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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Corbo Properties' Application [2012] NIQB 107

IN THE MATTER OF AN APPLICATION BY CORBO PROPERTIES LIMITED FOR JUDICIAL REVIEW

AND THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT PLANNING SERVICE ON 28 SEPTEMBER 2011 PURSUANT TO ARTICLE 25 OF THE PLANNING (NORTHERN IRELAND) ORDER 1991

AND FURTHER IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE ENVIRONMENT PLANNING SERVICE ON 5 MARCH 2010 PURSUANT TO ARTICLE 25 OF THE PLANNING (NORTHERN IRELAND) ORDER 1991

HORNER J

Introduction

[1] By this application for judicial review, Corbo Properties Limited (the "applicant") seeks to challenge the following two decisions of the Department of Environment (Planning Service) (the "respondent") to grant planning permission for retail development at Boucher Place, Belfast:

(i) Decision dated 5 March 2010 ('the 2010 Decision') whereby the respondent granted Deramore Holdings Limited (the "notice party") planning permission (reference Z/2009/0070/F) for "*demolition of part of building and reconfiguration and change of use of remainder from warehousing to form 2 bulky goods retail units with mezzanine floors and associated car parking, servicing, access arrangements and landscaping*" in respect of the notice party's application for planning permission dated 21 January 2009 ("the 2009 Application"); and

(ii) Decision dated 28 September 2011 ('the 2011 Decision') whereby the respondent granted the notice party planning permission (reference Z/2010/1312/F) for "*demolition of part of building and reconfiguration and change*

of use of remainder from warehouse to form two bulky goods retail units, inc. mezzanine floors, access, car parking, servicing and landscaping" in respect of the notice party's application for planning permission dated 22 September 2010 ("the 2010 Application").

[2] The 2011 Decision immaterially altered the floor space anticipated by the 2010 Decision and amended the configuration of the retail units.

Factual background

[3] The notice party is the registered owner of the lands situated at 1–9 Boucher Place, Belfast, the site to which the impugned planning permissions relate.

[4] The applicant, Corbo Properties Limited, is the owner (under a long lease from Belfast City Council of 125 years) and landlord of the retail park known as Boucher Crescent Retail Park, Belfast ("Boucher Park"). This is the largest single open class retail development in Northern Ireland. Tenants include Matalan, TK Maxx, Next, Boots, HMV, Carphone Warehouse, Starbucks and New Look, amongst others. Each unit holds the benefit of planning permission for Class A1 retail under the Planning (General Development) Order 1993 ("Class A1"). A number of the units are restricted from selling convenience goods and/or food but are otherwise unrestricted within Class A1.

[5] The applicant takes an interest in the development of potential competitor units in the Boucher Road area. Generally, the applicant would not consider applications or approvals for Class A1 retail units in the vicinity of Boucher Crescent to be of concern provided that, as is usually the case, such retail units are restricted to "bulky goods".

[6] The applicant filed its application for leave to apply for judicial review of the 2010 Decision and the 2011 Decision on 22 December 2011, 21 months after the date of the 2010 Decision.

The issues

[7] The parties agree that the only live issue in this case is in relation to the relief (if any) that the Court ought to grant in relation to the impugned 2010 Decision and the impact of issues such as delay, prejudice to the third party and detriment to good administration.

[8] The respondent acknowledges that the 2010 Decision granted planning permission in error since it lacked a condition restricting the use of the subject premises to the sale of bulky goods.

[9] Although acknowledging the planning permission under the 2010 Decision was granted in error, the respondent has not formally conceded the application in respect of the planning permission granted under the 2011 Decision which was, also, granted

omitting a condition restricting the use of the subject premises to the sale of bulky goods. The respondent states it has not made such formal concession because the parties are agreed on the only live issue in this case; formal concession of the application in respect of the 2011 Decision would not narrow the issues before the Court; it would not save court time, save any party expense, advance the real issue before the Court, or have any practical effect on any party's position; and the involvement of the notice party and its interest in the outcome of the application in relation to the 2011 Decision precludes the respondent making any concession.

[10] The applicant asserts that the only rational explanation for the respondent's failure to make such a concession in relation to the 2011 Decision is the erroneous reliance on the respondent's own failure to properly determine the earlier 2009 Application (the 2010 Decision). The applicant says, in so doing, the respondent has compounded its previous mistake and, again, failed to comply with Planning Policy Statement 5 - Retailing and Town Centres. The applicant adds that the 2011 Decision is a stand-alone permission. It is not dependent on the continuing existence of the 2010 Decision. Therefore, the applicant argues, if the 2011 Decision is not quashed, it can be implemented, contrary to the public interest and the interests of the applicant, regardless of what happens in relation to the 2010 Decision. The applicant also makes the point that the notice party does not advance any argument against the quashing of the 2011 Decision, beyond saying it has no interest in implementing that permission.

[11] Although the respondent acknowledges the error in relation to the 2010 Decision, it objects to a grant of relief because:

(i) the challenge to the 2010 Decision is exceedingly late (proceedings were issued on 22 December 2011 in respect of the planning permission granted on 5 March 2010); and

(ii) to grant relief would prejudice good administration since it would result in "severe and undesirable uncertainty" within the planning regime and introduce intolerable uncertainty into commercial life.

[12] The notice party confines its submissions to the challenge to the 2010 Decision. It seeks to implement this planning permission and, therefore, feels it is unnecessary to address the challenge to the later 2011 Decision.

[13] The applicant submits there can be no question whatsoever of denying it a remedy in relation to the impugned 2011 Decision, as the application for leave to apply for judicial review was brought within the 3 month period referred to in Order 53 Rule 4(1) of the Rules of the Court of Judicature (Northern Ireland) 1980.

The application for Judicial Review

[14] The detailed grounds on which relief is sought are set out in the Order 53 Statement dated 22 December 2011. In light of the only live issue before the Court

being as referred to above, it is not felt necessary to rehearse such grounds in full in this judgment.

[15] In summary and *inter alia*, the relief sought in the Order 53 Statement is for an order of certiorari to quash the 2010 and 2011 Decisions; a declaration that the 2010 and 2011 Decisions are unlawful, ultra vires and of no force or effect; and an order of mandamus to compel the respondent to adjudicate upon and re-determine the notice party's 2009 and 2010 Applications for planning permission in a proper and lawful manner.

Rules of the Court of Judicature (Northern Ireland) 1980

[16] Order 53 Rule 4(1) provides the time limit for making an application for leave to apply for judicial review may be extended if there is good reason for doing so:

> "4.-(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

Planning Policy Statement 5 – Retailing and Town Centres ("PPS 5")

[17] Under the heading of 'Objectives and Approach', paragraph 6 of PPS 5 refers to the respondent's recognition of the value and importance of established shopping areas in town, district and local centres and its commitment to protecting their vitality and viability:

> "The Department is committed to allowing freedom of choice and flexibility in terms of retail development throughout Northern Ireland and to assist the provision of a wide range of shopping opportunities to which the whole community has access. It is not the function of land use planning to prevent competition among retailers or between methods of retailing, nor to preserve existing commercial interests. <u>However, the Department recognises the value and importance of established shopping areas in town, district and local centres, and is therefore committed to protecting their vitality and viability</u>." [emphasis added]

[18] Under the heading, 'Planning for Retail Development', in relation to 'Comparison Shopping and Mixed Retailing', paragraph 39 of PPS 5 provides:

> "39. Major proposals for comparison shopping or mixed retailing will only be permitted in out-of- centre locations where the Department is satisfied that suitable town centre sites are not available and where the development satisfies all the following criteria:
>
> …
>
> - is unlikely to lead to a significant loss of investment in existing centres;
>
> - is unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping function;
>
> - will not lead to an unreasonable or detrimental impact on amenity, traffic movements or road safety;
>
> ...
>
> - will be unlikely to add to the overall number and length of car trips and should, preferably, contribute to a decrease; and
>
> - will be unlikely to prejudice the implementation of development plan policies and proposals.
>
> Where a proposed out-of-centre development satisfies the above criteria the Department will favour an edge-of-centre location over a location elsewhere out-of-centre."

The evidence

[19] Mr Stephen Kirkpatrick, a Director of Corbo Ltd, made his first affidavit on 20 December 2011. In this affidavit he dealt with, among other things, the issue of delay. At paragraph 4 he stated:

> "4. Neither I nor any other Director of Corbo was aware of the planning applications reference Z/2009/0070/F (the "2009 application") and Z/2010/1312/F (the "2010 application") but in any event any advertisement for those applications would not have raised specific concerns for Corbo as both were described as applications for "bulky goods" retail units."

He then went on to say that he first became aware of the 2009 and 2010 applications on 24 November 2011 when the current application reference Z/2011/1300F was advertised and he was alerted to the application by the applicant's agents, Ostick & Williams.

[20] Mr Kelly, an Associate Director of Ostick & William, confirms what Mr Kirkpatrick said. He draws attention in his affidavit at paragraph 73 to the fact that Mr Cairns of the SPT team was drawing the attention of Mr Dowey, a planning officer, in the Belfast Divisional Planning Office, to the fact that there had been a failure to include SPT's recommended conditions and informatives on the decision notice for Z/2009/0070 issued on 5 March 2001. Mr Cairns had acknowledged in his email that:

> "This could have serious implications for retail development at this location as the Department is no longer able to retain control of the nature, range and scale of retailing activity therein."

[21] At paragraphs 109 and 110 he makes it clear that the first time that he became aware of the 2010 planning permission was at the end of November 2011.

[22] Mr Faloon of the notice party in his affidavit dated 17 February 2012, paragraph 15 and 16, deals with "The Business Strategy". He states that the notice party changed its strategy completely upon the receipt of the March 2010 consent. At paragraph 24 he sets out what the notice party did. He claims the notice party:

> "1. Sought legal advice regarding the terms of the unrestricted permission and was advised regarding the 3 month time period within which the permission could be judicially reviewed;
>
> 2. As a result of the legal advice did not carry out any work until the 3 month period expired;
>
> 3. Took the commercial decision not to negotiate with Boots (the existing Tenant at the Boucher Place Site) regarding the execution of a new lease;
>
> 4. Began to progress negotiations with respect to Qualitrol with regard [to] renewal of their existing lease;
>
> 5. Did not exercise its right to determine the existing lease under the Business Tenancies (Northern Ireland) Order 1996 on the grounds of redevelopment, notice of which could have been served since April 2011;

> 6. More damagingly still, the notice party served a notice to determine under the Business Tenancies (Northern Ireland) Order 1996, on 14 September 2011, stating irrevocably that it would not oppose the granting of a new lease;
>
> 7. Took the last irrevocable step to enter into a new 10 year lease with Danaher UK Industries (known as Qualitrol) on 21 November 2011 on more financially favourable terms than had been previously offered by the notice party; and
>
> 8. Set in train pre-development marketing activity of the Boucher Place Site on foot of the impugned permission, including instruction of property agents and artist visualisation company, undertaking development appraisals, and entering into fee arrangements with consultants.
> …
>
> 25. Further, as a consequence of its reliance upon the terms of the March 2010 Consent, notice party did not implement either of the planning permissions which it obtained to redevelop the Wildflower Way Site. With the grant of a new lease to the tenant to the Wildflower Way Site, I am advised it is now impossible for the notice party to implement either of the said permissions and redevelop the site in preference to Boucher Place Site."

He goes on to say at paragraph 28:

> "28. In the event that the planning permissions which it is sought to impugn are quashed, the notice party would be prejudiced in the following ways:
>
> (i) The notice party would lose the enhanced value of unrestricted retail warehouse permissions at the Boucher Place Site;
> (ii) The notice party has now lost the ability to implement either of its planning permissions at Wildflower Way;
> (iii) The notice party may no longer be able to secure permission for retail warehousing at Boucher Place due to a change of planning policy in the period since the impugned permissions were granted…

(iv) In addition to the substantial loss of site value, the notice party will lose development profits."

Further claims relying on the affidavit evidence of Mr Crothers, Chartered Surveyor, quantify the prejudice in monetary terms as being of the order of several million pounds.

[23] Mr Watson, Chartered Surveyor on behalf of the applicant, disputes the claims made as to prejudice on the part of the notice party, complaining that they are overstated, but he accepts that he does not have sufficient information or documentary evidence to challenge them in detail.

[24] Mr Crothers in his affidavit evidence deals, inter alia, with the "Importance of Certainty" at paragraphs 44-48:

> "44. I advise regularly on property transactions where the grant of planning permission is a condition precedent or a trigger for certain, usually irreversible, steps to be taken by a party or parties on foot of a commercial agreement.
>
> 45. Such agreements consistently provide for a quarantine period of 3 months from the date of the grant of planning permission before the agreement is perfected and/or irrevocable steps are taken. The purpose of this provision is to legislate for the prospect of Judicial Review proceedings being mounted and is designed to give certainty to the parties that it is safe to proceed with their arrangements once the 3 month challenge period has elapsed.
>
> 46. If commercial parties are exposed to the prospect of Judicial Review proceedings arising after the 3 month period has passed, that prospect would effectively negate the careful planning that underlies such arrangements and would result in, or at least risk, commercial mayhem through uncertainty.
>
> 47. Moving from the general to the particular, in this case the Notice Party has taken prudent and informed commercial decisions that cannot now be reversed. It did so in reliance upon, inter alia, the Impugned Planning Permission, professional advice as to the efficacy of that Planning Permission, and an assessment of its commercial merits and value, compared to the alternative option.

> 48. In the event that this Honourable Court were to accede to the Application and move to quash the Impugned Planning Permission, not only would the Notice Party incur prejudice and losses measured in millions of pounds but the property market at large would be alerted and exposed to an unprecedented risk of having planning permissions made vulnerable to challenge and quashing long after being granted. Such prospect would create an intolerable burden of uncertainty in the property market and would have adverse implications for its participants."

[25] Mr Blackwood in his affidavit dated 16 October 2012 on behalf of the respondent concludes that there was no fraud or impropriety in the case. He says:

> "5. In summary I concluded that there was no evidence of fraud or impropriety in the case and that it was unnecessary to refer the matter for further investigation. In my opinion this was a case of individual error, compounded by corporate error in that the omission passed the group. I felt that this was a matter which could more appropriately be dealt with as a performance issue at local management level…"

[26] In his affidavit Mr Blackwood refers to the investigation he carried out and refers to paragraph 2.2 which deals with the 2010 Decision. He refers to the planning applicant seeking to take advantage of the omission to include a "bulky goods" condition and he questioned whether the issue of "unjust enrichment arose":

> "Although the planning condition on 'bulky goods' was omitted from Z/2009/0070/F, it is evident throughout the application file, including the description of the proposal, and correspondence etc., that this is what is being applied for. Given this point and the fact that the applicant [i.e., the planning applicant] is seeking to take advantage of this omission to claim that they are now in possession of an unfettered retail approval, is this decision affected by the legal premise of "unjust enrichment"? Obviously, this will be for the Department's Counsel to consider."

[27] At paragraph 3.3 Mr Blackwood referred to the more likely explanation as to what had occurred:

> "The more likely explanation is that it was error which has led to the issuing of this decision without RU's

> conditions and informatives. Such an error would have initiated with the Case Officer, it would then have been missed by DCG and subsequently missed by the authorised officer signing the decision notice. Although the more likely explanation, **it is of concern that the Department's established corporate decision making procedures could have failed at so many levels**…" (emphasis added).

[28] It is reasonably clear that:

(i) The 2010 Decision (and the 2011 Decision) was the result, not just on one level but on at least two different levels, of a most regrettable mistake on the part of the respondent, its servants and agents. It represents a serious dereliction of duty on the part of the respondent and brings the whole planning process into disrepute. On this occasion the respondent singularly failed to guard the public interest.

(ii) The applicant was unaware of this most serious error until November 2011 but did act promptly when the error was brought to its attention.

(iii) The notice party has acted to its detriment but it is not possible on the basis of the present evidence to quantify that detriment. However it is difficult not to conclude that the notice party knew, or should have known, that:

> (a) The respondent had made a grave error in 2010 which conferred a substantial benefit on the notice party by failing to include a "bulky goods" condition in the permission;
>
> (b) Once 3 months had expired from the 2010 decision, it would become increasingly difficult, but certainly not impossible, for any other party to bring a successful review of the 2010 decision;
>
> (c) However, in order to secure the 2010 planning consent, the notice party would need to act on it, otherwise it would face the argument in any subsequent proceedings that the 2010 decision could be safely set aside because the notice party would suffer no prejudice.

(iv) No evidence has been adduced of any possible detriment to other shopping centres including Boucher Park or Belfast City Centre, to the road traffic system in the Boucher Road area or to the Boucher Road environment as a consequence of the 2010 Decision (or the 2011 Decision). However PPS 5 represents a policy that the respondent believes is worth upholding. Therefore it is reasonable to conclude that the development authorised by the 2010 Decision will have significant adverse consequences for other third parties. The real issue is the extent of these adverse consequences. On this issue, it is disappointing to note, there is a dearth of

evidence. It is difficult to understand how the respondent can claim to be the guardian of the public interest without making a proper inquiry as to the consequences of implementing the 2010 Decision.

The submissions of the parties

[29] I am indebted to counsel for the comprehensive oral and written submissions made on behalf of each of the parties. The following represents a brief summary of the cases put forward by the parties in written and oral arguments but does each of them less than justice.

[30] On behalf of the applicant Mr Orbinson QC submitted that:

(i) This was a case of admitted error piled on admitted error. It was a complete subversion of the duty of the respondent under PPS 5 to protect existing retail centres against out-of-centre shopping centres.

(ii) Neither the respondent nor the notice party sought to defend the lawfulness of either decision because neither decision was defensible.

(iii) Public interest did not require the court to cement for the future the errors which had been put in place by the respondent. Instead it required, (despite the delay for which it was in no ways responsible), given the prejudice to other innocent parties and the alleged detriment to good administration, the quashing of both unlawful decisions.

(iv) The circumstances of the case were so exceptional that although it was unusual to quash planning decisions after 12 months, not just the 2011 Decision should be struck down, but also the 2010 Decision.

(v) The only prejudice to be suffered if the decisions were struck down was to the notice party. Further, the applicant claims the notice party must have known the decisions were unlawful in any event and took a chance when it proceeded on foot of them.

(vi) Finally the errors made were so profound that it cannot be good administration to try and support them.

[31] On behalf of the respondent Mr Shaw QC submitted that:

(i) The respondent did not dispute the lawfulness of the decisions, only the relief that should be granted as a consequence;

(ii) The respondent frankly acknowledged its failures, but these clearly arose through human error, not through lies or corruption;

(iii) The applicant had explained satisfactorily any culpability in bringing proceedings to challenge the 2010 Decision outside the 3 month period but what "cannot be hidden is the great duration", that is nearly 21 months delay on the part of the applicant in bringing a judicial review. Such a delay must be fatal to the applicant's claim for substantive relief.

(iv) "The least injustice" is produced by refusing to quash the 2010 decision.

(v) The respondent originally and now in these proceedings is the guardian of the public interest. This demands certainty and finality in administration. The quashing of the 2010 Decision does not advantage public interest but instead sets a wide-ranging and unhelpful precedent. It undermines the presumption of the validity of administrative decisions and is not to the advantage of the public.

[32] On behalf of the notice party Mr Beattie QC submitted that:

(i) His client has waited more than 3 months after obtaining the 2010 decision and following March 2010 had taken a series of steps which had resulted in an unmistakeable escalation of prejudice to the notice party.

(ii) The applicant had failed to adduce any evidence on its own behalf or from any other party suggesting that such a party had suffered prejudice. The onus was on the applicant to prove prejudice and, apart from articulating some generalised fears, it had failed to do that.

(iii) Absent bias or bad faith, a developer should not be concerned with the lawfulness of a planning decision. The most important issue for the court should be the prejudice which would be suffered by the notice party if the 2010 Decision was set aside.

(iv) The reasons for failing to institute proceedings are not relevant to the issue of prejudice and hardship and it is delay which militates against the granting of any relief to the applicant.

(v) The prejudice of setting aside a planning permission is a separate consideration and it should be given the greatest weight.

(vi) The principle of certainty is the underpinning principle of public law. Equity and fairness do not find favour in public law. Nor for that matter does the principle of unjust enrichment.

[33] The parties did agree on the following, or perhaps to be more accurate, did not dispute the following:

(i) The 2011 Decision was indefensible. The notice party had not proceeded on foot of it and did not intend to do so in the future.

(ii) The court in deciding whether to grant relief when there had been delay had to take into account different factors which included:

(a) The unlawfulness of the decision.

(b) Delay, its extent and the reasons for it.

(c) The prejudice which flows from that delay.

(d) The detriment to good administration by setting such permissions aside after more than 2 years had passed.

(e) The detriment to good administration by allowing an unlawful decision to remain in place and effective.

(f) The public interest.

(iii) It was the weight that should be given to each of those factors in this particular case which was in dispute. However each party agreed that it was for the court to carry out what was a nuanced and careful balancing exercise that was specific to the facts and circumstances of this particular case.

(iv) There was no claim for damages for negligence open to either the applicant or the Notice Party against the respondent: see Stable v Borough Council of Dartford (30 March 1982, a decision of the Court of Appeal in England).

(v) It was unlikely that resort to the ombudsman with a complaint of maladministration would achieve any effective relief for either the applicant or the notice party.

(vi) It was not possible on the basis of the present information to make a determination as to whether Mr Crothers, Chartered Surveyor, on behalf of the notice party, or Mr Watson, Chartered Surveyor, on behalf of the applicant, was correct in the conclusion each reached as to the financial prejudice suffered by the notice party.

Legal discussion

[34] The court has been inundated with a very considerable number of authorities. Many of these seem to produce contradictory outcomes. Many of the cases, including this one, involve the clash of legal principles and these collisions of legal principles have provided in the past and will provide in the future a lucrative source of income for many in the legal profession. It is not possible to say as generality what weight should be given to each of the various factors which the court has to take into account in exercising its discretion. That weight will vary

depending on the circumstances and the facts of any particular case. What the court should be seeking to achieve is, in the words of Elias J, "the least injustice" and the parties appear to agree that that is the correct approach.

[35] Judicial Review in Northern Ireland, A Practitioner's Guide (Larkin and Scoffield) discuss remedies in chapter 14. Paragraphs 14.51 and 14.52 under the heading 'Delay and effect on third party rights' discuss why a court might decline to grant relief in exercise of its discretion because of delay on the part of the applicant:

> "14.51 Another reason why the Court might decline to grant relief in the exercise of its discretion is delay on the part of the applicant. As we saw in Chapter 5, delay is primarily addressed at the leave stage. However it can also raise its head at the substantive hearing, particularly in the context of remedies. If there has been delay in bringing the proceedings and, in the meantime, others have acted reasonably upon the decision which is impugned in the proceedings, the Court may decline to grant relief. This is an aspect of the principle of legal certainty, requiring that the public be able to rely on official decisions and actions with a minimum of uncertainty and that, accordingly, if a challenge is to be brought, this should occur expeditiously to minimise reliance on an official decision which may effectively transpire to have been unlawful.
>
> 14.52 There is no direct equivalent in Northern Ireland of section 31(6)(b) of the Supreme Court Act 1981 which provides that: "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant … 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." Nevertheless, hardship or prejudice which might be caused by the grant of a remedy will still be an important factor in the exercise of the Court's discretion. A note of caution has been sounded, however, about resurrecting delay points at the substantive hearing based on the time taken to initiate proceedings, where this has not been considered sufficient to justify the refusal of leave."

[36] In Judicial Review in Northern Ireland, Gordon Anthony (Hart Publishing 2008) says at paragraph 1:07 in chapter 1 under the heading `What is Judicial Review and what are its purposes?':

> "[1.07]… Although the period of three months can be extended where the court considers that 'there is good reason' for doing so, emphasis has often been put on the point that applications should be made *promptly* and that they risk being dismissed for delay even if made within the three-month period. The underlying rationale here is simply that the overall process of public decision-making benefits from legal certainty when potentially disruptive challenges to decisions are prohibited after a set period of time (the disruption being taken as counter to the wider public interest in "good administration"). There is thus the corresponding presumption of legality in respect of decisions that are taken but not challenged timeously in the sense that the decisions are therefore deemed to be valid…"

[37] Paragraph 8.08 in chapter 8 (Remedies) under the heading, `Their Discretionary Nature' states:

> "[8.08] The prerogative orders and equitable remedies have always been discretionary in the sense that they did not, and still do not, issue automatically where an argument of illegality and so on was, or is, made out… For instance, the courts today may decline to grant a remedy … where the applicant has failed to bring proceedings within the requisite time frame…"

[38] In R v Secretary of State for Trade and Industry [1998] Env LR 415 Laws J at page 424 stated that there was a discretion to refuse leave or relief where there had been delay. He said:

> "This is an inevitable function of the fact that the judicial review court, being primarily concerned with the maintenance of the rule of law by the imposition of objective legal standards upon the conduct of public bodies, has to adopt a flexible but principled approach to its own jurisdiction. Its decisions will constrain the actions of elected government, sometimes bringing potential uncertainty and added cost to good administration. And from time to time its judgments may

> impose heavy burdens on third parties. This is a price which often has to be paid for the rule of law to be vindicated. But because of these deep consequences which touch the public interest, the court in its discretion – whether so directed by rules of court or not – will impose a strict discipline in proceedings before it. It is marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage. The rule of law is not threatened, but strengthened, by such a discipline."

[39] In R v Secretary for Trade and Industry, ex parte Greenpeace Ltd All England Official Transcript [1997-2008] Maurice Kay J said the following in respect of a tardy application for judicial review:

> "In my judgment, notwithstanding the lack of promptness which I have identified, this is a case in which the public interest balance comes down in favour of extending time and permitting the application to be made. Indeed, having had to construe the Habitats Directive on the basis of full submissions and having come to a clear view about it, to refuse permission would leave the matter in a somewhat unsatisfactory state."

[40] In R (on the application of Gavin) v Haringey LBC [2003] EWHC 2591 Richards J said at paragraph 45:

> "The delay in this case, a period of 32 months from the grant of planning permission to the commencement of proceedings, was on any view extremely long. On the other hand, it must be considered in conjunction with the explanation for the delay, namely the failure to comply with the publicity requirements and the claimant's lack of knowledge of the planning application or of the grant of planning permission. The claimant cannot fairly be criticised for failing to take action before he knew that there was anything to take action about."

[41] Richards J then went on to say that he could see nothing in the claimant's conduct to put in the balance against the grant of relief (paragraph 48). So it is clear that even when there has been a long delay, each case has to be decided on the

special facts relating to that particular application. However, it can be said as a general proposition that, especially in applications involving planning consents, the courts do consider it especially important that applications for judicial review are moved promptly. However, there may be cases in which it is not fatal to the granting of relief that there has been a substantial delay in the institution of proceedings. An example of this might be a planning permission, which, if implemented, would have such detrimental consequences that despite the delay, the public interest was such that relief had to be granted.

[42] In Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority [1991] 61 P and CR 343 the Court of Appeal held that in exceptional circumstances even where a decision was unlawful a judge was entitled, in the exercise of his discretion, not to grant relief. Glidewell LJ said at page 353:

> "Even if the judge has concluded that he could hold that the decision is invalid, in exceptional circumstances he is entitled nevertheless, in the exercise of his discretion, not to grant any relief."

[43] In Berkeley v Secretary of State for the Environment & Anor [2001] 2 AC 603 Lord Bingham said at page 608:

> "Even in the purely domestic context, the discretion of the court to do other than quash the relevant order or action where each excessive exercise of power is shown is very narrow."

[44] Lord Hoffman at page 616 said:

> "It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires."

However Lord Carnwath said in Walton v The Scottish Ministers [2012] UKSC 44 at paragraph 127 in respect of the statements of Lord Bingham and Lord Hoffman and of Glidewell LJ the following:

> "Although of course these statements carry great persuasive weight, care is needed in applying them in other statutory contexts and other factual circumstances. Not only did they rest in part on concessions by counsel for the Secretary of State, but the circumstances were very unusual in that, by the time the case reached the House of Lords, the developer had abandoned the project, and the decision had lost any practical significance."

[45] Again, the principle of legality suggests that an unlawful decision should be struck down and relief granted but in certain exceptional circumstances it may be appropriate for the judge to exercise his discretion and not grant relief.

[46] In Caswell & Anor v Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738 Lord Goff said at 749F:

> "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 had occurred, would be detrimental to good administration."

[47] In Corbett v Restormel Borough Council [2001] EWCA Civ 330 Schiemann LJ said at paragraphs 15-17:

> "15. Mr Christopher Katkowski QC who appeared on behalf of Mr Corbett submitted that the permission which had been unlawfully granted should be treated as though it had never had any legal existence; L&P never had the benefit of a lawfully granted planning permission and therefore should not be compensated for the modification of a lawfully granted permission. That submission has a certain elegance but can not stand on its own, as Mr Katkowski recognises. If it were right then no discretionary exercise by the Judge would be called for. Quashing would follow as of right. The reason why the submission can not stand on its own is that people rely and are entitled to rely on decisions of public bodies as being lawful until such time as they are quashed. They arrange their affairs on this basis. This is a desirable fact of life, desirable because if everyone felt free to ignore such decisions because they suspected or hoped that there was something legally wrong with them life would be filled with uncertainty.
>
> 16. However, as is well known, there clashes with this principle of legal certainty another principle which is also of great value — the principle of legality which requires that administrators act in accordance with the law and within their powers. When they do things they are not empowered to do this principle points towards the striking down of their illegal actions. The clashes between these two principles have given rise to many cases and many books and articles. The end result is that it is agreed on all sides that while the courts have power to quash they also have power to refuse to quash unlawful decisions.
>
> 17. Recognising as he does the existence of this discretion, Mr Katkowski submits that the Judge should incline to quash what is shown to be an unlawful decision unless the person resisting the quashing can show at least that he would be harmed by the quashing or some other reason is shown for not striking down. For my part, I would agree with that submission …"

[48] Sedley LJ says at paragraph 32:

> "How, one wonders, is good administration ever assisted by upholding an unlawful decision? If there are reasons for not interfering with an unlawful decision, as there are here, they operate not in the interests of good administration but in defiance of it."

[49] In R (on the application of Burkett) v Hammersmith & Fulham London Borough Council [2001] 3 PLR 1 Sedley LJ at page 13:

> "Administration beyond law is bad administration. The courts exist to protect the former as jealously as to stop the latter, but they cannot know which they are dealing with unless they hear out, and decide, viable challenges to the legality of administrative acts."

Again the court is involved in balancing the principles of certainty and legality to try to achieve in the circumstances of any particular case what is good administration. In some cases good administration will dictate that the relief is granted. In other cases good administration will demand that relief should be refused. It all depends on the particular facts and circumstances of that case.

[50] It is also necessary to consider the hardship which has been suffered by a developer who has acted on what prima facie appears to be a valid planning permission. Richards J dealt with this in R (on the application of Gavin) v Haringey LBC [2003] EWHC 2591 at paragraph 83 when he said:

> "I therefore consider that detriment to good administration ought to be taken into account as a separate and additional factor relevant to the exercise of discretion to quash. But it is of only secondary significance as compared with the hardship or prejudice to the developer."

[51] In R (on the application of Guiney) v London Borough of Greenwich [2008] EWHC 2012 Judge Mackie QC at page 54 decided that in the circumstances of that case, where the planning permission was unlawful because of the failure to consult with the claimant, determined that he should not quash the planning consent but instead should make a declaration:

> "The court will therefore issue a declaration as between the claimant and the defendant in terms which I will consider but on the basis that the terms of the declaration are to have no impact whatsoever upon the interests of the interested parties".

[52] In Re Aquis Estates Ltd's & Others' Application for Judicial Review [2000] NIJB 1 Kerr J had to decide whether to quash the grant of a planning permission in respect of a Tesco's store that was just about to open. He refused to do so. He was also asked to grant a declaration that planning permission was invalidly obtained. He said:

> "I do not consider this is appropriate. It should be clear that, but for the expenditure on the development and the imminence of the opening of the store, I would have acceded to the application for judicial review. Having made that clear in this judgment, I do not believe that any further purpose would be served by making the declaration sought."

It would seem that the judge would have quashed the planning permission but for the imminence of the store opening and the necessary prejudice and hardship that would have been suffered by Tesco, although that is not entirely clear as he simply refers to judicial review and not to the relief he would have granted. There was no suggestion in that case that Tesco knew or should have known that the planning permission which was granted to them was unlawful.

Discussion

[53] It is clear that the 2011 Decision must be quashed. The 2010 Decision presents much more difficult issues. Clearly the 2010 Decision was the result of egregious errors on the part of the respondent, its servants and agents and is obviously unlawful. The applicant is inevitably bound to suffer prejudice because if the 2010 Decision is not quashed the retail units of the notice party will compete with the retail units in Boucher Park. In the present climate with retailers fighting for their lives, landlords can ill afford immediate competition. The notice party will inevitably suffer prejudice if the 2010 Decision is set aside because, as I have explained, it has reorganised its business affairs on the basis that it could rely on the 2010 Decision. But it may well be that it is the general public who will suffer the most if the 2010 Decision remains in place. Public interest is a very significant factor but the respondent has singularly failed to obtain any meaningful information as to how the 2010 Decision will impact on that public interest. It is impossible, for example, to make any assessment of what the granting of the planning permission to the notice party will have on traffic in the Boucher Road area, or on the environment, or on other retail centres such as Boucher Park or Belfast City centre. Mr Shaw QC made it clear that the respondent has not carried out any such exercise. The notice party is ignorant as to what harm, if any, it might inflict on the public should it go ahead and develop in accordance with the planning permission it has been granted. The applicant has carried out no such exercise, insisting that the court should infer that damage to the public interest will necessarily follow such a radical breach of PPS 5. In those circumstances it is very difficult to search for a solution that will cause "the least injustice". There is, however, no way that the court can ignore the

unlawfulness of the respondent in this application by granting a planning consent for retail without a "bulky goods" condition. Accordingly, I propose to make a declaration to the effect that the 2010 Decision is unlawful.

[54] I was told by Mr Shaw QC that he had no instructions as to how the respondent will react to such a declaration. The respondent should act, in accordance with the public interest, of which it claims quite properly to be the guardian, although its actions in this particular case may suggest otherwise to the disinterested observer. My provisional view is that, in order to protect that public interest, the respondent must assess the effect of the 2010 Decision on, inter alia,

(a) Other shopping centres.

(b) Road traffic.

(c) The environment.

If such an assessment indicates that there are likely to be significant adverse consequences, then the respondent must give proper consideration as to whether it is in the public interest to revoke the planning permission granted to the notice party and pay compensation pursuant to Article 38 of the Planning (NI) Order 1991 and Section 26 of the Land Development Values (Compensation) Act (NI) 1965. Obviously decisions whether to effectively ignore the declaration, whether to carry out an assessment of the effect of the implementation of the 2010 Decision on the public, whether to revoke the planning permission and what, if anything, to pay, by way of compensation, are all matters amenable to judicial review. Those decisions will inevitably be the object of anxious scrutiny by the applicant, the notice party and other interested members of the public. It would be wrong for the court to say anything further at this stage. It is clear that whatever course the respondent proposes to take, given the declaration which has been made by the court, the respondent should do so expeditiously.

Conclusion

[55] The 2010 and 2011 Decisions are unlawful. An order will be made quashing the 2011 Decision. A declaration will be made that the 2010 Decision was unlawful. The respondent will then have to decide what is the lawful course to take. It will have to do so in the light of the declaration and in particular of the effect of the 2010 Decision on the public interest.