–23) falls within the category of blocks to be licensed by the decision of April 7, 1997. Quite clearly Dr Rogers' report does not in effect relate to the content of that decision at all. It is principally concerned in passages to which Mr Pleming drew my attention but to which I need not think refer in any detail, with such (no doubt important) matters as the merits of LP's qualification for protection under the Directive 4.1 ff) and the potential effects of oil exploration west of Shetland upon the LP habitat (2.7, of paragraph 6).

Dr Wilson had been asked to provide information about the distribution and ecology of LP. Section 5 of his report is headed "COMMENTS ON BLOCKS ON OFFER IN THE 17th ROUND". He proceeds to list those tranches proposed for licensing on November 21, 1995 in three areas: North west of Shetland and northern North Sea; West of Orkney and West of Scotland; Rockall Bank and North East Atlantic. He offers judgments as to the likely presence or otherwise of LP in each tranche. The report has no focus whatever on the blocks the subject of the April 1997 decision.

Although as I have shown Dr Rogers' report is to some extent "tranche-specific" (more accurately, "block-specific") Mr Ouseley's overall submission that these reports could perfectly well have been obtained months before April 7, 1997 is plainly correct. Not a word in either could only have been written after that date.

Mr Ouseley also submits that if the applicants' grounds of challenge are

good, the first respondent ought presumably to have been obliged to undertake a detailed survey, well before deciding to grant licences, in order to ascertain whether oil operations in the tranches being offered, or any of them, would have a significant effect on LP. But the applicants must have known before April 7, 1997 that no such survey had been undertaken and that the first respondent had no intention of undertaking it. In those circumstances, the very logic of the applicants' case is prospective to the grant of licences. Before April 1997, therefore, they should have come to court to assert that the first respondent proposed to grant licences in the Atlantic Frontier without investigating their possible effects on concerns which would or might engage the Habitats Directive.

These submissions for the respondents are in my judgment well-founded. The true nature of the applicants' case must be that the first respondent should not have embarked upon a decision to issue licences without first complying with the Directive's provisions which are, as the applicants must have appreciated, logically prior to any such decision. The whole burden of that case is that procedures should have been followed by the first respondent, consistently with the Directive, before any question of granting licences should have arisen. It is important to have in mind the nature of the Directive's regime. A series of substantial steps had to be undertaken before any SACs would be adopted by the Commission. Only after that would the measures provided for by Article 6.3 bite in relation to any particular site. The applicants knew or should have known after November 21, 1995 and well before April 7, 1997 that the government would not undertake any such steps, nor apply Article 6.3, in relation to the UKCS. These considerations give the key, in my judgment, to the degree of specificity as to the facts which the applicants needed to establish before mounting a challenge based on the real substance of their complaint. Their proper interest was to show that failure to apply the Directive beyond territorial waters, far from being just an arid point of law, had the potential to damage in some respect the very interests with which the Directive was concerned. Everything necessary to demonstrate such a case, were it good on its legal merits, was or should have been available to the applicants during 1996. They had reports which preceded those of Drs Rogers and Wilson during that year. That from Berry Marine Consultants (obtained in October 1996) referred to the distribution of LP, the protection of deep sea habitats, and the Directive. It is described by Dr Wilson himself (paragraph 2.2 of the latter's report) as giving "a comprehensive assessment and evaluation of the issues at stake for the Atlantic Frontier Region". Professor Odell's report, also material to the points now sought to be taken by the applicants, is dated December 20, 1996. His terms of reference did not involve LP; he was concerned broadly to describe the strategic and political importance of oil developments on the Atlantic Frontier. The much more

specific information contained in the later reports of June 1996 from Dr Rogers and Dr Wilson could perfectly well have been obtained in the course of 1996. And I attach some significance to the fact that the applicants' solicitor Miss Tripley deposes (paragraph 11.1 of her first affidavit) to the fact that a consultant engaged by the applicants, Mr Aikman, raised legal issues with her arising from the Berry report and on February 11, 1997 indicated his concern that the government may have failed to protect LP by means of the Directive; and (paragraph 11.2) on February 17, she was approached in terms to consider the legal merits of seeking a judicial review, as she puts it, "under the Habitats Directive". She says (paragraph 11.2):

> "At that stage, I did not consider that Greenpeace had sufficient information to bring such proceedings and advised them to seek expert evidence concerning the abundance and distribution of [LP]. In addition, I believed that grounds for judicial review did not arise until the Government granted the 17th Round licenses [sic]."

The approach, entertained of course in perfect good faith, was in my judgment mistaken. A challenge brought well before April 7, 1997 to vindicate the applicants' true case, supported by evidence which was or could have been then available, would have run no risk whatever of being declared theoretical or premature. In the result there is as it seems to me nothing in Mr Pleming's insistence that his clients had to or reasonably might await the April 7, 1997 decision. In my judgment, as after November 21, 1995, there was every reason for the applicants to mount a judicial review which would have been wholly concrete resting on these foundations: (1) the Directive had not been properly implemented. As a bare proposition that had been available since October 1994; (2) the government, wrongfully, had no intention of proposing any SAC on the UKCS; (3) licences were to be offered for oil exploration operations which would certainly amount to "plans" or "projects" within the Directive; (4) the areas on offer contained or probably contained reefs of LP, potentially subject to protection under the Directive, and it was the government's duty to investigate and in due course consider whether on that account any such areas should be nominated as potential SAC sites.

I consider, moreover, that this view of the matter is lent some support by certain actions of the applicants themselves taken before April 7, 1997. On August 21, 1996 Lord Melchett, the applicants' Executive Director, wrote to the Prime Minister to urge a change of policy in relation to the development of the Atlantic Frontier. In the course of it he referred to the Habitats Directive and named some 21 species of cetaceans to be found west of Shetland, though there is I think no mention of corals or of LP. On March 25, 1997 the applicants themselves put in an application for licences

in respect of all 275 blocks on offer in the 17th Round. I am afraid I consider this to have been an eccentric manoeuvre; the application was inevitably refused, as Greenpeace must surely have known it would be. It could not have been regarded as a serious means of inducing a change of heart within government, and amounts to a distraction from what had long since been the proper course of action for the applicants to take, namely the initiation of proceedings, not least in view of this passage in their accompanying letter:

> "Initial research we have conducted in the light of this application suggests that the importance of the Atlantic margin for deep sea life forms is high. The work-plan presented in our application outlines our intention to conduct an extensive survey of marine mammals in the licence area."

While this contains no reference to LP, it points to the very sort of exercise which on their true case the applicants should and could have asserted upon a judicial review ought to be undertaken by government under the Habitats Directive. Then on April 2, 1997 the applicants along with others made a written complaint to the European Commission. Among other things the subject of the complaint included

> ". . . breach by the U.K. Government of an undertaking given on its behalf by the DTI on 18th April 1995 regarding implementation within 12 months of the EIA Directive and Article 6(2), (3), and (4) of the [Habitats] Directive . . ."

I should say in passing that there has, as it seems to me, been a misunderstanding on the applicants' part concerning the nature of this undertaking. I will not go into the details. The applicants conceived (not very surprisingly, in light of the language used) that the government had actually undertaken to the Commission to apply the Directive to the UKCS. That was not the case. The undertaking was to make regulations which would require the issue of licences to be subject to the provisions of Article 6.2–4 of the Directive; but Miss Harding for the first respondent explains, the intention was no more (and certainly no less) than to ensure that the Directive was complied with *vis-à-vis* sites nominated pursuant to the implementing regulations in accordance with the government's understanding of the Directive's scope, which of course did not include the UKCS. In fact, as it seems to me, had there been an undertaking actually to apply the Directive to the UKCS that would have been an additional reason for the applicants to move the court sooner rather than later. However, more pertinent for present purposes are the applicants' implicit assertion that the U.K. had not properly implemented the Directive and their request to the Commission, at a date before (albeit very shortly before) April 7, 1997, to take action then and there. Any such action, presumably in the

form of infraction proceedings under Article 169 of the Treaty of Rome, would of course have differed in various respects from a domestic judicial review; and I accept also that the focus of the complaint to the Commission is principally directed to an alleged failure to implement the EIA Directive and that no expert evidence about the distribution of LP or the possible impact of oil exploration on candidate SAC's was put forward. Nevertheless the complaint tends to suggest the existence of an actual and not merely inchoate justiciable issue in relation to the Habitats Directive's transportation at a time before any licences were granted in the 17th Round.

Accordingly in my judgment the applicants are for all these reasons out of time. They should have brought their case promptly after November 21, 1995, or at least December 24, 1996; and if it were necessary for my decision I would hold that November 24, 1995 is the relevant date. Between November 1995 and December 1996 nothing happened to justify the applicants moving only after the later date. As I have said they had the reports from Berry Consultants and Professor Odell before December 24, 1996, and could also have obtained further material from Dr Rogers and Dr Wilson before that date.

Whether or not Order 53, r. 4(1) strictly applies (on the basis that the "date when grounds for the application first arose" may refer to a date earlier than that of the decision which the applicants have chosen to challenge), in my judgment makes no difference. The applicants have brought their case very much later than they ought to have done; the court has ample discretion, inherent or within the Rules and section 31(6), to refuse relief accordingly if it considers that that is the proper course to take. However I will postpone my decision of that question until I have considered whether, if I am wrong to hold that the applicants should have moved before April 7, 1997, they applied promptly after that date.

Did the applicants apply for leave promptly after April 7, 1997

In paragraph 11 of her first affidavit Miss Tripley describes the steps taken by the applicants between February 17, 1997 (when she advised them to seek expert evidence) and June 30, 1997 when their judicial review papers were lodged. I will not set them all out. Mr Aikman made contact with Dr Wilson between February 17 and 24, and Dr Wilson supplied a preliminary report on March 27, 1997. Meanwhile on March 21, 1997 Miss Tripley advised that a further expert would be required to deal with matters outside Dr Wilson's expertise. Then (paragraph 11.2(vii)).

> "There was some delay during this period [presumably after March 21, 1997] whilst Greenpeace considered whether or not it wished to proceed with the case and to incur the expense of further expert evidence. In

> addition, it was necessary for Greenpeace to carefully evaluate the costs involved in bringing such a case and how it might finance any application to the court."

In March and at the beginning of April the applicants were taking what might be described as collateral forms of action. They made application for the grant of licences to themselves, and their complaint to the Commission; these I have briefly described. Then on April 25, 1997 they wrote to the first respondent requesting that the government suspend the taking of any further steps until the provisions of the EIA and Habitats Directives had been complied with. The letter is reasoned and detailed. Its principal concern was with the EIA Directive, but it asked in terms

> "... what information if any did the Government take into account regarding the biodiversity of species such as [LP] and what consideration was given to the need to protect the species under the Habitats Directive?"

I am told (it is not in the affidavit) that it was only on May 27, 1997 that the applicants instructed council to give preliminary advice on the merits. On June 10, after a summary report had been received from Dr Rogers, they instructed Miss Tripley to write to the first respondent threatening proceedings. No letter was written to any of the oil companies; they knew nothing of the intended legal action until June 19, when the first respondent passed on the applicants' letter to them. On June 18, the applicants had received a substantive reply (after an acknowledgement on May 5) to their letter of April 25 (the General Election had of course intervened).

The courts have very firmly stated that a judicial review applicant must proceed with particular urgency where third party interest are involved. The respondents cite *R. v. ITC, ex p. TVNI Ltd* (CA: unreported, June 19, 1991); *R. v. Swale B.C. ex p. RSPB* [1991] 1 P.L.R. 6, *per* Simon Brown J. at 23; *R. v. Secretary for Health, ex p. Furneaux* [1994] 2 All E.R. 652 at 658e; and *R. v. Avon C.C., ex p. Adams* [1994] Env.L.R. 442 at 448, a case to which I have already referred in another context. With respect I need not, I think, set out any of the passages relied on; the principle is plainly established. I consider that it applies with particular force in proceedings brought by a public interest plaintiff, who must act as a friend of the court. In the present case, the applicants have not in my judgment had any specific regard to the interests of the oil companies in the specific regard to the interests of the oil companies in the steps taken by them after April 7, 1997. They have not moved with any urgency in light of those interests. Of course, it is the very activities of the licensees on the UKCS, or their prospective activities, which are anathema to the applicants. It might seem to be asking a lot that they should shape the timing of their application so as to offer some

protection to these interests, whose fulfilment would in their view be the cause of grave environmental damage. But the test is entirely objective. The oil companies are no less litigants of good faith than is Greenpeace. They have committed and are committing vast sums on the faith of the April 7, 1997 decision, and did so also before that date, as applicants for the licences. It behoved Greenpeace, not of course to entertain the least subjective sympathy for their position, but to recognise that the court would require damage to their interests to be minimised so far as was consistent with the administration of justice and the proper ventilation of the applicants' case as to the Habitats Directive; and that the court would require it through an insistence on very great promptness. In my view the applicants failed to act with such promptness after April 7, 1997. As a matter of detail I cannot understand why they did not go to counsel before May 27, 1997.

I should add that the judgment of this question is inevitably coloured by all that had gone before that date. Even if the applicants should have been allowed to challenge the April decision distinctly, the whole history at least from the date of the implementing regulations in 1994 presses with special force so as to impose an obligation, once the decision had been made, to act in effect immediately. But if that puts the matter too high, still there was here a conspicuous lack of that urgency or promptness which ought to have been the first characteristic of this leave application.

Should the applicants be excused their failure to move in time?

Leaving Emmott aside, I must decide on this part of the case whether there is good reason now to allow the applicants to proceed despite their failure to come to court at the right time. Again, I think it makes no difference whether the question is addressed as a function of Order 53, r. 4(1) ("there is good reason for extending the period . . .") and of section 31(6) ("substantial hardship to, or substantially prejudice [to] the rights of, any person or . . . detrimental to good administration") or as an application of the High Court's inherent discretion as to the grant or refusal of leave.

The issues material to this part of the case are as follows. (1) Have the applicants a reasonable objective excuse for coming late? (2) What if any is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if leave were now granted? (3) Even if there is substantial damage within any of those categories, does the public interest require that I allow the applicants' judicial review to go forward?

I have in substance dealt with issues (1) and (2) in earlier sections of this judgment. I need not elaborate (1) any further. I have in effect already held that there was every objective reason for the applicants to move much sooner than they did. That might not conclude issue (1) against them if

there were some additional factor to demonstrate that on the particular facts it was reasonable for them to wait, whether one is looking at November 21, 1995 or December 24, 1996 or April 7, 1997. In my judgment there is none. As regards issue (2)—essentially the section 31(6) criteria—there is a little more to be said. I have already referred to the oil companies' costs. They incurred, as the applicants must have known, very great expenditure from November 1995 onwards. But not only that. As Mr Ouseley submitted (and it is supported by evidence) they are effectively committed to entering into contracts with the providers of rigs or drilling equipment at an early stage, there being rival bidders for the providers' services notably, as I understand it, for operations off South America. More deeply, there is every prejudice to their rights, and every detriment to good administration, if the legal system is seen to contemplate and accept challenges to the validity of this licensing process at a stage when the licensees have accepted the risks of the venture on the faith of what must have seemed a firm decision to grant the licences in question. The point is not only that the oil companies involved in this case may lose large sums of money which, had the applicants moved earlier, would not have been at risk. Rather, the promotion of this challenge now would generate a severe and undesirable uncertainty within the whole process of the licensing regime, and potentially within other analogous regimes. If it were recognised and understood that in a regulated system for the distribution of licences which operates by stages, everything is vulnerable to legal action even at the last stage when the licences have been awarded and despite all the distinct and publicised steps earlier undertaken, there is every risk of dislocation and disruption. Potential bidders might be deterred. The effectiveness of a system by which applications are considered and licences awarded on the merits might be undermined: not only in the instant case; more generally. These are consequences which, though they may be welcome to the applicants in this instance, are not the legitimate achievement of any judicial review brought by them. I hope it goes without saying that I do not mean to endorse or condemn the policy which underlies the 17th Round, nor do I take any position as to the merits or demerits of oil exploration on the UKCS or the applicants' objections to it. If I were to do so I should grossly exceed my proper function. I hold only that the proceedings by way of judicial review should not have unlooked for effects, themselves not properly achievable by legal action, where that can properly be avoided; especially where those effects prejudice the interests of third parties and create real uncertainty in the business of public administration. I emphasise that there will be cases, perhaps not infrequent, when such consequences have to be borne if the rule of law is to be upheld. *Fiat justitia, ruat coelum* is a salutary maxim as much in public as in private law. But here, the applicants' real case could and should have

been raised much earlier. That is the fact which protects the rule of law in circumstances such as these. Much objective damage, to third party interests and to good administration, would be caused if now this challenge were to go forward.

On this part of the case I therefore conclude issues (1) and (2) against the applicants. Upon issue (3) I must consider whether nevertheless the public interest requires me to allow the applicants to proceed. There are here two areas of debate canvassed by the respondents: (a) the strength of the applicants' legal case on the merits; (b) the extent to which conditions attached to the licences and other measurers (notably the "Model Clauses") will offer protection to LP so as to render the application of the Habitats Directive less pressing on environmental grounds. Mr Barling Q.C. for the first respondent went, I think, so far as to submit that the Directive would make no difference.

However I consider that it would be wrong to enter into the detail of either of these debates. The first would effectively require me, albeit provisionally, to try the substantive judicial review. That cannot be a proper exercise at this stage, absent any submission by the respondents that leave should be refused because the applicants have no arguable case; and if that were the issue, my duty would be to assess the matter on "a quick perusal", as Lord Diplock said. On a "quick perusal", the respondents concede that the applicants have a case. Having looked carefully at the materials placed before me, I will go so far as to say only that I consider the applicants' case to be very difficult. The second question would require me to arrive at a factual judgment on the merits as to the need for the protections offered by the Habitats Directive *vis-à-vis* oil exploration on the UKCS and the distribution and importance of LP. Despite the wealth of material advanced by Mr Barling to show the strength of environmental safeguards offered under the licensing regime, I cannot see that such an exercise is in the least appropriate. It would require the court to measure the relative merits of the system's safeguards against those of the Directive, and thus implicitly to enter into the question how desirable—at least in the particular circumstances—the Directive's safeguards are. I think that would be improper. If the law requires the Directive to be applied to the UKCS, it is by no means for me to suggest that it does not matter very much if it is not so applied. I will say only that it is clear that the measures inherent in the licensing scheme, and imposed upon individual licences granted, appear to offer a substantial degree of protection to the environmental interests which the applicants are concerned to protect.

The real judgment that has to be made as to the impact of the public interest depends on considerations I have already canvassed. For reasons I have given at length, the public interest decisively required this challenge to be brought much earlier than it has been. There is in my judgment no

sufficient countervailing public interest which should persuade me now to permit it to go ahead.

St Kilda

I have said that the applicants' case relating to St Kilda is free-standing. In light of the conclusions I have reached, I need not enter into it. The respondents say that the Habitats Directive was fully applied in relation to any relevant areas in St Kilda's vicinity. They have adduced what on the face of it is powerful evidence to that effect. The applicants dispute this contention as a matter of fact, suggest that in any event I should not consider the further affidavits sworn for the respondents which concern St Kilda (but if I do would seek to rely on further evidence themselves), and raise other arguments. However I understand Mr Pleming to accept that if I am against him in principle on time grounds, his case as to St Kilda falls as well.

Leave is refused.

Solicitors—none referred to in the original source.

COMMENTARY

There is a long line of decisions in which the courts have stressed the importance of bringing actions promptly, arguing that "the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision [an] authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision" (see *O'Reilly v. Mackman* [1983] 2 A.C. 237). To reinforce that, Order 53, r. 4(1) and the Supreme Court Act 1981, s. 31(6) have the effect that when considering an application for leave (or exercising discretion to grant relief), where there is a lack of promptness, a court must refuse the application unless there are good reasons for extending the time or it is unlikely that the persons affected by the grant of the relief would suffer hardship or prejudice.

The main issue which needs to be determined is the extent to which an application is brought "promptly". In this case there were two aspects of that issue. First, what action triggered the grounds of the application to seek leave? Secondly, was there any good reason to extend the time beyond the requirement for promptness?

Order 53, r. 4(2) makes it clear that time starts to run from the date on which grounds for the application first arose which is not necessarily the same as the date of any decision which is made subsequently. For example in *R. v. Cardiff C.C. ex p. Gooding* [1996] Env. L.R. 288 it was held that the

date when grounds for challenge arose was when the City Council produced an unlawful invitation to tender for a waste management contract rather than date of the decision to award the contract to someone other than the applicant. This presents potential applicants with somewhat of a dilemma. Do they bring an action as soon as they become aware of the potential unlawfulness of an action (and risk the chance that they will be turned away for prematurity) or do they wait for the decision itself? Much will depend upon the evidence which is available to the applicant to support the view that the grounds of challenge have already arisen.

On the facts of this case, Laws J. took the view that the grounds for the challenge arose when it was probable that some of the licences which were to be awarded would damage the habitat of LP. The evidence of the presence of LP in areas allocated under the licences awarded in April 1997 was actually very restricted. Although the initial estimate put LP in 24 blocks, only one was eventually allocated under the formal decision. When all of the evidence was assembled there was nothing put forward which was specifically related to the blocks awarded in the April tranche. Greenpeace argued that they needed to wait until after the actual blocks were awarded in order to investigate the potential effect of the decision on the habitats. Laws J. considered that the evidence which was submitted on behalf of Greenpeace did not actually relate to any information which only became available after the date of the decision to award the licences. Furthermore, if, as was contended by Greenpeace, the Government's error lay in the non-implementation of the Habitats directive, it should have been clear to them that the process of granting the licence was flawed once the question of granting the licences first arose. At that point, if the Habitats directive did in fact apply to the UKCS, there should have been an assessment of the potential environmental impact of the award of licences in accordance with Article 6(3) of the Directive.

On the second aspect of the "promptness" issue, Laws J. adopted a line of reasoning which has been prevalent in many challenges to planning decisions. The timing of a challenge depended to a large extent upon the prejudice which would be suffered by an affected third party. The oil companies had spent a considerable sum of money after the grant of the licences and the public interest demanded that such third parties should have a degree of certainty when planning expenditure. This approach was adopted in *Mass Energy Ltd v. Birmingham C.C.* [1994] Env. L.R. 298 where the Court of Appeal approached the question of granting leave by looking to resolve the dispute as speedily as possible in order to avoid any unnecessary delay.

The ultimate lesson to be learned from this case is that where the applicant is bringing an action on behalf of the public interest, the timing of the application is absolutely crucial. Perhaps it is truer to say that

potentially affected parties must be put on notice of any intended action as early in the process as possible so that any prejudice is minimised. For example, according to the judgment of Laws J. in this case, the first the oil companies knew of this application was over two months after the award of the licences. It was not surprising therefore that they had spent money in the interim period. Putting them on notice at an earlier time (even where the grounds of the challenge had already been established) would mean that the argument that the third parties had been prejudiced would be much more difficult to sustain.

The central question in this case, whether the Habitats Directive has been implemented correctly in U.K. law was dismissed as being "very difficult" for Greenpeace, but it is quite clear that the protection of marine areas has always been less of a priority than terrestrial sites (see further, Warren, "Marine Protected Areas" in *Nature Conservation and Countryside Law*, University of Wales Press, 1996). Ironically, the Government moved to close the loophole which was identified in this case, (*i.e.* that there was no proper assessment of the potential environmental impact of the operation of the licences) with the introduction of draft regulations on the environmental assessment of offshore installations.