R. v. Peak District National Park Authority, ex p. Bleaklow Industries Limited (Queen's Bench Division, Harrison J., April 21, 1999)[1]

Planning permission for mineral workings—application for determination of conditions to which permission subject—request for environmental assessment—determination in absence of environmental assessment—determination ultra vires—application for judicial review—whether there should be an order of certiorari to quash determination—certiorari ordered—application allowed.

Bleaklow Industries Limited ("the Applicant") was the mineral owner of the majority of land covered by a 1952 planning permission at Longstone Edge in the Peak District National Park. The Applicant had leased some of its mineral rights to a company which, together with the owner of the remaining mineral rights, jointly applied to the Peak District National Park Authority ("the Authority") for a determination of the conditions to which the 1952 permission was to be subject. Following determination of that application on February 13, 1998, as it did not appear that the joint applicants were going to appeal against the Authority's determination, the Applicant applied for leave for judicial review of that decision. After making that application the Applicant learnt that the Authority was taking the point that it lacked jurisdiction to make the determination it made on February 13, 1998 in view of the decision of the Court of Appeal in *R. v. North Yorkshire County Council, ex p. Brown* in which it was held that, when determining the conditions to be attached to interim development order permissions, the mineral planning authority could require an environmental assessment. That decision was upheld in the House of Lords on February 11, 1999.

The Authority required an environmental assessment from the joint applicants on February 9, 1998, immediately following the Court of Appeal decision, but this had not been provided by February 13, 1998 when the Authority made its determination. The Authority wrote to the joint applicants on February 17, 1998 indicating that it had made its determination without prejudice to its view that it lacked jurisdiction to make the determination, in view of the absence of an environmental assessment.

The point in issue in the Applicant's judicial review proceedings was whether there should be an order of *certiorari* to quash the Authority's determination of February 13, 1998 (which both parties agreed could not stand). The Applicant argued that the Authority had made a decision that was intended to be unequivocal but which was admitted to be *ultra vires*. The determination had ostensible effects touching not only the parties but potentially many others and so an order of certiorari should be made to ensure that the ostensible effects were addressed. The Authority responded that, in the absence of an environmental assessment, it had no jurisdiction to determine the application and its decision was therefore a nullity. It was not therefore necessary or appropriate to order *certiorari* to quash the decision.

Held, allowing the application.

1. There should be an order of *certiorari*. It would be positively undesirable not to make such an order.
2. There was a determination which on the face of all the public documents was an unequivocal decision, without any reservation to suggest that there was a lack of jurisdiction rendering it a nullity. That reservation was contained in a private letter which was not available to the public and, in the absence of *certiorari*, there was no reason why a third party should know that the determination was a nullity.
3. There should be an order of *certiorari* to prevent the continuance of any ostensible effect of the determination.

Application allowed.

The following judgment was given.

Harrison J.: This is an application for judicial review of a decision of the respondent made on February 13, 1998 and notified to the Applicant on February 17, 1998. The decision related to a determination of

[1] *M. Kingston* Q.C. and *D. Park* (Ratcliffe and Bibby, Cumbria); *P. Petchey* (Tyndallwoods, Birmingham).

new conditions to be attached to a 1952 mineral planning permission, together with a working rights notice specifying the effect of the resultant restrictions on working rights.

The determination was made pursuant to Schedule 13 of the Environment Act 1995 which provides a system whereby the mineral planning authority can review the conditions attached to mineral planning permissions granted between 1948 and 1982 The applicant is the mineral owner of the majority of the land covered by the 1952 planning permission at Longstone Edge in the Peak District National Park. It is a small family owned company and the mineral rights represent the overwhelming majority of its assets. In 1988 the applicant leased some of the mineral rights to a predecessor of a company within the R.M.C. group of companies. The other minerals within the site are owned by Laporte Minerals. No issue arises in relation to them.

In March 1997 R.M.C. and Laporte Minerals made a joint application to the respondent, who is the mineral planning authority for the Peak District National Park, for a determination of the conditions to which the 1952 planning permission was to be subject. I will have to return in due course to some of the history immediately preceding the respondent's determination of that application on February 13, 1998. However, the applicant perceived that the determination would have a serious effect on the value of its only assert. As it did not appear at the time that R.M.C. were going to appeal to the Secretary of State against the determination, the applicant decided that it should apply for leave to move for judicial review of the determination. In its Form 86A the applicant raised a number of legal issues relating to the scope of the 1952 planning permission and the effect of the restricted working rights notice on the viability of the operation and on the asset value of the site.

However, since lodging the application the appliant learnt that the respondent was taking the point that it did not have jurisdiction to make the determination on February 13, 1998 in view of the decision of the Court of Appeal given a few days earlier on January 28, 1998 in *R. v. North Yorkshire County Council, ex p. Brown* [1998] Env. L.R. 381, reversing the decision of Hidden J. at first instance, whereby it was held that a mineral planning authority could require an environmental assessment when determining the conditions to be attached to pre-1948 interim development order permissions because such a determination came within the concept of a "development consent" within the meaning of Council Directive (EEC) 85/337. The Court of Appeal quashed the determination of conditions in that case. That decision was subsequently upheld by the House of Lords on February 11, 1999; it is to be found at [1991] 1 All E.R. 969. Althought that case involved the legislation relating to pre-1948 mineral permissions contained in the Planning and Compensation Act 1991, the parties are agreed that the reasoning in the North Yorkshire County Council case applies equally to determinations of conditions attached to mineral permissions granted between 1948 and 1982 which are governed by Schedule 13 of the Environment Act 1995.

In the present case the respondent had required an environmental assessment from the applicant on February 9, 1998 immediately following the Court of Appeal decisions but, perhaps not surprising, it had not been provided by February 13, 1998 when the respondent's determination was made. Thus it was that the respondent took the point that it did not have jurisdiction to make the determination in the absence of an environmental assessment.

The applicant was not aware that the respondent was taking that point until so notified by the respondent on June 29, 1998. Having learnt of the point being taken, the applicant amended its Form 86A to refer to it. A leave hearing took place over about one and a half days before Collins J. at which the respondent also argued, as an alternative to its jurisdiction point, the issues of delay, alternatively remedy and the merits of the legal issues raised by the applicant. Leave was granted by Collins J. on August 26, 1998. At that time it was known that an appeal to the House of Lords was pending in the

North Yorkshire County Council case. As I have said, the House of Lords upheld the Court of Appeal's decision on February 11, 1999.

In the light of the House of Lords' decision the respondent no longer pursues the alternative issues that it argued at the leave stage. Its position is that its determination of February 13, 1998 was made without jurisdiction and was a nullity and that in those circumstances *certiorari* is not necessary or appropriate. The applicant, however, whilst accepting that the determination is a nullity and cannot stand, maintains that there should be an order of *certiorari* to quash the determination. The applicant suggests that the respondent is only resisting an order of *certiorari* in order to avoid an order for costs being made against it.

The point in issue, therefore, falls within a small compass, namely should there be an order for *certiorari* to quash the determination which both parties agree cannot stand? The length of the arguments did not, however, match the brevity of the point, although that is not a comment which I make critically. I hope that I will be forgiven if I do not traverse all the matters that were raised. It is, however, necessary to refer to paragraph 9 of Schedule 13 of the Environment Act 1995 and to the history of this matter before turning to the submissions that were made.

Applications, such as that made by R.M.C., for determination of conditions to which 1948 to 1982 mineral planning permissions are to be subject, are made to the mineral planning authority under paragraph 9 of Schedule 13 of the 1995 Act. Paragraph 9(9) of Schedule 13 provides that the mineral planning authority has three months, or such extended period as may be agreed in writing between the parties, to determine the application. If the mineral planning authority fails to determine the application within that period, it shall be treated as having been determined that the conditions shall be those specified in the application. Perhaps not surprisingly, the conditions specified in the application are often less restrictive than those that would otherwise be imposed by the mineral planning authority.

Paragraph 9(10) of Schedule 13 provides that if the mineral planning authority is of the opinion that it is unable to determine the application until further details are supplied to it, it can give notice to the applicant within one month of the application specifying the details which it requires. Where such a notice is served, the three-month period for determination runs from the date of receipt of all the further details specified in the notice, not from the date of receipt of the application. In effect, a notice requiring further details stops the clock running until the details are provided.

Paragraph 9(11) provides that the further details specified in the notice may include any information, plans or drawings or verification evidence which it is reasonable for the mineral planning authority to request to enable it to determine the application.

Having considered the provisions of paragraph 9 of Schedule 13 of the 1995 Act, I turn to a brief history of the respondent's consideration of R.M.C.'s application.

In December 1997 the respondent requested further information from R.M.C., basically saying that the application should relate to the whole site rather than a part of it and asking for details of the minerals within the site. The respondent gave R.M.C. six weeks to provide the information, failing which the clock would start to run and the scheme would then be determined on the information available.

On January 14, 1998 R.M.C. made it clear that they were not prepared to provide the information. They stated that the clock had started to run from November 18, 1997 so that the respondent's period for determination of the application would expire on February 17, 1998, after which the site would be operated on the conditions contained in their application.

On January 28, 1998 the Court of Appeal's decision in the *North Yorkshire* case was given, holding that there was power for a mineral planning authority to require an environmental assessment on an application for review of conditions of interim development order permissions.

On February 9, 1998 the respondent wrote to R.M.C., *inter alia*, referring to the Court of Appeal's decision and requiring an environmental assessment to be submitted, but agreement was not forthcoming from R.M.C. It was in those circumstances, with R.M.C. saying that the clock was running and that the period for determination expired on February 17, 1998 after which the conditions specified in the application would prevail, that the respondent reached its decision on February 13, 1998.

The view taken by the respondent authority upon the advice of its solicitor, Mr Francis, is explained in Mr Francis' affidavit. He explains how there is no mechanism under the 1995 Act for determining the issue that had arisen between the respondent and R.M.C., and that, if R.M.C. were correct, the conditions in R.M.C.'s application would be imposed on the planning permission. Mr Francis did not consider it feasible to obtain a declaration from the court in the time available.

The respondent authority at its meeting on February 13, 1998 accepted Mr Francis' advice to make a determination on the basis that there was jurisdiction to do so, but without prejudice to the respondent's contention that, without an environmental assessment, there was not jurisdiction to make such a determination.

Mr Francis states in his affidavit that if the decision had been expressed in any way which was equivocal it might have been subject to challenge and the consequence which a without prejudice decision had been intended to avoid might have occurred. Accordingly, Mr Francis did not advise that any resolution or decision notice should be expressed to be without prejudice or in another way seek to reflect the respondent's view that it did not have jurisdiction to consider the matter.

The respondent accepted Mr Francis' advice, as a result of which the officer's report, the respondent's resolution and the notices of determination and restriction on working rights were all unequivocal without any trace of any reservation that the respondent had about its jurisdiction to make the determination. Its reservations were, however, contained in its letter to R.M.C. dated February 17, 1998 which accompanied those notices. In that letter the respondent stated:

> "The authority does not accept your view on any of these points but in view of the contents of your letter and on the basis that the Authority does have jurisdiction and without prejudice to its contention that it does not the Authority formally determined your application at its meeting on Friday February 13, 1998. A copy of that determination is enclosed."

That letter was, of course, sent to R.M.C., not to the applicant.

At the end of March 1998 the applicant received copies of the notices from the respondent after it had requested them, but without any accompanying information about the respondent's reservations about its jurisdiction. It was not until the applicant received a letter from the respondent on June 29, 1998 that it became aware of the respondent's jurisdiction point, albeit that it may have learned about it earlier if it had written a letter before action to the respondent before making its application for leave to apply for judicial review.

It was said by Mr Kingston Q.C., on behalf of the applicant that the applicant was put in a difficult position because it was known that an appeal to the House of Lords was pending in the *North Yorkshire County Council* case and that, if the Court of Appeal decision were reversed, the respondent would be likely to argue, as it did in the alternative at the leave hearing, that it had made a perfectly lawful

determination, by which time the applicant would be out of time for making a judicial review application. It was submitted that the respondent was trying to have its cake and eat it, as a result of which the applicant had to make its judicial review application in order to try and safeguard its only asset.

Mr Petchey, on the other hand, said on behalf of the respondent that the respondent was put in a difficult position by R.M.C. asserting that their conditions would prevail if there were no determination by February 17, 1998, and that there was insufficient time beforehand for the dispute with R.M.C. to be decided by the court.

To bring the matteer up to date, I was informed that R.M.C. did eventually appeal to the Secretary of State on August 14, 1998 against the respondent's determination. That appeal is still extant, but nothing has been done to progress it. R.M.C. have ceased quarrying at the site and have indicated their wish to negotiate with the respondent their withdrawal from the site. Apparently their lease expires within the next few days.

Mr Petchey submitted that, as a result of R.M.C.'s failure to provide an environmental assessment, the respondent had no jurisdiction to determine the application and that its decision was a nullity and of no effect. In those circumstances it was not necessary or appropriate to order *certiorari* to quash the decision. He said that the respondent lacked jurisdiction, not "being entitled to enter upon the enquiry in question" in the sense mentioned by Lord Reid in *Anisminic Limited v. Foreign Compensation Commission* [1969] 2 A.C. 146. It is worth quoting the relevant passage of the speech of Lord Reid at page 171 when he said:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such case the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdicition to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

It seems to me from that passage, and from another passage in the speech of Lord Pearce at page 195 B to C, as well as from subsequent authority, that all decisions of the kind mentioned by Lord Reid in the *Anisminic* case, whether made without jurisdiction in the first place or involving errors of law whilst exercising jurisdiction, are *ultra vires* and nullities. The courts commonly grant orders of *certiorari* to quash such decisions.

Mr Petchey also relied on a passage in the judgment of Lord Denning in *R. v. Paddington Valuation Officer, ex p. Peachy Property Corporation Limited* [1966] 1 Q.B. 380 at page 402 when he said that, in the case of an order which is a nullity, there is no need for an order to quash it and that it is "automatically null and void without more ado".

Mr Kingston suggested that the decision cannot now stand along side more recent authorities, particularly *London and Clydeside Estates Limited v. Aberdeen District Council* [1991] W.L.R. 182 where

Lord Hailsham said at page 187 in respect of a certificate that was vitiated in the sense that it failed to comply with a mandatory requirement:

> "But the subject could not safely disregard it as not having been issued. Had he done so, he might well have fallen into the very trap of losing his right to complain of the vitiating factor which has caught other subjects in the reported decisions, and, in my view, he was not only wise but bound to seek a decree of reduction of some other appropriate remedy striking down the offending certificate."

He went on at page 189 to say:

> "At one end of this spectrum there may be cases in which a fundamental objection may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necesary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary . . ."

Mr Kingston also referred to the case of *Smith v. East Elloe Rural District Council* [1956] A.C. 736 which, Mr Petchey reminded me, had been described by Lord Reid in the *Anisminic* case as "not a very satisfactory case". Nevertheless, at page 769 of that case Lord Radcliffe stated:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

Mr Petchey referred me to the case of *Boddington v. British Transport Police* [1998] 2 All E.R. 203, particularly in relation to the relevance of reliance on the unlawful act by another party. Mr Kingston referred me to the case of *R. v. Hendon Justice, ex p. Director of Public Prosecutions* [1994] Q.B. 167 where, at page 178, Mann L.J., having reviewed the relevant authorities, stated:

> "In our judgment, *certiorari* can go to quash a decision which is a nullity and which by hypothesis is accordingly not an acquittal. We recognise the defiance of logic in stating that the order can go, but in practice decisions which are nullities are quashed as a convenient way of preventing the continuance of any ostensible effect."

Those are observations with which I respectfully entirely agree.

Finally, so far as the authorities are concerned, both parties referred me to the decision of Ognall J. in *R. v. Rochdale Metropolitan Borough Council, ex p. Brown* [1996] Env.L.R. 100 which concerned a determination by a mineral planning authority of conditions to which an old mineral planning permission should be subject. The applicant applied for an order of *certiorari* to quash it on the ground of a failure to provide a proper opportunity to make representations. It was argued by the mineral planning authority that the decision should not be quashed because, if it were, the result would be that the permission would become subject to the owner's proposed conditions. That argument was rejected by

Ognall J. who accepted the applicant's argument that the determination could be quashed, leaving the notice still standing so as to obviate any difficulty of requiring the period to run afresh from a deemed date of application by the owners.

Mr Kingston only asked me to quash the determination of February 13, 1998. His overall submission was that the respondent had deliberately made a decision that was intended to be unequivocal but which was now admitted to be *ultra vires*. The decision has ostensible effects, touching not only the parties and R.M.C. but also, potentially, many others. He submitted that an order of *certiorari* should be made in the usual way to ensure that the ostensible effects are addressed and so that the position is clear rather than confused.

Whilst it has taken some time to refer to the relevant authorities that were quoted to me, the point, as I said before, boils to down a short one. Should there be an order of *certiorari*? I have no doubt that there should. Mr Petchey very properly accepted that I had the power to make an order of *certiorari* in these circumstances but he submitted that I should not exercise my discretion to do so because it was unnecessary and inappropriate to do so. In my view, it would be positively undesirable not to make an order of *certiorari*.

There was a determination, which on the face of all the public documents relating to it—the officer's report, the resolution and the notices—was an unequivocal decision, without any reservation to suggest that there was a lack of jurisdiction rendering it a nullity. That reservation was contained in a private letter to R.M.C. which is not available to the public. Ostensibly, there is also an extant appeal by R.M.C. to the Secretary of State against the determination. In the absence of an order of *certiorari*, there is no reason why a third party should know that the determination is a nullity.

In my view, it is undesirable that a public decision like this should simply be left in the hope that everyone will know that it is a nullity. There is a need for clarity and a need to ensure that members of the public are not misled, particularly at a time when R.M.C.'s lease is coming to an end and where there may, therefore, be different people involved. I see no good reason why the usual good course of ordering *certiorari* in circumstances such as these should not follow. In my view, there should be an order for *certiorari* to prevent the continuance of any ostensible effect of the determination in this case. It would have been better if the notices themselves could have been quashed as well, but it would appear from the decision of Ognall J. in the Rochdale case that there is good reason for the applicant not inviting me to do so. In any event, it is the quashing of the determination that goes to the heart of the matter. I will, therefore, allow this application and make an order of *certiorari* to quash the respondent's decision of February 13, 1998.

The parties also made submissions to me on the question of costs which, it seems to me, is probably at the heart of the reason for the continuing issue between the parties. Mr Petchey submitted that, if there was an order for *certiorari*, there should be no order for costs. He made that submission on the basis that the circumstances of the case were unusual in that the parties were doing their best in a difficult situation where it was not clear whether an environmental assessment could be required. Furthermore, the respondent's position had been vindicated by the House of Lords' decision in the *North Yorkshire* case. He also relied on the applicant's failure to write a letter before action.

Whilst I appreciate the points made by Mr Petchey, the plain fact of the matter is that this hearing would not have been necessary if the respondent had been prepared to accept that there should be an order of *certiorari*. It follows from the decision that I have made that they should have accepted that there should be an order of *certiorari*. In those circumstances, I consider that costs should follow the event. I will therefore order that the respondent should pay the applicant's costs.

Comment. As would be expected the House of Lords decision in *R. v. North Yorkshire County Council* [1999] J.P.L. 616 is having an impact on similar applications that were in the pipeline when the decision was handed down. In the present case the Planning Authority made the relevant decision before the House of Lords decision. They therefore were rightly concerned that if they did not determine the application, paragraph 9 of schedule 13 to the Environment Act 1995 would take effect and they would be deemed to have accepted the conditions proposed by the applicant. Once the House of Lords' decision was made, they took the view that their determination was a nullity as an environmental assessment should have been submitted. The present case concerned the rather technical point as to whether it was now open to the applicants to seek *certiorari* to have the determination quashed. The issue was therefore whether a decision that in legal theory was so much wastepaper could be formally overturned. Harrison J. took the pragmatic view that it could and considered that, as the determination was public document, it was right that it should be made public that the determination was of no legal effect.

The crucial question is of course why the applicant was so concerned to have the determination held to be a nullity. The hope presumably is that the consequence of the determination being held to be a nullity, is that paragraph 9 will bite and the planning authority will be deemed to have accepted the conditions set out in the original application. On the other hand this would be arguably contrary to the E.C. Directive. Lord Hoffmann referred to this argument at the end of his speech when he stated:

> "Secondly it was submitted that in the case in which a mineral planning authority fails to deal with an application to determine conditions and a deemed determination on the conditions proposed by the developer takes effect under paragraph 2(6)(b) of Schedule 2 [the equivalent of paragraph 9 of schedule 13] the court should disapply the deeming provision on the ground that it would enable a mineral authority merely by inaction to avoid its European law obligations to undertaken an environmental impact assessment. This question does not arise in the present case and I say nothing about it."

It would be very hard to interpret the provisions in a way that required there to be an environmental assessment before the deemed consent has effect, but the *Kraajveld* decision of the European Court of Justice could mean that the English courts will have to disapply the deeming provisions so far as they are contrary to E.C. law. However in another recently decided decision of *R. v. Durham C.C., ex parte Huddleston*, December 13, 1999, Richard J. held that the Directive could not have that effect as it would giving the Directive "horizontal effect".

Millington v. The Secretary of State for the Environment, Transport and the Regions and Shrewsbury and Atcham Borough Council (Court of Appeal, Butler-Sloss L.J., Schiemann L.J., Mantell L.J., June 25, 1999)[4]

Farm—vineyard—growing grapes—making wine—sale of wine—whether within the definition of agriculture.

Mr Millington, a farmer, owned a farm near Shrewsbury, which embraced parts of the remains of the Roman city of Uriconium. In 1991 he started planting vines and began making wine on the site from his own grapes in 1996. He called his vineyard the Wroxeter Roman Vineyard. In time members of the public came to visit the vineyard and the Roman remains in cars and coaches. The visitors sampled the wine, were served light refreshments and often purchased the wine. Atcham Borough Council served an enforcement notice on Mr Millington alleging the following breach of planning control:

> "Change of use of Wroxeter Roman Vineyard from agricultural holding to use of the land for agriculture and (a) sales of wine (b) sales of light refreshments (c) visits by fee paying members of the public and organised groups including coach parties."

The reason given was that the activities led to noise and general disturbance detrimental to the amenities of the neighbouring properties and Mr Millington was required to cease all three activities.

Mr Millington appealed. At a public inquiry, the Inspector dealt with the appeal against the enforcement notice together with an application for planning permission and an application for a Certificate of Lawfulness of Existing Use or Development. The appeal in relation to the enforcement notice was dismissed thus

[4] *C. George Q.C.* and *G. Jones* (Manby & Steward, Telford, Shropshire TF3 4NQ); *R. Drabble Q.C.* (the Treasury Solicitor).