IN THE SUPREME COURT

NIMBY

Appellant

-and-

THE COUNCIL

Respondent

SKELETON ARGUMENT
ON BEHALF OF THE APPELLANT

INTRODUCTION

1. This is an appeal against the decision of the Court of Appeal dismissing Nimby's Appeal and certifying two questions of public importance which Nimby was encouraged by the Court of Appeal 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?

FACTUAL BACKGROUND

2. The procedural history and factual background of this case can be found in the Approved Judgment of the Court of Appeal in this matter (**AB Tab 1).** In summary, Nimby opposes the grant of planning permission for a change of use of a nearby factory from manufacturing furniture to a composting site for the treatment of organic wastes. The claim is based on two admitted procedural failures:

i. That there should have been consultation (the domestic law point); and

ii. That there should have been an environmental statement (the European law point).

3. The Appellant submits that the approach taken by the Court of Appeal is unlawful. Relief should be granted as the claim was brought within three months in respect of the breaches of both European and domestic law.

Delay

4. CPR 54.5(1) (**AB Tab 2**) provides that in judicial review proceedings:

> *"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."*

The two requirements have been repeatedly held to exist independently of each other; it is not to be to assumed that filing within three months will always amount to filing promptly; *R v Cotswold DC Ex p. Barrington Parish Council* [1998] 75 P.&C.R. 515. (**AB Tab 3**).

5. Once the Claimant has overcome the initial hurdle of permission, section 31(6)(b) of the Senior Courts Act 1981 (**AB Tab 4**) can take effect at the substantive hearing hearing to deny relief where it would be likely to cause substantial hardship or prejudice to the rights of any persons, or would be detrimental to good administration.

SUBMISSIONS

European Law and Environmental Impact Assessment

6. The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 give effect to Council Directive 85/337/EEC (**AB Tab 5**). The provisions of the Directive are to be read and given effect to in a purposive manner, to give effect to the Directive's objectives. The Directive recites that:

"the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects [and] affirms[s] the need to take effects on the environment into account at the earliest possible stage in all technical planning and decision-making processes…"

7. Article 2(1) imposes the primary obligation on Members States to ensure that;

"all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects.

8. The scope of the rights conferred on individuals by the Directive are wide ranging and include the right to participation in environmental issues by way of democratic and inclusive procedure (*Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (**AB Tab 6**) *at 615 per Lord Hoffmann)* . Lord Steyn in *R (on the application of Burkett) v Hammersmith and Fulham LBC* (No.1) [2002] Env. L.R. Part 6, 151 (**AB Tab 7**) at 158 drawing upon the decision in *Berkeley* for support said ;

"The Directive creates rights for individuals enforceable in the courts; There is an obligation on national courts to ensure that individual rights are fully and effectively protected."

9. In *Berkeley* Lord Bingham at 608 forcefully suggested that;

"Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still."

Therefore, the normal consequence of a failure to comply with the Regulations in breach of European law will be quashing of the decision given the significance of effective implementation of the Directive, and the protection of the procedural rights it confers.

This strict approach should be applied by the courts where there is non-compliance with the Directive whether the challenge has come promptly or otherwise within three months.

The rigorous approach taken in *Berkley* cannot be reconciled with a rigidly imposed and capricious rule that prevents an individual from raising environmental concerns and/or being granted relief even when they have brought their claim within a relatively short period of the breach.

The failure of the Respondent to implement the Directive correctly, and instead employ a "wait and see, and serve an enforcement notice if necessary" approach is the very antithesis of the precautionary principle at the heart of the Directive. The consequences of quashing a permission are far more desirable and does not prohibit a future grant of permission upon proper consideration of an Environmental Statement and after participation from those affected by the development. In that sense, the potential prejudice to the developer can be mitigated.

The rights conferred on individuals by the Directive are rendered nugatory where both planning authorities and the courts deny access and relief in matters of environmental justice. It is plainly unreasonable in the face of a breach of European Law to force a claimant to jump the additional hurdle of promptitude where the three month rule is more easily met and helpfully accessible.

The Directive and the rights is confers on individuals seeks to

> *"redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects;" Burkett* per Lord Steyn at [15].

There is an obligation on Member States to meet that imbalance and guarantee the rights to effective review of administrative decisions. That obligation is not met where individuals are unable to ascertain their rights and obligations by reference to a sufficiently precise, clear and foreseeable limitation period; *Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08) [2010] P.T.S.R. 1377 (**AB Tab 8**) confirming the concerns of Lord Steyn in *Burkett* at [53]. In *Uniplex*, (followed by *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 Ch (**AB Tab 9**), it was said that

the requirement of "promptness" did not comply with the requirements of legal certainty, and further, that it would be wrong to allow a limitation period to start before knowledge of infringement was obtained by the claimant.

A Member State does not fulfill its obligations under the Directive when a claimant with accrued procedural rights is denied relief for failing to meet an unknown time limit - even more so where they have been shut out of the decision making process and could not have known of the decision at the time it was made. Such a barrier has immense capacity to cause injustice and is productive of unnecessary uncertainty and practical difficulty. The right to challenge effectively, decisions of such profound importance as those affecting the environment ought not to be dispensed with so arbitrarily in a way that tips the balance too far in favour of major developers who, for the most part are profiting from potentially harmful pursuits.

Domestic Law and Failure to consult.

Contrary to the belief that withholding relief because of undue delay promotes good administration, it is submitted that it does quite the opposite. The preeminence given to financial prejudice over potential damage to the environment and the procedural rights of individuals is plainly wrong. Greater environmental stewardship is encouraged by an approach which recognises that denying important procedural rights is unacceptable, and that deserving claimants should not face additional hurdles in bringing their claims. The most predictable effect is that developers with the biggest and ultimately most environmentally harmful projects who spend a great deal of money in a very short time (thereby prejudicing themselves) after the grant of permission will be protected from having their permissions quashed.

It is inequitable now for the Council to seek to shut the claimant out given that it is the Council who prevented Nimby from participating at an earlier stage. As such, Nimby's case is strong on the merits, a factor for consideration that has not escaped the attention of the Courts. In *Finn-Kelcey v Milton Keynes BC* [2009] Env. L.R. Part 17 at 299 at [29] and [47] (**AB Tab 10**) Kenne LJ commented;

> *" 29. … There may be considerations which mean that it is in the public interest that the claim should be allowed to proceed, despite the delay and the absence of any*

explanation for that delay. If there is a strong case for saying that the permission was ultra vires, then this court might in the circumstances be willing to grant permission to proceed . But, given the delay, it requires a much clearer-cut case than would otherwise have been necessary. I turn therefore to consider the substantive merits of the claim, which asserts a breach of both domestic and European law….

47. It follows from that that the appellant falls far short of establishing the sort of clear-cut case which would be necessary to persuade the court to override the breach of CPR r.54.5(1), given that this was a claim no filed promptly."

In Keene LJ's judgment, a cast-iron claim with irrefutable merit is sufficient to dispense with the need for promptness as a separate requirement to the three month time limit, and thus, relief can be granted. It is submitted that this is the correct approach despite what could be substantial prejudice to developers. The merits of a case cannot properly be divorced from the question of delay if justice is to be done, and planning authorities should not be able to rely on a technical defence to a claim where there has been manifest error; particularly where they themselves are responsible to a large extent for the delay.

CONCLUSION

In cases involving a breach of European Law, the breach vitiates the decision whether there is prejudice or not. Quashing is not within the Court's discretion, but is the normal consequence of breach of the Directive. The Court of Appeal failed to give sufficient weight to the significance of the breach of European law, or the strength of Nimby's case concerning the breach of domestic law.

Further, it would be impractical to have a two tier system relating to breaches of domestic law and European law thereby disadvantaging claimants who have suffered only a breach of one or the other. Relief must be available for both where claims are brought within 3 months. For those reasons, the Court is asked to answer the certified questions in the negative, allow the appeal, and quash the planning permission.