

Neutral Citation Number: [2016] EWCA Civ 84

Case No: C1/2015/0985, C1/2015/0990

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE DOVE**

Royal Courts of Justice
Strand, London, WC2A 2LL

23/02/2016

B e f o r e :

**THE MASTER OF THE ROLLS
LORD JUSTICE TOMLINSON
and
LORD JUSTICE SALES**

Between:

**THE QUEEN on the application of
DANIEL GERBER**

**Claimant/
Respondent**

- and -

WILTSHIRE COUNCIL

**Defendant/
1st Appellant**

- and -

**TERRAFORM POWER INC
NORRINGTON SOLAR FARM LIMITED**

**Interested
Parties/
2nd Appellant**

**DJ Forsdick QC & Jonathan Wills (instructed by Legal Services, Wiltshire Council) for
the 1st Appellant**

**Richard Drabble QC & Jonathan Wills (instructed by Watson Farley & Williams LLP)
for the 2nd Appellants**

**Morag Ellis QC & Jenny Wigley (instructed by Richard Buxton Environmental &
Public Law) for the Respondent
Hearing date : 20 January 2016**

Lord Justice Sales:

1. This is an appeal from the decision of Dove J in which he extended time for the respondent (Mr Gerber) to bring judicial review proceedings and then quashed the planning permission granted by the appellant council ("the Council") for installation of photovoltaic arrays mounted on frames to form a solar farm on 22.1 ha of agricultural land at Broughton Gifford, Wiltshire ("the Site"). Mr Gerber owns Gifford Hall, a Grade II* listed building close to the Site. The application for planning permission was made by the owner of the Site, a Mr Steve Rademaker, who has not played a part in the appeal.

2. The planning permission was granted on 25 June 2013. The judicial review proceedings to challenge the grant of planning permission were only commenced on 20 August 2014. In the meantime, the other appellants (“Norrington” and “Terraform”, respectively) between them had in February 2014 purchased from Mr Rademaker a 25 year leasehold interest in the Site with its planning permission and then installed the solar farm, with the installation being completed in June 2014.
3. Prior to granting planning permission the Council had posted notices of the planning application at prominent places in the vicinity of the Site in accordance with its obligations under article 13 of the Town and Country Planning (Development Management Procedure) Order 2010 (“the 2010 Order”), including at the end of the lane leading to Gifford Hall, but Mr Gerber had not noticed them. Notice of the application was also given in the local newspaper, the Wiltshire Times, but Mr Gerber did not see it. Details of the planning application were also posted on the Council’s website, but Mr Gerber did not know about this. Mr Gerber did not appreciate that there was an application for permission for development of the Site and so made no representations to oppose it.
4. Mr Gerber first realised that the Site was being developed when he noticed development work being carried out on it on 19 March 2014, at which point he checked the position on the Council’s website and realised that an application for planning permission had been made and had been granted. On 20 March 2014 he wrote an email to the Council to object to the development on the grounds of the detrimental impact it had on the setting of Gifford Hall. The Council rejected his complaint and eventually Mr Gerber commenced this claim for judicial review.
5. On 20 October 2014 Dove J granted permission for the application for judicial review to be brought, reserving to the substantive hearing on the merits the question whether the claim should be dismissed under either CPR Part 54.5 or section 31(6) of the Senior Courts Act 1981 on grounds of delay. At the substantive hearing, the Council, Norrington and Terraform all argued that the claim should be dismissed on grounds of delay and Norrington and Terraform adduced evidence of the substantial financial hardship they would suffer if the planning permission was now quashed and the solar farm had to be dismantled. They also joined in resisting Mr Gerber’s claim on the legal merits.
6. At the substantive hearing, the judge granted Mr Gerber an extension of time for bringing his claim. In doing so, the judge held that by assurances it had given in its published policy on consultation, its Statement of Community Involvement (“SCI”), the Council had created a legitimate expectation on the part of Mr Gerber that he would receive a letter of notification of the planning application as the owner of a neighbouring property, albeit Gifford Hall and its garden was not a property adjoining the Site. The judge upheld the four grounds of challenge to the grant of planning permission for the solar farm. First, the Council had wrongly failed to assess that the development of the Site could have a significant impact on the setting of Gifford Hall, a Grade II* listed building, and on the Broughton Gifford conservation area nearby and had acted unlawfully by failing to consult English Heritage for its views as the Council was required to do under regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990. Later correspondence with English Heritage revealed that it would probably have objected to the development on these grounds. Secondly, the Council had unlawfully failed to comply with its duty to give special weight to the desirability of preserving the setting of Gifford Hall as a listed building under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990, as explained in *East Northamptonshire DC v Secretary of State for Environment, Food and Rural Affairs* [2014] EWCA Civ 137; [2015] 1 WLR 45. Thirdly, the Council had failed to comply with its obligation to consult Mr Gerber by direct communication with him pursuant to the legitimate expectation created by its SCI. Fourthly, the Council had failed properly to screen the development in order to decide whether an environmental impact assessment should be carried out in relation to it pursuant to the Town

and Country Planning (Environmental Impact Assessment) Regulations 2011 (“the EIA Regulations”), which implement the relevant EU Directive. The judge held that the legal errors which occurred in the case were serious, particularly the failure to give proper consideration to the interests of a nationally protected heritage asset and observing the requirements of EU environmental law. The judge held that the claim should not be dismissed by reason of application of section 31(6) of the 1981 Act on grounds of delay, hardship to Norrington and Terraform or detriment to good administration. Accordingly, he quashed the grant of planning permission for construction of the solar farm on the Site.

7. The Council, Norrington and Terraform now appeal against this decision. They submit that the judge erred in holding that the Council had created a legitimate expectation by reason of the SCI and in his assessment of the significance of the delay by Mr Gerber in commencing his claim under both CPR Part 54 and section 31(6). They do not appeal in respect of the judge’s ruling that the first, second and fourth grounds of challenge referred to above were each made out. It is a testament to the quality of the judgement in relation to those grounds that the appellants recognised that an appeal could not succeed in relation to them. We were greatly assisted in understanding the case by the clarity of the judge’s reasoning on those points.

Legal and policy framework

8. At the time the Council took its decision to grant planning permission the CPR Part 54.5(1) provided:

“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.”
9. A court has a discretion under CPR Part 3.1(2)(a) to extend time for compliance with this rule.
10. Part 54.5 was amended with effect from 1 July 2013 to displace rule 54.5(1) in cases specified in rule 54.5(5), which provides as follows:

“Where the application for judicial review relates to a decision made by the Secretary of State or a local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose.”
11. However, since the grounds for judicial review in this case arose before 1 July 2013 the relevant time limit is that in the unamended version of Part 54.5, i.e. as set out in Part 54.5(1). At most, the amendment in July 2013 emphasised the importance of promptness in claims for judicial review of planning decisions, as the judge noted at [77], but the importance of promptness in such cases is in any event emphasised in well-known authorities pre-dating the amendment in July 2013, including *Finn-Kelcey v Milton Keynes BC* [2008] EWCA Civ 1067; [2009] Env LR 17, to which I refer below.
12. On any view, Mr Gerber required an order under CPR Part 3.1(2)(a) to extend time for bringing his judicial review claim. In deciding whether to extend time, the judge was obliged under CPR Part 1.2(a) to seek to give effect to the overriding objective set out in CPR Part 1.1(1) to enable the court to deal with the case justly and at proportionate cost. As set out in CPR Part 1.1(2), dealing with a case justly and at proportionate cost includes, so far as is practicable, a range of matters including at Part 1.1(2)(f) “enforcing compliance with rules, practice directions and orders”. Sub-rule (f) was added along with other amendments of the overriding objective provisions with effect from 1 April 2013, as part of the Jackson procedural reforms. It was thus in effect before the grounds for judicial review arose in this case. It does not appear that the

judge had his attention drawn to this provision, which is intended to emphasise the importance of parties complying with the procedure rules and any time limits set out in the rules. However, in the particular context of this case I do not think that Rule 1.1(2)(f) adds significantly to the emphasis upon the need for promptness in bringing judicial review proceedings already appearing from guidance given in this court in *Finn-Kelcey*.

13. Section 31(6) and (7) of the 1981 Act provides:

“(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –

(a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.”

14. There was no significant difference between the parties regarding the principles applicable for finding that public statements or policy documents issued by a public body have created a legitimate expectation enforceable in public law. In order to give rise to a legitimate expectation a promise or assurance given by the public authority must be “clear, unambiguous and devoid of relevant qualification”: see *R v Inland Revenue Commissioners, ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545, DC, at 1570 per Bingham LJ; also see *R (Davies) v HM Revenue & Customs* [2011] UKSC 47; [2011] 1 WLR 2625.

15. Article 13(4)(a) of the 2010 Order requires notice of an application for planning permission to be given by way of either a “site display in at least one place on or near the land to which the application relates” or the service of notice on any adjoining owner or occupier. The object of this provision is to give potential objectors and the public generally a fair opportunity to make representations to oppose the grant of planning permission pursuant to an application. In this case the Council complied with its obligation under article 13 by posting notices under the first limb at a number of locations on roads close to the Site, including at the end of the lane leading to Gifford Hall. It is common ground that it complied with its obligation under article 13.

16. The SCI is an extensive document including discussion and background explanations as well as statements of policy. For present purposes, the relevant statement of policy on notification of planning applications is contained in para. 5.6, as follows:

“5.6 The council recognises that many people are most interested in applications that directly affect them, such as householder applications, which constitute almost 50% of all planning applications received in Wiltshire. The council endeavours to notify occupiers of premises which adjoin the application site and may be affected by the proposed development individually by letter that an application has been received. They are invited to view the application and make any written observations within 21 days.”

17. The SCI had attached to it Appendix 1 which set out a table referring to different methods of engagement with the public and a summary of their strengths and weaknesses. Appendix 1 included this statement:

“If the council receives a planning application that it feels may affect neighbouring properties then it will notify persons affected by writing to them directly. Recipients of neighbour notification letters have 21 days in which to respond.”

Factual background

18. The judgement below contains a full discussion of the factual background. It is not necessary to repeat it all here. For present purposes, the relevant facts can be summarised as follows.
19. In November 2012 Mr Rademaker submitted his application for planning permission for the solar farm. He held two public exhibitions locally regarding the plans, which also received publicity in the Wiltshire Times and the parish magazine and were displayed on the village hall notice board.
20. The application was posted on the Council’s website, was advertised in the local press and notices were displayed at various points around the Site in accordance with the 2010 Order.
21. The Council’s screening opinion of 12 September 2012 under the EIA Regulations was to the effect that no environmental impact assessment was required in relation to the proposed development.
22. The planning permission in issue was granted by an officer of the Council under delegated authority by a decision notice dated 25 June 2013. As part of the reasoning for the decision, the officer relied upon an absence of local objections to the development. The decision was reported in the local press. The permission was made subject to various conditions, including regarding the density of placement of the solar panels and the type of screening fences required to be built around the development.
23. Well after the three month period referred to in CPR Part 54.5, on 3 February 2014 Norrington took a 25 year lease of the Site. Norrington is now an indirect subsidiary of Terraform. Norrington purchased the materials for construction of the solar farm and then commenced work on construction of the solar farm on about 19 March 2014, the day on which Mr Gerber learned of the development and the planning permission.
24. On 20 March 2014 Mr Gerber emailed the Council to protest about the development and to object that he had not been consulted directly about the planning application. A Council officer replied to say that the adverse impact of the development upon Gifford Hall would not be significant.
25. Meanwhile, Norrington and Terraform had made another application for planning permission to modify aspects of the development, to allow for construction of CCTV towers around the Site. Mr Gerber learned of this application.
26. Mr Gerber consulted solicitors, Merrett & Co., who held themselves out as planning specialists. Mr Gerber gave some account of the advice he was given in his witness statement in these proceedings, although he did not disclose any attendance note and we cannot be sure of the full detail of what was said. However, it does appear from Mr Gerber’s witness statement that the question of seeking judicial review out of time was considered and that he was advised that it was unlikely he would get permission to bring such a claim. The judge described the advice given as “incomplete”, because it did not refer to the claim eventually made under the EIA Regulations. I discuss below whether the substance of the advice given and its accuracy or otherwise has any bearing on the case.
27. Merrett & Co wrote a letter to the Council dated 22 April 2014 on behalf of Mr Gerber to complain of maladministration by the Council and to object to the new application for planning

permission. They made a series of points the substance of which is similar to the grounds of claim eventually advanced by Mr Gerber in these proceedings (leaving aside reliance on the EIA Regulations): that the Council had breached its policy in the SCI by failing to notify Mr Gerber of the application; it had failed to assess correctly the setting of Gifford Hall as a heritage asset; it had failed to assess the impact of the development on the setting of Gifford Hall; it had failed to consult English Heritage; it had failed to give proper consideration and weight to the harm to the setting of Gifford Hall; and it had failed to comply with its statutory duty to protect the setting of a listed building. The letter said that Mr Gerber recognised that he had lost his opportunity to object to the planning permission already granted and to seek judicial review of that permission. It thus appeared that he had made a firm decision not to seek judicial review. He did not write to Norrington or Terraform to warn them that he might seek judicial review of the planning permission.

28. The Council reviewed its position in the light of this letter. It rejected Mr Gerber's complaints.
29. The construction of the solar farm continued apace. It was completed in June 2014. However, Norrington and Terraform failed to comply with the conditions of the permission. In particular, they installed a fence which failed to comply with the fencing condition attached to the permission, and which was indeed of a kind specifically considered and disapproved at the time when the permission was granted. Mr Gerber also maintains that there were other failures to comply with the permission granted, such as that they installed solar panels in an array which was more densely distributed on the Site than the permission allowed. It remains to be seen whether and what enforcement proceedings might be taken by the Council in relation to any such breaches of planning control.
30. The Council has refused the second application for planning permission.
31. On 23 July 2014 Terraform completed an Initial Public Offering on the NASDAQ Global Select Market based on a prospectus listing Norrington as a project generating cash flow in the United Kingdom. Terraform and Norrington make the point in these proceedings that if the planning permission is quashed, that will harm the ability of companies seeking to invest in green energy generation in the United Kingdom to attract investors to fund such projects, because of the uncertainty whether they will be able to rely on planning permissions granted by planning authorities to carry out such developments even though they have gone without challenge within the time provided for in CPR Part 54.5 and indeed, as in this case, for a considerably longer period.
32. In late July 2014 Mr Gerber changed solicitors and instructed his current solicitors, Richard Buxton Solicitors ("RBS"). RBS informed the Council that Mr Gerber was now, after all, considering bringing judicial review proceedings to challenge the planning permission which had been granted for the Site.
33. On 11 August 2014 RBS wrote a pre-action protocol letter to the Council setting out draft grounds of claim (much the same as in the letter of 22 April 2014, but adding a complaint about failure by the Council to comply with its obligations under the EIA Regulations) and demanding a response within seven days.
34. The Council responded by letter dated 20 August 2014 to reject the claim. The same day, Mr Gerber issued his claim form to commence these proceedings.
35. The evidence for Norrington and Terraform, the substance of which was accepted by the judge, is that if the planning permission is quashed and they are required to dismantle the solar farm, the cost of dismantling it and restoring the Site to agricultural use would be around £1.5 million. In addition, the cost of installing the solar farm of about £10.5 million would have been

wasted and lost. In addition, a premium of £2000 paid for an option to take the lease and locked-in rental payments of approximately £36,300 under the lease would also be wasted.

The judgement

36. The judge granted an extension of time for the bringing of these judicial review proceedings. He set out to examine how long the relevant delay had been and whether Mr Gerber had a reasonable explanation why it occurred and held that the starting point for the assessment of this issue was that Mr Gerber had been unaware of the grant of planning permission until 19 March 2014 and that he should have been personally notified of it pursuant to what the judge found to be a promise made in the SCI, such that the Council's legal error in failing to act in compliance with the SCI constituted a reasonable explanation for the delay down to 19 March 2014: [82]. In relation to the delay thereafter, the judge held that there was a reasonable explanation because Mr Gerber needed time to assimilate all the issues, not having been involved prior to that date, and he had been incompletely advised by Merrett & Co. and acted reasonably in relying on their advice by pursuing a complaint of maladministration and in not launching proceedings, while at the same time pursuing other avenues to dispute the development (including objecting to the second application for planning permission); and when he received advice from RBS that the grant of planning permission was susceptible to judicial review he acted promptly to bring his claim: [83]-[87].
37. The judge found that the four substantive grounds of challenge to the decision referred to above were made out. As regards the ground of challenge based on legitimate expectation, he held that on a proper interpretation of the SCI the Council had promised that it would consult all affected neighbours, including Mr Gerber as the owner of Gifford Hall, thereby creating a legitimate expectation of consultation which it had failed to honour. It should be noted that, as referred to above, the legitimate expectation ground was found by the judge to be relevant to the exercise of his discretion whether to extend time for the bringing of the claim.
38. Finally, the judge considered whether relief in respect of these flaws should be refused in the exercise of the court's discretion by reference to section 31 of the 1981 Act: [88]-[111]. He took into account a number of factors and decided that the planning permission should be quashed. He placed weight on the illegality bearing upon the national interest represented by the listed building occupied by Mr Gerber, particularly where it had emerged in the course of consideration of the second application that English Heritage was critical of the original grant of planning permission ([103]); the failure to give proper weight to the interest of protecting Gifford Hall as a listed building ([104]); the failure to comply with EU law and the EIA Regulations ([105]); the weight given in the decision to the absence of local objection, whereas in fact Mr Gerber should have been given an opportunity to object pursuant to the legitimate expectation found by the judge to derive from the SCI ([106]); the fact that Norrington did not construct the development in compliance with the terms of the permission, in particular as regards the form of fencing ([107]); the very serious financial prejudice which would be suffered by Norrington and Terraform if the decision were quashed ([108]); national policy in support of the provision of renewable energy ([109]); and "the final ingredient" of the question of prejudice to good administration ([110]). At paras. [110]-[111] he said this:
 - "110. The final ingredient is the question of prejudice to good administration. As Richards J observed in *Gavin [R (Gavin) v Haringey LBC* [2003] EWHC 2591 (Admin)] it is perhaps of secondary significance to the issues, for instance, of hardship or prejudice to the interested parties. He also, correctly, observed that the interests of good administration cut both ways. In this case, on the one hand, there is the obvious need for certainty and reliability in decision making. Equally, for the reasons which I have set out above, this is a decision which is the subject of a number of serious flaws and does not represent an example of good administration. It is, of course, of concern that a decision which has stood for many months and upon which the parties have relied might be

quashed. On the other hand, the legal errors which have occurred in this case are serious. On balance prejudice to good administration provides some, but no more than a little, support on the particular facts of this case for not quashing the decision.

111. The exercise of the discretion as to whether or not to quash a decision of this kind is obviously highly fact sensitive. Standing back from the detailed examination of each of those considerations and weighing them in the round in my view on balance, and it is a fine balance, the factors which weigh in support of what Carnwath LJ described [in *Tata Steel UK Ltd v Newport City Council* [2010] EWCA Civ 1626 at [13]-[15]] as the normal approach namely quashing the decision outweigh those which oppose that approach. The proper consideration of the interests of a nationally protected heritage asset and observing the requirements of EU environmental law are, in my view, of particular importance to the question of discretion in this case. In the circumstances I am satisfied that it is appropriate for the planning permission to be quashed, rather than declaratory relief granted.”

Discussion

39. On this appeal, the Council, Norrington and Terraform do not dispute the judge’s findings that the first, second and fourth substantive grounds of challenge to the grant of planning permission are well-founded. In my view, they were right not to do so. However, they submit that the judge erred in law in his ruling on the legitimate expectation ground, in his exercise of discretion to extend time to bring the claim and in his exercise of discretion to grant relief and quash the planning permission. It is appropriate to deal with the question of legitimate expectation first.

Legitimate expectation

40. With respect to the judge, I accept the submission of the appellants that he erred in his ruling that on its proper interpretation the SCI contained an unambiguous promise to consult Mr Gerber directly about the application for planning permission, which the Council failed to honour. The judge arrived at this conclusion by running together para. 5.6 of the SCI with the summary of the position in Appendix 1 to the SCI, set out above. In my judgement, however, on a proper interpretation of the SCI the relevant policy is that set out in para. 5.6, and it cannot be said that it is possible to read that in conjunction with Appendix 1 in order to spell out a clear and unambiguous promise in accordance with the relevant standard in *MFK Underwriting Agencies* that any neighbour affected by an application for planning permission would be consulted directly by the Council.
41. Paragraph 5.6 of the SCI is clearly set out within that document as the relevant policy for consultation of neighbours. It is expressly directed to consultation of the owners of properties adjoining sites for proposed development. Gifford Hall does not adjoin the Site in the present case, so Mr Gerber could not bring himself within the scope of para. 5.6.
42. In my view, it is not possible to say that the text in Appendix 1 leads to the conclusion that the SCI contains a clear and unambiguous promise that anything more extensive will be done by the Council by way of consultation: (i) para. 5.6 is drafted in precise terms which conflict with the wider interpretation which the judge sought to spell out of the SCI, so at best (from Mr Gerber’s point of view) there is an ambiguity in the SCI; but in any event, (ii) para. 5.6 is highlighted in the main text of the SCI and clearly identifies the content of the relevant policy in the SCI, so it must be regarded as setting out the definitive statement of what the Council promises to do; and (iii) Appendix 1 to the SCI, although poorly drafted, is not part of the main text of the document and does not purport to set out definitive policy promises or to qualify the main text of the SCI, but only sets out a summary of different options to make broad comparisons between them.

43. Although the proper interpretation of the SCI is an objective matter for the court and the way in which the parties may have read the SCI is in no way definitive, I think it is fair to point out that in the letter of 22 April 2014 Mr Gerber and his then solicitors identified para. 5.6 in the SCI, and not Appendix 1, as containing the relevant statement of policy by the Council. In my opinion, they were correct to do so.
44. There was, therefore, no breach of legitimate expectation by the Council. Mr Gerber says that other non-adjoining properties received individual notifications of the application for planning permission, but the Council has given an explanation why that happened which appears reasonable. The important point for present purposes, however, is that whether the Council's explanation is accepted or not, this feature of the case does not support Mr Gerber's legitimate expectation submission, founded as it is on what he maintains the Council promised in the SCI itself.

Discretion as to extension of time to bring the claim: CPR Part 54.5

45. The judge's error regarding legitimate expectation affected his exercise of discretion to extend time to bring the claim. In my view, contrary to the judge's finding, Mr Gerber has no reasonable explanation for the lengthy delay between the grant of planning permission on 25 June 2013 and 19 March 2014, when he first registered an objection to the development by emailing the Council. I also consider that the judge erred in finding that Mr Gerber had a reasonable explanation for the later period of delay between 19 March 2014 and his launching legal proceedings on 20 August 2014, based upon his reliance on legal advice. I address these two periods of delay in turn.
46. The basic position regarding the need for an objector to a grant of planning permission to take speedy action to challenge such grant in the courts is not in doubt. This is clearly set out in the relevant authorities. Once planning permission is granted the owner of the land to which it relates is entitled to rely upon it and there is a substantial risk that he will begin investing effort and money to do so without waiting any lengthy period before he does. Also, planning permission will have been granted because the grantor is satisfied that it is in the overall public interest for the development to occur, without any further delay. The basic rules regarding notification of applications for planning permission set out in the 2010 Order are designed to afford potential objectors a fair opportunity to learn about and object to an application for planning permission before it is granted. The courts' approach in relation to an application to extend time for judicial review has to strike a fair balance between the interests of the objector, the interests of the developer and the public interest. In light of the risk of detrimental reliance by a developer on the grant of permission and possible prejudice to the public interest, it is incumbent on an objector to proceed with the "greatest possible celerity" so as to minimise the risk of prejudice to those other interests.
47. Keene LJ, referring to the test in CPR Part 54.5, said this in *Finn-Kelcey*:
 - "22. The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In *R v Exeter City Council ex parte JL Thomas & Co Ltd* [1991] 1 QB 471 at 484G, Simon Brown J (as he then was) emphasised the need to proceed with 'greatest possible celerity', as he did also in *R v Swale BC ex parte Royal Society for the Protection of Birds* [1991] 1 PLR 6. Once a planning permission has been granted, a developer is entitled to proceed to carry out the developments and since there are time limits on the validity of a permission will normally wish to proceed to implement it without delay. In the *Exeter* case, Simon Brown J referred to the fact that a statutory challenge as to what is now Section 288 of the Town and Country Planning Act 1990 to a ministerial decision must be brought within 6 weeks of the decision. Thus if a planning permission is granted by the Secretary of State on an appeal or a called-in application, the objector seeking to question the

validity of that decision must act within 6 weeks, without there being any power in the court to extend that period of time...

24. I would respectfully agree that, where the CPR has expressly provided for a 3-month time limit, the courts cannot adopt a policy that in Judicial Review challenges to the grant of a planning permission a time limit of 6 weeks will in practice apply. However, that does not seem to me to rob the point made by Simon Brown J and others of all of its force. It may often be of *some* relevance, when a court is applying the separate test of promptness, that Parliament has prescribed a 6 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 2 situations: for example, where a 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 permission. Thus where in the latter case an objector is for some time unaware of the local authority decision, the analogy is less applicable. That was not the situation in the present case, where BLEW and its supporters, including the appellant were very well aware of the decisions by the respondent's committee and then by the full council. 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."
48. Absent any legitimate expectation relevant to his specific case, Mr Gerber was in the same position as any member of the public so far as notification of applications for planning permission in the locality was concerned. The notification rules in the 2010 Order are themselves part of the legal framework designed to strike a fair balance between the competing interests of objectors and developers. If there is compliance with those rules, as in this case, potential objectors among the general public will have been given what is normally to be regarded as a fair opportunity to learn about and object to a proposed development before planning permission is granted. Landowners are expected to be reasonably observant in keeping an eye on developments in their locality which might affect them. There was no legitimate expectation for Mr Gerber in this case that might have put him off his guard as to that. Where a fair opportunity has been given to objectors to learn in good time about a proposed development in their locality via compliance with the notification rules, then in view of the possible harm to other competing interests it is reasonable to expect them to move with speed to challenge the lawfulness of the grant of planning permission for that development in the courts, if that is what they wish to do.
49. In my judgement, where proper notice of an application for planning permission has been given pursuant to the 2010 Order it is not appropriate to extend time for bringing a legal challenge to the grant of such permission simply because an objector did not notice what was happening. Extending time in such a case so that a legal objection could be mounted by someone who happened to remain unaware of what was going on until many months later would unfairly prejudice the interests of a developer who wishes to rely upon a planning permission which appears to have been lawfully granted for the development of his land and who has prudently waited for a period before commencing work to implement the permission to ensure that no legal challenge is likely to be forthcoming, as happened here. Prompt legal action after grant of a planning permission to challenge its lawfulness will be required in all cases, unless very special reasons can be shown of a kind which are wholly absent in this case. Especial speed will be expected in the case of objectors who have been involved in the planning process throughout, as emphasised by Keene LJ in *Finn-Kelcey* at [24], but it does not follow that the strong requirement of prompt action will be substantially relaxed in the case of someone who, despite a planning authority's compliance with the notification rules laid down in law, remained in ignorance.

50. In my view, therefore, the judge erred in ruling that Mr Gerber had a reasonable explanation for the first period of delay, from 25 June 2013 to 19 March 2014. Mr Gerber was not the beneficiary of any legitimate expectation; he had the same opportunity as any member of the public to learn about the application for planning permission for the development and the grant of permission; and the obligation to proceed with “greatest possible celerity” applied to him as it did to any other objector among the general public.
51. Accordingly, since Mr Gerber had no reasonable explanation for the first period of delay, I consider that the judge was wrong, by reason of the flaw in his legal analysis regarding the legitimate expectation ground and in principle, to grant an extension of time for the bringing of this claim.
52. I also consider that Mr Gerber had no reasonable explanation for the further period of delay after 19 March 2014, when he learned about the grant of planning permission, and that the judge erred in his assessment of the position in relation to this period of delay as well. In relation to this period, I think the judge accorded inappropriate weight, as a matter of principle, to the fact that Mr Gerber was acting on the basis of legal advice he had received. I also think, on the particular facts, that the judge’s assessment regarding the legal advice from Merrett & Co. is open to challenge; but given the wider question of principle this is of less significance.
53. The fact that a person acts (or omits to act) on the basis of legal advice does not make him less responsible in law for his actions (or omissions to act). Legal advice helps him to decide what to do, but in most contexts it is still his decision and his actions (or omissions) which determine how his rights and liabilities in relation to another person should be adjusted. This approach is underwritten by important practical considerations of particular force in the planning context: (i) legal advice is protected by legal professional privilege and evidence about its precise content sufficient to allow a court to assess what it was and the extent to which the recipient in fact acted upon it will not usually be available (in the present case, for example, the court was given only a very summary and incomplete account of what was said); (ii) where a legal requirement to take action within a particular time limit is in issue in a context like that here, where other private parties are proposing to act once given permission to do so by a public authority, it would undermine the protection for such other parties which is supposed to be provided by application of that requirement to an excessive degree if the recipient of the advice were entitled to refer to private exchanges with his lawyers of which the other parties know nothing (and in relation to which he might even seek to shop around to find a lawyer willing to give particular advice which assisted him in that regard), in order to escape from the effect of such a requirement; and (iii) the interests of the person receiving the advice are adequately protected in another way, since if the legal advice is wrong and by acting on it he loses some right or advantage as against other persons, he may have a right of action against his lawyer, e.g. for damages for diminution in the value of his land by reason of loss of amenity because of development of other land nearby. Other than in exceptional circumstances where other factors are also in play, therefore, I consider it is wrong in principle for the court to exercise its discretion to extend time to bring judicial review proceedings in the planning context by reference to legal advice which an objector might have received. I agree with the observation of Stadlen J in *Melton v Uttlesford District Council* [2009] EWHC 2845 at [50] that “A change of legal representation and/or a change of opinion on law and/or tactics is unlikely to pass the test” for allowing an extension of time under CPR Part 54.5; indeed, the position can be stated still more strongly than this, as I have sought to do.
54. In my view, cases in the immigration context in which the courts are prepared to exercise greater latitude to extend time in favour of a person who has relied on legal advice do not provide helpful guidance here: compare, for example, *R (Tofik) v Immigration Appeal Tribunal* [2003] EWCA Civ 1138, [25]. In the immigration context, typically all that is in issue is the action of a public authority and there is no question of detrimental reliance by other private parties on what appears to be a valid decision by such an authority. Moreover, it may be that a

person facing deportation might suffer such an infringement of their rights if the wrong advice is given (e.g. in an extreme case they might be killed or tortured on their return to their country of origin) that a claim against his lawyer after the event could not possibly be regarded as providing an appropriate alternative avenue for protection of the interests of that person.

55. In relation to the second period of delay in the present case, I respectfully consider that the judge erred in principle by finding that Mr Gerber had established that he had reasonable grounds for delaying in acting promptly by reason of his reliance on the legal advice he received from Merrett & Co. (see [85]), even if that advice might have been flawed in some way. I think that he also erred by relying alongside this on the steps taken by Mr Gerber to complain about the grant of planning permission by means other than by challenging it in law as providing a reasonable explanation why he did not commence proceedings promptly after discovering on 19 March 2014 that planning permission had been granted: see [86]-[87]. The developers were entitled to rely upon the planning permission as valid and lawful unless a court ruled otherwise, and none of the other steps taken by Mr Gerber, such as complaining about maladministration, changed that. As Richards J (as he then was) observed in *R (Gavin) v London Borough of Hackney* [2003] EWHC 2591 (Admin) at [69], “Applicants for planning permission are entitled to rely on the local planning authority to discharge the responsibilities placed upon it”; when they are granted planning permission they are entitled to rely upon it as a lawful grant of permission unless it is set aside by a court. What was required to change that position in this case was prompt legal action to challenge the lawfulness of the planning permission, if Mr Gerber wished to stop the development from proceeding.
56. In my judgement, Mr Gerber had no proper grounds for delaying commencing legal proceedings as he did after 19 March 2014 and has no reasonable explanation for this second period of delay. This is an additional reason why it was wrong for the judge to extend time to claim judicial review in this case.
57. Further, even if I were wrong in that view on the reasoning thus far, I consider that the judge erred in his assessment of the significance of the legal advice Mr Gerber received from Merrett & Co.. Although the judge referred to the advice given as “incomplete”, because of what he took to be an omission regarding the effect of the EIA Regulations, so far as concerns the part of the advice material to the question of delay I cannot see that it was incomplete or inaccurate. The advice which Mr Gerber was given about the difficulty of persuading a court to grant permission to bring a judicial review claim out of time in a case like this seems to me to have been correct. (In fairness to Merrett & Co. I should add that since we have not been given a full account of the advice given by them, on the basis of the limited evidence we have seen I do not think that it can be said with confidence that they did not address the EIA Regulations in advising Mr Gerber or that any advice which they gave was flawed). Mr Gerber received what appears to have been correct advice about his chances in seeking an extension of time to claim judicial review, took an informed decision on the basis of that advice not to launch legal proceedings and told the Council of his decision in the letter of 22 April 2014. Contrary to the view of the judge, this undermines yet further his request for an extension of time under CPR Part 54.5. The fact that about four months later he found another firm of solicitors which was prepared to give him more optimistic advice in that regard does not afford a reasonable explanation for the second period of delay.
58. For the reasons set out above, in my judgement the judge was wrong to extend time under CPR Part 54.5 for Mr Gerber to bring his judicial review claim. On a proper assessment for the exercise of the court’s discretion in that regard, the correct decision should have been to refuse to extend time for the claim to be brought. This is a sufficient basis for determining the appeal in favour of the Council, Norrington and Terraform and setting aside the quashing order made by the judge. However, it is appropriate to go on to consider the judge’s exercise of discretion as to remedy under section 31 of the 1981 Act as well, since I am satisfied, with respect to the judge, that he erred here as well.

Discretion as to remedy: section 31(6) of the 1981 Act

59. Section 31(6) provides that the court “may” refuse to grant relief where “the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person” or where it “would be detrimental to good administration.” Even where there might be substantial hardship or prejudice to a person other than the claimant or detriment to good administration, the court has a discretion whether to refuse relief. This requires the court to make an overall evaluative assessment having regard to what, depending on the circumstances, may be a range of relevant considerations, including the extent of the substantial hardship or prejudice likely to be suffered by such other person (here, Norrington and Terraform) if relief is granted as compared with the hardship or prejudice to rights which would be suffered by the claimant (Mr Gerber) if relief is refused and the extent of the detriment to good administration if relief is granted as compared with the detriment to good administration through letting public law wrongs go without redress if relief is refused.
60. The decision of the House of Lords in *R v Dairy Produce Quota Tribunal, ex p. Caswell* [1990] 2 AC 738 is the leading case which provides guidance about the proper approach to the exercise of the discretion under section 31(6). Lord Goff referred to observations of Lord Diplock in *O’Reilly v. Mackman* [1983] 2 AC 237 regarding the public interest in good administration and went on at pp. 749F-750B as follows:
- “I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. This is because applications for judicial review may occur in many different situations, and the need for finality may be greater in one context than in another. But it is of importance to observe that section 31(6) recognises that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking the question whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently of matters such as these. In the present context that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened. In the present case, the court was concerned with a decision to allocate part of a finite amount of quota, and with circumstances in which a re-opening of the decision would lead to other applications to re-open similar decisions which, if successful, would lead to re-opening the allocation of quota over a number of years. To me it is plain, as it was to the judge and to the Court of Appeal, that to grant the appellants the relief they sought in the present case, after such a lapse of time, would be detrimental to good administration ...”
61. In accordance with usual principles regarding exercise of discretion by a judge at first instance, where a judge has directed himself correctly in law and has had regard to relevant considerations his exercise of discretion under section 31(6) will not be overturned unless the ultimate conclusion reached is clearly wrong and outside the range of legitimate choices which might be made in the circumstances.
62. In the present case, I do not think that it is possible to separate out the exercise of discretion as to remedy under section 31(6) from consideration of the factors relevant to the exercise of discretion whether to extend time under CPR Part 54.5. The longer the delay after the grant of planning permission the greater the risk and extent of hardship and prejudice to Norrington and Terraform if the grant is set aside. The weaker the justification which Mr Gerber had for exposing them to such hardship and prejudice by his delay, the more weight should be given to

the prejudice to their interests as compared with the prejudice to his. For reasons already explained, I think that the judge erred in his assessment of that part of the case and even if time were to be extended, this also affects his exercise of discretion under section 31(6).

63. Moreover, in my opinion the judge's assessment of the factors bearing on detriment to good administration is also flawed in further respects. First, his reasoning is again affected by his error regarding the existence of a legitimate expectation on the part of Mr Gerber that he would be individually notified of the application for planning permission: see [106]. Secondly, the other factors pointing in favour of quashing the decision which the judge took into account at [103]-[105], at least as described by the judge, seem to me to be aspects of the question of prejudice to good administration, in line with the guidance in *Caswell*. I find it difficult to follow the way in which the judge appears to weigh them in that context in para. [110], arriving at the conclusion after balancing the competing factors that consideration of prejudice to good administration provides support for not quashing the decision, and yet in the following paragraph [111] he takes the same matters into account again in arriving at the conclusion that the decision should be quashed.
64. Also, I think that the judge's reliance in para. [111] on the observations of Carnwath LJ (as he then was) in *Tata Steel* regarding the normal result of an exercise of discretion as to remedy where unlawfulness has been shown to affect a grant of planning permission as being that the permission should be quashed and the matter regularised by reconsideration by the planning authority (para. [15]) was misplaced. The context in which Carnwath LJ made his observation was one in which it appears that the judicial review claim to challenge the permission had been brought in proper time in compliance with CPR Part 54.5. Planning permission was granted on 16 December 2009 and the claim for judicial review was issued in good time on 19 February 2010. Carnwath LJ's judgement addressed only a purported exercise of the general discretion as to remedy which exists in any judicial review case: see [7]-[8]; he did not treat the case as one based on exercise of the discretion under section 31(6). Elias LJ agreed with the reasoning of Carnwath LJ as regards the general discretion, and he did refer to section 31(6), but only to point out that it did not come into play because there was no delay by the claimant: [19]-[20]. Pitchford LJ agreed with both judgements. Thus on proper analysis this case provides no guidance as to how the discretion under section 31(6) should be exercised in a case where there is significant delay without reasonable excuse.
65. For all these reasons, I consider that had it been necessary to do so this would have been a case in which this court should set aside the judge's exercise of discretion and decide how the discretion as to remedy under section 31(6) should be exercised afresh.
66. Had we reached this stage in the analysis, I consider that the appropriate result would have been to exercise the discretion in favour of not quashing the planning permission. The principal reasons for this are (i) the long delay by Mr Gerber in launching proceedings, for which there is no good excuse; (ii) the major financial detriment which would be suffered by Norrington and Terraform which would arise as a result of that delay, if the planning permission were quashed; (iii) the less substantial and less significant damage to Mr Gerber's own interests (principally the harm to amenity he will have to bear as a result of being able to see the solar farm from certain parts of his property, despite a certain amount of screening of the solar farm by trees); and (iv) the balance of factors affecting the interests of good administration, which comes down in favour of refusing relief in this case for reasons similar to those identified by the judge at [109] and [110], by reference to the need to provide for renewable energy in the national interest and the need for certainty and reliability in decision making in this area, particularly where implementation of viable renewable energy schemes such as this solar farm is likely to depend on attracting investment at significant levels in capital markets and where such investment may well not be forthcoming if there is any serious question-mark about the validity of necessary planning permissions after a reasonable period has elapsed with no steps being taken to mount a legal challenge to the lawfulness of such permissions. The present context is

one in which the need for finality as regards the validity of the decision made is particularly strong, as contemplated in the passage from Lord Goff's speech in *Caswell* set out above.

67. In view of the length of the unjustified delay in this case and the extent of the prejudice to Norrington and Terraform, I would not attach significant weight to the fact that the ground of claim based on the EIA Regulations reflects EU legal requirements. As explained above, Mr Gerber had a fair opportunity to bring proceedings to challenge the planning permission in this case in proper time which was an effective opportunity for the purposes of EU law. In general terms, the application of domestic law in relation to time limits and remedial discretion in the context of planning cases does not offend against the EU principles of equivalence (or non-discrimination) and effectiveness as regards procedure and remedy: see *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51; and *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710, [54]-[59] per Lord Carnwath JSC.
68. I do not consider that EU law can be taken to exclude the usual operation of section 31(6) in a case like this. Lord Carnwath's further observations in *Champion* at [63] regarding the possibility that it might even eventually be found to be necessary to challenge a screening opinion in good time separately from any challenge to a planning permission which is subsequently granted on the basis of that earlier opinion serve to emphasise the importance in this area of prompt legal action being taken by objectors to a development and the compatibility of that approach with EU law. Although reserving his opinion on this issue, he said, "I see no reason in principle why, in the exercise of its overall discretion, whether at the permission stage or in relation to the grant of relief, the court should be precluded from taking account of delay in challenging a screening opinion, and of its practical effects (on the parties or on the interests of good administration)". In my view, it is equally legitimate to apply section 31(6) and the usual principles governing the exercise of discretion under it in the context of the challenge based on the EIA Regulations as it is in relation to the other grounds of challenge made out by Mr Gerber.
69. In the exercise of discretion under section 31(6) I would not attach great weight to the failure of Norrington to comply with the terms of the planning permission. The Council will be able to take enforcement action if it thinks it appropriate in the public interest and it would be disproportionate by reason of this aspect of the case to deprive Norrington and Terraform of what would otherwise be the benefit of an exercise of discretion in their favour under section 31(6).

Conclusion

70. For the reasons given above, I would allow this appeal. I would set aside the judge's extension of time under CPR Part 54.5 for the claim to be brought and in consequence would set aside his order quashing the planning permission granted in this case. Had it been necessary to do so, I would also have set aside the judge's exercise of discretion under section 31(6) and would have exercised the discretion afresh in favour of upholding the validity of the planning permission which was granted by the Council.

Lord Justice Tomlinson:

71. I agree.

Lord Dyson MR:

72. I also agree.