(Code LS04)

IN THE SUPREME COURT

NIMBY

Appellant

-and-

THE COUNCIL

Respondent

SKELETON ARGUMENT
ON BEHALF OF THE RESPONDENT

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 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 (**RB Tab 1).** In summary, Nimby opposes the grant of planning permission for the 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 Respondent submits that the approach taken by the Court of Appeal was lawful. Relief should not be granted in respect of a claim that is not brought promptly albeit within three months.

SUBMISSIONS

European law

4.CPR 54.5(1) (**RB 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 and so 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. (**RB Tab 3**). Further, the wording of 54.5(1)(b) makes clear that the long-stop will be three months after the claim *first arose* (my emphasis), without any reference to the state of knowledge of the Claimant.

5. Where a claimant fails to act promptly, the discretionary power within section 31(6)(b) of the Senior Courts Act 1981 (**RB Tab 4**) can take effect at the substantive 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.

Knowledge

6. Where a planning permission is challenged, the words in CPR 54.5(1) ‘‘after the grounds to make the claim first arose" refer to the date when the planning permission was granted; *R (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] Env. L.R. Part 6,

151 (**RB Tab 5**). In *Barrington*, the position was made clear by Keene J as he then was at page 525;

> *"It would to my mind be strange indeed if the criterion of "promptly and in any event within three months were to be judged by reference to the applicant's state of knowledge when the permission had been granted by a Local Planning Authority, when that forms no basis for the time limit which operates in relation to challenging a planning permission granted by the Secretary of State or one of his inspectors"*

7. This position is certain in it's effects and remains unaltered by the decision in *Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08) (**RB Tab 6**), a public procurement case based on Directive 89/665 and carefully confined to the interpretation of that Directive. The ECJ ruled in that case :

(i) national courts should extend the limitation period to run from the date on which the Claimant knew or ought to have known of the breach [50]; and

(ii) that the requirement of promptness is not predictable in its effects and does not therefore ensure effective transposition of that Directive at [42].

8. *Uniplex* was considered, again, within the context of public procurement in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 Ch (**RB Tab 7**). Mr Justice Mann at [50] found it difficult to interpret the Directive in line with *Uniplex*. Purporting to give effect to that decision he commented;

> *" 50. The long stop date is plainly and in terms one which starts with the infringement rather than the knowledge of it. The expression "from the date when grounds for the bringing of the proceedings first arose" is not capable of any other interpretation…."*

9. At [51] Mann J used the discretion within those regulations to extend the period for bringing proceedings so as to make time run from the date of knowledge. If follows that the approach to be taken in extending time limits is a discretionary one and not an absolute requirement. A discretion to extend time where there is good reason to do so is already well established in domestic law. This is plainly a sensible approach that avoids the overwhelming prejudice that may be caused by a successful challenge to a planning permission long after it was granted. Accordingly *Sita* provides no additional support to the Claimant.

Promptness.

10. In that same case, Mann J disregarded the requirement of promptness as a limiting factor within the long-stop time period of three months as incompatible with the Directive. However, neither *Sita* nor *Uniplex* can be used to support the proposition that the requirement of promptness should not apply in cases other that those concerning public procurement. Coulson J in *R (oao Pampisford Estate Farms Ltd v SS for Communities and Local Governmen*t [2010] EWHC 131 (Admin) (**RB Tab 8**), a case referring to the opinion of Advocate General Kokott in *Uniplex* concluded at [57]

> *"the opinion in Uniplex, which cannot as a matter of EC law overturn on its own the statutory basis of CPR 54.5, and was not concerned with a situation in which a lack of promptness could have a significant adverse effect on numerous other parties."*

It is submitted therefore that the approach taken in *Hardy v Pembrokeshire CC* (Permission to appeal) [2006] EWCA Civ 240, (**RB Tab 9**) by Keene LJ is the preferred approach to "promptness" and undue delay. Drawing on support from the decisions in *Lam v. United Kingdom* Application 41671/98 (**RB Tab 10**), and *Burkett* Lord Justice Keene concluded at [18] ;

> *"for all these reasons and despite the doubts expressed obiter in Burkett, it seems to me that there is no realistic prospect of the applicant successfully establishing that CPR 54.5(1), insofar as it requires a claim form to be filed "promptly", is contrary to European law and unlawful."*

Furthermore, Lord Steyn in *Burkett*, although expressing some doubt over the uncertain requirement of 'promptitude' as a pre-requisite for permission had no issue with the equally uncertain wording of section 31(6) that undue delay may bar relief at a substantive hearing, commenting at 159;

> *"It is, however, a useful reserve power in some cases, such as where an application made well within the three month period would cause immense practical difficulties"*

There is good reason for the discretion to deny relief where a claimant has not acted promptly which applies whether the breach complained of is one of European or domestic law. Further, it would be incongruous for there to be a two-tier system with relief in claims brought in respect of European Law and not in those which rely solely upon domestic grounds of review, and so both fall to be considered under well established and existing principles in domestic law.

Domestic Law

Where the application for permission to seek judicial review is not made promptly, there is "undue delay" for the purposes of section 31(6)(b); the reason for imposing such a strict requirement of promptitude was made clear in *Hardy* ;

> *"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."*

Delay won't be the only factor taken into consideration by the court; the potentially harsh effects of the requirement are tempered by by further considerations; *R. (Gavin) v Haringey LBC* [2003] EWHC 2591 (Admin); [2004] 2 P. & C.R. 13 (**RB Tab 11**) at [21]:

> *It will be necessary to consider the principles governing the exercise of the court's discretion with regard to the grant or withholding of relief in a case where there has been delay in bringing the challenge, and then to consider the individual factors relevant to the exercise of that discretion on the facts of the present case. Such factors include (i) the nature of the legal errors and the conduct of the council, (ii) the period of delay and the conduct of the claimant, (iii) hardship or prejudice... if relief is granted, (iv) other issues concerning...conduct... and (v) detriment to good administration if relief is granted.*

The present approach is one that allows the court to exercise discretion in allowing or denying relief. It is capable of meeting with unfairness to the third parties, as well as to the claimant; where there is delay, time can be extended and remedy granted where there are good reasons to depart from the normal rule. Lack of promptitude is however an important consideration that can not be wholesale dispensed with thereby leaving those who have relied

on their planning permissions exposed to financial hardship such as there would be in this case where the developer has invested £6 million in the site.

The Court ought not to be fettered in its discretion to deny relief when, having performed the balancing act alluded to in *Gavin*, the court finds that the hardship and prejudice to third parties outweighs that of the Claimant. It is in the interests of good administration that the discretionary exercise is undertaken by the court, explained in *Hardy* by Keene LJ at [10];

> *"A public law decision by a public body in almost all cases affects the rights of parties other than the decision-maker and the applicant seeking to challenge such a decision. 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 person and business decision accordingly."*

The requirement for promptitude is not just aspirational - it is a separate requirement. To insist on a set time limit of three months in which a claimant can be guaranteed a remedy for a successful claim renders that limb of CPR 54.5(1) otiose. Such an interpretation does violence to the ordinary language of the provision and could undoubtedly lead to unfairness.

CONCLUSION

It is submitted therefore that the Court of Appeal erred on the facts of this case in determining that the appropriate course was to extend time to three months from the date of knowledge of the breach; extending time is discretionary - not a rule. Further, if there were good reasons to extend the time in which Nimby could bring a claim, the Claimant has failed to act promptly within the new time frame waiting until the end of the three month period without good reason.

Whether the breach complained of is one of European or Domestic Law, the requirement for promptness allows to court to balance competing considerations in a way that a bright line rule would not. Such an approach would undoubtedly require the sanction of parliament and ought not to be taken. The law as it is strikes a balance and the balance on these particular facts falls in favour of dismissing the appeal.