

RECENT CASES: AN UPDATE

Tom Cross

Robert Fidler v SSCLG and Reigate & Banstead Borough Council

[2010] EWHC 143 (Admin)

Judge: Sir Thayne Forbes; Date of judgment: 3/2/2010

Why the case matters

This is the first court case to consider the legal position where a developer seeks to acquire immunity from enforcement for the erection of a dwelling-house on the basis of the four-year rule by deliberately concealing the construction. Can the developer get away with it?

What happened

At Inquiry, the Inspector found as a fact that Robert Fidler “constructed” a house “as a building” by June 2002. Mr Fidler had made it clear that the construction was undertaken in a clandestine fashion, using a shield of straw bales around it and tarpaulins or plastic sheeting over the top in order to hide its presence during construction and for a subsequent period of four years. The straw bales were removed in July 2006. The Inspector accepted that, at the date the enforcement notice was served (February 2007), the dwelling had been built and in occupation for over 4 years. The Inspector also agreed that the straw bales were “not part of the structure of the dwelling”.

Nevertheless, relying on the decision of the House of Lords in *Sage* (2003), the Inspector dismissed Mr Fidler’s appeal on the basis that the four-year time limit had not expired by February 2007 as the building operations had not been substantially completed until the removal of the straw bales in July 2006.

The issue



TCPA 1990 section 171B(1) provides that the four-year period in respect of building operations begins “with the date on which the operations were “substantially completed”. The issue in this case was therefore whether and in what way the presence of the straw bales encasing the dwelling bore upon the question of “substantial completion”. Mr Fidler argued that, since the erection of straw bales did not fall within (what he argued to be) the exhaustive definition of “building operations” in section 55(1A) of the 1990 Act, they were distinct from the actual dwelling house which, considered alone, had acquired immunity.

What the Court said

Dismissing Mr Fidler’s s.289 appeal, the judge held that the Inspector had been entitled to find, as a matter of fact and degree, that the straw bales formed part of the building operations which Mr Fidler originally contemplated and intended to carry out ([23]-[24]). It was therefore open to the Inspector to conclude that “substantial completion” did not take place until July 2006, when the bales were removed, and that the enforcement notice was therefore in time.

Comment

The judge placed great reliance on *Sage*. *Sage* had nothing to do with deception. *Sage* holds that whether there has been “substantial completion” of a dwelling is a matter of fact and degree. But the issue in *Sage* was whether a building had *itself* been substantially completed (given that it was not yet itself fit for habitation). The House of Lords held that if the developer stops short of completing the building, he cannot argue that time runs from that point. The intellectual problem with applying *Sage* here is that in this case Mr Fidler plainly did intend to build a completed dwelling from the very beginning, which (as the Inspector found) he actually did. The fact that, during and following that construction he sought to conceal what he had done is in my view irrelevant to what he actually did. The statute is concerned only with the latter.

That a developer should benefit from deliberate deception may be unpalatable, but the problem should be addressed through legislative amendment, not strained case law.

Welwyn Hatfield Council v. SSCLG**[2010] EWCA Civ 26****Judges: Pill, Mummery and Richards LJJ; Date of Judgment: 20/01/2010**Why the case matters

This case is also concerned with deception on the part of a developer seeking to acquire immunity from enforcement. In dealing with the issues of statutory construction necessary to dispose of the appeal, the Court of Appeal makes a number of more general remarks about the relevance of deceit in the enforcement context (see especially Mummery LJ at [37]-[47]).

What happened

In December 2001 Mr Alan Beesley was granted planning permission for the erection of a hay barn, subject to a condition that the building was to be used only for agricultural purposes. Mr Beesley admitted that, in applying for that permission, he had deliberately deceived the council in that, while applying for a hay barn, he had always intended to build and reside in it as a dwelling. Mr Beesley constructed the building with the external appearance of a barn but internally fitted as a dwelling. He and his wife lived in the building for four years, then applied for a CLEUD on the basis that the time for enforcement action against *use* of the building as a dwelling had expired. The Council refused the certificate, but it was granted by an Inspector on appeal.

The Council successfully challenged the award of the certificate in the High Court. Collins J held that the construction of the building was lawful and not in breach of planning control; and, since there was never any intention to use it otherwise than as a dwelling house and it had never been used for any purpose other than a dwelling house, there had been no change of use. Collins J commented that the refusal of a certificate to Mr Beesley accorded with the merits of his case. Mr Beesley appealed to the Court of Appeal.

The issue

Section 171B(2) of the TCPA 1990 provides that “where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach”. The issue



was therefore how that provision applied to a situation where there is an intended use of a building for a purpose other than the use for which an application is made.

What the Court said

The unanimous analysis was as follows: the planning permission was for the erection of a hay barn and conditional upon the building being used for agricultural storage. The permitted use of the building was therefore for agricultural storage. Mr Beesley, however, did not use the building for agricultural storage. He used it as a dwelling-house. That was a different use from the permitted use. Therefore Mr Beesley was entitled to a certificate through s.171B(2). Immunity from enforcement did *not* depend upon establishing *actual* use for agricultural storage for a period, however short, prior to the residential use: use of the building for a use other than the permitted use was sufficient (*per* Richards LJ at [27]-[29]).

The courts will not adopt a strained construction of the time-limits in reaction to deliberate deceit on the part of an applicant for a CLEUD (*per* Richards LJ at [18]).

The lesson for local planning authorities was clear: look carefully at the *inside* of the building and not just the exterior. External appearances can be misleading (*per* Richards LJ at [35]).

Pill LJ stressed that local authorities should use their extensive powers in respect of enforcement, including inspection of buildings, internal as well as external, before completion of the building, requiring information from the owner / occupier (section 171C TCPA 1990) and exercising rights of entry (section 196A and 196B TCPA 1990) (at [54]).

R (oao Perrett) v SSCLG & West Dorset District Council**[2009] EWCA Civ 1365****Judges: Pill, [Wilson](#) and [Richards LJJ](#); Date of judgment: 18/12/2009****Why the case matters**

The Court of Appeal decides an important issue of general principle relating to the reconsideration of enforcement appeals following a decision of the High Court on a s.289 appeal to remit the matter back to the Secretary of State.

What happened

Mr Perrett appealed against a large number of enforcement notices relying, in all cases, on grounds (a), (b), (d), (f) and (g) of section 174(2) of the TCPA 1990. The Inspector dismissed a number of the appeals and Mr Perrett challenged those decisions through a s.289 appeal. The appeal was disposed of by a consent order in which it was agreed that the Inspector had erred in law in relation (but only in relation) to the ground (a) appeals. It was also agreed (as paragraph 22.6C of the Part 52 Practice Direction required) that the matter should be remitted to the Secretary of State for redetermination (rather than that the decision should be quashed).

In the lead-up to the redetermination hearing, a dispute arose as to whether the Inspector was obliged to reconsider the appeals not only in relation to ground (a) (i.e. whether planning permission should be granted) but also ground (d) (i.e. whether there was immunity from enforcement). The Inspector decided that ground (d) should be excluded from the scope of the redetermination.

The issue

Whether, as a point of general principle, when a matter is remitted to the Secretary of State for redetermination following a successful appeal under section 289 of the 1990 Act, the Secretary of State (or his Inspector) is *obliged* to reconsider the whole of the enforcement notice appeal afresh, including grounds that were not the subject of the further appeal under section 289.

What the Court said



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The Secretary of State had a discretion as to the manner in which an enforcement notice appeal was reheard following a remittal. It would have been unsatisfactory if a remittal gave rise to the inflexible position for which Mr Perrett was arguing, and the statute and rules did not compel such a result (*per* Richards LJ at [17]).

The normal remedy under [s.288](#) is for the court to quash a decision, in which case the Secretary of State *has* to consider the matter afresh. Under [CPR PD 52 para.22.6C\(14\)](#) and [s.289\(5\)\(a\)](#), however, the court does not set aside a decision found to be erroneous on an appeal under s.289. There is no reason to require the same approach under section 288 when the decision has not been set aside (under s.289) (*per* Richards LJ at [18]).

On redetermination, there has to be a rehearing sufficient to enable the Secretary of State to remedy the error identified by the court, but in the absence of any further provision, it was left to the Secretary of State to decide how to go about the task (*ibid*).

When disposing of a s.289 appeal, it is important that the order of the court (or, as in this case, the consent order between the parties approved by the court) should clearly define the error in the decision appealed against and thereby make clear what must be done to produce a determination in accordance with the opinion of the court. There was no reason why the order should not give guidance on the scope of the rehearing (*per* Richards LJ at [29]).

R (oao Akester and Melanaphy) v DEFRA (and ors)

[2010] EWHC 232 (Admin)

Judge: [Owen J](#); Date of judgment: 16/2/2010Why the case matters

The effect of the Habitats Regulations in the planning context is that where planning permission is sought for a development that constitutes a plan or project which is likely to have a significant effect on a European site, the local planning authority cannot grant permission unless and until it has made an “appropriate assessment” of the implications of the development for the site and has ascertained that the development will not adversely affect the integrity of the site.

What happened

Since about 1830 there has operated a regular ferry service between Lymington and Yarmouth. The service has always been regular and well-used. The river, and in consequence the ferries, now pass through European protected sites. From 1973 the service was operated using three “Class C” vessels, but it was proposed to replace these with a substantially larger and more powerful type of vessel called “Class W”. Natural England, among others, advised that the new ferries would be environmentally damaging. Nevertheless, Wightlink decided to introduce the Class W ferries.

Article 6.3 of the Habitats Directive (92/43) says that “any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site...”.

Local residents applied for judicial review of Wightlink’s decision on the basis that it was made and implemented in breach of the Habitats Directive and the Habitats Regulations 1994 (which seek to implement the Directive).

Significant issues

- (1) the meaning of “plan or project” in the Directive (Article 6.3) and Habitats Regulations (Reg 48);
- (2) the proper approach as to whether there has been “appropriate assessment” of such a “plan or project”, as required by the Directive (Article 6.3) and the Regulations (Reg 3(2)).

What the Court said

Interpreting the leading case of *Waddenzee* (ECJ):

- the term “plan or project” should be given a “very broad” definition and meaning in light of Article 6.3’s objective to achieve a high level of environmental protection ([72]-[74]);
- the proper approach is that the requirement for an appropriate assessment is triggered unless the risk of significant adverse effects can be excluded. Wightlink argued that it would be an incorrect approach to Article 6.3 to conclude that just because an action could potentially have an impact on the environment or a European site, then it should be considered to be a “plan or project”. But that is *precisely* the effect of Article 6.3 ([75]-[76]);
- It does not matter whether the risk of adverse effects on the protected site would be caused by the activity directly (as in *Waddenzee*) or indirectly (as in this case). In *Waddenzee* the intervention with the natural surroundings was the direct effect of a dredging operation on the seabed. In this case the Class W ferries had potential to interfere with the natural surroundings because they could indirectly disturb the bed and banks and cause erosion ([77]).

In this case, Natural England had advised that it “could not be ascertained that the introduction of the Class W ferries would not have an adverse effect on the [European sites]”. From that a decision maker would have been bound to conclude that the risk of significant adverse effects on the protected sites could not be excluded, and that in consequence the requirement for an appropriate assessment was triggered.

As to whether appropriate assessment had taken place *in fact*:

- The Court noted that there is no prescribed form for an appropriate assessment ([96]). It is implicit that there is no need for a freestanding document purporting to be such;
- There must be (among other things) adequate account taken of conflicting views, whether they be offered by Natural England or members of the general public ([104]);
- In this case, although Wightlink was not obliged to follow the advice given by Natural England, it “was bound to accord considerable weight to its advice, and there had to be cogent and compelling reasons for departing from it” ([112]). Wightlink’s decision was not reasoned. In the absence of a reasoned decision, the Court could not be satisfied that Wightlink “gave the formal advice from Natural England the weight that it deserved, and in consequence that it



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could properly have come to the conclusion that no doubt remained as to whether the introduction of the new ferries would have adverse effects on the protected sites” ([115]). The decision was also improperly influenced by commercial considerations ([119]-[121]).

R (on the application of Woolley) v (1) Cheshire East Borough Council and (2) Millennium Estates

Ltd

[2009] EWHC 1227 (Admin)

Judge: Judge Waksman QC; Date of Judgment: 5/6/2009

Why this case matters



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In the context of challenges to grants of planning permission based on a failure to take any or adequate account of European environmental law obligations, this is a decision of great practical significance. It raises the question: what evidence is needed in order to satisfy the court that a planning authority has grappled with and / or complied with the European law?

What happened

Millennium made an application for planning permission for the demolition of a property and its replacement by a larger property. It was initially refused on appeal; the Inspector having found that the view of the proposed development was an unacceptable intrusion onto an adjoining area of special country value. There had been evidence before the inspector that a small roost for pipistrelle bats had been found at the existing property, but he found that proposals for adequate mitigation, compensation and enhancement for the local bat population would not result in significant harm to biodiversity interests pursuant to PPS9. Millennium then made an amended application. The report of the Council's planning officer noted an improvement in the set-back of the proposal, and stated that a condition would have to be imposed to secure a method statement concerning the mitigation for the bats. Permission was granted. M had, as required in relation to a site containing a bat roost, obtained a licence from Natural England. Mr Woolley sought to challenge the permission decision, arguing that the Council had failed to have regard to the requirements of reg.3(4) of the 1994 Regulations.

Issue

What, in practical terms, is the nature of the duty imposed on a decision-maker by Reg 3(4) of the Conservation (Natural Habitats etc) Regulations 1994 ("the 1994 Regulations") at the planning decision stage?

What the Court said

The Court emphasised that very clear guidance was set out in para.116 of ODPM Circular 06/05, which states that "when dealing with cases where a European protected species may be affected, a planning authority...has a statutory duty under regulation 3(4) to have regard to the requirements of the Habitats Directive in the exercise of its functions." The Circular also refers to the giving of weight "to reflect these requirements" and contemplated that as a result of taking account of the Directive, a local authority might refuse permission altogether.



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A local authority could not discharge its duty simply by making the obtaining of a licence a condition of the grant of permission: that did not, in truth, engage with the Directive, as if no licence was obtained it would be a criminal offence, so there was a clear incentive to obtain one anyway.

In the circumstances, the local authority had acted in breach of reg.3(4). The planning officer's report had made no mention of the Directive or the Regulations. It referred to the need to have a condition for the mitigation of disturbance to the bats but that did not amount to consideration by the local authority. The planning permission was therefore quashed.

Point to note

This case does *not* decide that, in cases where obtaining a licence would be necessary, permission must necessarily be refused. What the decision-maker must do is properly to engage with the “habitats consequences” of granting planning permission. It is perfectly legitimate to deal with a habitats issue by way of condition, but *only* if proper consideration of the effect of granting planning permission on that habitat is undertaken.

R(oao Morge) v Hampshire County Council**[2009] EWHC 2940 (Admin)****Judge: [Judge Bidder QC](#); Date of Judgment: 17/11/2009**

Why this case matters

It further discusses (and in greater depth than *Woolley*) the nature of the obligations on planning authorities under the Habitats Regulations when considering granting planning permission. There is a sense in which it pulls in the opposite direction from *Woolley*.

What happened

The Council granted planning permission for a new busway. Bats roosted in and foraged along the site. Natural England had initially objected to the proposal but withdrew their objection as a result of a Bat Survey commissioned by the Council. In the Officer's Report to Committee, members were informed that the Survey identified the presence of protected bats and that "an Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them from these proposals". Members were also told about Natural England's change of position.

Article 12(1)(b) of the Habitats Directive is to the effect that the "deliberate disturbance" of European Protected Species (of which the bats were one) is prohibited. Article 16 allows derogation from the prohibition in Article 12 in specified circumstances including where it is in the overriding public interest.

Relying on the Directive, Ms Morge sought judicial review of the decision. She argued that the proposal would result in "disturbance" to the bats within the meaning of Article 12. She said that, since the Officer's Report made no real reference to the "disturbance" of the bats, it was an inaccurate or incomplete summary of the findings of the Bat Survey. There simply was not enough information in the Report, she argued, to enable the committee to make up its own mind as to whether there would be compliance with the Directive if permission were granted. Ms Morge relied in that argument on *Woolley* and PPS 9, and invited the Court to make a Reference to the ECJ on the meaning of "disturbance".

The Council argued that (on the basis of the Bat Survey’s conclusions) there was no “disturbance” in this case and so the Article 16 derogations need not have been considered. In the context of the Bat Survey and the withdrawal of Natural England’s objection, in particular, it could be assumed that the members did engage with the provisions of the Directive. The Council distinguished *Woolley* on the basis that in that case there had been no adequate engagement at all with the Directive.

What the court said

The judge was not persuaded that the Officer’s Report was inadequate or misleading. Since consideration of the Art16 derogation depended on whether Art12 was engaged by the proposal, the fundamental issue was whether the proposals *did* lead to “disturbance” ([182]).

Having regard to the inclusive definition of disturbance in Art12, further definition was unnecessary and unlikely to be helpful. However, it was important that any authority should approach the question in the correct way:

- Detailed expert evidence and a thorough survey of the area affected would almost certainly be essential and planning officers had to accurately and fairly summarise the conclusions of the report in which the evidence was contained ([183]).
- The planning authority had to have regard to the aims of the Directive set out in the Preamble, namely the maintenance of biodiversity and the need to take measures to conserve certain threatened species ([184]).
- As Art12(1)(b) made clear, any authority considering whether proposals might involve “disturbance” to a European Protected Species would first need to consider whether there was evidence that the disturbance adversely affected the breeding, rearing, hibernation or migration of the EPS concerned. In the instant case, the detailed findings of the survey did not support such adverse effects ([185]).
- The authority should also have regard to the Commission guidance ([186]).

In this case the judge found that the Council had responded to Natural England's specific objections by commissioning the detailed bat survey. The survey showed the careful consideration of potential direct and indirect harm to the EPS, considering, as the authority was entitled to do, the methods of mitigation which could reduce the potential for harm. The executive summary of the survey made it clear that the proposals did not involve deliberate disturbance of that EPS within the meaning of art.12(1)(b) of the Directive. The decision was therefore lawful.



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NOTE: Ms Morge's appeal from the decision was heard by the Court of Appeal during the week of 8th March. Judgment is reserved.

Newcastle Upon Tyne City Council v SSCLG

[2009] EWHC 3469 (Admin)

Judge: [Langstaff J](#); Date of judgment 11/12/2009

Why this case matters

For the first time since the 2006 amendment to the Town and Country Planning Act 1990 s.62, the court was required to consider who was responsible for determining whether or not a planning application was valid: the local authority, or the Secretary of State on appeal?

What happened

Article 20 para (3)(d) of the GDPO makes it a requirement of a valid application that it contain the particulars thought “necessary” by the authority under TCPA 1990 s.62(3) (as amended and in force from August 10, 2006). Policy applying to those statutory provisions is contained in Circular 02/2008: *Standard Application Form and Variation*, which lays down national (effectively mandatory) requirements. The national and local validity requirements must be published by local planning authorities.

It was a validity requirement of Newcastle that, in addition to a satisfactory site plan, certain applications be accompanied by a number of specific assessments such as daylight/sunlight study; a bat survey; a photo montage and so on. Newcastle received an application to which those requirements applied, but which was not accompanied by them, and so declined to determine the application. The developer appealed the non-determination to the Secretary of State under s.78. The Inspector decided that he could himself determine what was “necessary” (within the meaning of s.62(3)) in order for a planning application to be valid.

The issues

- (i) Whether the Secretary of State is entitled to substitute his own view for that of the local planning authority as to what requirements are “necessary” for the validity of the application;
- (ii) Whether the Secretary of State must determine the validity of a planning application as a separate determination or whether he can, at the same time as an argument on validity, hear other issues arising in the same application.



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What the Court said

It was not in dispute that, on an appeal against non-determination for invalidity, the Secretary of State could decide whether, *as a question of fact*, the validity requirements had been met. The issue was whether the Inspector could substitute himself for the authority in deciding whether they should *be* requirements (in a given case). The Court said that the Inspector had no business doing so in this case.

Article 20 of the GDPO means that an application is valid if it contains in part the particulars or evidence required by an authority under section 62(3), and therefore it is invalid if it does not ([35]). There is no provision for an appeal from the Secretary of State against the local authority's decision to impose the requirement as to what they consider necessary. Any appeal in that respect is properly to be brought by judicial review ([36]). The whole point of the recent redrafting of the procedure is to allow the Secretary of State to make certain "blanket" provisions for the whole country by means of the standard form planning application, but to give power to local authorities to decide what further formal requirements should be imposed having regard to local conditions with which the Secretary of State cannot be so familiar ([37]).

As to the timing issue: it is for the Secretary of State to decide how to resolve the issue of validity. He will need to resolve the question of validity as a precondition for *allowing* any wider appeal but it is for him to judge the most effective procedure by which to do that ([40]).

Land Securities (and ors) v Fladgate Fielder (a firm)**[2009] EWCA Civ 1402****Judges: Mummery, Moore-Bick, [Etherton LJJ](#); Date of Judgment: 18/12/2009****Why this case matters**

It is no secret that, in the planning world, the bringing of judicial review is often motivated by commercial rivalry. This is the first case ever to consider whether or not (albeit in narrowly defined circumstances) the bringing of such a judicial review might constitute the tort of abuse of process, rendering the judicial review claimant liable in damages to the developer whose planning permission he seeks to challenge.

What happened

Land Securities got planning permission to develop a site opposite to a building occupied by Fladgate pursuant to a lease. Fladgate, who was planning to move offices and was attempting to dispose of the residue of its lease, became concerned that the proposed development would adversely affect its marketability and value. So Fladgate applied for judicial review of the decision to grant planning permission to Land Securities, challenging the planning authority's approach to the developer's provision of affordable housing.

Land Securities then brought an action in damages against Fladgate, claiming that the purpose of the judicial review proceedings was not to prevent the development, but was rather to pressure them into giving Fladgate financial help. They claimed that the issue of the proceedings constituted the tort of abuse of process. At first instance the judge entered summary judgment in favour of Fladgate. He found that the tort of abuse of process *could* apply to proceedings for judicial review, but the question was whether, in bringing the proceedings, Fladgate had been acting for an improper or collateral advantage (which he found it had not).

The issue

Whether the tort of abuse of process might, in principle, be constituted by the launch of judicial review proceedings, and, if so, what the ingredients of the tort are.

What the Court said



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The authorities provided no basis for extending a tort of abuse of process to applications for judicial review. The decision in *Grainger v Hill* 132 ER 769 QB, which was authority for a tort of abuse of process, had never been overruled, but it concerned a blatant misuse of a particular process *within* existing proceedings and involved compulsion by arrest and imprisonment to achieve a collateral advantage. Statements in the authorities describing a broader application of the test of abuse of process than the critical factual elements of *Grainger* were all obiter. There was no clearly accepted approach for identifying what was sufficiently collateral to establish the tort of abuse of process (*per* Etherton LJ at [67]). It made no sense to extend to all cases of economic loss a tort of abuse of process which could apply even where the alleged abuser had a good cause of action. This principle applied with particular force to judicial review proceedings (*per* Etherton LJ at [68]-[71]).

The tort cannot be committed by a person who institutes proceedings with a genuine interest in, and an intention to secure, their successful outcome, *even if* the claimant's motives are mixed and they hope that they may also achieve an objective not itself within the scope of the proceedings. That is often the situation in Judicial Review proceedings concerning planning matters, which often are "by their very nature, driven primarily by commercial or private motive rather than a high-minded concern for the public weal" (see *Mount Cook*) ([73]).

See further Cross, [*The Tort of Abuse of Process and Judicial Review: A Disincentive for the Rival Challenge?*](#) JR [2009] 256 (NOTE: I deal there with the judgment at first instance).

Uniplex v NHS Business Services Authority**European Court of Justice Case C-406/08 (28 January 2010)**Why this case matters

Uniplex is likely to become extremely important in judicial review generally and has a particular relevance to planning and environmental challenges. It suggests that the overarching requirement that judicial review proceedings be brought “promptly” may be incompatible with European law making it more difficult than previously for judges to hold that judicial review challenges brought within the outer three-month time limit are nevertheless not brought “promptly” and are therefore time-barred. A tension has now developed between Europe and the domestic courts on this issue.

Background

The CPR 54 requirement that challenges to administrative decisions should be brought “promptly” (and in any event within 3 months) is well known. The primary and overarching test is not the (outer) three month period but “promptitude”. The compatibility of the promptitude requirement with the principle of legal certainty was doubted by Lord Steyn and Lord Hope of Craighead in *Burkett v LB of Hammersmith* [2002] UKHL 23 but the domestic courts have nevertheless applied the test, occasionally with rigour. In *R (Finn-Kelcey) v. Milton Keynes Council & MK Windfarm Ltd* [2008] EWCA Civ 1067, for instance, Keene LJ upheld a decision at first instance that a challenge to a windfarm consent brought within 3 months was nevertheless not brought promptly enough. Subsequent cases have followed *Finn-Kelcey* (see e.g. *R. (on the application of Derwent Holdings Ltd) v Trafford BC* [2009] EWHC 1337 (Admin)).

What happened

The NHS launched a tendering procedure for a contract for the supply of haemostats (a type of surgical tool) and invited Uniplex to tender. Uniplex was unsuccessful and sought to challenge the NHS’s decision in the High Court pursuant to Regulation 47(7)(b) of the Public Contracts Regulations 2006 which provided that proceedings must not be brought “unless ... those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose...”. The 2006 Regulations implement Directive 89/665 which mandates review procedures to the award of public supply and public works contracts. A dispute arose as to whether the



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proceedings had been brought “promptly” and a Reference was made. Were the 2006 Regulations compatible with the Directive?

What the ECJ said

The ECJ held that the requirement of “promptitude” in the 2006 Regulations did not ensure effective transposition of the Directive (at [42]). It observed that certainty required that limitation periods must be sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (at [39]), and endorsed Advocate General Kokott’s Opinion that a limitation period the duration of which is placed at the discretion of the court is not predictable in its effects (at [42]). So, in order to ensure the effectiveness of the European law, the national courts had to disregard the promptitude requirement when considering delay ([50]). This plainly has immediate ramifications for the *Finn-Kelcey* line of authority where a judicial review challenge is based on an alleged breach of European law.

The Court also held that, in order to ensure effective protection, time must run from the date on which the claimant knew or ought to have known of the breach of the relevant European law ([32]). This may also have dramatic consequences in planning judicial review based on breach of European law. The domestic position, since *Burkett*, has been that time has run from the grant of permission, *not* from when the aggrieved challenger knows of the grant of permission. Watch this space. Authorities and developers should not assume that, simply because three months have elapsed from a grant of permission, no challenge could be brought.

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