# WYCHAVON DISTRICT COUNCIL v. SECRETARY OF STATE FOR THE ENVIRONMENT AND VELCOURT LTD

QUEEN'S BENCH DIVISION

(Turner J.): December 16, 1993

*Planning permission for the erection of poultry houses for broiler production—local planning authority challenge—decision* ultra vires *the Inspector and breached terms of Directive 85/337 on environmental assessment—directive capable of having "direct effect"—capacity of local planning authority to enforce directive at all and as against an individual—direct enforceability of the directive—held—directives having "direct effect" cannot be relied upon by any party not itself an emanation of the state—the applicant authority is not an "individual" for the purposes of Community Law—Articles in the directive not sufficiently unconditional or precise to give the directive "direct effect"*

By a Notice of Motion dated October 1, 1991, the applicants sought leave to quash the decision of the Inspector contained in his decision letter dated August 21, 1991. The Inspector had allowed the appeal of the second respondent from the decision of the applicants to refuse planning permission for the erection of poultry houses for broiler production and dwellings for agricultural workers at Throckmorton Airfield, Hereford.

The broad grounds of the application were that:

(1) The decision was *ultra vires* the Inspector under the powers conferred upon him under the Town and Country Planning Act 1990.
(2) The requirements of Directive 85/337 of the Council of the European communities had not been complied with.

The Particulars in the Notice of Motion set out seven separate points:

(1) Article 12 of the directive required Member Governments of the Community to implement the directive three years from the date of its formal notification, that is by July 3, 1988. The United Kingdom Government had not done so until July 15 of that year, which it then did by means of Regulations (S.I. 1988 No. 1199) being made on July 12.
(2) The directive required the Member Governments to implement

measures that, before consent was given for projects likely to have significant effects on the environment, required an environmental assessment to be carried out.

(3) The directive was capable of having *direct effect* such that in respect of the application made by the second respondent on July 11, 1988, the Inspector erred in law in holding that an environmental assessment was not required.

(4) Because, in the absence of an environmental assessment, the Inspector did not refer the matter to the Secretary of State, he had no power to entertain the appeal.

(5) The applicants were entitled to rely upon the directive as having *direct effect* as against the second respondent.

(6) The Inspector failed to take account or give due weight to the absence of an (adequate) environmental assessment or the effects of off-site disposal of litter.

(7) In taking into account the uncertain prospect of a new road link.

The question identified as being outstanding for the court was whether or not the applicants could, as a matter of community law enforce the directive as against the second respondent. This question was divided into two, thus:

(I) Can a local planning authority in its capacity as respondent to an appeal from the refusal of a planning application made to it, (a) seek to enforce a directive if otherwise it is *directly enforceable* or (b) enforce such a directive against a private individual as opposed to a party which is an emanation of the state?

(II) Is the directive itself of such a character that, in accordance with community law, it is *directly enforceable*?

**Held,** in dismissing the application:

(1)(a) The general principle is that directives having *direct effect* cannot be relied upon by any party which is not in itself an emanation of the state and there can be no question that a private limited company, like the second respondent, is such a party.

(b) Following the decision in *Foster v. British Gas* [1990] E.C.R. the applicant authority is not an "individual" for the purposes of Community Law and may not rely upon the provisions of an unimplemented directive as against such an individual.

(2) A number of articles in the directive were not sufficiently clear or unequivocal in their terms so as to fulfil the requirements of unconditionality and certainty and thus the directive was incapable of having *direct effect*.

(3) The Regulations came into effect on July 15, 1988, and it follows that the original application having predated July 15, the requirements of

regulation 4(1) could not have been met. Since the "relevant application" for the purposes of regulation 11 must be one which falls within regulation 4, there is no scope for importing into appeals brought in respect of applications made after July 15 the requirements which apply to applications made on or after that date.

(4) It cannot be assumed that planning permission is required for the deposit of chicken litter off-site. If that activity is a normal agricultural use, no permission is required. If it is not such, then permission will have to be obtained for such other site as may be chosen for the deposit. In holding that "What happens to it afterwards is another matter and not which is before me to consider" the Inspector properly directed himself in law. In any event, by the imposition of condition 4 to the grant of consent, it is manifest that the Inspector did expressly consider the matter.

(5) There was material available to the Inspector which although not put in the form of an environmental assessment covered all the matters that such a statement would have provided. Moreover, on the hearing of the appeal, the applicants did not themselves argue that the contents or substance of the directive would or should have affected the outcome of the appeal process or as to the effect of the Regulations.

(6) If the applicants' argument that the directive and Regulations should be treated as in force prior to July 15, 1988, it would involve giving retroactive effect to the latter and deny the second respondents their right to make their original application on the basis of existing law. This would be contrary to the community law position enunciated in *Officier van Justitie v. Kolpinghuis Nijmegen BV* [1989] 2 C.M.L.R. 18.

## Cases cited:

(1) *Duke v. Reliance* [1988] A.C. 618; [1988] 2 W.L.R. 359; [1988] 1 All E.R. 626, H.L.

(2) *E.C. Commission v. Italy* (Case 33/90) [1991] I E.C.R. 5987; [1992] 2 C.M.L.R. 353; [1993] Env.L.R. 452.

(3) *Finnegan v. Clowney Youth Training Programme* [1990] 2 A.C. 407; [1990] 2 W.L.R. 1305; [1990] 2 All E.R. 546; [1990] 2 C.M.L.R. 859, H.L.

(4) *Foster v. British Gas plc* (Case C–188/89) [1990] I E.C.R. 3313; [1990] 2 C.M.L.R. 833.

(5) *Fratelli Costanzo SpA v. Comune di Milano* (Case 103/88) [1989] E.C.R. 1839; [1990] 3 C.M.L.R. 239.

(6) *Marleasing SA v. La Commercial Internacional de Alimentation* (Case C–106/89) [1990] I E.C.R. 4135; [1992] 1 C.M.L.R. 305.

(7) *Marshall v. Southampton and South-West Hampshire Area Health*

*Authority* (Case 152/84) [1986] 1 Q.B. 401; [1986] 2 W.L.R. 780; [1986] 2 All E.R. 584; [1986] 1 C.M.L.R. 688.

(8) *Officier van Justitie v. Kolpinghuis Nijmegen BV* (Case 80/86) [1987] E.C.R. 3969; [1989] 2 C.M.L.R. 18.

(9) *Wansdyke District Council v. Secretary of State for the Environment* [1993] 1 P.L.R. 15.

(10) *Webb v. Emo* [1993] 1 W.L.R. 49.

*Mr Timothy Jones* and *Miss Susan Belgrave* for Wychavon.
*Mr Gerald Barling, Q.C.* and *Mr David Elvin* for the Secretary of State.
*Mr Harry Wolton, Q.C.* and *Mr Becket Bedford* for Velcourt Ltd.

**TURNER J.:** By Notice of Motion dated October 1, 1991, the applicants seek leave to quash the decision of the Inspector conveyed in a Decision Letter dated August 21, 1991. By his decision, the Inspector had allowed the appeal of the second respondent from the decision of the applicant to refuse them permission for the erection of poultry houses for broiler production and dwellings for agricultural workers at Throckmorton Airfield, Hereford ("the site").

The broad grounds of the application are that

(i) The decision was *ultra vires* the Inspector under the powers conferred upon him under the Town and Country Planning Act, 1990.
(ii) The requirements of Directive 85/337 of the Council of the European Communities ("the directive") had not been complied with.

This formulation did little to direct attention to the scope and complexity of the arguments advanced in support, or in refutation, of the basis of the application which, in modified form, may be gathered from the Particulars given in the Notice of Motion. These were that:

(1) Article 12 of the directive required Member Governments of the Community to implement the directive three years from the date of its formal notification, that is by July 3, 1988. The United Kingdom Government had not done so until July 15 of that year, which it then did by means of Regulations (S.I. 1988 No. 1199) being made on July 12 (the Regulations).
(2) The directive required Member Governments to implement measures that, before consent was given for projects likely to have significant effects on the environment, required an environmental assessment to be carried out.
(3) The directive was capable of having *direct effect* such that in respect of the application made by the second respondent on July 11, 1988, the Inspector erred in law in holding that an environmental assessment was not required.
(4) Because, in the absence of an environmental assessment, the

Inspector did not refer the matter to the Secretary of State, he had no power to entertain the appeal.
(5) The applicants were entitled to rely upon the directive as having *direct effect* as against the second respondent.
(6) The Inspector failed to take into account or give due weight to the absence of an (adequate) environmental assessment or the effects of off-site disposal of litter.
(7) In taking into account the uncertain prospect of a new road link.

**The Decision Letter**

In the original application, which was in outline only, the second respondent had not specified the number of birds which were intended to be reared at any one time on the site. There was, however a supporting document in the form of a questionnaire to which the second respondents had replied by stating that the application related to the raising of 350,000 poultry per year in the proposed development. It later transpired that this was a serious and mistaken underestimate of the numbers that would be raised annually. In a document which came into existence in about October 1990, it emerged that the true anticipated annual throughput of poultry was 1.25 million birds. This had led the applicants to submit to the Inspector that the appeal which he was hearing related to a fresh application. If this submission was upheld, it would mean that this "fresh" application was made subsequent to the date of the commencement of the Regulations and was therefore caught by, and would have to comply with, them. The Inspector rejected this argument in terms that are set out in paragraph 4 of the Decision Letter. The applicants had also submitted that the project should be construed as being subject to the Regulations. The Inspector held that:

> "It is a matter of law, therefore, that the Regulations do not apply to this proposal and an environmental assessment cannot be required."

In the following paragraph he said

> "It is accepted that the (350,000) figure was an error ... In the circumstances ... there are no grounds to conclude that an environmental assessment can be required in this case."

The reference to numbers of birds was relevant because of the publication of indicative criteria in the Circular 15/88: Town and Country Planning (Assessment of Environmental Effect) Regulations 1988, by paragraph 2 of Appendix A to Schedule 2 of which it, was provided that

> "New poultry rearing installations will not generally require EA: however, those designed to house more than 100,000 broilers ... may require EA."

Environmental assessment is defined as "meaning the whole process

whereby information about the environmental effects of a project is collected, assessed and taken into account in reaching a decision whether (or not) the project should go ahead". One of the complaints raised by the applicant was that the Inspector had erred by failing to take into account a material consideration when he declined to consider what (would happen) to the chicken litter after it had been transported from the site. Paragraph 18 of the Decision Letter reads, where relevant:

> "Finally, on this question of smell, there is the issue of nuisance from the disposal of the ... litter. This is a material consideration in determining the appeal. But the appellants indicate an intention to remove all litter from the site ... Thus ... the actual disposal of the ... litter has been effectively dealt with in relation to the consideration of this appeal. What happens to it afterwards is another matter and not one which it is before me to consider. It becomes then a separate operation which may or may not require planning permission. If (it) is required, then approval must be sought and considered in the normal way."

The soundness of the points made by the applicants will have to be considered at a later stage in this judgment.

**The legal submissions**

The outstanding question for the court was whether or not the applicants could, as a matter of community law enforce the directive as against the second respondent. This question naturally divides itself into two, thus

> "I Can a local planning authority in its capacity as respondent to an appeal from the refusal of a planning application made to it, (a) seek to enforce a Directive if otherwise it is *directly enforceable* or (b) enforce such a directive against a private individual as opposed to a party which is an emanation of the state?
> II Is the Directive itself of such a character that, in accordance with community law, it is *directly enforceable*?"

I (a) The general principle is that directives having *direct effect* cannot be relied upon by any party as against a party which is not itself an emanation of the state. There can be no question that a private limited company, as is the respondent, is not a party against which a directive of the required characteristic can be enforced. The rationale for this statement of principle is that

> "(The directive) is, in cases like the present, addressed to Member States and not to the individual. The obligations imposed by such a directive are on the Member States. Such a directive does not have to be notified to the individual and it is only published in the *Official Journal* by way of information—in my view a far too tenuous a link with the individual concerned to create a legal obligation.

> Despite the general phrases to which I have referred, I read the court's judgment (in *Roberts v. Cleveland Area Health Authority* [1979] 1 W.L.R. 754) as saying implicity, as I said explicitly, that a directive comes into play *only* to enable rights to be claimed against the state in default. The state cannot rely upon its own failure to confer those rights. The citizen may assert them against the state either as a sword or as a shield."

See the opinion of Sir Gordon Slynn A.G. in *Marshall v. Southampton Health Authority* [1986] 1 Q.B. 401 at 412. The Court endorsed this opinion at 421 of the report in the same case, where, at paragraph 48, it said

> "With regard to the argument that a directive may not be relied upon as against an individual, it must be emphasised that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the possibility of relying upon the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as against such a person. It must therefore be examined whether, in this case, the health authority must be regarded as such a person."

As against these clear statements of principle it was submitted by the applicants that where the provisions of an unimplemented directive are unconditional and sufficiently precise the material provisions of the directive prevail over national law or non-conforming legislation. In this context reliance was placed on section 2(1) of the European Communities Act 1972. It was further submitted that the doctrine of *direct effect* applies to the courts of Member States and, as a consequence it may impose additional burdens on private persons. *Marleasing SA v. La Comercial Internacional de Alimentation* [1992] 1 C.M.L.R. 305 was cited to support this proposition. The headnote to this case reads:

> "Directives. Horizontal direct effect. A directive may not of itself impose obligations on an individual and consequently a provision of a directive may not be relied upon *as such* against an individual.
> National courts. Directives. In applying national law, a national court must interpret it, as far as possible, in the light of the wording and purpose of any EEC directive, whether the national law originated before or after the directive."

Emphasis added as above. The reliance which the applicants sought to place on this case, as the citation from the headnote makes inevitable, was highly selective. The only apparent support to be prised out of the report is to be found in the discussion which immediately follows the holdings. It is the passage

> "*that* although without direct effect (and not having been implemented into Spanish law) ordinary Spanish law, *e.g.* the Civil Code, must be interpreted so as to give effect to ... the directive as though it had been implemented".

As background to the judgment of the court the court said:

> "[5] In *Becker* the Court stated that where a provision of a directive is unconditional and sufficiently precise, it may be relied upon by an individual against a member state which has failed to transpose the directive into national law within the prescribed period. In *Marshall* the Court added that the possibility exists only in relation to the Member State concerned and state bodies. It follows from that finding that a directive may not of itself impose obligations on *an individual* and that a provision of a directive may not be relied upon as against *such a person*.
> That position has since been repeatedly reaffirmed, most recently in *Buseni*."

The next section of the judgment has the cross-heading *"THE OBLIGATION TO INTERPRET NATIONAL LAW IN CONFORMITY WITH THE DIRECTIVE"*. Paragraph 7 continues:

> "Although a provision of a directive may not be relied upon against an individual, national courts are still required, as the Court of Justice stated in *Van Colson* and *Kamann*
> 'in applying the national law specifically introduced in order to implement [the] directive . . . to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189(3).'
> That obligation on the part of the national court to interpret their national law in conformity with a directive, which has been reaffirmed on several occasions, does not mean that a provision in a directive has direct effect in any way between individuals. On the contrary, it is the national provisions themselves which, interpreted in a manner consistent with the directive, have direct effect.
> 8. The obligation to interpret a provision of national law in conformity with a directive arises whenever the provision in question is to any extent open to interpretation. In those circumstances the national court must, having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe the national provision concerned in a manner consistent with the directive.
> The obligation to give an interpretation in conformity with a directive is, it is true, restricted by community law itself, of which it forms a part, and in particular by the principles of legal certainty and non-retroactivity which also form part of Community law."

These quotations from *Marleasing* not only do not support the applicants' main argument on this application, they are positively destructive of it. Had the Inspector done as the applicants now contend that he should, that would have amounted to the imposition of obligations

on the second respondent, a private individual, in conformity with the directive and in a manner inconsistent with the express terms of the measure by which that directive was intended to be implemented by the United Kingdom government.

(b) The answer to this question is to be found, in part, in the preceding section of this judgment. But the matter does not end there because of the legal status which the applicants enjoy under community law. While it was accepted on their behalf that they were for some purposes at least an "emanation of the state", it was not accepted that in their role as applicants in this application they could properly be so characterised. This submission involved the novel proposition that while as Planning Authority (and as such an emanation of the state for that purpose) for the purposes of the *original* planning application, the applicant was not to be treated as occupying that role for the purpose of this application. It was said that their role was to act "for the promotion and protection of the interests of the inhabitants of their area"; see section 222 of the Local Government Act, 1972. As such, the applicants were to be treated as though they were individuals. It was submitted that the reason why the word "individual" in cases of *direct effect* was used in order to emphasise the fact that a Member State which has failed to implement a *directive* may not rely upon a doctrine which comes into play, by reason only of its own default. An individual has no role to play in the process of implementation. He is not involved unless and until the state has taken steps to implement the directive.

It is necessary, therefore, to determine the status of the applicants, assuming always that if they are *not* an emanation of the state they may rely upon the doctrine of *horizontal direct effect*. The European Court has considered this question in a number of decisions, some of which were referred to in argument. Perhaps the leading case on this topic to which reference need be made is *Foster v. British Gas plc* (Case 188/89) [1990] I E.C.R. 3313 at 3348 where the Court held that:

> "[18] On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organisations or bodies which were subject to the authority or control of the State *or had special powers beyond those which result from the normal rules applicable to relations between individuals.*
> (Emphasis added)
> [19] The Court has accordingly held that a provision of a directive could be relied on against tax authorities ... local or regional authorities (... local or regional authorities (... *Fratelli Costanzo v. Comune di Milano* [1989] E.C.R. 1839), constitutionally independent authorities responsible for the maintenance of public order and safety ... and public authorities providing public health services ...
> [20] It follows from the foregoing that a body, whatever its legal form, which

has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied on."

In *Fratelli (supra)* the European Court had held at page 1870 that:

"[28] ... the national court asks whether administrative authorities, including municipal authorities, are under the same obligation to apply the provisions of (the Article) and to refrain from applying provisions of national law which conflict with them.
[30] It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.
[31] It would, moreover, be contradictory to rule ... that those (administrative) authorities are under no obligation to apply the provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all the organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions.
[33] The answer to (this) question must therefore be that the administrative authorities, including municipal authorities, are under the same obligation to apply the provisions of (the Article) and to refrain from applying provisions of national law which conflict with them."

In conclusion to this part of the judgment, I hold that the applicant authority is not "an individual" for the purposes of Community Law and may not rely upon the provisions of an unimplemented *directive* as against such an individual.

II It has already been seen that the party seeking to rely upon an unimplemented directive must be able to show that its provisions are not conditional and are sufficiently precise. Article 189(3) of the Treaty provides that:

"A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

The provisions of the directive itself are to be found at pp. 1 to 9 of the bundle. The submission of the applicants was that since Article 12 of the directive, which is concerned with the date of implementation, was expressed in clear and unequivocal terms the requirements of unconditionality and certainty was readily fulfilled. The submission for the first respondent was that it was necessary to examine the substantive

provisions of the directive and give consideration to the presence or absence of conditionality and certainty within them before reaching a decision whether or not the directive was, in legal theory, capable of being given *direct effect*. It is unnecessary for me to analyse each article in the directive in turn in order to determine whether or not it is unconditional or uncertain. It will suffice if in respect of any Article which offends against the principle it is identified. Articles 1(1), 2(2) and (3), 3, 4(2), 5(1) and (2), and 6(1) and (3) all, in my judgment, offend the principle. In the result, I hold that the directive is incapable of having *direct effect*.

The applicants endeavourd to surmount the difficulty in regard to the commencement date of the Regulations by arguing that they should be construed, so far as possible so as to come within the requirements of the directive. The immediate problem which this approach throws up is that the Regulations are quite specific as to their commencement date. No amount of interpretation, properly so-called, can overcome this obstacle. So it is that I hold that there is no scope for the introduction into this case of the principle of *indirect effect*. Even were this conventional view of the submission to be wrong in principle, it is clear on authority of such cases as *Duke v. Reliance* [1988] 1 All E.R. 626, *Finnegan v. Clowney* [1990] 2 W.L.R. 1305 and *Webb v. Emo* [1993] 1 W.L.R. 49 that it is indeed correct. As Lord Keith of Kinkel said in *Webb* at 60:

> "As the European Court of Justice said, the national court must construe domestic law to accord with the terms of a directive in the same fields only if it is possible to do so. That means that the domestic law must be open to an interpretation consistent with the directive whether or not it is also open to an interpretation inconsistent with it."

Moreover, it is hard to see how in logic, the Regulations can be held to be effective on a date prior to that upon which they come into operation. Not only is it provided by the Regulations that they are to come into force "on the third day after the day on which they are made", it is also specifically provided (by Reg. 4(1)) that the regulation applies to:

> "any ... application received by the authority with whom it is lodged on or after the 15th July 1988".

It follows that the original application, having predated July 15, the requirements of *that* regulation, at least, could not have been met. The applicants then argued that when an Inspector was hearing an appeal after July 15, he was nevertheless bound to apply regulation 11(2) to an appeal which was heard after that date. The literal meaning of that regulation required him to comply with the requirements of regulation 10. Whether this submission is good depends upon the proper construction of the Regulations as a whole. In my judgment, this point can be shortly addressed and dismissed. Regulation 11(1) provides that:

> "Where the Secretary of State on consideration of an appeal under section (78 of the Act of 1990) forms the view that the relevant application is ... a(n) ... application, and the documents sent to him ... do not include a copy of an environmental statement, Regulation 10 shall apply ..."

Since the "relevant application" for the purposes of regulation 11 must be one which falls within regulation 4, there is no scope, in my judgment, for importing into appeals brought in respect of applications made before July 15 the requirements which apply to applications made on or after that date. There is no ambiguity in the Regulations which can be validly prayed in aid by the applicants in support of the court introducing a benign interpretation of the Regulations.

From what has already been said, this is a case in which the applicants have failed to persuade me that they have any standing to rely upon the terms of the unimplemented directive and, even if they had, the terms of the directive itself do not come to their aid. It was then submitted that the Inspector erred in failing to take into account the planning aspects concerned with off-site disposal of the chicken litter I have found this submission one which is hard to comprehend. Paragraph 18 of the Decision Letter expressly and fully considers all aspects of the problems which might arise during the process of the disposal of the litter. It is true that the Inspector stated that:

> "... the actual disposal of litter has been effectively dealt with in relation to the consideration of this appeal. What happens to it afterwards is another matter and not one which is before me to consider. It becomes then a separate operation which may or may not require planning permission. If planning permission is required, then approval must be sought and considered in the normal way."

This is an impeccable approach. It was submitted that it contained an error of law in that on the analogy of such cases as *Wansdyke District Council v. Secretary of State for the Environment* [1993] 1 P.L.R. 15 the Inspector could not lawfully determine the appeal without taking this issue into account as a "material consideration". The special factor present in *Wansdyke* but which is absent from the present, is that there were two sites which were linked in the sense that the planned development of the one depended upon the ability of the occupier of that site being able to obtain a site for itself which also needed planning consent for development on the second site. In the present case it cannot be assumed that planning consent is required for the deposit of chicken litter off-site. If that activity is a normal agricultural use, no permission is required. If is not such, then permission will have to be obtained for such other site as may be chosen for the deposit. In holding that

> "What happens to it afterwards is another matter and not which is before me to consider."

the Inspector properly directed himself, in law. In any event, by the imposition of condition 4 to the grant of consent, it is manifest that the Inspector did give express consideration to the very matter which the applicants submit that he did not. Furthermore, it by no means follows that if litter was deposited off site, the place of that deposit would not be one which already enjoyed approval for its purpose. If and to the extent that a fresh site was selected, there is nothing to indicate that those who owned or controlled it would not seek and obtain the requisite consent.

A further criticism of the Decision Letter related to the Inspector's treatment of the traffic issue. At paragraph 23 of the Letter, he said:

> "I consider that the amount of traffic generated by the proposal would neither be significant nor critical in its impact to the extent that refusal of planning permission would be justified."

On the evidence which was available to the Inspector, it is impossible for this court to hold that this part of his decision was unreasonable.

As the argument in this case was developed by the applicants, it became apparent that there was material available to the Inspector which although not put in the form of an environmental impact assessment, covered all the matters that such a statement would have provided. If such were to prove to be the case, of necessity this court would refuse to grant the application as a proper exercise of its discretion. First it will not have been overlooked that it was open to the applicants as respondent to the appeal, to have led evidence to the effect that had an environmental impact assessment been carried out, it would have shown that there were solid grounds for the Inspector to have refused the appeal. Moreover, on the hearing of the appeal, the applicants did not themselves argue that the contents or substance of the directive would or should have affected the outcome of the appeal process or as to the effect of the Regulations. It was to the procedural impact of the Regulations in regard to the provisions of regulation 11, in particular, that reliance was placed by the applicants. There has been no submission from the applicants that has come near to persuading the court that the Inspector's decision would have been in any way altered, had he been persuaded that he should hear the appeal as though the directive had been *directly effective*.

A further ground of argument was that if the applicants' submissions in regard to the date at which the directive or the Regulations were to be treated as if in force, that would involve according retroactive effect to the latter. If the applicants' argument was to be upheld it would deny the

second respondents of their right to make their original application on the basis of existing law, that is without the need for submission of an EA. The community law position in regard to such a point is well made by the case of *Officier van Justitie v. Kolpinghuis Nijmegen BV* (Case 80/86) [1989] 2 C.M.L.R. 18, where at 27 and paragraph [12] of the judgment, it was held:

> "As the Court stated in Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westphalen* the Member States obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and purpose of the directive in order to achieve the result referred to in Article 5 of the Treaty.
> [13] However, the obligation on the national court to refer to the content of the directive when interpreting the relevant rules of the national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity."

In accordance with the principle enunciated in *Kolpinghuis*, the Inspector would have been acting unlawfully if he had treated the hearing of the appeal as though the original application had been made on or after July 15, 1988.

For the several reasons expressed in the course of this judgment, this application must be refused.

*Solicitor*: Mr Ian Marshall, Pershore for Wychavon; Treasury Solicitor for the Secretary of State; Shawcross & Co. for Velcourt Ltd.

## COMMENTARY

This case provides yet another example of the "individual", in this case an authority, arguing that an E.C. directive provides a *direct effect* enabling that individual to enforce the terms of the directive against a third party. In this case the points at issue were conveniently broken down by the judge into two main parts:

> (1) could a local planning authority in that capacity seek to enforce a directive if otherwise it was directly enforceable? If so can it enforce the responsibility against another individual rather a party which is an emanation of the state?; and
> (2) is this directive directly enforceable?

Based on the decisions in *Marshall v. Southampton Health Authority* [1986] 1 Q.B. 401 and *Marleasing SA v. La Comercial Internacional de*

*Alimentation* [1992] C.M.L.R. 305 the judge had no difficulty in holding that "a directive may not be relied upon as against an individual". In essence a directive imposes obligations on Member States and bodies which are emanations of the state; it does not impose obligations on individuals although the individual can assert the right given to him by a directive as against the state either as a sword in challenging the state or as a shield in defending himself against an action brought by the state.

The answer to the second part of the question would seem to be answered by the response to the first part. In order to avoid this conclusion the respondent suggested that in bringing the action it was doing so not as the local planning authority which had determined the original planning application but in a role where it was acting "for the promotion and protection of the interests of the inhabitants of the area" (see s. 222 of the Local Government Act 1972). It argued further that the word "individual" was used in order to emphasise the fact that a Member State which has failed to implement a directive may not rely upon a doctrine arising from its own default. Thus the respondent, which could have played no part in the implementation of the directive, was not involved and therefore did not offend the doctrine.

Novel as this argument was it did not take the respondent far. Based on *Foster v. British Gas plc* [1990] E.C.R. 3313 in which it was stated that:

> "... It follows that when the conditions under which the Court was held that individual may rely on the provisions of a directive before the national courts are met, all the organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions."

On the second question, the judge looked at the directive to see whether the requirement of "unconditionality and certainty" were fulfilled. It was held that a number of articles offended that principle and that the directive was incapable of having direct effect. It should be noted that in undertaking this analysis the judge said that it was unnecessary to analyse each article in turn, it being sufficient for any article to offend the principle. This would seem to infer that a directive has to be unconditional and certain in its entirety before becoming directly enforceable.