

PLANNING HIGH COURT CHALLENGES

PRACTICE AND PROCEDURE: UPDATE

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Topics:

- (i) Time limits for seeking judicial review:**
 - a. Recent case-law on the requirement of promptitude**
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- (ii) The discretion to refuse relief:**
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¹ This paper updates, but draws heavily on an earlier paper by James Maurici QC

Time Limits for Seeking Judicial Review

1. As is well known, the standard time limit for seeking judicial review (as set out in CPR Rule 54.5) is that the claim form must be filed:

- “(a) promptly, and
- (b) in any event not later than 3 months after the grounds to make the claim first arose.”

In the field of planning, this requirement has had a somewhat uncomfortable history.

2. On the one hand, the distinct likelihood that developers will spend (often significant sums of) money in reliance on what they believe is a valid permission, and the consequent need for early certainty, have repeatedly led the Court to find ways of refusing permission for applications, notwithstanding the fact that the claims have been brought within 3 months. In particular, some delegates will remember the line of authority which drew parallels with the six week time limit for statutory challenges under s. 288, and culminated in the decision of Laws J (as he then was) in ***R. v. Ceredigion County Council, ex parte McKeown [1998] 2 PLR 1*** that it was nearly impossible to conceive of a case in which leave to move for judicial review would be granted to attack a planning permission when the application was lodged more than six weeks after the planning permission had been granted.
3. That proposition was roundly rejected by the House of Lords in ***R. (Burkett) v. Secretary of State for the Environment [2002] UKHL 23, [2002] 1 WLR 1593***, where Lord Steyn said (at paragraph 53) that:

"the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a 'six weeks rule'. This is a misconception. The legislative three months limit cannot be contracted by a judicial policy decision."

4. Nonetheless, the idea that planning calls for tighter time limits has been difficult to shake off. So, for example, in ***Finn-Kelcey v. Milton Keynes BC [2008] EWCA Civ 1067*** Keene LJ observed that:

"It may often be of some relevance, when a court is applying the separate test of promptness, that Parliament has prescribed a six weeks time limit in cases where the

permission is granted by the Secretary of State rather than by a local planning authority, if only because it indicates a recognition by Parliament of the necessity of bringing challenges to planning permissions quickly. There are differences between the two situations: for example, where the Secretary of State grants a permission, an objector is entitled to be notified of the decision, which is not the case where a local planning authority grants the permission. Thus where in the latter case an objector is for some time unaware of the local authority decision, the analogy is less applicable... My point is simply that, while there is no 'six weeks rule' in judicial review challenges to planning permissions, the existence of that statutory limit is not to be seen as necessarily wholly irrelevant to the decision as to what is 'prompt' in an individual case. It emphasises the need for swiftness of action."

5. On the other hand, there have long been concerns about the use of the Rule 54.5 requirement of promptitude as a means of curtailing claims: in ***R (Burkett) v Hammersmith and Fulham LBC*** [2002] 1 W.L.R. 1593 Lord Steyn said at para. 53:

"... there is at the very least doubt whether the obligation to apply "promptly" is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms . It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty."

6. In the later case of ***Hardy v Pembrokeshire CC*** [2006] Env. L.R. 28 the Court of Appeal said of this:

"13 There seem ... to be a number of problems with this line of argument. First and foremost, this very point has been advanced before the European Court of Human Rights in the case of ***Lam v United Kingdom***, App. No.41671/98 , and rejected. That was a case concerning an application for leave to seek judicial review of a planning decision, where leave had been refused on the ground of lack of promptness. The applicant contended before the European Court of Human Rights that the terms of Order 53, r.4(1) of the Rules of the Supreme Court (the predecessor to CPR 54.5(1)) were contrary to the principles of legal certainty, and reliance was also, as here, placed on Art.6 . The Court held that this complaint was manifestly ill-founded, stating:

"In so far as the applicants impugn the strict application of the promptness requirement in that it restricted their right of access to a court, the Court observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim. The applicants were not denied access to a court ab initio . They failed to

satisfy a strict procedural requirement which served a public interest purpose, namely the need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions.”

It is to be observed that *Lam* does not appear to have been cited to the court in *Burkett*”

7. However, in *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] 2 CMLR 47, the European Court of Justice concluded that rules limiting the period with which proceedings may be brought to vindicate right deriving from Community law must be certain in order to ensure that the law is capable of effective enforcement, and that a requirement to bring proceedings “promptly” rendered the limitation period discretionary, and thus undermined the effectiveness of the transposition into domestic law of the relevant community legislation.
8. *Uniplex* was a procurement case. Domestic decisions in its wake have raised three particular issues:
 - a. does it apply to planning cases which raise a point of European law?
 - b. if so, where does this leave the time limits for challenges based on purely domestic law?
 - c. Does the same point apply to the exercise of the Court’s discretion to refuse relief under s. 31(6) Senior Courts Act 1981?
9. Of these issues, the first two are likely to be rendered redundant by the government’s recently proposed changes to judicial review. However, for the intervening period it is worth summarising where things have got to. Point (c) is picked up under Topic 2, below.

(i) the promptness rule – where are we now?

a. Does Uniplex apply in planning cases?

10. At High Court level, it has been accepted that *Uniplex* applies in planning cases on EIA grounds: see the decisions of HHJ Thornton in *R (Buglife) v. Medway Council* [2011] EWHC

746 (Admin) and Collins J. in *R (U & Partners(East Anglia) Ltd) v. Broad Authority and Environment Agency* [2011] EWHC 1824 (Admin).

11. The matter has now been considered by the Court of Appeal in *R (Berky) v. Newport CC* [2012] 2 CMLR 44, which concerned a judicial review challenge to the grant of a planning permission dated 26 January 2011, and where the claim had been lodged on 26 April 2011.
12. On the basis of cases such as *Crichton v Wellingborough BC* [2004] Env LR 11 (see para. 56) and *R (Hardy) v Pembrokeshire* [2006] Env. L.R. 16 (see para. 46) in the High Court and [2006] Env. L.R. 28 in the Court of Appeal (see para. 8) this would have meant that ordinarily the claim had been lodged outside the 3 months time limit, such that any issue of promptness would not arise. However, the Appellant successfully argued against that conclusion, on the grounds that 25 April 2012 was a bank holiday and CPR 2.8(5) provides that where the period “specified for doing any act at the court office ends on a day on which the office is closed, that act shall be in time if done on the next day on which the court office is open”. The Court of Appeal held that the application had been filed within the three-month time limit of CPR r. 54.5(1). Carnwath LJ said:

“32 The judge dealt with this issue relatively shortly by reference to the guidance in *Hardy v Pembrokeshire CC* [2005] EWHC 1872 (Admin) (Sullivan J.), approved [2006] EWCA Civ 240. He held that applications were brought neither within three months, nor promptly as required by CPR 54.5(1). On the basis of the Court of Appeal judgment in *Kaur* [1973] 2 W.L.R. 663 (to which he may not have been referred) Mr Harwood submits that he was wrong on the three months limit. The three months should have been taken as starting with the day following the grant of permission, and in any event the Bank Holiday should have been disregarded. Although we did not hear detailed argument, that seems correct. The issue of the timing therefore turns on the separate requirement for “promptness”, and the general discretion under Senior Courts Act 1981 s.31(6) to refuse relief for undue delay. ...”

13. Moore-Bick LJ said (at para. 48):

“the natural meaning of that expression is that the three months begins to run on the day after the grounds arose, a conclusion which is supported by the decision of this court in *Kaur* [1973] 2 W.L.R. 663 . In the present case planning permission was granted on January 26, 2010, so the three-month time limit expired on April 26, 2011. In any event April 25, 2011 was a Bank Holiday and is to be disregarded for these purposes. The claim was therefore filed just within time, but the judge held that it had not been filed promptly.”

14. On the issue of promptness and EU law the members of the Court of Appeal each took a different view:

- a. Carnwath LJ considered that *Uniplex* probably did apply beyond procurement cases, but thought the position was sufficiently uncertain that he would have made a reference if that case had turned on delay;²
- b. Moore-Bick LJ thought the conclusion in *Buglife* was correct

“because there is no distinction for these purposes between the cases, each of which involves the application in the domestic context of rights deriving from Community legislation”

- c. Sir Richard Buxton was less convinced, observing that:

“74 All of the foregoing assumes that the jurisprudence of *Uniplex* [2010] 2 C.M.L.R. 47 applies directly to the requirement in art.10a of Directive 85/337 that member states must ensure that, in accordance with the relevant national legal system, members of the public having a sufficient interest have access to a review procedure before a court of law to challenge the legality of acts affected by the Directive: so that judicial review can only qualify in that role if it is shorn of its requirement that applications should be made promptly. There are some reasons for caution on that issue.

75 The court in *Uniplex* [2010] 2 C.M.L.R. 47 necessarily was not exposed to the implications in the national legal order of the extension of its ruling to all types of administrative acts. In another case greater emphasis on the effect on applicants for planning permission as well on the effect on objectors, and appreciation that the requirement of promptitude is indeed judicially-controlled, and only applied after judicial consideration of the circumstances of the case, might lead to a different view. Such an analysis, of the actual application of the provision in the context of the national legal order, is not excluded by Community law. As we have seen, the objection of the CJEU to the promptitude requirement is that it deprives the objector of an effective remedy. ...

² See para 37

76 ... in the planning context, as exemplified by the present case, it would be difficult to say under the normal use of language that the applicants did not have an effective remedy, in the sense that the procedural rules, to adopt the language of *Rewe Zentralfinanz* [1977] 1 C.M.L.R. 533, did not make it impossible for them to exercise their rights. All that they were required to do was to assert those rights with a promptitude appropriate to the administrative issues at stake. Whether adjudication on that issue of promptitude created the uncertainty and discretionary power perceived by the CJEU in *Uniplex* [2010] 2 C.M.L.R. 47 would need to be determined in the light of national judicial practice, in a manner exemplified by the speech of Lord Hope in *Burkett* [2002] UKHL 23.

77 The wider implications of the need for an effective remedy in the specific context of planning therefore merits reconsideration: but in view of the terms of the judgment in *Uniplex* [2010] 2 C.M.L.R. 47 that reconsideration cannot be undertaken without recourse to the CJEU. I regretfully agree with Mr Fordham that the parties in a case in which the point does not need to be decided should not be put to that trouble and expense”

15. However, if the majority view tends to suggest that (for the time being, at least) *Buglife* is correct, none of the Court of Appeal seemed at all happy with that result:

a. At para 53, Moore-Bick LJ observed that:

“even if it is confined to Community law challenges, the *Uniplex* principle, as currently expressed, is capable of creating significant difficulties, particularly in the context of planning decisions”

b. Sir Richard Buxton said:

“64 The applicant’s case builds on *Uniplex* [2010] 2 C.M.L.R. 47 to argue that a separate requirement of promptness is forbidden in any proceedings, such as the present proceedings, that involve any “Community” claim: a view that was fully accepted by H.H.J. Thornton in *Buglife* [2011] EWHC 746 (Admin). That approach, if extended throughout the planning field, gives rise to manifest inconveniences, both forensic and practical.

65 The practical difficulties can be seen from the timetable in this case. The only “Community” objection raised is as to the means whereby the decision was taken that

an EIA was not required. That decision was taken on January 7, 2010 and duly publicised. The planning committee resolved to approve the application at its meeting on October 13, 2010. The planning permission was issued on January 26, 2011, and it is agreed that it was notified within the next week to objectors, including various of the present applicants. Once armed with the planning permission Morrisons were entitled to, and did, commence works that it must have been apparent would involve considerable expense as well as the commitment of the workforce engaged in the construction works. The considerations recognised by this court in *Finn-Kelcey* [2008] EWCA Civ 1067 were clearly present. If legal challenges were to be brought it was in everyone's interest, including the proper interests of those objecting to the construction of the supermarket, that those challenges should be notified promptly, so that they could be resolved promptly. Instead of doing that, the applicants sent no letter before action, nor any other indication of their intentions, but simply filed the proceedings at the end of April 2011, effectively complaining of a decision that had been taken in January 2010.

66 That time ran from the date of the planning permission, and not from the date on which the decision complained of was taken, was decided by the House of Lords in *Burkett* [2002] UKHL 23 . The applicants were of course entitled to rely on that authority, but in practical terms the length of time for which the decision actually complained of had been before the public should have placed on them a particular obligation of promptitude once time did start to run.

67 The regime contended for by the applicants necessarily applies to any objector to a planning permission. If the objector in the present case had been not a citizens group but another supermarket operator, seeking to avoid competition for its own local store, under the approach in *Uniplex* [2010] 2 C.M.L.R. 47 as extended to this case it would have been entirely open to Morrisons' business rival to have announced in January 2010 that it objected to the screening opinion, but that it would not reveal whether it was going to bring proceedings until two months and thirty days had elapsed from the date of the subsequent planning permission. The opportunity for commercial blackmail does not need to be emphasised ..."

16. Consequently, *Berky* is unlikely to be the last word on the subject. For present purposes, it is likely that domestic courts will continue to apply *Uniplex* to planning cases raising EIA points, but in a case where promptness matters and EU law grounds are raised, a reference will be required to resolve the scope of application of *Uniplex*. Europe beckons for anyone who has the stomach for the fight!

(ii) **Implications for challenges based on domestic law?**

17. As noted above, **Uniplex** is underpinned by the obligation to provide an effective remedy for the infringement of rights which are underpinned by European law. In this sense, the decision has no direct relevance to challenges based purely on principles of domestic law. However, many planning challenges will involve both domestic and European law grounds. Is it sensible to have different rules for each? Moreover, if the requirement of promptitude is insufficiently certain, why is this not a legitimate objection, regardless of the origin of the ground relied upon?
18. In **R (Macrae) v County of Herefordshire DC** [2012] EWCA Civ 457, the appellant argued that because the ‘promptness’ requirement in judicial review was incompatible with EU law (as to which see below) it was undesirable to have one rule applicable to cases where there is an EU law dimension and another applicable to purely domestic cases. The basis of the arguments made in **Macrae** was that the European Convention on Human Rights via the Human Rights Act 1998 requires that even in a domestic case the promptness rule must be disapplied because it lacks legal certainty, and such certainty is also required by the Convention. As noted above, this point finds some support in **Burkett**.
19. In **Macrae**, the Court did not find it necessary to decide the issue. Sullivan L.J. stated (at para. 11) that “[t]hose are interesting arguments, but in my judgment it is unnecessary to resolve them in this case because this appeal turns very much on its own particular facts”. On the facts the Court of Appeal held that, even if a requirement of promptness did apply, the appellant had brought his claim promptly. However, the point re-emerged in **Berky**, where once again there was a difference of opinion:
- a. Carnwath LJ considered that,³ if **Uniplex** applied, it would not have affected the promptness requirement in respect of the domestic law grounds in the case, only the EIA ground;
 - b. Like Carnwath LJ, Moore-Bick LJ⁴ could see no reason why Community and domestic law challenges should not be subject to different time limits,

³ Para 35

- c. Sir Richard Buxton said⁵ that assuming **Uniplex** applies to planning, then it disappplies the time limits in respect of all the grounds (both domestic and European) so long as one of the grounds raised was an EU point and not “plainly unarguable”. However, these comments were directed at a hypothetical situation where at least one of the grounds was a European point.

20. Overall, therefore:

- a. the majority view is that, in cases where there is a mixture of European and domestic law points, **Uniplex** would not prevent the Court from refusing permission (on grounds of delay) for the domestic grounds;
- b. **Uniplex** will not apply to claims brought on a purely domestic law point. (In **R (Halebank PC) v Halton BC [2012] EWHC 1889 (Admin)** the Judge appears to have accepted that, following **Berky**, promptness remains a requirement where the grounds are domestic not EU based: see paras. 111 and 118.

(iii) The Aarhus angle

21. Interestingly, the developments in **Uniplex** mirror the jurisprudence on the Aarhus Convention. In the **Port of Tyne** case ACCC/C/2008/33 the Aarhus Compliance Committee said this on the delay rules:

“138. The Committee finds that the three-month requirement specified in CPR rule 54.5 (1) is not as such problematic under the Convention, also in comparison with the time limits applicable in other Parties to the Convention. However, the Committee considers that the courts in England and Wales have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a judicial review be filed “promptly” (see paras. 113–116). This may result in a claim for judicial review not being lodged promptly even if brought within the three-month period. The Committee

⁴ Para 53

⁵ Paras 68-69

also considers that the courts in England and Wales, in exercising their judicial discretion, apply various moments at which a time may start to run, depending on the circumstances of the case (see para. 117). The justification for discretion regarding time limits for judicial review, the Party concerned submits, is constituted by the public interest considerations which generally are at stake in such cases. While the Committee accepts that a balance needs to be assured between the interests at stake, it also considers that this approach entails significant uncertainty for the claimant. The Committee finds that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.

139. As was pointed out with regard to the costs of procedures (see para. 134 above), the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. On the contrary, reliance on such discretion has resulted in inadequate implementation of article 9, paragraph 4. The Committee finds that by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e., the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable.”

22. The DEFRA letter (see above) to the Aarhus Compliance Committee said:

“Recommendation to review the rules regarding the timeframe for the bringing of applications for judicial review identified in paragraph 139 of the findings in case ACCC/C/2008/33 to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework.

The UK notes the Committee's findings that by failing to establish clear time limits within which claims may be brought in England and Wales and to set a clear and consistent point at which time starts to run, the UK fails to comply with the requirement of Article 9(4) of the Convention. As indicated to the committee in our comments on the draft compliance committee findings, we are considering the issue of time limits for judicial review proceedings with a view to ensuring that we get the balance right between enabling environmental claims to be made and avoiding unnecessary delay. The Ministry of Justice has consulted with the Administrative Court judiciary on the issue of whether the term 'promptly' should be retained or whether the time limit should simply specify a maximum period and whether it would be appropriate to set the clock running when the applicant becomes aware or should have become aware of the decision to be challenged, and are now considering whether further public consultation would be appropriate.”

(iv) Proposed reform of time-limits

23. Interesting though the preceding points may be, they are soon likely to be rendered academic by the Government's proposals for the Reform of Judicial Review.

24. These follow the consultation which took place in December 2012, which was explained⁶ as being:

“driven by concern about the growth in the use of Judicial Review⁷ and the delays those proceedings create, in some cases frustrating plans for growth.”

In particular, it was said that:

“Delays caused by the time it takes to conclude a Judicial Review do not just slow down the decision-making process, adding to costs: they can also create uncertainty in the decisions of public bodies, which can be a particular concern for planning and infrastructure cases, and for other cases which seek to stimulate growth”

25. Amongst the proposals put forward was a suggestion that the time limits for seeking judicial review should be shortened to six weeks in planning cases.

26. The proposals drew widely differing responses. Unsurprisingly, the proposed shortening of time was welcomed by many in the development industry, but there were strong objections from almost all other quarters: of the 198 responses, only 44 (22%) supported the proposal, while 133 (67%) disagreed.

27. Amongst the arguments put forward by those opposing was the concern that six weeks would not allow time for a claimant to comply with the Pre-Action Protocol, with the result that many claims would be brought on a protective basis, often on ill-informed grounds. Respondents also commented that it was not clear what was meant by “planning cases”.

⁶ Foreword to “Reform of Judicial Review: the Government Response”

⁷ In fact, as most commentators pointed out, the current delays in judicial review have more to do with the explosion in the number of immigration claims than anything else (the number of planning cases has remained broadly static for some time), and the situation should improve significantly following the transfer later this year of immigration cases to the Upper Tribunal.

28. Notwithstanding the objections, and the express recognition that most of the responses were opposed to reform, the Government has announced that it intends to proceed with the changes. The key elements are:
- a. The time limit for seeking judicial review in planning cases will be reduced to six weeks;
 - b. “Planning cases” will involve any proceedings relating to a decision whether or not to grant planning permission under the planning acts, including procedural decisions such as decisions by the Secretary of State on whether or not to call in an application, and decisions relating to the requirements under the EIA Regulations. It will not apply to challenges to planning policy statements such as NPSs or the development of Local Plans;
 - c. Given the shorter time limits, the requirement to bring claims promptly will no longer be necessary and the Civil Procedure Rules Committee will be invited to amend the COR accordingly;
 - d. It is accepted that the shortened time-limit is unlikely to allow sufficient time to fulfil the Pre-Action Protocol, and the Master of the Rolls will be invited to disapply it in these cases.
29. Additionally, the reforms will remove the right to renew an application for permission to seek judicial review to an oral hearing in cases where the judge considering the paper application certifies that the claim is “totally without merit”. There will also be a new fee (£215) for an oral renewal hearing, which will be waived if permission is granted.
30. Whether these changes help reduce the number of hopeless claims for judicial review remains to be seen. However, they will render irrelevant much of the debate that has been raging about the effect of *Uniplex*.

(v) **Other delay cases**

31. In **R (V) v Secretary of State for the Home Department** [2012] EWHC 1499 (Admin), Ouseley J held that it was appropriate to grant an extension of time for renewing an application for permission for judicial review to an oral hearing where, through administrative error, the court's paper refusal of permission had not come to the attention of the claimant's solicitor until after the deadline had passed.

The Discretion to Refuse Relief

32. Even where a claimant in judicial review can demonstrate an error of law, the grant of relief is still discretionary. There are two areas where there have been recent developments on the exercise of this discretion.

(i) **The Uniplex point – does it apply?**

33. In practice, the introduction of a six week time limit should drastically reduce the number of cases in which a respondent can reasonably argue that a claimant who has met the new time limit is nevertheless guilty of undue delay. However, although they are rare, there are cases where the Courts have relied on the requirement of promptitude to reject cases brought even within six weeks. The proposed reform of judicial review relates only to the grant of permission, and does not affect that exercise of discretion to refuse relief. To what extent, after **Uniplex**, does the Court have the power to refuse relief on grounds of delay?

34. In **U & Partners**, Collins J. concluded that **Uniplex** applied both to the grant of permission and the discretion to refuse relief. However, the court in **Berky** was divided on the issue:

a. Carnwath LJ concluded that **Uniplex** was concerned only with the time allowed for commencing proceedings and did not affect the Court's power to withhold remedies under s. 31(6) of the Senior Courts Act 1981;

b. Moore-Bick LJ and Sir Richard Buxton considered that, on the assumption that **Uniplex** applied in planning cases, it also applied to s. 31(6). Moore-Bick LJ said:

“50. ... The principle to be derived from **Uniplex** [2010] 2 C.M.L.R. 47 is that rules limiting the period within which proceedings may be brought to vindicate rights

deriving from Community law must be certain in order to ensure that the law is capable of effective enforcement. A requirement that proceedings be brought “promptly” is considered by the Court of Justice to render the limitation period discretionary and thus to undermine the effectiveness of the transposition into domestic law of the relevant Community legislation.

51 In *R. v Dairy Produce* [1990] 2 A.C. 738 the relationship between R.S.C. Ord. 53, r. 4(1), which provided that an application for leave to apply for judicial review should be made promptly and in any event within three months from the date when grounds for the application first arose, and s.31(6). Lord Goff, with whom the other members of the House agreed, approved the dictum of Ackner L.J. in *R. v Stratford upon Avon DC Ex p. Jackson* [1985] 1 W.L.R. 1319 that whenever there was a failure to act promptly or within three months there was “undue delay” within the meaning of s.31(6). He explained, however, at p.747 that the two provisions could be reconciled because s.31(6) is not directed to the time within which an application for judicial review may be made; rather, it provides particular grounds on which the court may refuse leave to proceed or to grant substantive relief.

52 Carnwath L.J. is of the view that the decision of the Court of Justice in *Uniplex* [2010] 2 C.M.L.R. 47 is concerned only with the time allowed for commencing proceedings and does not affect the court’s power under s.31(6) to withhold remedies. However, I am unable to accept that distinction. The power to withhold relief arises whenever there has been undue delay, which, on the basis of Lord Goff’s speech in *Caswell* [1990] 2 A.C. 738, occurs whenever there has been a failure to comply with the requirement of the rules to commence proceedings promptly. Moreover, the power under s.31(6) to withhold a remedy on the grounds of undue delay is one to be exercised in accordance with the judgment of the court in the individual case. As a result, relief may be refused on the grounds of delay in commencing proceedings, if the court thinks that appropriate, despite the fact that the three-month time limit has not been exceeded. That seems to me to infringe the Community law principles of certainty and effectiveness just as much as a rule which requires proceedings to be brought promptly.”

35. The majority therefore indicates that *Uniplex* applies. In *Quidnet Hounslow LLP v Mayor and Burgesses of the London Borough of Hounslow* [2012] EWHC 2639 (TCC) Coulson J. treated *Berky* as authority that “that the exercise of the general discretion under Section 31(6) of the Senior Courts Act 1981, to refuse relief for undue delay, was also affected by the decision in *Uniplex*” (see para. 86).

36. On a related point, the decision of Stadlen J in **R (RP) v Brent LBC** [2011] EWHC 3251 (Admin), gives guidance about when it is permissible to revisit the question of delay at the substantive judicial review hearing. Stadlen J held that if the judge granting permission for judicial review had extended time notwithstanding the fact that the claim was served more than three months after the grounds for the claim had arisen, it was likely that that finding would be final and could not be reopened at the substantive hearing. However, if as in the present case, the judge had found that the claim had been issued within three months and had found insufficient prejudice to the local authority to prevent him granting permission for judicial review, the question of delay could be re-canvassed if new material adduced at the substantive hearing demonstrated substantial hardship or prejudice or detriment to good administration if relief was granted.

(v) The discretion not to quash in EU cases

37. It is generally understood that the remedies granted in a judicial review claim are discretionary and that, even if judicial review grounds are made out, the decision whether to grant relief will turn on the specific facts of the case.⁸ However, in **Berkeley v Secretary of State** [2001] 2 AC 603 at 616 Lord Hoffmann said that in cases involving the breach of an EU directive transposed into UK law, the discretion not to quash could only very rarely (if ever) invoked in cases which involved the failure to comply with a mandatory requirement of EU law transposed into national law on the basis that the breach made no difference to the outcome:

“A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.

Although section 288(5)(b), in providing that the court ‘may’ quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so

⁸ See, for example, **R v Panel on Take-overs and Mergers ex p. Datafin plc** [1987] QB 815 at 840 and **Bolton Metropolitan Borough Council v Secretary of State for the Environment** (1990) 61 P & CR 343 at 353.

would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell LJ in **Bolton Metropolitan Borough Council v Secretary of State for the Environment** (1990) 61 P & CR 343, 353. Mr Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

38. Ever since these comments were made, the Courts have expressed concerns that they should not be interpreted too widely: see Carnwath LJ in **Bown v. Secretary of State for Transport, Local Government and the Regions** [2004] Env. L.R. 509 at 526, endorsed by the House of Lords in **Edwards v. Environment Agency** [2008] Env. L. However, the recent decision of the Supreme Court decision in **Walton v The Scottish Ministers** [2012] UKSC 44 signals a much more significant retreat. Pointing out the relationship of standing with the court's powers to refuse relief, Lord Carnwath said this:

"103. I will however add a few words of my own on the issue of discretion, which in practice may be closely linked with that of standing, and may be important in maintaining the overall balance of public interest in appropriate cases (see, for example, **R v Monopolies and Mergers Commission, ex p Argyll Group plc** [1986] 1 WLR 763, 774–775). In this respect, I see discretion to some extent as a necessary counterbalance to the widening of rules of standing. The courts may properly accept as 'aggrieved', or as having a 'sufficient interest' those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the AWPR.

104. Mr Mure QC for the Ministers drew a distinction between breaches respectively of domestic and of European law. He accepted that if there had been a substantial failure to accord Mr Walton proper participation as required under European law, then subject to the issue of standing the court should not withhold a remedy. Further, he submitted, since the schemes and orders were drawn in a form which does not enable Fastlink to be dealt with separately, the court would have no alternative under this statutory scheme but to quash

them all, with the effect that the statutory procedures for the whole project would have to be started all over again.

105. On the other hand, he submitted, if the only breach established were one of fairness under domestic law, then the court would have wider discretion to refuse relief. It could draw a balance between the “very attenuated” nature of Mr Walton’s own interest, and the great public interest in allowing this important scheme to proceed without delay.”

39. Lord Carnwath drew attention to the distinction between that case and the circumstances in ***Berkeley***:

“131. In the present case, both the statutory context and the factual circumstances are again distinguishable from those applicable in ***Berkeley***. The factual differences are dramatic. In ***Berkeley*** there was no countervailing prejudice to public or private interests to weigh against the breach of the directive on which Lady Berkeley relied. The countervailing case advanced by the Secretary of State was one of pure principle. Here by contrast the potential prejudice to public and private interests from quashing the order is very great. It would be extraordinary if, in relation to a provision which is in terms discretionary, the court were precluded by principles of domestic or European law from weighing that prejudice in the balance.

132. The statutory context, as I have explained it above, is also significantly different from that applicable in ***Berkeley***. First, under the 1984 Act, even in respect of EIA, a breach of the regulations does not, as under the planning Acts, render the subsequent decision outside the powers of the Act. It is a breach of the requirements laid down by section 20A, and as such is within the second ground of challenge, but is thus also subject to the need to show ‘substantial prejudice’. Secondly, and more importantly for the purposes of this case, there is nothing to assimilate the requirements of the SEA Directive to the requirements of the 1984 Act, breach of which alone may give rise to a challenge under that procedure. No doubt the adoption of a plan or programme in breach of the SEA Directive would be subject to challenge by judicial review at the appropriate time. But the legislature has not thought it necessary to provide for a separate right of challenge on those grounds in relation to the approval of a subsequent project made under the 1984 Act.”

40. Lord Carnwath then rejected the proposition that breach of EU law required quashing in all cases and sought instead to align the cases involving breaches of EU law with those under challenge in the purely domestic context:

“138. It would be a mistake in my view to read these cases as requiring automatic ‘nullification’ or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells* makes clear, the basic requirement of European law is that the remedies should be ‘effective’ and ‘not less favourable’ than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered ‘impossible in practice or excessively difficult’. Proportionality is also an important principle of European law.

139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.

140. Accordingly, notwithstanding Mr Mure’s concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court’s discretion are materially affected by the European source of the environmental assessment regime.”

41. Lord Hope agreed:

“156. The scope for the exercise of that discretion in that context is not therefore as narrow as the speeches in *Berkeley* might be taken to suggest. The principles of European law to which Lord Carnwath refers in para 138 support this approach. Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck.”

42. ***Berkeley (No. 1)*** therefore now looks like a case pretty much confined to its own facts.

Costs

(i) Aarhus, EU law and access to justice – the latest position ...

43. The issue of costs in environmental litigation is a major issue, given the development of the protective costs regime and the Aarhus Convention. The last month has seen:

- a. The introduction of new rules in the CPR to deal with costs in Aarhus claims
- b. The decision of the CJEU in the reference from the Supreme Court in **R (Edwards & another) v Environment Agency [2011] 1 W.L.R. 79**.

44. A key feature in the background to both these developments has been the vigorous legal debate as to whether a 'subjective' or 'objective' approach should be taken to assessing the means of an individual claimant.

- a. The Court of Appeal in **R (Garner) v Elmbridge BC [2012] P.T.S.R. 250** had noted that (per Sullivan LJ) that whether or not the proper approach to the "not prohibitively expensive" requirement under Article 10a [as inserted by the PP Directive] "should be a wholly objective one, I am satisfied that a purely subjective approach is not consistent with the objectives underlying the directive".
- b. In **Coedbach v Secretary of State for Energy and Climate Change [2010] EWHC 2312 (Admin)** Wyn Williams J had noted that "In **Garner** Sullivan LJ left open whether it was permissible to have regard to the personal circumstances of the particular claimant. He did not determine that issue definitively but, in my judgment, the tenor of what he says tends to support the view that some regard should be paid to the individual circumstances of a claimant".
- c. In Scotland, in **Road Sense v Scottish Ministers [2011] Env. L.R. 22** Lord Stewart (making a protective expenses order) noted the uncertainty with regard to the objective/subjective approach;
- d. In **Edwards** Lord Hope noted:

“[i]t is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of the objective approach, but this has yet to be finally determined.”

45. It is clear that the Aarhus Convention played a prominent role in Lord Justice Jackson’s report and has influenced his recommendations on costs in judicial review generally, and in January this year (following a consultation exercise which began in January 2012) the Civil Procedure Amendment Rules were published, to take effect from 1 April. The new Rules effectively codify the regime on Protective Costs Orders in Aarhus cases, and set fixed costs which can be recovered. In summary:

- a. The fixed recoverable costs regime will apply in all cases where the claimant states in the claim form that the case is an Aarhus Convention Case (defined as “a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject”) subject only to the court determining that the case is in fact not an Aarhus case at all.
- b. Defendants wishing to argue that a case is not an Aarhus case must say so in their acknowledgement of service, and set out their reasons. The Court will then decide whether it is an Aarhus case at the earliest opportunity. If proceedings are necessary to determine that issue, there will be no order for costs if the Court concludes it is not an Aarhus case, but if it concludes that the claim is an Aarhus case it will normally order the defendant to pay the claimant’s costs of those proceedings on an indemnity basis. This is obviously intended to discourage Defendants from contesting the application of fixed costs unless they are sure of their ground;
- c. The recoverable costs are fixed as follows -
 - (a) the liability of the claimant to pay costs of the defendant will be capped at £5,000 if the claimant is an individual and at £10,000 where the claimant is an organisation; and

(b) the liability of the defendant to pay the costs of the claimant will be capped at £35,000.

These limits apply irrespective of the means of the parties concerned.

46. These proposed changes do not apply to “statutory procedures of various kinds (including some statutory appeal and statutory review procedures” because (it is said) further work is needed to identify whether and if so how and to what extent these procedures fall within the scope of the Convention and to identify whether the above approach is the appropriate way forward and, if so, what the impacts might be. For example, it is noted that the permission filter of judicial review is absent in such cases, and they may involve appeals by developers as well as members of the public or NGOs. It also notes that the issues surrounding what application the Convention might have in private law cases are in particular more complex, since (as Lord Justice Jackson noticed in his review) costs protection for one party would potentially have a serious impact on the other party, who might well have very limited resources also. The Government is continuing to look at these issues and proposes to bring forward proposals separately.
47. As will be apparent from the above, the reforms adopt a wholly objective position. This may need to be revisited given the recent decision of the CJEU in *Edwards*.
48. *Edwards* involved consideration of whether in relation to costs in cases covered by the EIA and IPPC Directives (and implementing in part Article 9 of the Aarhus Convention) the assessment of whether litigation is or is not “prohibitively expensive” to be decided on an 'objective' basis by reference (for example) to the ability of an 'ordinary' member of the public to meet the potential liability for costs, or should it be decided on a 'subjective' basis by reference to the means of the particular claimant, or upon some combination of the two bases. The questions referred by the Supreme Court to the CJEU were:

“1. How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by article 10a 85/337/EEC and article 15a 96/61/EEC (“the Directives”)?

2. Should the question whether the cost of the litigation is or is not “prohibitively expensive” within the meaning of Article 9(4) of the Aarhus Convention as implemented by the Directives be decided on an objective basis (by reference, for example, to the ability of an “ordinary” member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases?

3. Or is this entirely a matter for the national law of the Member State subject only to achieving the result laid down by the Directives, namely that the proceedings in question are not “prohibitively expensive”?

4. In considering whether proceedings are, or are not, “prohibitively expensive”, is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?

5. Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?”

49. On 13 September the CJEU heard oral argument in the reference. The Commission intervened in support of the Appellant and Denmark, Greece and Ireland intervened in support of the United Kingdom. Advocate General Kokott gave her opinion on 18 October 2012. The CJEU handed down judgment on 11 April 2013. The Court ruled that:

“The requirement, under the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him. Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal."

50. **Edwards** will now return to the Supreme Court for further argument. The decision is likely to fuel a debate as to whether the new rules applicable to Aarhus claims in the High Court have gone too far and now offer greater protection to claimants than EU law and the Aarhus Convention require. In the meantime, because the new costs rules apply only to applications for judicial review, the judgment in **Edwards** will be of importance in considering the issue of costs on appeals in environmental cases, see CPR 52.9A.

(ii) Costs: discontinuance or late agreement to grant of relief

51. If a claim for judicial review is discontinued by the claimant *after* the grant of permission the defendant may be entitled to its costs in full. Such a scenario occurred in **R (Penev) v Secretary of State for the Home Department** [2012] EWHC 551 (Admin), in which Treacy J held that the defendant should recover its costs because it had been clear from the outset that the claim was likely to become academic (since the claimant would soon be entitled to a right of settlement in the UK).

52. Defendants who concede judicial review claims at the very last minute risk paying costs on an indemnity basis. In **R (U) v Newham LBC** [2012] EWHC 610 (Admin), Wyn Williams J ordered the defendant to pay the claimant's post-permission costs on an indemnity basis in circumstances where the defendant conceded 2 days before the substantive hearing. He held that the defendant had not done so because of any new information or argument, but

rather because it had been “burying its head in the sand” as to the merits of the claim for the previous 8 months.

53. The Court of Appeal clarified the approach to be taken to the award of costs in cases that have become ‘academic’ because the defendant has agreed to grant the relief sought by the claimant in *R (Bahta) v. Secretary of State for the Home Department* [2011] 5 Costs L.R. 857. Formerly the leading case was *R (Boxall) v. Waltham Forest LBC* (2001) 4 CCL Rep 258, in which Scott Baker J had held that in the absence of good reason to make any other order, the fallback position was to make no order as to costs. In *Bahta*, Pill LJ (with whom Sullivan LJ and Hedley J agreed) held that in such cases a claimant who has complied with the pre-action protocol will be entitled to his costs. In order to resist such an order the defendant will have to show good reason for a different approach. Pill L.J. gave important guidance on costs and on the procedure to be followed where judicial reviews are compromised:

“59 What is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant. Inherent in that approach, is the need for a defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol, an aspect of the conduct of the parties specifically identified in CPR 44.3(5). The procedure is not inflexible; an extension of time may be sought, if supported by reasons.

60 Notwithstanding the heavy workload of UKBA, and the constraints upon its resources, there can be no special rule for government departments in this respect. Orders for costs, legitimately made, will of course add to the financial burden on the Agency. That cannot be a reason for depriving other parties, including publicly funded parties, of costs to which they are entitled. It may be, and it is not of course for the court to direct departmental procedures, that resources applied at an earlier stage will conserve resources overall and in the long term.

61 In the case of publicly funded parties, it is not a good reason to decline to make an order for costs against a defendant that those acting for the publicly funded claimant will obtain some remuneration even if no order for costs is made against the defendant. Moreover, a culture in which an order that there be no order as to costs in a case involving a public body

as defendant, because a costs order would only transfer funds from one public body to another, is in my judgment no longer acceptable.

...

63 I have serious misgivings about UKBA's claim to avoid costs when a claim is settled for "purely pragmatic reasons". My reservations are increased by the claim, on the facts of the present cases, that the right to work was granted for pragmatic reasons. I am unimpressed by suggestions made in the present cases that permission to work was granted for reasons other than that the law required permission to work to be granted. There may be cases in which relief may be granted for reasons entirely unconnected with the claim made. Given the Secretary of State's duty to act fairly as between applicants, and the duty to apply rules and discretions fairly, a clearly expressed reason would be required in such cases. The expression "purely pragmatic" covers a multitude of possibilities. A clear explanation is required, and can expect to be analysed, so that the expression is not used as a device for avoiding an order for costs that ought to be made.

64 In addition to those general statements, what needs to be underlined is the starting point in the CPR that a successful claimant is entitled to his costs and the now recognised importance of complying with Pre-Action Protocols. These are intended to prevent litigation and facilitate and encourage parties to settle proceedings, including judicial review proceedings, if at all possible. That should be the stage at which the concessions contemplated in **Boxall** principle (vi) are normally made. It would be a distortion of the procedure for awarding costs if a defendant who has not complied with a Pre-Action Protocol can invoke **Boxall** principle (vi) in his favour when making a concession which should have been made at an earlier stage. If concessions are due, public authorities should not require the incentive contemplated by principle (vi) to make them.

65 When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol. I regard that approach as consistent with the recommendation in para 4.13 of the Jackson Report.

...

67 The circumstances of each case do require analysis if injustice is to be avoided. Such analysis will not normally be difficult if the parties have stated their cases competently and clearly and if the statement of reasons required when a consent order granting relief is submitted to the court genuinely and accurately reflects the reason for the termination of proceedings.

68 I accept that the principle of proportionality, and the workload of the courts, require that limits are placed on the degree of analysis which is appropriate but judges should not too readily be deterred. If they find obscurity, or obfuscatory conduct by the parties, that can be reflected in the order made. A willingness to investigate is likely to promote clarity in future cases.

69 Where relief is granted by consent, CPR 54.18 provides a procedure whereby the court may decide the claim for judicial review without a hearing. That procedure should be followed wherever possible. It requires the filing of a document signed by all the parties “setting out the terms of the proposed agreed order together with a short statement of the matters relied on as justifying the proposed agreed order and copies of any authorities or statutory provisions relied on” (CPR PD 54A, para 17.1).”

54. Further guidance was given by the Court of Appeal in *M v Croydon London Borough Council* [2012] EWCA Civ 595, where it was held that in circumstances where the local authority had conceded a judicial review claim the judge had been wrong to make no order as to costs. The Court of Appeal held that:

- a. The position where cases settled in the Administrative Court should be no different from general civil litigation, namely that the rules under CPR 44.3(2) applied. Where a claimant obtained all the relief he sought, whether by consent or after a contested hearing, he was the successful party who was entitled to all his costs, unless there was good reason to the contrary;
- b. However, where a claimant obtained only some of the relief which he sought the position on costs was more nuanced. In such cases, there could be argument as to which party was more successful in light of the relief sought and not obtained. Even if the claimant was accepted to be the successful party, there might still be an argument as to the importance of the issue (or costs relating to the issue) on which he failed;
- c. Where a claimant had been wholly successful there was no reason why he should not recover his costs. Where he only partially succeeded, the court would normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful parts of the claim, how important those parts were compared with the

successful parts of the claim, and how much the costs were increased by pursuit of the unsuccessful parts.

- d. In a case where there has been a compromise which did not actually reflect the claimant's claims the court will often be unable to gauge whether there was a successful party. In such cases there was a powerful argument that the default position should be no order as to costs. However, sometimes it will be sensible to look at the underlying claims and to seek to ascertain who would have won had the claim not settled.

55. Compliance with the pre-action protocol is a matter to be taken into account when deciding whether to award costs to a successful claimant. The decision of the Court of Appeal in ***R (KR) v Secretary of State for the Home Department*** (18/10/12 unreported) shows that it is also necessary to consider causation and the extent to which non-compliance with the pre-action protocol has caused costs to be incurred. On the facts, the Court of Appeal held that the Judge had been wrong to make no order for costs following the settlement of judicial review proceedings because the claimant's failure to comply with the pre-action protocol was causally insignificant to the incidence of costs and the claimant had substantially succeeded in achieving the relief sought.

56. In ***R (Loucif) v Secretary of State for the Home Department*** [2011] EWHC 3640 (Admin), Ouseley J held that a challenge to an order for costs made on an application for permission to seek judicial review (or a challenge to the quantum of such an order) should be made by written submissions in accordance with the procedure set out in ***R (Ewing) v Office of the Deputy Prime Minister*** [2005] EWCA Civ 1583 [2006] 1 W.L.R. 1260. Such a challenge should not be made by way of a renewed (oral) application for permission for judicial review.

57. To re-cap, the procedure established in ***Ewing*** is that the judge refusing permission should include in the refusal a decision whether to award costs in principle and an indication of the amount which he proposed to assess summarily; the claimant should be given 14 days to respond in writing and should serve a copy of his response on the defendant, who should have seven days to reply in writing; thereafter, the decision would be made by the judge on the papers.

58. In the rather unusual case of ***R (Burton) v Secretary of State for Communities and Local Government*** [2012] EWHC 1404 (Admin), the claimant applied to have his claim for judicial review transferred from Birmingham to London on the basis of an alleged appearance of bias by the court staff. Specifically, the claimant was concerned that the claim had been re-listed as a result of pressure having been exerted over the listing officer by a non-party – a representative of a local opposition group possibly acting on behalf of somebody at Secretary of State level. HHJ Robert Owen Q.C. rejected the application. He held that the allegations of bias were generalised and unsupported. Moreover, whatever conversations had taken place between the listing officer and non-parties, this was of no relevance to the substantive business of the court. Accordingly, no procedural unfairness arose.

Challenging Inspectors' costs decisions

59. The decision of HHJ Waksman Q.C. in ***Golding v Secretary of State for Communities and Local Government*** [2012] EWHC 1656 (Admin) confirms that it is impermissible to seek to challenge an Inspector's costs decision under s.288 TCPA 1990. The only proper route for such a challenge is an application for judicial review (which requires permission to be obtained first).

Standing

60. The issue of standing and persons aggrieved was considered by the Supreme Court in ***Walton v The Scottish Ministers*** [2012] UKSC 44 (17.10.12). The Supreme Court took a much more generous view of standing than the lower courts. Lord Reed held:

“87. The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be aggrieved: where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry, as in ***Cumming v Secretary of State for Scotland*** and the analogous English case of ***Wilson v Secretary of State for the Environment*** [1973] 1 WLR 1083. Ordinarily, however, it will be relevant to consider whether the applicant stated his objection at the appropriate stage of the statutory procedure, since that procedure is designed to allow objections to be made and a decision then to be reached within a reasonable time, as intended by Parliament.

88. In the present case, Mr Walton made representations to the Ministers in accordance with the procedures laid down in the 1984 Act. He took part in the local inquiry held under the Act. He is entitled as a participant in the procedure to be concerned that, as he contends, the Ministers have failed to consult the public as required by law and have failed to follow a fair procedure. He is not a mere busybody interfering in things which do not concern him. He resides in the vicinity of the western leg of the WPR. Although that is some distance from the Fastlink, the traffic on that part of the WPR is estimated to be greater with the Fastlink than without it. He is an active member of local organisations concerned with the environment, and is the chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He has demonstrated a genuine concern about what he contends is an illegality in the grant of consent for a development which is bound to have a significant impact on the natural environment. In these circumstances, he is indubitably a person aggrieved within the meaning of the legislation.”

61. Having referred to the SC decision in ***AXA General Insurance Ltd and others v HM Advocate and others*** [2012] 1 AC 868, Lord Reed noted:

“92. ... a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words directly affected, upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application. As Lord Hope made plain in the final sentence, there are circumstances in which a personal interest need not be shown.”

62. He referred to Lord Hope’s statement in ***AXA*** at para. 63 that:

“A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.”

63. Lord Reed then stated:

“94. In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the

public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.

95. At the same time, the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded. In that regard, I respectfully agree with the observations made by Lord Carnwath at para 104.”⁹

64. Lord Hope added:

“151. I should like however to add a few words of my own on the question of standing in the context of environmental law. They are prompted by the Extra Division's observation in para 37 that Mr Walton had placed no material before the court to support the proposition that the schemes or orders or any provision therein substantially prejudice his own interests or that they would affect his property. His residence was some significant distance from the leg of the proposal which was the particular target of his attack. There was, therefore, an initial question to be addressed, whether or not he was a person "aggrieved" for the purposes of paragraph 2 of Schedule 2 to the 1984 Act. Indicating that they were of the view that he was not such a person, the judges of the Extra Division said in para 39 that in that situation they would have had no hesitation in concluding that, had they been with Mr Walton in all or any of his attempts to attack the legality of the schemes and orders, they would not have granted the remedy of quashing them. This was because it would have been quite inappropriate that the project, whose genesis came about some 30 years ago and about which there had been a huge amount of public discussion and debate, should be stopped from proceeding by an individual in his position: para 40.

152. I think, with respect, that this is to take too narrow a view of the situations in which it is permissible for an individual to challenge a scheme or order on grounds relating to the protection of the environment. An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious

⁹ Lord Carnwath's comments are cited above, in the section on the discretion to refuse relief.

examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.

153. Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity. There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind, such as the Scottish Wildlife Trust and Scottish Natural Heritage in their capacity as the Scottish Ministers' statutory advisers on nature conservation. It would normally be to bodies of that kind that one would look if there were good grounds for objection. But it is well-known they do not have the resources to object to every development that might have adverse consequences for the environment. So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied.

154. For these reasons it would be wrong to reject Mr Walton's entitlement to bring his application on environmental grounds simply because he cannot show that his own interests would be substantially prejudiced. I agree with Lord Reed's conclusion in para 88 that he has demonstrated a genuine concern about the legality of a development which is bound to have a significant impact on the environment, and that he is entitled to be treated as a person aggrieved for the purpose of the statute.

155. The better way to meet the concerns that the Extra Division expressed about this case in para 40 would have been to weigh in the balance against any breach of the Directive that the applicant was able to establish the potential prejudice to public and private interests that would result if the schemes and orders were to be quashed."

65. Interestingly, the decision of the Court of Appeal in ***Ashton v. Secretary of State for CLG & Coin Street Community Builders Ltd*** [2011] 1 P. & C.R. 5 (especially at paras. 32 to 55) was not discussed by the Court though ***Walton*** calls into question the potentially narrower approach to standing adopted towards the “persons aggrieved” formula used in cases such as ***Ashton***. At para. 54 in ***Ashton*** Pill L.J. held that “His participation in the planning process was insufficient in the circumstances to acquire standing. He was not an objector to the proposal in any formal sense and did not make representations, either oral or written, at the properly constituted Public Inquiry. Mere attendance at parts of the hearing and membership of WCDG, which has not brought proceedings in this court, were insufficient.” The principles, summarised at para. 53 in ***Ashton***, may place too much weight on participation in the process in the light of ***Walton***.
66. The decision of HHJ Thornton Q.C. in ***R (Williams) v Surrey CC*** [2012] EWHC 516 (Admin) takes a pragmatic approach to the question of standing in judicial review. The Judge granted permission for the claimant to bring judicial review proceedings in respect of a local authority’s decision to introduce “community public libraries”. The defendant disputed the claimant’s standing on the basis that she did not live or work in the local authority’s area (she lived close to the administrative border and worked at a local university). HHJ Thornton Q.C. considered that the claimant had a genuine interest in the running of public libraries and that she did have a sufficient interest. In any event, he held that it was appropriate to add a second claimant with undisputed standing to the claim so that the claim would not fail due to a lack of standing at the substantive hearing. He justified this step on the grounds that joinder of a second claimant did not add to the time required for the hearing; it did not add to the costs; the issues raised were important and so the claim should not fail for lack of standing.
67. Similar pragmatism is evident in the decision of Underhill J in ***R (SDR) v Bristol City Council*** [2012] EWHC 859 (Admin). In ***SDR*** the applicant could not be substituted for a claimant in judicial review proceedings because those proceedings had been effectively discontinued, but Underhill J allowed him to bring a fresh judicial review claim out of time because it was in substantially identical terms to the original claim.

Striking out

68. The chances of successfully striking out a claim for judicial review are slim, as HHJ Birtles Q.C.'s decision in **R (Lyon) v Cambridge City Council** [2012] EWHC 2684 (Admin). The claim concerned the grant of planning permission to demolish an existing sports pavilion and to erect a new pavilion on the playing fields of a sixth form college. The defendant applied to strike out the claim on the merits and because of the late service of amended grounds of claim. The strike out hearing took place together with the hearing of the application for permission for judicial review. After a day's argument the Judge did not consider that it would be appropriate to use summary powers of disposal, such as striking out:

"[80] It seems to me sensible that I should deal with the situation as it was before me on 1 August 2012. McCombe J had made an order on 13 June 2012 ordering that the permission hearing and the strike out hearing be listed together for an oral hearing. Because of the state of the lists those matters were not heard by me until 1 August 2012. While the Claimant's conduct of the earlier part of the case can be criticised the fact of the matter was by 18 May 2012 the Interested Party (and presumably the Defendant) had received the Claimant's detailed statement of facts and grounds. The documents had been lodged and it was not for a further two and a half months ie until 1 August 2012 that the matter was heard. I also bear in mind that the application for permission and the application to strike out took a whole day (the time estimate by McCombe J was quite accurate).

[81] Against that background I examine CPR 3.4(2). First, I do not think after argument of that length that it can be said that the statement of case discloses no reasonable grounds of bringing or defending the claim. The length of this judgment is proof of that. The second, for the same reasons I do not think that the statement of case is an abuse of the court's process. Third, the amended statement of grounds were indeed substantial and clear (and very helpful). They were certainly not likely to obstruct the just disposal of the proceedings. Fourth, although there may have been technical failure to comply with CPR 54.5(1)(a) and Practice Direction 54A I do not consider that the Interested Party has been prejudiced in any material way. Mr Pereira took me to the witness statement of Miss Natalie Minott at paras 28 – 31 dated 15 May 2012 which deals with delay to the works and prejudice to the Interested Party. The work has not yet started and although the Interested Party needs to be able to demonstrate to the Education Funding Agency that the funds have been appropriately spent before April 2013 there is no hard evidence that if the works start shortly the Education Funding Authority will actually claw back the funding if the work is not completed by that date.

[82] I am also conscious that the strike out procedure is supposed to be a summary procedure. In fact in this case it became inextricably interwoven with the application for

permission to apply for Judicial Review. In those circumstances I am not prepared to exercise my discretion to strike out the claim after such a substantial hearing.”

Form N463 Urgent applications

69. As explained by Sir John Thomas in *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin), the Administrative Court has now revised Form N463 (applications for urgent consideration). He explained:

“2. This court, because of a very substantial number of such claims, has now revised its form N463. First the form requires in section 1 that the reasons for urgency be stated. Secondly, it requires in section 2 the appellant to state the timetable in which the matter should be heard. Third, it requires the justification for immediate consideration to be given. In particular it requires the date and time when it was first appreciated that an immediate application might be necessary and, if there have been any delays, the reasons are to be stated. Also the form requires any efforts that have been made to put the defendant and any interested party on notice to be set out.

3. The form was revised because the Administrative Court faces an ever increasing large volume of applications in respect of pending removals said to require immediate consideration. Many are filed towards the end of the working day, often on the day of the flight or the evening before a morning flight. In many of these applications the person concerned has known for some time, at least a matter of days, of his removal. Many of these cases are totally without merit. The court infers that in many cases applications are left to the last moment in the hope that it will result in a deferral of the removal.”

70. The case also contains a warning:

“5. In this particular case (where we do not name the solicitor), no reasons for urgency were given, no information was given of the time at which it was appreciated the matter required immediate consideration and nothing was set out as to whether the defendant had been notified. The judge who considered this application refused it as totally without merit.

6. The court has required the attendance of the solicitor today. It has received an apology on his behalf. Neither he nor the caseworker appreciated that this information is now required. It is for that reason that on this occasion we do not name either the employee or the firm.

7. However, we will for the future do the following. If any firm fails to provide the information required on the form and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first appreciated and the efforts made to notify the defendant, the court will require the attendance in open court of the solicitor from the firm who was responsible, together with his senior partner. It will list not only the name of the case but the firm concerned. Non-compliance cannot be allowed to continue.

8. That will not be the only consequence of failing to complete the requirements set out in this form. First, one consequence may be that, if the form is not completed, the judge may simply refuse to consider the application. Second, if reasons are not properly set out or do not explain why there has been delay or the reasons are otherwise inadequate, the court may simply refuse to consider the application for that reason and that reason alone.

9. These remarks apply equally to the form soon to be introduced for out of hours applications and the form for renewals when an application has been refused on the papers.

10. These late, meritless applications by people who face removal or deportation are an intolerable waste of public money, a great strain on the resources of this court and an abuse of a service this court offers. The court therefore intends to take the most vigorous action against any legal representatives who fail to comply with its rules. If people persist in failing to follow the procedural requirements, they must realise that this court will not hesitate to refer those concerned to the Solicitors Regulation Authority.

11. That is a warning for the future. We hope it will be unnecessary to have any further hearings of this kind or to refer anyone to the Solicitors Regulation Authority, but we will not hesitate to do so where there is a failure to comply with the court's requirements."

Rule changes

71. New CPR 54.1A provides for the delegation of specified judicial powers to qualified barristers and solicitors working in the Administrative Court Office. This is a similar provision to CPR 52.16(1) applicable in respect of the Court of Appeal. The delegation is of judicial as opposed to formal or administrative powers. The rationale is to increase efficiency by allowing delegation of certain minor matters to court officers. A party may request any decision of a court officer to be reviewed by a judge.

72. CPR 54.7A has been introduced to establish a procedure for judicial review applications of non-appealable decisions of the Upper Tribunal. In ***R (Cart) v Upper Tribunal*** [2011] UKSC 28

[2011] 3 W.L.R. 107, the Supreme Court held that such decisions were amendable to judicial review on a limited basis –where a compelling point of principle of practice is raised.

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