

In the Court of Appeal (Civil Division)

R - v - The Bird Preservation Commission ex parte English Country Holidays

Following growing evidence that numerous species of British birds are under threat of extinction from farming and tourism, the Bird Preservation Commission (BPC) is set up by the (fictitious) Birds Act. Under section 1 of the Act, the BPC is given power to acquire areas where there is “a substantial threat of serious harm to the local bird population” by compulsory purchase. Section 2 states that if the BPC considers that a given area should be compulsorily purchased, it shall publish details of the proposed compulsory purchase order, and unless no objections are received, shall arrange for a public local inquiry to be conducted by an Inspector appointed by the Department of the Environment. Section 3 provides that 28 days prior to the enquiry, the BPC and any objectors shall disclose to each other the substance of the evidence each side proposes to rely on at the inquiry. Section 4 provides that following the inquiry, the Inspector will make a report and a recommendation to the BPC, which will then decide whether or not to make the final purchase order. The Act contains no provision as to the procedure to be followed at or after the inquiry, a matter which it should be assumed is not covered by any other statutory provision.

In May 1999, the BPC gave notification that it proposed to compulsorily purchase the Parkland Leisure Area in Sussex, which is owned by English Country Holidays (“ECH”). ECH objected to the purchase. Each side disclosed its evidence to the other, in accordance with the Act; this included summaries of the evidence of a number of expert witnesses as to the threat to bird life in the Parkland area, which were sent to ECH. The Inquiry was chaired by Dr Hawk, the inspector appointed by the Department of the Environment. During the enquiry, Dr Hawk ruled that an expert witness (Dr Eagle), whose evidence had not been disclosed in advance, should be permitted to give evidence about the recent destruction of birds’ nests and eggs by children visiting the picnic site with their families. Cross-examination of all witnesses by a lawyer for this purpose was turned down by him. Dr Hawk’s report strongly recommended that the Parkland area be subject to compulsory purchase, a recommendation which was accepted by the BPC.

After the hearing, and the BPC’s decision, it subsequently transpired that Dr Hawk was at the time of the Inquiry, and still is, an active member of and part time campaigner for the Royal Society for the Protection of Birds (RSPB).

ECH sought judicial review of the decision to compulsorily purchase the Parkland Leisure Area in the High Court.

At the trial, Giles J refused the application for judicial review on the following grounds:

- (1) Applying the test in *R v Gough* [1993] A.C. 646, there was no real danger of bias on the Part of Dr Hawk; the case did not fall within the automatic disqualification rule set out in *Re Pinochet* [1999] 1 W.L.R. 272;

- (2) The requirement to disclose the evidence to the other side prior to the Inquiry was, on its proper construction, a directory one only; therefore, although there had been a technical breach of the statute in allowing Dr Eagle to give evidence which had not been so disclosed, this was not grounds for overturning the decision of the BPC. Similarly, the denial of legal representation provided no such grounds: whilst there might, in cases of a grave threat to the applicant's liberty, be a discretion to permit him or her to have legal representation, this was not such a case and Dr Hawk's discretion on the matter had not been incorrectly exercised.

ECH now appeals to the Court of Appeal, contending that the ruling of Giles J should be reversed, and the decision of the BPC quashed, on the following grounds:

- (1) Dr Hawk's membership of the RSPB and the work he did for it meant that in conducting an Inquiry which turned principally upon the preservation of bird life, he was in effect acting as a judge in his own case and therefore under the rule set out in *Re Pinochet* [1999] 1 W.L.R. 272 he should be treated as having been automatically disqualified from acting as Inspector; alternatively, there was real danger that he had been biased, under the test in *R v Gough* [1993] A.C. 646.
- (2) The requirement to disclose the expert's reports prior to the Inquiry was clearly intended to be mandatory but had been breached, resulting in prejudice to ECH and unfairness at the Inquiry; moreover the ECH had been wrongfully denied the right to make use of legal representation. Consequently, the Inquiry had suffered from fundamental procedural defects.

This problem is taken from the first round of the ESU-Lovell White Durrant Mooting Competition 1999-2000, and was provided courtesy of the English Speaking Union.