IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

NIMBY

Appellant

-and-

THE COUNCIL

Respondent

APPROVED JUDGMENT

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1. The facts of this case are simple, but, like snails in bottles of ginger beer, its resolution raises important issues of law.

2. Nimby lives in Small Town. Some 30 m from Nimby's house on Quiet Street, there is a factory. It manufactured furniture. There was no history of complaint in respect of that industrial use. In the autumn of 2009 an application was made to the Council to change the use of the factory to a composting site for the treatment of organic wastes.

3. The Council decided that the proposal was not one which required an environmental impact assessment. It is common ground that this was an error on the Council's part. The Council did advertise the planning application, but did not notify Nimby as they

ought to have done in accordance with the relevant Order under the planning Acts. In any event, the Council received no objections to the proposal and granted permission on 24 December 2009.

4. Nothing happened until 1 May 2010 when the use of the site for composting commenced. Nimby noticed this immediately because of the traffic, the noise, the smell and the flies from the composting activity. Nimby raised the matter with the operator and the Council and was shocked to learn that planning permission had been granted. She knew nothing about the application, nor the grant of permission until the site commenced operations.

5. After consulting a very helpful web-site about 'law and your environment', she very quickly realised that her only option was to apply for judicial review of the grant of planning permission. This she did on 29 July 2010, almost three months after she knew that planning permission had been granted without an EIA.

6. It is apparent from the evidence filed in this case that the operator of the composting plant has invested some £6M in the site and that the site is crucial to the Council's obligations in meeting targets for the recycling of wastes.

7. The Council raised the issue of delay in opposing the grant of any relief in this case.

8. The judge granted permission to apply for judicial review but refused any relief on the basis that the claim had not been made promptly. She now appeals to this court.

9. The reference to 'promptly' is to CPR r.54.5(1) , which governs claims for judicial review. It provides:

> "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."

10. As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in para.(a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily

amounts to filing promptly: see R. v Independent Television Commission Ex p. TV Northern Ireland Ltd [1996] J.R. 60, [1991] T.L.R. 606 and R. v Cotswold DC Ex p. Barrington Parish Council [1998] 75 P. & C.R. 515 . The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker. For example in Hardy v Pembrokeshire CC (Permission to appeal) [2006] EWCA Civ 240 at [10] it was held:

> "It is important that those parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly."

11. In that same case this court rejected a submission that the requirement in CPR r.54.5(1) for an application for judicial review to be made "promptly" offended against the principle of "legal certainty" in European law.

12. 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 p. JL Thomas & Co Ltd [1991] 1 Q.B. 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 p. Royal Society for the Protection of Birds [1991] 1 P.L.R. 6 . Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are time limits on the validity of a permission they 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 under what is now s.288 of the Town and Country Planning Act 1990 to a ministerial decision must be brought within six 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 six weeks, without there being any power in the court to extend that period of time.

13. That factor led Laws J. (as he then was) to conclude in R. v Ceredigion CC Ex p. McKeown [1997] C.O.D. 463, [1998] 2 P.L.R. 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. That was perhaps a somewhat extreme statement

of the position, and certainly it was rejected by the House of Lords in R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1) [2002] UKHL 23, [2002] 1 W.L.R. 1593 , where Lord Steyn (with whom the rest of the Appellate Committee generally agreed) said at [53] that from the McKeown case

> "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."

14. I would respectfully agree that, where the CPR has expressly provided for a three-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 six 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 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.

15. Against these considerations, we have had our attention drawn to recent authority of the ECJ. In summary where breach of European law is in issue, time runs from the date on which the Claimant knew or ought to have known of the breach (Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08)). In Sita UK Ltd v Greater Manchester Waste Disposal Authority [2010] EWHC 680 Ch, the court held that the appropriate course was to extend time to three months from the date of knowledge of the breach.

16. I am grateful for the careful researches of Counsel amongst the Scottish cases. In succinct and tempting arguments it was suggested that the more flexible approach which is found the plea in bar, *Mora,* is to be preferred: Inner House in Somerville v Scottish Minister [2007] SC 140; United Coop Ltd v National Appeal Panel for Entry to the Pharmaceutical Lists [2007] SLT 831.

17. For my part I would hold that the Claimant (now Appellant)has applied within three months of her knowledge of the breach, but has not acted promptly. No good reason has been advanced to explain what is almost three months of delay. I appreciate that there is a need for some certainty in these matters, but I do not think that there is a need to make a fetish of it. I consider that the court retains a discretion even where issues of European law are in play. Tempting though the Scottish approach is, such a change is for others to consider.

18. I dismiss the appeal but certify two questions of public importance upon which I would encourage Nimby to pursue in the Supreme Court:

(i) Is it lawful to refuse relief on the basis that the Claimant has not acted promptly in respect of a breach of European law, albeit that the claim was brought within 3 months?;

(ii) Is it lawful to refuse relief on the basis that the Claimant has not acted promptly in respect of a breach of domestic law, albeit that the claim was brought within 3 months?