

Case law update: the key decisions of the past year

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Introduction

1. It would probably not be possible, and certainly not easy, to compile a shortlist of the year's most important cases with which everyone would agree. Still less so, perhaps, in a field as broad-ranging as planning has become. Members of today's audience, who represent - we are pleased to see – an impressive cross-section of interests within the field, would no doubt hold diverging views. This paper lays no claim, for that reason, to be a definitive list of the most important judgments in 2008/9. I present it, rather, as an update on case law, much very recent, covering a wide spectrum of miscellaneous topics. I hope that, in the process, at least some of the key decisions of the past year will emerge. I hope too that all will find at least something of interest.
2. The paper covers topics in no particular order. In each case, I consider (1) those to whom the decision is most likely to be of interest; (2) the facts of the case; (3) what was held; and (4) the significance of the decision. Where they occur, references in square brackets are to paragraph numbers of the relevant decision.

Gypsy cases

Wychavon District Council v Secretary of State and Butler [2008] EWCA Civ 692

Who should be interested in the case?

- Those representing gypsies seeking to obtain planning permission on land within the Green Belt; and
- those working for local authorities charged with determining their applications.

What happened in the case?

3. The Butlers, who were gypsies, appealed against a decision by Mitting J ([\(2007\) EWHC 3209 \(Admin\)](#)) quashing a decision of a planning Inspector granting temporary planning permission for their continued stationing of a mobile home and touring caravan on a site in the Green Belt.
4. The Butlers had acquired the Green Belt site and had stationed a caravan there. They had two young children. The husband worked as a landscape gardener and had developed a business breeding horses. They had applied for permission to station a mobile home and caravan on the site. It was not in dispute that the residential use of the site was inappropriate development in the context of Green Belt policy but the Butlers claimed that “very special circumstances” existed, within the meaning of PPG 2, which justified the development. The local authority disagreed and refused permission. The Butlers appealed to the Secretary of State.
5. On appeal, the Inspector held that, although a permanent permission would not be appropriate in light (among other things) of the extent of the harm, a temporary

permission would enable a Gypsy and Travellers Accommodation Assessment (“GTAA”) to be completed by the local authority (in accordance with Circular 01/2006) and allow additional sites to be made available. The Inspector found that, bearing in mind the undisputed need for Gypsy sites generally and, particularly, the lack of any current alternative site, those matters, when taken together, clearly outweighed the Green Belt and other harm.

6. On a challenge to that decision made by the local authority, Mitting J had cause to consider the proper approach to the well-known and much invoked paragraph 3.2 of PPG 2, which is as follows:

“...inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations”.

7. In finding, at first instance, that the Inspector had erred in law by failing to approach the guidance in PPG 2 in the correct way, Mitting J followed the approach set out by Sullivan J (as he then was) in [*R \(on the application of Chelmsford BC\) v First Secretary of State* \(2003\) EWHC 2978 \(Admin\), \(2004\) 2 P & CR 34](#). At para 58 of that case, Sullivan J said this:

“The combined effect of paragraphs 3.1 and 3.2 is that, in order to justify inappropriate development in the Green Belt, (a) there must be circumstances which can reasonably be described not merely as special but as very special and (b) the harm to the Green Belt by reason of inappropriateness and other harm must clearly be outweighed by other considerations. *Those other considerations must be capable of being reasonably described as very special circumstances. If they are capable of being so described*, whether they are very special in the context of the particular case will be a matter for the decision-maker’s judgment” (emphasis added)

8. Applying that test, Mitting J concluded that the circumstances identified by the Inspector as outweighing the harm caused (leading to the grant of the temporary permission) were *incapable in law* of amounting to very special circumstances, even when taken together. So, for instance, he held that the forthcoming assessment of the need for gypsy sites, regionally and nationally, even coupled with the Council’s intention to address the matter was not a special circumstance (let alone a very special circumstance). Similarly, the fact that there was an acknowledged need nationwide for gypsy sites was, he said, simply “commonplace”, and could not amount to a special factor. The judge quashed the Inspector’s decision.

What was held in the case?

9. The Court of Appeal allowed the Butlers’ appeal and restored the Inspector’s decision. Carnwath LJ, giving the leading judgment, held that Mitting J had been wrong to treat

the words "very special" in para.3.2 of PPG2 as simply the converse of "commonplace" [21]. He held that the word "special" in the guidance connoted "not a quantitative test, but a qualitative judgement as to the weight to be given to the particular factor for planning purposes" [ibid.]. He noted that the special position of Gypsies was reflected in Circular 01/2006, against which background it would be impossible, he said, to hold that the loss of a Gypsy family's home, with no immediate prospect of replacement, was *incapable in law* of being regarded as a "very special" factor for the purposes of the guidance [22].

10. What then, was the proper approach? According to Carnwath LJ, the guidance in PPG 2 did not exclude or restrict the consideration of any potentially relevant factors, including personal circumstances, but limited itself to indicating that the balance of such factors had to be such as clearly to outweigh Green Belt considerations. It was thus left to Inspectors, he said, to make their own judgement as to how to strike that balance in a particular case [23].
11. Commenting specifically on what was said by Sullivan J in *Chelmsford*, Carnwath LJ said that there was no reason to draw a rigid division between the two parts of the question posed by para.3.2 of PPG 2 [25]. There was simply no reason, according to the Court of Appeal, why the factors which made a case "very special" should not be the same as, or overlap with, those which justified holding that Green Belt considerations were clearly outweighed [26].
12. Contrary to Mitting J's view, therefore, the Court of Appeal held that the Inspector had not erred by failing to apply a two-stage test under para.3.2. His decision was to stand. (It should be noted that there was also a challenge to the Inspector's decision on the basis of alleged perversity. This, too, failed, and does not affect the wider point of principle).

What is the significance of the case?

13. The main significance of the *Wychavon* decision is that it rejects what might fairly be described as the somewhat legalistic approach to planning policy taken by Sullivan J in *Chelmsford*. *Wychavon* makes it very difficult to argue that a particular factor or factors is or are *incapable in law* of amounting to "very special circumstances". Providing that an Inspector's decision does not fail on some other public law ground (such as perversity; as indeed occurred in *Chelmsford* – without criticism from the Court of Appeal in *Wychavon* at [27]), the Inspector will be entitled to form his or her own view as to whether or not the factors advanced in favour of the gypsies amount to "very special circumstances". Conceivably, one such factor could suffice. More likely, a combination of circumstances, when taken together, may legitimately be considered as "very special" (see further *R (Basildon District Council) v First Secretary of State and Temple* [2004] EWHC (Admin) 2759, per Sullivan J at [17]).
14. Of course, the decision does not necessarily make it easier (or more difficult) to obtain (or resist) permission at inquiry in any given case; all will depend on the strength of the circumstance(s) put forward. It does however make it more difficult to attack Inspectors' decisions on the basis that they have misdirected themselves as to the proper approach to paragraph 3.2 in PPG 2.

Basildon District Council v (1) Mccarthy & Ors (2) Culligan & Ors (3) Coyle & Ors (4) Taylor & Ors & Equality & Human Rights Commission (Intervener) [2009] EWCA Civ 13

Who should be interested in the case?

- Those representing gypsies in resisting direct action enforcement; and
- Those considering effective means of enforcement against gypsies.

What happened in the case?

15. Basildon District Council (“the Council”) appealed against a decision by Collins J ((2008) EWHC 987 (Admin), (2008) 19 EG 205 (CS)) that, in deciding to take direct action against the respondent Irish travellers or gypsies under s.178 of the Town and Country Planning Act 1990 (“the 1990 Act”) to secure compliance with various enforcement notices, it had failed to take into account all relevant matters.
16. The sites in respect of which the direct action was intended had a long history of enforcement. The occupation without permission had been for various periods, the earliest being from late 2001. Action had been taken by the Council in the form of enforcement notices under s.172(1) of the 1990 Act which the gypsies sought to defeat by applying for planning permission. In each case the Secretary of State had upheld the enforcement notice and refused permission, including temporary permissions, over a period of years. Meanwhile temporary permissions had been granted on some sites elsewhere in the Basildon district. There was no question, as it was put in the Court of Appeal, but that the gypsies had “reached the end of the road” in their attempts to regularise their position by obtaining planning permission or temporary planning permission.
17. Acknowledging this long history, and accepting that “the time must come when they will have to leave”, Collins J had nevertheless found that, in deciding the take direct action in respect of the whole of the sites, the Council had acted unlawfully. The thrust of his decision was that some (or more) consideration should have been given by the committee to whether there were any individual families whose circumstances were such, whether because of serious ill-health or the needs of their children, that in their individual cases eviction would be disproportionate (see High Court judgment at [66]). The judge found this in spite of the fact that the officers’ report had annexed the individual circumstances of the various families; his view was that the possibility that some might be permitted to remain, at least on a temporary basis, should have been spelt out.
18. Counsel for the respondent gypsies on the appeal submitted that the long planning history of the sites did not detract from the Council’s ongoing obligations under the Homelessness legislation to find alternative sites and that, particularly in the absence of such a further search, it was incumbent upon the Council to consider the claim of each occupant not to be evicted, one by one and plot by plot. It was argued that the personal circumstances of each should have been considered, and that in the circumstances the Council’s aim, which was for “site clearance”, had given rise to an unlawful decision.

19. There was a further issue of interest before Collins J, pursued on appeal. It was submitted by the Equality and Human Rights Commission, who intervened in the proceedings, that insufficient consideration had been given by the Council to the impact of the decision to evict on already very disadvantaged people. It was said that, pursuant to its obligations under section 71 of the Race Relations Act 1976 (“the 1976 Act”) and s.49A of the Disability Discrimination Act 1995 (“the 1995 Act”) the Council should have carried out impact assessments, conducted consultations, and gathered information when deciding whether to evict. Referring to what was said by Dyson LJ in *R (Baker & Others) v Secretary of State and London Borough of Bromley* [2008] EWCA Civ 141, Collins J had rejected the Commission’s arguments on this point. As to the duty to eliminate racial discrimination and promote equality of opportunity and good relations between persons of different racial groups, the judge held that the officer’s report to committee had had due regard to that duty in all the circumstances. As to the duty under the 1995 Act, Collins J had held that the fact that the officer had made no reference to that Act in the report was of no relevance. The balancing exercise required to be undertaken under the 1995 Act, the same indeed as that under the 1976 Act, had been undertaken in substance.

What was held in the case?

20. Pill LJ gave the leading judgment. He held, firstly, that the judge had been right to conclude that a failure to refer specifically to the race equality duty could not render a decision unlawful provided that it was apparent that the decision-maker made clear that he had in substance had due regard to the relevant statutory duty [67]. There was, he held, no breach of duty under either the 1976 or 1995 Act in this case.
21. As to the lawfulness of the Council’s approach, he held, importantly, that the planning history of the site, which included the flagrant disregard of enforcement notices upheld by the secretary of state, could legitimately form the basis for a decision to take action under s.178. Persistent breaches of both planning control and the criminal law were factors which could be taken into account [70]. In light of that context, Pill LJ held that the local authority had not erred in failing to give further consideration to alternative sites at the time the decision to proceed under s.178 was taken since, as appeared from Circular 01/2006, sites were to be provided through the development plan process. A failure to bring forward development plan document allocations did not, in this context, render a decision to act under s.178 unlawful. Finally, he found that the local authority had given sufficient consideration to the case of each respondent, since “considerable information had been provided to members about each respondent and that information had been considered in a two-hour closed session” [76]. In all the circumstances, therefore, the local authority’s decision to take action under s.178 was a lawful decision lawfully taken.

What is the significance of the case?

22. Although, in the case of *Basildon*, it was the exercise of the direct action power which fell to be challenged, the nature of the argument bears similarity to numerous cases concerning the extent to which it is necessary for local authorities to reconsider the same matters at each stage of what may be a lengthy enforcement process. In the (important) context of one such (very) long process, the Court of Appeal was not prepared to quash the Council’s decision on the basis of inadequate consideration of

individual circumstances, given both that these would previously have been considered at the enforcement notice stage and, more importantly, that individual circumstances were in fact considered in an annex to the report. As to the question of alternative sites, the Court of Appeal thought it appropriate, in light of the repeated refusals by the Secretary of State to grant even temporary planning permission on the sites, to consider that these should be brought forward through the development plan process. Notable in this respect was Pill LJ's reference to the well-known statement of the European Court of Human Rights in [Chapman v United Kingdom \(27238/95\) \(2001\) 33 EHRR 18 ECHR](#) that there was no positive obligation of general social policy to provide as many sites as the Gypsy community sought [69].

23. The reality of the gypsies' judicial review application was summarised pithily by Lloyd LJ in this way:

“In effect, what the claimants seek by their judicial review application is the equivalent of a temporary planning permission, or (what comes to much the same thing) an extension of time for compliance with enforcement notices, save that the temporary permission, or the extension, would be open-ended in time. Viewed in that way, it seems to me that the claimants face an insuperable obstacle in the fact that the Secretary of State has refused to grant any temporary planning permission, and the time given (and in some cases extended) for compliance with the enforcement notices has expired”.

24. Against the lengthy enforcement background, the Court found the submissions of the Equality and Human Rights Commission unpersuasive. Although Pill LJ's reasoning is brief on the point, the Court appears to have deemed it sufficient that (among other things) an initial Race Impact Assessment had been carried out, and that, as the Council submitted, “the duties were to be considered in a context in which the claimants had carried out unauthorised development in the Green Belt and were liable to criminal sanctions for non compliance with enforcement notices” [58]. The Court's reluctance to find a breach of what might broadly be termed the human rights duties in the 1976 and 1995 Acts follows in the wake of a similar approach in *R (Baker & Others) v Secretary of State and London Borough of Bromley* [2008] EWCA Civ 141, noted above.

EIA

R (on the application of Louisa Baker) v Bath & North East Somerset Council (19th February 2009)

Who should be interested in the case?

- Anyone concerned with either opposing or promoting development which falls within one of the descriptions of EIA development in Schedule 2 of the [Town and Country Planning \(Environmental Impact Assessment\) \(England and Wales\) Regulations 1999](#) (“the 1999 Regulations”), notwithstanding that the

development in question does not appear to satisfy one of the applicable thresholds; and

- Environmentalists and others concerned with making representations to the Secretary of State in respect of screening EIA development.

What happened in the case?

25. The claimant, Louisa Baker, applied for judicial review of a decision of Bath and North East Somerset Council to grant planning permission to a waste disposal company (“the company”) for *further* development of a waste disposal facility. The company had *previously* been granted planning permission for a waste disposal facility that managed "green" waste (cuttings from gardens) through composting. It was said that this process gave off unpleasant odours which resulted in a number of complaints to the local authority from individuals who, like Ms Baker, lived close enough to the facility to be affected by it.
26. The local authority subsequently granted the company three planning permissions for the further development of the facility, described in the applications as “changes or extensions” to the existing development. The further developments would have the effect that the existing use was intensified and that compost would be transported and processed from the primary site to a secondary site. It was common ground that the development, if taken as a whole, would constitute Schedule 2 development and be subject to EIA (as a waste disposal installation within the meaning of Schedule 2, para 11(b)). However, the local authority did not subject the further applications to screening because in no case did the change/extension exceed the relevant threshold which, by dint of Schedule 2, para 13, column 2 of the 1999 Regulations, has to be ‘applied to the change or extension (and not to the development as changed or extended)’.
27. The claimant contended in the High Court that, contrary to Directive 86/337 the local authority had failed to consider the possible effect on the environment of granting the three planning permissions. Resisting the claim, it was argued, firstly, that the grants of planning permission were modifications to an already authorised development so that the further development did not cross the threshold contained in the [Town and Country Planning \(Environmental Impact Assessment\) \(England and Wales\) Regulations 1999](#) Sch.2 para.13 column 2, which implemented the Directive. It was said that there was therefore no need for an environmental impact assessment before planning permission was granted. It was argued further that the provision for the screening of development contained in [reg.4\(8\)](#) of the Regulations provided the necessary protection for the environment, and the interests of the public. Reg 4(8) provides:

“The Secretary of State may direct that particular development of a description mentioned in [Column 1 of the table in Schedule 2](#) is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of “Schedule 2 development” is satisfied in relation to that development.”

What was held in the case?

28. Collins J analysed closely the content of and purpose behind the Directive. He noted that it was clear from Article 4 of the Directive that projects that were likely to have a significant effect on the environment had to be subject to an environmental assessment before being approved. Annex II to the Directive identified those projects, such as waste development as in the instant case, that allowed a Member State to adopt a case by case approach or set a threshold. However, the judge thought it clear from Annex II para.13 to the Directive that “any change or extension of projects listed in ... Annex II, already authorized ... which may have significant adverse effects on the environment” required a fresh consideration of whether an environmental impact assessment was necessary. He commented that it was “plain beyond any peradventure, jurisprudence and the purpose behind the Directive” that it would be wrong if regard was only had to the effect of the change of an approved project itself rather than the *cumulative* effect that change would have. Collins J held that, accordingly, Sch.2 Para.13 Column 2 to the Regulations did not properly implement the Directive as it sought to limit the application of the threshold to the further development rather than assess the cumulative effect that that development would have on the development as a whole. He agreed with the claimant that, in the instant case, no consideration had been given as to what effect the intensification of the development would have on the environment.
29. Collins J also noted that Article 10a of the Directive required that members of the public concerned with a development should have
- “access to a review procedure before a court of law or another independent and impartial body... to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive ... in order to further the effectiveness of the provision of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”
30. He held that it was clear from that Article that there was an obligation on the Secretary of State to make clear to members of the public that they had a right to make an application to the Secretary of State to invite her to require development likely to have significant effects on the environment to be subject to environmental impact assessment. He held, further, that the procedure provided for by the Regulations did not comply with Article 10a of the Directive as there was no requirement or obligation provided for concerned members of the public to be informed of their right to address the Secretary of State.
31. For those reasons Collins J quashed the grants of planning permission to the company.

What is the significance of the case?

32. As things stand, this is clearly a very important if controversial decision. It is understood that an appeal is likely. Plainly it has consequences for any “change or extension” to development falling within one of the descriptions in Schedule 1 of the

1999 Regulations, or (as in this case), to development listed in most of Schedule 2. The effect of the judgment appears to be that where such a “change or extension” may have significant adverse effects on the environment, screening is required, regardless of the size of the “change or extension”, which could be very small. Therein lies the controversy of the case.

33. *Baker* adds to an increasing body of case law concerning developments which do not, in themselves, appear to require EIA, but which are likely to have significant environmental effect through their cumulative impact with existing (or forthcoming) development. Recently, in *Ecologistas en Accion v Ayuntamiento de Madrid* (C-142/07) (2009) Env LR D4 ECJ, the ECJ has emphasised, as it has a number of times previously, that the Directive adopts an overall assessment of the effects of projects or their alteration on the environment, and that “it would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works”. In the *Madrid* case, however, the projects in question were part of a complex civil engineering scheme for improving and refurbishing virtually the whole of the Madrid urban ring road, split into 15 independent sub-projects. One can readily appreciate a court’s desire to ensure that the cumulative environmental effect of such a substantial development, completed in stages, is considered; less clear is whether, in light of the screening options for which provision is made in the Regulations, the Directive requires EIA to be considered every time that a developer wishes to make a small extension to an accepted EIA development.
34. The Secretary of State’s power to screen development subject to EIA under Regulation 4(8) was considered in [*Berkeley v Secretary of State for the Environment, Transport and the Regions* \(No3\) \(2001\) EWCA Civ 1012, \(2001\) 3 CMLR 11](#). Faced with a challenge to Regulation 4(8) based on inadequate imposition, the Court in that case did not find any fault with the domestic provision. Collins J distinguished *Berkeley* (No 3) on the basis that Article 10(a) of the Directive, upon which he relied, was not in force at the date of that decision. It remains to be seen whether the judge’s approach will prevail.

Case C-75/08 - Christopher Mellor v Secretary of State for Communities and Local Government (Advocate General Opinion 22/01/2009)

Who should be interested in this case?

- Anyone concerned with challenging or defending decisions of local planning authorities or the Secretary of State that a particular development should not be subject to Environmental Impact Assessment.

What happened in the case?

35. The Opinion deals with a reference by the Court of Appeal made in *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* (2008) EWCA Civ 213; (2009) Env LR D1 (CA (Civ Div)) to the European Court of Justice (“ECJ”).

36. As part of its consideration of an application to develop a formal naval base in an area of outstanding natural beauty involving, among other things, the installation of a hospital, the relevant local planning authority issued a screening opinion. This said that there was no need for an environmental impact assessment in respect of the proposal, as no significant impact on the environment was to be expected. Mr Mellor, the applicant in the domestic proceedings, disagreed, maintaining, in particular, that a bat roost would be destroyed. The local authority thereupon revised its opinion. By letter dated 4th December 2006, however, the Secretary of State notified a decision that EIA was not required. Her reason was that the project would not be likely to have significant effects on the environment by virtue of factors such as its nature, size, or location. More detailed reasons were not stated. Mr Mellor challenged that decision.
37. In a reference to the ECJ, the Court of Appeal asked whether under art.4 of Directive 85/337 (as amended) Member States must make available to the public reasons for a determination that in respect of an Annex II project (Schedule 2 development in the 1999 Regulations) there was no requirement to subject the project to environmental impact assessment. It asked further about the standard of reasons, if any, which would be expected in those circumstances.

What was held in the case?

38. Advocate General Kokott accepted that the EIA Directive does not *expressly* require reasons to be given for a decision to dispense with an environmental impact assessment [20], but considered the question from the standpoint of principle. In particular, she emphasised that domestic procedural rules must not render excessively difficult the exercise of rights conferred by the Community legal order (the principle of effectiveness) [27]. She reasoned that, if there be no requirement to give reasons in the case of a negative screening opinion:

“It is doubtful ... whether the limits of the principle of effectiveness are respected. A specific expression of the principle of effectiveness is the principle of effective legal protection. That principle requires that rights conferred by Community law must be enforceable judicially. In particular, the courts must be able to review a decision of the authorities to refuse such a right. Review must extend also to the reasons given for the decision” [28].

39. She went on:

“... If a decision lacks the corresponding information, it is at the very least difficult subsequently to ascertain whether the body that took the decision took account at all of the possible environmental effects of a project. Doubts would frequently remain as to whether a subsequent justification was merely being provided in court for a decision taken on other grounds” [30]

40. She concluded that Member States should therefore, under Article 4 of the EIA Directive, make available to the public reasons for a decision that, in respect of an Annex II project, it is not necessary to subject the project to EIA. Having reviewed the relevant case law from other contexts, she had this to say about the standard of reasons:

“...there must be a sufficient demonstration of the reasons why legal and factual aspects which have already been raised in the procedure do not show that there is a possibility of significant effects on the environment. There is no need, however, to define a position on matters which are clearly irrelevant or of no importance or plainly secondary importance, or to anticipate potential objections” [51]

41. She suggested that, in this case, it would be incumbent on the UK to consider the ecological sensitivity of the area of development, and the possible effect of the bat roosts.

What is the significance of the case?

42. It should be noted that this is not a decided case as such but merely an Opinion by the Advocate General recommending that the European Court of Justice adopt her conclusions and reasoning. In most cases the ECJ adopts the Advocate General’s Opinion, although there is no guarantee that it will. Should it do so, however, it will become clear that both local planning authorities and the Secretary of State must give reasons for negative screening opinions.
43. The ECJ’s decision would also overrule the approach adopted by the Court of Appeal in *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Marson* [1998] 3 P.L.R. 90; [1998] J.P.L. 869, which has long proved controversial. In that case it was held that there was no general duty to give reasons in the case of a negative screening decision, and that, in any event, what little reasons had been provided sufficed. *Marson* was followed by Richards J in *Gillespie v First Secretary of State* [2003] EWHC 8, (see para 94).
44. But ECJ authority since both *Marson* and *Gillespie* cast considerable doubt on whether the decisions could survive. It was by *Commission v Italy* Case C-87/02 [2004] ECR I-5975, in particular, that Advocate General Kokott was persuaded in *Mellor*. There the Italian authorities had given approval for a road scheme and subsequently decided that it did not require an EIA. The Commission argued that “clear and precise reasons” had to be given for any decision not to require EIA, and that this had not occurred. Although the ECJ did not directly decide the point, it noted that the screening opinion of the Italian authorities as to whether there should have been an EIA was “based on a cursory statement of reasons and merely refer[red] to the favourable opinion of the Coordinating Committee”. The strong implication of this statement was that EU law did in fact require reasons to be given for a decision not to require EIA. Insofar as it indicated a change of direction from the position in *Marson*, the force of the reasoning in the *Commission v Italy* case was recognised domestically by Burton J in *R (Probyn) v First Secretary of State* [2005] EWHC 398, who observed that “it is plain that the

drift of the European Courts – or at any rate, those arguing before the European Court – is flowing in the other direction from *Marson*”. A-G Kokott’s opinion in *Mellor* reinforces this view.

R (Finn-Kelcey) v. Milton Keynes Council & MK Windfarm Ltd [2008] EWCA Civ 1067

Who should be interested in the case?

- Anyone involved in a judicial review of a planning matter where the “promptness” of the claim could be in issue.

What happened in the case?

45. The appellant appealed against a decision by Collins J ([\(2008\) EWHC 1650 \(Admin\)](#)) refusing permission to apply for judicial review of a grant of planning permission for a wind farm consisting of seven wind turbines up to 125 metres in height, as well as a substation and various related features. The local authority granted planning permission and Mr Finn Kelcey, a local landowner and member of an organisation which objected to the proposal, issued proceedings *just* within the three month period provided for by [CPR r.54.5\(1\)](#) (the grant of permission was on 14th January 2008 and the claim form was filed on 10th April that year). Collins J refused permission to apply for judicial review on grounds of delay and on the merits of the claim, which alleged non-compliance with the Environmental Information Regulations 2004 on the basis that that legislation required so-called “raw wind data”, to be made available to the public.

What was held in the case?

46. Keene LJ emphasised that, as the wording of CPR 54.5(1) indicates, and as has been often repeated in the authorities, it is not to be assumed that filing the claim form within the three month “outer” period means that it has been filed “promptly”. He stated that the importance of acting promptly applied with particular force in cases where it was sought to challenge the grant of planning permission. He noted that once a planning permission has been granted, a developer is entitled to proceed to carry out the development and, since there are time limits on the validity of a permission, will normally wish to proceed to implement it without delay [22].
47. He made reference to what was said by Lord Steyn in *R (Burkett) v Secretary of State for the Environment* [2002] UKHL 23, [2002] 1 WLR 1593 at [53] that, in the case of judicial review, it was not appropriate to regard as time-barred claims brought outside of the six week non-extendable period prescribed in challenges made, under s.288 of the Town and Country Planning Act 1990, to certain determinations of the Secretary of State. Nevertheless, Keene LJ suggested that the fact that Parliament had prescribed a six week time limit in the statutory review procedure emphasised the need to act promptly where the permission was granted by a local planning authority (and therefore subject only to challenge by way of judicial review).
48. In deciding that Collins J was right to reject the claim on grounds of delay, the Court of Appeal noted that Mr Finn-Kelcey had been aware of the decision of the local

authority's planning committee to grant permission as soon as that decision was made, and of the subsequent decision of the local authority not to rescind that decision. The Court did not consider that there was any adequate explanation for the delay in issuing proceedings until the end of the three month period. Although, it noted, a pre-action protocol letter had been sent, it was clear from the notes to CPR 54.5 that this did not remove the obligation to bring the claim promptly.

49. Keene LJ went on to hold that the substance of the claim was not such as to allow it to proceed in the public interest.

What is the significance of the case?

50. Whilst in no way seeking to dissent from the general statement of the position given by Lord Steyn in *Burkett*, this decision re-emphasises the particular importance of the requirement of promptness in the planning context. Planners can add it to the list of authorities from other fields which stand for the proposition that “within three months” does *not* mean “prompt”.
51. Yet the decision need not cause undue alarm for challengers. The challenge was made right at the end of the three month period in *Finn-Kelcey*. A Court is inevitably more likely to take a delay argument seriously in these circumstances. It is also important to recognise the particular context of the *Finn-Kelcey* case *within* planning. That context was recognised by Keene LJ in the following passage:

“... In the present case there is in existence a particular consideration because of the nature of the proposed development. PPS 22 stressed the importance of renewable energy projects, referring to the UK target of generating 10 per cent of electricity from renewable energy sources by 2010, so as to comply with its international obligations entered into by the Government” [28].

52. The decision in *Finn-Kelcey* can therefore properly be seen as an application of what was said by Sullivan J in *R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1847 (Admin): “... delay in challenging decisions in respect of renewable energy projects is more than usually prejudicial to good administration”.

Officers’ reports to committee

R (on the application of Cathco Properties Holdings Ltd) v Cygnor Gwynedd Council & Finneys Ltd [2008] EWHC 1462 (Admin)

Who should be interested in the case?

- Anyone involved in challenging (or defending) by way of judicial review the decision of a local planning authority on the basis of what was (or was not) contained in the officer’s report to its committee; and
- Specifically, perhaps, those advising clients in the retail sector.

What happened in the case?

53. The claimant retailer, Cathco, operated a furniture retail business in Bangor Town Centre in Wales. Bangor Town Centre was undergoing redevelopment works, which had made available a number of further retail units. Cathco challenged a planning permission granted by the local authority to a rival company, Finneys World of Interiors, for development of an out-of-town shopping centre which allowed the extension, by rebuilding, of existing retail units. Cathco believed that the permission granted to Finneys would be detrimental to the Town Centre generally, and specifically to its own business.
54. Cathco's challenge was based fundamentally on the officer's failure properly to convey to the Council's planning committee the correct policy background. At the time of the committee's decision, relevant policy in force sought to direct retail development to town centres, and only supported retail development in edge-of-town or out-of-town locations where there was shown to be an established need (the sequential approach). This contrasted with the position over the preceding fifteen years. But there was also an emerging Unitary Development Plan (UDP) which put into force policies set out in a Ministerial Interim Planning Policy Statement of 2005, one of which included the criteria to be met for any proposed new retail warehouses selling bulky comparison goods in out-of-town locations. The UDP had been put out for public consultation and representations had been received, but it had not yet gone to any inquiry.
55. The committee was advised by the planning officer that the local authority had resolved to give weight only to those policies within the UDP that had received no objections, and as the policies relating to out-of-town developments had received objections, then "little if no weight" could be attached to them in determining the instant application. The actual operational guidance recommended by the local authority was that where no objections had been received to an individual policy in the UDP, then considerable weight could be attached to it, but where objections had been made, then the weight that could be attached to that policy as a material planning consideration was *less*.
56. In relation to establishing need, the officer's report had explained, amongst other things, that there was a shortfall in the anticipated overall amount of local growth and expenditure, that there was no other land available that would satisfy Finney's requirements, that impact assessments carried out for three larger retail developments had concluded that certain supermarket redevelopments would not affect the vitality and viability of the city centre; and that in the future the greatest demand would be for comparison goods.
57. Cathco argued that the above advice given by the officer to the planning committee was misleading. It submitted that the committee consequently misdirected itself having regard to it.

What was held in the case?

58. In relation to the way in which the officer dealt with the emerging UDP, Collins J noted firstly that the officer's advice to the committee concerning the weight to be

given to policies in the UDP which had received objections was plainly wrong and misleading [20]. The judge went on, secondly, that “the assertion that because objections had received little if no weight could be attached to the policy was equally wrong and misleading. It was necessary to consider the *nature* of any objections ...” (emphasis added). This was because none of the objections received suggested that the test of need or the sequential approach should not be applied to all retail development outside established centres; all were simply either points of clarification or re-wording. It was therefore wrong to advise the committee that it should in the circumstances attach little, if no weight to that policy. Collins J was satisfied that, on that basis alone, the decision could not stand [21]. Nevertheless the judge’s criticisms of the report went further.

59. In relation to the question of need, Collins J accepted that the officer was entitled to take into account the shortfall in the anticipated overall amount of local growth and expenditure. The judge said, however, that the fact that there was no land available to satisfy Finney’s requirements did not establish an overall need [28]. He held, also, that the impact assessments were not relevant; one concerned a town centre development and the other two concerned food convenience and had not raised the issue of comparison goods directly. Therefore, the officer had relied on largely immaterial considerations [29]. There was no *evidence* of need; it amounted to no more than an assertion and it was not permissible for the officer to reach the conclusion that he had in the particular absolute terms. He could have stated that it was simply his view, but he should have then summarised the reasons which led him to form that view. It was only sufficient for him to rely upon his own personal judgment if he told the committee that that was what he was doing and explained that there was not really any evidence supporting his contention [31]. Therefore, there was insufficient consideration of the question of need and insufficient advice given to the committee. This too vitiated the committee’s decision.

What is the significance of the case?

60. The most important point to come out of *Cathco* is probably that relating to emerging policy. In cases where a policy has not yet been to inquiry, but weight may yet be attached to it on the basis that it represents the “direction of travel”, officers need to be sure properly to communicate to members the nature of any objections which may have been received in relation to it. The reality of the position in *Cathco* was that, although a number of comments had been received, they were not really objecting to the content of the proposed policy at all. The planning authority’s internal guidance suggested that, in these circumstances, at least some if not considerable weight should be attached to an emerging policy. Yet that was precisely the opposite of what the officer said.
61. Collins J’s treatment of the evidence of need should not be misunderstood as meaning that a planning committee is not entitled to grant an application for permission where no retail impact assessment has been advanced in support of the specific proposal. It may do, providing its conclusion on the basis of the evidence before it remains rational. The problem in *Cathco* was that the officer presented mere assertion as if it were hard evidence.

62. Note should also be taken of a comment made by Collins J in relation to pre-existing case law on the content of officer's reports. Whilst accepting as "an entirely correct indication of the approach that should be adopted to officers' reports, the judge added to the remarks made by Sullivan J in *R v Mendip District Council ex parte Fabre* (CO/4770/98) that:

"it is the practice in all councils, an appropriate practice, that members of the public are entitled to see in advance of a meeting of a planning committee the relevant reports, including of course the relevant officer's reports. The purpose of that is so that they too can know the basis upon which the Council is being invited to approach a particular application and (and this is the most important aspect) they can themselves make representations, either if the policy of the particular planning authority permits it orally at the meeting, alternatively in writing, and if an objector is aware of something which he or she regards as an error in the officer's report or an omission, that is the opportunity to apprise the committee of that error or omission and to make relevant representations about it. The whole purpose of advance disclosure is to enable objectors or those interested to have that opportunity and so, as it seems to me ... it is important to remember that there is this further consideration so that the basis upon which relevant advice is given is at least made clear in a sentence or two" [35].

63. In *Cathco*, as the judge pointed out, the officer's report was defective even for the purpose of informing the members, let alone the purpose of enabling representations sensibly to be made.

Construing planning permissions

Barnett v Secretary of State for Communities and Local Government [2008] EWHC 1601 (Admin)

Who should be interested in the case?

- Anyone who has cause to construe a planning permission

What happened in the case?

64. An Inspector dismissed seven appeals made by the claimant, Keith Barnett, against three enforcement notices and four refusals of planning permission issued by the London Borough of Lambeth ("the Council"). The claimant appealed the enforcement notice decisions under s.289 of the Town and Country Planning Act 1990 and sought to challenge the planning permission decisions pursuant to s.288 of the same.
65. In 1995, Mr Barnett was granted planning permission on appeal to erect a detached dwelling on agricultural land, which, when constructed, became known as "Miscombe Manor". The approved drawings to this approved application defined the permitted curtilage of the new dwelling. But the claimant was of the view that, in 1998, planning

permission had been granted for an extension of the curtilage beyond that permitted in 1995, on the approval of an application for an extension and alterations to Miscombe Manor. At the inquiry into the enforcement and planning permission appeals, the claimant argued that matters enforced against (a tennis court, chain link fence, swimming pool and pool house) were all permitted development within the curtilage of Miscombe Manor.

66. The claimant's argument that the curtilage had been extended by the 1998 permission was based on the fact that the application for the extension and alterations enclosed two plans so indicating (drawings 01 and 02 respectively). This was met by the response that the permission itself did not expressly incorporate these drawings, but described the approved proposal as being "amplified by ... the plan received 30.11.98". This was a reference to a plan showing the extent of the estate, edged by a blue line, and on which there was a red line around an area which the Inspector concluded was the same as the 1995 permitted curtilage and did not include any part of the appeal site. The Inspector concluded that the plan received by the Council on 30th November 1998 correctly identified the application boundary for the purposes for which the application submitted. He dismissed the claimant's appeals. The claimant sought to challenge that decision in the High Court.
67. The claimant pointed out that there is a difference between what is required to accompany applications for outline planning permission, and outlines for full permission. The difference was that, although both must be accompanied by a site plan (identifying the land to which it relates), it is only in the case of an application for full permission that it must be accompanied by such other plans and drawings as are necessary to describe the development the subject of the application. The claimant submitted that, bearing this statutory framework in mind, where a full planning permission for the erection, alteration or extension of a building is granted, it is unnecessary for that permission to incorporate expressly the application plans and drawings. Thus, although the 1998 permission did not expressly incorporate the application or the application plans, it did not need to do so because it was, on its face, a full and not outline permission for building operations.

What was held in the case?

68. Sullivan J had cause to consider the leading authority on the construction of planning permissions, *R v Ashford Borough Council ex parte Shepway District Council* [1999] P & CR 12. In that case, Keene J (as he then was) had held that, as a general rule, when construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself. This rule, it was said, extended to not having regard to the planning application as well as to other extrinsic evidence, unless the permission incorporates the application by reference.
69. Sullivan J distinguished *Ashford* from the present case on the basis that, in the former, Keene J was considering the proper implementation of an *outline* consent. The issue in *Ashford* was whether, in construing a permission, regard could be had to a letter which had been included in an environmental statement that had accompanied the application. Such an issue did not occur in *Barnett*. Sullivan J said this:

“If it is plain on the face of the permission that it is a full permission for the construction, erection or alteration of the building, the public will know that, in addition to the plan which identifies the site, there will be plans and drawings which will describe the building works which have been permitted precisely because the permission is not, on its face, an outline planning permission. In such a case those plans and drawings describing the building works were as much a part of the description of what has been permitted as the permission notice itself ... On its face, a grant of full planning permission for building operations is incomplete without the approved plans and drawings showing the detail of what has been permitted. In the absence of any indication to the contrary, those plans and drawings will be the plans listed in the application for permission”.

70. Sullivan J held that, applying this principle, drawings 01 and 02 were approved and were an integral part of what was permitted in 1998. To the extent that the Inspector said otherwise, he was wrong. The judge held, however, that that was not sufficient to invalidate the Inspector’s overall conclusion that “as a matter of fact and degree ... the 1998 permission did not grant planning permission for an extension of the residential curtilage to Miscombe Manor”. This was because the Inspector was entitled to find that drawing 01 did not “redefine” the curtilage of the Manor. Sullivan J commented that, although the interpretation of a planning permission is a matter of law, “whether a particular plan does, or does not, show an extension to a curtilage or any other feature is very much a question of fact, and to an extent expert judgment in understanding what is shown on plans and drawings”. He said that there was no necessary implication, in drawing 01, that the curtilage was being extended by dint of the application for an extension; and noted that the Inspector himself referred in his decision letter to the intentions of the architect who drew up plan 01 and said that it was unlikely that the applicant had deliberately intended to extend the curtilage. Sullivan J held that, given that context and other information on the site plan, the only reasonable inference for the Inspector to draw was the one he did in fact draw: that the curtilage in 1998 remained the same as had been permitted in 1995. The claimant’s challenge failed on that basis.

What is the significance of the case?

71. An appeal of Sullivan J’s decision is due to be heard shortly. For that reason little purpose is served by extensive analysis. Suffice it to say, at this stage, that whatever the outcome in the Court of Appeal, it is likely to involve further analysis of the *Ashford* principles. Sullivan J was at pains to point out in *Barnett* that his approach involved no dissent from what Keene J said in that case – but will the Court of Appeal consider it workable or desirable for there to be two sets of “principles” in the case law, applying respectively to outline and full permissions?

Vires

R (on the application of Blow-Up Media Limited UK) v London Borough of Lambeth [2008] EWHC 1912 (Admin)

Who should be interested in the case?

- Those concerned specifically with the erection of and enforcement against advertising hoardings; and
- Enforcement officers generally and those who are contracted to perform services on their behalf.

What happened in the case?

72. The claimant company, Blow-Up Media, sought judicial review of a decision of the London Borough of Lambeth's decision to serve two notices under the London Local Authorities Act 1995 s.11 ("s.11") and the Town and Country Planning Act 1990 s.225 ("s.225") respectively which required it to remove an advertisement hoarding erected on scaffolding on the front of premises on Brixton Road, next to the underground station. Blow-Up Media had obtained consent to erect the hoarding, but had failed to erect it in accordance with the approved plans, as the consent required. A planning enforcement officer visited the site and prepared a report for his team leader recommending that the notices be served. The notices were duly issued by a Mr Flynn, the team leader responsible for planning enforcement at the Council.
73. Blow-Up Media did not remove the advertisement within the 21 day period specified in the notice. It was removed by a private contractor on behalf of the local authority.
74. Blow-Up Media challenged both the issue of the notice and the means of enforcement. In particular, it submitted that the *vires* of the enforcement action was open to challenge on the basis that the Council's scheme of delegation had not been followed. It argued, further, that since no officer of the local authority had been present to supervise the removal of the advertisement, what happened was not the discharge of a function by the local authority, but the discharge of a function by a private contractor, which it said was unlawful. Finally it submitted that Blow-Up Media's rights under Article 1 of the First Protocol of the European Convention on Human Rights were engaged, and it was clear from the officer's report that there was no consideration at the time the notices were issued whether the action to be taken was proportionate.

What was held in the case?

75. Addressing, by way of background, the nature and purpose of the s.11 power, Sir Michael Harrison agreed with the claimant that it could properly be described as "draconian", in that it provides no right of appeal or right to compensation, albeit that that was not without precedent in other regimes. He accepted, too, that it was a power that should be exercised with care. He did not, however, accept the claimant's submission that it should only be exercised when the identity of the offender is unknown [34].
76. In respect of the scheme of delegation, the claimant argued, among other points, that it was not within the power of the person who issued the s.11 notice to have done so, because the relevant section of the scheme gave authority only to determine "Town Planning Applications and related matters (including enforcement decisions)" which did not, it was said, embrace the exercise of the s.11 power. Sir Michael Harrison

rejected that submission, holding that it was appropriate to construe those words “in a broad and inclusive fashion” [51].

77. The claimant also argued that, even if the scheme of delegation allowed for the exercise of the s.11 power by the Assistant Director of Planning (a Mr Brown), it was not then possible for Mr Brown to sub-delegate the power to another officer, in this case Mr Flynn, the team leader responsible for planning enforcement, who issued the notices. Having reviewed the case law at paras [69]-[71], and in particular what was said in *Cheshire CC v Secretary of State for the Environment* (1988) JPL 30 and *Provident Mutual Life Assurance Association v Derby City Council* (1981) 1 WLR 173, Sir Michael Harrison did not accept that sub-delegation was not possible. The judge commented that it would have been wholly impracticable for Mr Brown to have dealt himself with all his functions as Assistant Director of Planning [72], and that, by sub-delegating according to internal arrangements, Mr Brown was not relinquishing his decision-making powers but simply enabling certain named officers to take decisions on his behalf [73].
78. The final point raised by the claimant in relation to the scheme of delegation was that the sub-delegation from Mr Brown to Mr Flynn was made under a scheme of delegation which was no longer in force. It was argued that it was unlawful to carry over a sub-delegation from a previous scheme which was no longer in force. Sir Michael Harrison found this argument “superficially attractive” but came to the view that he should “look at the substance rather than the form of the matter”. He held that the substance of the matter was that, under the custom and practice of the local authority, the delegation of powers made under a previous scheme was carried over without the requirement of express incorporation in the new scheme in circumstances where there was no change in the name of the relevant officer and no material change in the delegated power. That custom and practice led to the result that the sub-delegation of powers by Mr Brown remained operative as there was no need to incorporate it into the new scheme [79]. The judge nonetheless commented that it was unsatisfactory that there existed documents relating to the delegation of powers which were not incorporated into the current scheme of delegation. He recommended that the local authority should review that situation [80].
79. Sir Michael Harrison dealt shortly with the claimant’s argument that an officer needed to be present at the scene of the enforcement. He accepted the Council’s case that it was open to the local authority to employ a private contractor to remove the advertisement, and that the private contractor was in these circumstances acting as the servant or agent of the authority [85].
80. The claimant finally alleged a lack of consideration by the Council as to whether the issue of the notices was proportionate. Sir Michael Harrison was not persuaded on the evidence that the proportionality of the decision to issue the notices had been “deliberately or consciously taken into account” [107]. However, having regard to all the evidence, including that of the harm caused by the hoarding, the judge found that the action taken by the local authority was proportionate in the circumstances and there had been no breach of Blow Up Media’s rights under Article 1 of the First Protocol.

What is the significance of the case?

81. A number of arguments were raised in *Blow-Up Media*. Two particular points emerge of practical significance for local authorities. Firstly, and obviously, care should be taken to ensure that schemes of delegation are clearly drafted, making clear who has power to do what. In particular, where informal arrangements of sub-delegation are made, it may be appropriate for reference to be made to that fact. Secondly, it is always easier to defend a decision engaging the human rights of the person affected where the proportionality of the action has been considered *expressly* in the relevant documentation. It is true that, as *Blow-Up Media* reinforces, a court on review is concerned with the end-result, and not the process, in circumstances where a violation is alleged (see in that respect *R (on the application of Shabina Begum) v Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Limited* [2007] 1 WLR 1420), but a reference to a human rights consideration in terms will rarely do any harm.

Access to environmental information

The Office of Communications v The Information Commissioner [2009] EWCA Civ

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Who should be interested in this case?

- Those in local authorities responsible for responding to requests made under the Environmental Information Regulations 2004 (“EIR”); and
- Anyone seeking “environmental information” held by a public body, including a local authority, in connection with a prospective, pending or past planning determination;

What happened in the case?

82. This was an appeal by the Office of Communications appealed against a decision by Laws LJ ([2008] EWHC 1445 (Admin)) requiring it to disclose information relating to the location and other details of mobile phone masts.
83. Following the Stewart report, which considered the risks to health occasioned by electro-magnetic radiation emitted from mobile phones and phone masts, OFCOM established a website called “Sitefinder” on which members of the public could search for information about mobile phone base stations. The site allowed for an individual to find out whether there was a phone mast in a particular area by inputting a postcode, town name or street name. It provided a number of details about a mast on such a search (such as an antenna height, frequency range and so on), but it did not give the address of the base station or its postcode, national grid reference or latitude/longitude co-ordinate, nor did it indicate whether the base station was mounted on a particular building or structure.
84. It will be recalled that Regulation 12 of the EIR provides as follows:

“12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5);
and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information

...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;

...

(c) intellectual property rights”.

85. A request was made to OFCOM by the NHS to disclose grid references for the base stations in connection with epidemiological research. OFCOM declined to disclose that information relying on the [Environmental Information Regulations 2004 reg.12\(5\)\(a\)](#) and [reg.12\(5\)\(c\)](#) on the basis that disclosure would compromise the security of the sites which provided the emergency services network and would also adversely affect the intellectual property rights of the mobile network operators which provided the information for the website.

86. Both the Information Commissioner (in the first instance) and then the Information Tribunal found that the exceptions under reg.12(5)(a) and (c) for public safety and intellectual property rights were engaged but that in each case the public interest in maintaining the exception was outweighed by the public interest in disclosure. Importantly, the Tribunal held that each exception had to be considered separately for the purposes of the public interest balancing exercise under [reg.12\(1\)\(b\)](#) and that it was not permissible to weigh the aggregate public interest in maintaining the exceptions against the public interest in disclosure.

87. Laws LJ upheld the tribunal's approach and dismissed OFCOM's appeal. The main issue before the Court of Appeal was whether the Tribunal's approach to the balancing exercise was the correct one.

What was held in the case?

88. Richards LJ, giving the leading judgment, held that where more than one exception to disclosure under reg.12(5) was found to apply they were to be considered *together* for the purpose of the public interest balancing exercise under reg.12(1)(b). The starting-point of his analysis was the general principle of statutory construction that the words "the public interest in maintaining the exception" in reg.12(1)(b) were to be read as "the public interest in maintaining the exception or exceptions" (meaning whatever exceptions were found to apply), since words in the singular include the plural unless

the contrary intention appears (see ss.6 and 23 of the Interpretation Act 1978). That in itself, it was held, suggested that the exceptions were to be considered together [37]. Richards LJ based his conclusion further on the fact that reg.12(5)(a) contained a number of separate exceptions which could obviously potentially overlap. Similarly there was clearly potential overlap between reg.12(5)(c) and [reg.12\(5\)\(e\)](#). He suggested that, in these circumstances, “it would be wholly artificial to have to look at each exception separately for the purpose of the public interest balancing exercise” [38].

89. Richards LJ considered further that the cumulative public interest interpretation was consistent with Article 4(2) of Directive 2003/4, which the EIR implement, and which provides:

“The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal”

90. Richards LJ commented that that article required that the grounds of refusal were to be narrowly construed, not that each was to be looked at separately for the purpose of the public interest balancing exercise [40]. He added that the aggregate approach did not make the application of the exceptions unworkable [42]. Accordingly the case was remitted to the tribunal to reconsider the public interest balancing exercise on the correct basis.

What is the significance of the case?

91. This was the first time that the Court of Appeal has had cause to consider the EIR. The case addresses an important, indeed critical, point of interpretation. It will often be the case in practice that the relevant public authority considers that non-disclosure of environmental information is justified on the basis of more than one of the so-called “exceptions” to disclosure set out in Regulation 12. Assuming it is right, in such circumstances, to treat the relevant exceptions as engaged, it will be in a stronger position, after this decision, to defend its case. Nevertheless, the decision should not be seen as detracting from the clear rule set down in Regulation 12(2) of the EIR, and which applies equally in all circumstances: “a public authority shall apply a presumption in favour of disclosure”. It is important to remember that, in circumstances where more than one “exception” may legitimately be relied upon, the balancing exercise must now be approached holistically does not mean that the presumption loses any of its force.

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