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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY WINDSOR SECURITIES LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE PLANNING APPEALS COMMISSION DATED 17 DECEMBER 2003

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal by the Planning Appeals Commission (PAC) from the judgment of Girvan J given on 28 June 2004 quashing a decision of PAC dated 17 December 2003. PAC had dismissed an appeal by Windsor Securities Ltd (Windsor) against the non-determination of an application for variation of a condition imposed by a planning permission granted in January 1998. The application that Windsor had made was for permission to vary the condition in order to permit the sale of goods within Use Class 1 (excluding food) in retail warehouse units at Shore Road, Newtownabbey.

Background

[2] On 23 January 1998 the Department of the Environment granted outline planning permission, with conditions, for the erection of retail warehouse units. One of the conditions was that the gross floor space of the proposed retail warehousing should not exceed 40,000 square feet and no individual

unit should be less than 10,000 square feet in gross floor space. The reason for this condition was stated to be the need to control the scale and nature of the retailing activity so as not to prejudice the continuing viability of established commercial centres. Another condition required that the floor space comprised in retail warehousing should be used only for the retail sale and ancillary storage of those items listed in the condition. These items covered DIY materials, garden materials, furniture etc. and such items as the Department determined fell within the category of bulky goods. An expressed reason for that condition was to control the nature, range and scale of the commercial activity to be carried on at the location and to secure a satisfactory mix of land use.

[3] The site was developed with four 1,000 square metre retail warehouse units and ancillary parking and was completed at a cost of about £4,000,000. Windsor has since found it impossible to let the units. In May 2002 permission was granted to change the use of unit 1 to a health and fitness club. The other units have not been let and are still vacant. On 21 June 2002 Windsor applied to the Department for a variation of the conditions imposed. The purpose of the application was to widen the range of goods that could be sold at the remaining units so that it encompassed all non-food items. The Department failed to make a decision within two months of the lodging of the application and the applicant lodged a statutory appeal with PAC in December 2002. A public hearing took place in June 2003 before one of the Commissioners, Mr Scott, who recommended that the condition should remain in place and that the appeal be dismissed. PAC as a corporate body dismissed the appeal on 17 December 2003.

[4] PAC concluded that the proposal represented a "major retail development" within the terms of Planning Policy Statement 5: Retailing in Town Centres (PPS5). Paragraph 38 of PPS5 indicates that town centres are the preferred location for major comparison shopping and paragraph 39 declares a presumption against comparison shopping in out-of-centre locations. The area of the subject site at Abbey Centre was an out-of-centre development. To succeed, Windsor's proposal, in the view of the Commission, had to "satisfy the criteria set out in paragraph 39".

[5] The first criterion of paragraph 39 requires that the proposal should complement existing shopping provision or should meet deficiencies in the overall shopping facilities. In this instance it was not in dispute that shopping provision would be enhanced if the application were granted and that no 'accessibility issues' would arise. It was concluded therefore that the first criterion of paragraph 39 was satisfied.

[6] The second and third criteria can be considered compendiously. They require respectively that the proposal should be unlikely to lead to a significant loss of investment in existing centres and that the development

should be unlikely to have an adverse impact on the vitality or viability of an existing centre or undermine its convenience or comparison shopping functions.

[7] On these criteria the Department argued that the precedent effect of the grant of permission to Windsor would have a considerable impact on other retail warehouses in the locality. It suggested that it would have effects on the viability and vitality of centres such as the Abbey Centre, other centres in areas such as Glengormley, schemes in Belfast city centre, Ballyclare and Carrickfergus. The Commission decided that, on the evidence presented to it, the direct impact that the proposals would have should be relatively limited. It concluded, however, that if permission were granted this would create a significant precedent for retail warehousing floor space on a significant scale. For this reason it came to the view that, if the proposed development was allowed to proceed, it was likely to lead to a loss of investment in those centres that the Department had identified and to have an adverse effect on their vitality and viability.

Statutory and policy background

[8] The Planning (Northern Ireland) Order 1991 sets out the framework for planning practice and procedure in Northern Ireland. The 1991 Order does not itself prescribe planning standards but confers a wide discretion on the decision-making authorities themselves to define and enforce those standards. Article 25(1) of the 1991 Order provides that the Department of the Environment for Northern Ireland, when dealing with an application for planning permission, shall have regard to the development plan, so far as material to the application, and to any other material considerations. Article 25 applies to determinations made by the PAC by virtue of article 32(6) of the 1991 Order.

[9] There is no issue in this appeal as regards the relevant development plan. The essential subject of the appeal is the approach taken by the PAC to other "material considerations". Any consideration which relates to the use and development of land is capable of being a material consideration. It is well established that planning policies are material considerations where they are relevant to the application and such planning policies must be taken into account in deciding the application.

[10] The Department has a general statutory duty under article 3 of the 1991 Order "to formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development". There are numerous planning policies. One type of planning policy is the Planning Policy Statement; these statements set out the policies of the Department on different aspects of land use planning. Those relevant to this appeal are Planning Policy Statement 1: General Principles (PPS1) and

Planning Policy Statement 5: Retailing and Town Centres (PPS5). PPS 1 sets out the general principles of planning policy; paragraph 59 provides that the Department's guiding principle in determining planning applications is that development should be permitted, having regard to the development plan and all other material considerations, unless the proposed development will cause demonstrable harm to interests of acknowledged importance.

[11] PPS5 sets out the Department's policy for town centres and retail development for all Northern Ireland. It incorporates many of the policies relating to retail development in the Planning Strategy for Rural Northern Ireland published in September 1993. PPS5 is drafted so as to meet the Government's policy objectives for town centres and retail developments. These objectives are to sustain and enhance the vitality and viability of town centres; to focus development, especially retail development, in locations where the proximity of businesses facilitates competition from which all consumers are able to benefit and maximises the opportunity to use means of transport other than the car; to maintain an efficient, competitive and innovative retail sector; and to ensure the availability of a wide range of shops, employment services and facilities to which people have easy access by a choice of means of transport.

[12] The paragraphs of PPS5 relevant to this appeal are these: -

> "**Major Retail Development**
>
> **36** Major retail development comprises retail development with over 1000 square metres of gross retail floorspace. The Department's policies for types of major retail development are set out at paragraphs 38 to 48 (inclusive). Proposals for major retail development in the countryside, outside the development limits of settlements, will not be acceptable.
>
> **37** Conditions restricting the scale and nature of major out-of-centre retail developments may be imposed on permissions to protect the shopping role of existing centres. Such conditions may specify minimum or maximum store sizes and types of goods to be sold. Where appropriate, a planning agreement (under Article 40 of the Planning (Northern Ireland) Order 1991) may be used to secure developer contributions to new or improved public transport provision or road improvements or to facilitate, regulate or restrict developments.

Comparison Shopping and Mixed Retailing

38 Town centres will be the preferred location for major comparison shopping and mixed retailing development proposals. The availability of suitable sites within the town centre, in particular those which have been identified in the development plan, will be an important consideration where development is proposed outside the town centre. Applicants should be able to demonstrate that all potential town centre sites have been thoroughly assessed.

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:

- complements or meets existing deficiencies in the overall shopping provision;

- 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 accessible by a choice of means of transport;

- will provide adequate car parking, cycle parking and facilities for other transport modes, where appropriate;

- is to a standard of design, of both the buildings and the spaces around the buildings, which contributes positively to townscape and is sensitive to the surrounding area;

- provides suitable access for the disabled;

- 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.

...

Assessment of Major Retail Proposals

57 The Department will have regard to the following key considerations in assessing proposals for major retail development (over 1000 square metres gross retail floorspace) in locations outside a town centre, or where appropriate, outside the defined primary retail core:

-the extent to which the proposal complements the existing facilities or meets existing deficiencies in shopping provision;

-the extent to which the development would complement or undermine the strategy for existing centres set out in the Area or Local plan, taking into account progress being made on its implementation, in particular through public investment;

-its accessibility by a choice of means of transport;

-its likely effect on overall travel patterns and overall number and length of car trips;

-the likely implications for the continuing validity and viability of existing centres if the

proposed development does not take place; and

- the likely impact on the vitality and viability of existing centres.

In assessing the likely impact on the vitality and viability of a centre, the following will be taken into consideration:

- the potential effects on future private investment needed to safeguard the vitality and viability of that centre (taking account of the likely growth in population and expenditure);

- the potential changes to the quality, attractiveness and character of the centre;

- the potential changes to the role of the centre in the economic and social life of the community;

- the potential changes to the range of services that the centre will continue to provide; and

- the potential increase in the number of vacant properties in the primary retail core.

58 In considering the impact of major retail development proposals on the vitality and viability of existing centres, the Department will consider the incremental effects of the new development on existing centres, where appropriate. The Department will also take into account the likely cumulative effects of recently completed retail developments and outstanding planning permissions for retail development, where appropriate.

59 In addition all policy proposals for major shopping development will be subject to assessment against criteria relating to impact on local amenity, traffic generation and access, car parking, public transport provision, design and landscaping. In order to properly evaluate the traffic impact of development proposals and to determine what infrastructure improvements

may be necessary, a Traffic Impact Assessment may be required in support of planning application.

60 The Department will normally require that all applications for out-of-centre or out-of-town retail development over 1000 square metres gross retail floor space should be accompanied by information on:

- the applicant's approach to site selection and the availability of suitable alternative town centre sites;

- its likely trading impact on existing centres, including consideration of the cumulative effects of the proposal, recently completed retail developments and outstanding planning permissions for retail development, where appropriate;

- its accessibility by a choice of means of transport giving an assessment of the proportion of customers likely to arrive by different modes of transport;

- the contribution that the proposal may make to meeting existing deficiencies in shopping provision or complementing existing facilities;

- the likely changes in travel patterns over the catchment area and, where appropriate

- any significant environmental impacts."

The decision on the judicial review application

[13] Girvan J concluded that PAC had failed to properly consider the impact of paragraphs 58 and 60 of PPS5 in relation to the precedent argument and that its decision on the developer's appeal therefore could not stand. The learned judge quashed the decision and remitted the appeal to PAC for reconsideration in light of his ruling. He observed that PAC would have to keep in mind the ruling of the Court of Appeal in the D5[1] case (which decided that the criteria set out in PPS5 are not mandatory, statutory

[1] *Re Belfast Chamber of Commerce and others' application for judicial review* [2001] NICA 6

requirements and that the decision maker must have regard to any countervailing factors which might call for the granting of permission).

[14] The learned judge's reasoning can be found at paragraph 12 of his judgment:

> "[12] If planning permission is granted in the present case for the proposed development other applicants in a similar position to the applicant seeking planning permission for similar developments will doubtless seek to call in that permission [in] support of their application. The question arises as to whether a planning permission in the present case (which taken on its own might be justified) should be refused because of this fear. Any subsequent applicant for planning permission would, however, face the implications raised by paragraphs 58 and 60 of PPS5 referred to above. Neither the Commission nor the single Commissioner in the decision properly considered the effect or implication of those provisions of the policy on the question of the precedent effect of a permission in the present case. It seems to me that paragraphs 58 and 60 of PPS5 must be taken into account when considering the question of the precedent effect. If the applicant has made out a case for permission taking his application on its own merits the permission will in itself present later applicants not so much with a precedent that assists them but an added hurdle which they must overcome if they are to succeed in their application. It would clearly be open to the Department (if a further application is made by another party following a permission in this case and relying on the fact that permission had been granted in this case to strengthen its argument) to seek to resist the application relying on para 58. As each succeeding application proceeds the hurdle facing later applicants become[s] higher the more permissions are granted. Construing para 58 in this way means that the effect of the precedent value of a permission in the present case is different from the effect it appeared to have to the Commission on their reasoning."

The appeal

[15] For the appellant Mr Larkin QC submitted that the judge had erroneously decided that the essentially adjectival paragraphs of PPS5 (*i.e.* paragraphs 58

and 60) added something to paragraph 39 and that they extinguished the free-standing principle of precedent. This approach, Mr Larkin said, was quite unwarranted and was at odds with the way in which paragraphs 58 and 60 have been consistently interpreted by PAC. That interpretation has been that these later paragraphs do not introduce new criteria and, in particular, do not add anything to the requirements of paragraph 39. The interpretation is well known and has been accepted by the "planning community".

[16] A contrast was to be drawn, Mr Larkin argued, between paragraph 39 which imposes substantial policy requirements that must be fulfilled and paragraphs 57 to 60 which deal with assessment of retail development. The later paragraphs are drafted in quite a different style. They simply describe how the Department will consider the issues there outlined. They do not add or subtract anything from the earlier policy requirements. They do not refer to precedent and cannot be regarded as having nullified this fundamental planning principle.

[17] Not only did the learned judge wrongly suppose that paragraphs 58 and 60 mitigated the effect of precedent, Mr Larkin submitted, he also failed to have proper regard to this essential planning standard. Precedent was central to the orderly, consistent development of lands. It was not feasible to allow development to take place on a 'first come, first served' basis, although this was the approach contemplated by the learned judge.

[18] Mr Larkin disputed the suggestion that PAC had treated the requirements of paragraph 39 as mandatory. He pointed out that Mrs Campbell, the deputy Chief Commissioner, had stated firmly in an affidavit filed for the appellant that a failure to satisfy one or more of the criteria of paragraph 39 would not necessarily lead to a rejection of a proposal. Where, as here, a proposal failed to meet the second and third criteria of that paragraph, however, this militated strongly against the grant of permission, Mr Larkin argued.

[19] Finally, Mr Larkin contended that, even if the judge's view of the effect of paragraphs 58 and 60 on the issue of precedent was correct, he ought nevertheless to have refused judicial review on the ground that this point had not been argued before Commissioner Scott. It had been raised for the first time on the judicial review application. In this way the respondent had avoided representation from the Department on the issue. This was significant, Mr Larkin claimed, because the Department had never signalled disagreement with the approach of PAC to the issue of precedent nor the conclusion implicit in that approach that paragraphs 58 and 60 had nothing to say on the precedent issue. The proper course, Mr Larkin said, would have been to require the developer to make a fresh application for planning permission so that the matter could be fully debated at a planning appeal hearing.

[20] For the respondent Mr Hanna QC drew our attention to paragraph 6 of the decision of PAC which stated that in order to succeed in the planning application, "in addition, proposals must satisfy the criteria set out in paragraph 39". They concluded that criteria 2 and 3 were not satisfied and this was a central reason for dismissing the appeal. Mr Hanna suggested that this betrayed an impermissible approach. Instead of treating the criteria as matters to which they should have regard, PAC approached the matter on the basis that if the criteria were not fulfilled, planning permission must be refused. This, Mr Hanna said, was contrary to established authority, most notably the decision of this court in the *Belfast Chamber of Commerce* case. The learned judge had resolved this issue against the respondent but it was the subject of a cross appeal to this court.

[21] Mr Hanna pointed out that the judge decided that Mrs Campbell's claim in paragraph 8 of her affidavit (that the Commission acknowledged that a failure to satisfy the criteria would not necessarily lead to a rejection of the proposal) went beyond mere elucidation of the decision and therefore fell foul of the principle outlined in *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302 to the effect that the court should be very cautious about admitting evidence to correct or add to the reasons given for a decision. He suggested, therefore, that this court should conclude that, contrary to Mrs Campbell's claim, the Commission had in fact treated the criteria in paragraph 39 as mandatory in effect.

[22] Mr Hanna's second and principal submission was that PAC had fundamentally misinterpreted PPS5 and that this was reviewable as a matter of law. Alternatively, the approach taken to the application of the policy was "outside the *Wednesbury* parameters". On his argument that the Commission had misinterpreted the policy Mr Hanna drew particular attention to the statement in paragraph 58 that the Department would take into account the likely cumulative effects of recently completed retail developments and outstanding planning permissions. He suggested that if PAC's approach was followed (of anticipating the precedent effect of allowing a development which would not, of itself, have the forbidden adverse impact) this statement in paragraph 58 would be entirely superfluous. In effect paragraph 58 negatives precedent, Mr Hanna claimed. It makes reliance on precedent irrelevant in this context.

[23] On the issue of precedent, Mr Hanna, while not conceding that this applied in the present case, drew our attention to the statement in *Poundstretcher Ltd and another v Secretary of State for the Environment and another* [1989] JPL 90 to the effect that where precedent is relied on, mere fear or generalised concern is not enough. PAC in the present case had no evidence beyond a generalised concern that this development, if permitted, would constitute a precedent. Its decision to refuse the planning appeal on the

ground that the proposal would create a precedent was therefore *Wednesbury* unreasonable.

Did PAC treat the criteria in PPS5 as mandatory?

[24] In an affidavit sworn on behalf of the Commission, Mrs Campbell said: -

> "The Commission found that the proposal failed to satisfy the second and third criteria of paragraph 39 of PPS5. The Commission acknowledges that a failure to satisfy one or more of the criteria of paragraph 39 would not necessarily lead to a rejection of a proposal but considered the proposal's failure against the general objectives of PPS5. These were referred to in the draft reasons for refusal and the Commission found this failure to be a determining issue in this appeal.

[25] We were invited by Mr Hanna to reject the unambiguous statement that PAC was aware that failure to comply with the criteria was not necessarily fatal to the application. We can find no warrant for doing so. Mrs Campbell holds a highly responsible position in PAC. The statement made was, no doubt, carefully considered. It would be astonishing if such a claim was made without proper foundation. The only basis on which Mr Hanna suggested that it should be doubted was a single sentence in the decision document. Taken in isolation this might give the impression that PAC considered that the criteria were essential prerequisites to success in the appeal but such a view would neglect clear judicial authority to the contrary effect. It is inconceivable that the Commission would have been unaware of that authority or that it would have failed to apply it in this instance. We are entirely satisfied of the *bona fides* and accuracy of Mrs Campbell's statement and must therefore reject the claim that PAC had wrongly regarded the requirements of paragraph 39 as mandatory.

[26] We feel that we should take the opportunity to say that we do not have any misgivings about the propriety of the contents of Mrs Campbell's affidavit. It is to be remembered that this was prepared in reaction to a judicial review challenge which had as its centrepiece an argument that had not been addressed to Commissioner Scott. The fact that this appeared to present, in the judge's words, "a robust defence of the decision reached" is as unsurprising as it is untoward. It was inevitable that this should be a more focused and direct explanation of the Commission's reasoning in response to the judicial review application than would have appeared from the decision document itself. We do not consider that Mrs Campbell's affidavit offends the principle outlined in *Ex parte Ermakov* in any way.

The effect of paragraph 58

[27] At the centre of the judicial review application and the appeal lies the claim made by Windsor that precedent ought not to have played any part in PAC's decision. Mr Hanna accepted that precedent was a well established principle of planning law and that in most planning contexts it had a part to play in deciding whether development should be permitted. In this particular case, however, he argued that the Department had in effect eliminated precedent as a consideration by stating in paragraph 58 that it would take into account the incremental effects of the new development on existing centres and the likely cumulative effects of recently completed retail developments and outstanding planning permissions. Mr Hanna's argument resolved to the proposition that these considerations were exhaustive of the matters that would be taken into account in deciding the outcome of a planning application.

[28] We cannot accept this argument. In our judgment precedent is always likely to loom large in any planning application or appeal if a pre-existing development that can be portrayed as a precedent is available. In *Collis Radio Ltd. and Another v. Secretary of State for the Environment and Another*29 P&CR 390, 234 EG 905 Lord Widgery CJ referred to its importance in the following passage: -

> "This is a problem which has appeared in the administration of the planning law since its inception. There is no doubt whatever that, human nature being what it is, if permission is granted for a particular form of development on site A it is very difficult to refuse similar development on site B if the circumstances are the same. It must happen constantly in practice that a local planning authority refuses planning permission in respect of site A because of the consequences which it fears might flow in respect of sites B, C and D. No court has so far said that that is not a proper consideration to be adopted by a planning authority …"

[29] Where he can identify a precedent for his proposal a developer will advance this as strongly as possible in support of his planning application. Indeed the principle of precedent was prayed in aid by the developer in the presentation of the appeal to PAC in this case. If this overarching principle were to be eradicated for this type of planning application, we consider that much more explicit language than that contained in paragraphs 58 or 60 of PPS5 would be required. Neither paragraph makes any reference to precedent. Both contain descriptions of the approach that the Department

will take to planning applications of the type involved in this case but they do not state (nor, in our judgment do they imply) that other planning considerations will no longer be relevant.

[30] We are satisfied, therefore, that PAC was correct to conclude that precedent was a relevant issue to be considered in the determination of Windsor's appeal. In our view the continued relevance of precedent does not, as Mr Hanna claimed, rob paragraph 58 of meaning. The considerations there outlined remain valid and pertinent on an appeal such as was involved here. They can comfortably co-exist with the principle of precedent.

Was PAC's view of the precedent issue a 'mere fear or generalised concern'?

[31] This matter is dealt with in paragraph 3.6 of Commissioner Scott's report where he said: -

> "There was also the incremental impact of other retail warehouses in the locality following suit for unrestricted Class 1 retailing, which would undoubtedly be undesirable in the public interest. Precedent was always an issue. The warehousing directly across the road from the Abbey Centre to both the west and north amounted to approximately 55,000 square metres of floorspace currently restricted to bulky goods. There were 10,000 square metres of unoccupied floorspace in Valley Retail Park (VRP). Between VRP and the Abbey Centre there were extant but unimplemented approvals for a further 5400 square metres of retail warehousing on the site of the former Courthouse and the site opposite the former Swinson House. A relaxation of the bulky goods condition on one of the VRP units has already been sought. The letter of 7 May 2003 from Lambert Smith Hampton (PAC 7) only confirmed the Department's concerns that there would be further proposals to remove bulky goods conditions in other unoccupied retail warehouses in the area. With such a large amount of competing unrestricted floorspace complete with free surface car-parking there would undoubtedly be an impact upon the city centre and it could place a number of city centre schemes at risk, such as Victoria Square, Cathedral Way and Castle Court."

[32] Mr Hanna offered no criticism of this analysis and in our judgment the quoted passage deals effectively with any suggestion that this was a generalised fear or concern. Specific examples of anticipated applications were given. With such a quantity of unoccupied floor space it is not difficult to anticipate that there would be intense interest in the outcome of Windsor's appeal and the expectation that this would herald a number of similar applications is irresistible. PAC's conclusion on this issue was not *Wednesbury* unreasonable; it was virtually inescapable.

Time for appealing

[33] Mr Hanna raised as a preliminary issue the fact that the appellant had not lodged a Notice of Appeal within three weeks of the filing of the order of Girvan J. He argued that a decision to grant or refuse an order of certiorari is interlocutory in nature and relied on *R (Curry) -v- National Insurance Commissioner* [1974] NI 102 and *R -v- Environment Secretary ex parte Hackney London Borough Council* [1983] 1 WLR 524. The time limit for appealing to the Court of Appeal from an interlocutory order is twenty-one days from the date on which the order appealed from was filed: Order 59 rule 4(1)(a) of the Rules of the Supreme Court (Northern Ireland) 1980. The Order in this case was filed on 28 June 2004 and Mr Hanna submitted that time therefore expired on Monday 19 July 2004. The Notice of Appeal was served on 29 July 2004 and was therefore, he said, 10 days out of time.

[34] The answer to this interesting argument is supplied, we are satisfied, by section 18 (6) of the Judicature (Northern Ireland) 1978 which provides:-

> "No return shall be made to orders of mandamus prohibition or certiorari and no pleadings in prohibition shall be allowed but, subject to any right of appeal, such orders shall be final."

[35] We are of the opinion that this statutory provision overtakes earlier judicial pronouncements as to the interlocutory nature of orders of certiorari. It also avoids what would have been the unacceptably anomalous position of some species of judicial review orders (such as mandamus, declaration or prohibition) having a six week time limit for appeal and others (such as some forms of certiorari) being confined to a three week period. We should say that, if the time for lodging an appeal had been three weeks it is highly likely that we would have extended the time for appealing, in light of Mr Hanna's commendably candid statement that no prejudice had accrued to his client as a result of the timing of the notice of appeal.

Costs

[36] The learned judge had refused to make an award of costs in favour of Windsor despite the fact that it had been successful in its application before him. Windsor appealed against that decision but in light of our conclusion that PAC's appeal must succeed, this is no longer a live issue and we do not intend to say anything further about it.

Conclusions

[36] We have concluded that PAC did not treat the requirements of paragraph 39 of PPS5 as mandatory; that they were right not to regard paragraphs 58 and 60 as eliminating precedent as a relevant issue to apply to Windsor's appeal; and that their application of that principle to the appeal was not unreasonable. PAC's appeal against the judge's decision must therefore succeed and the application for judicial review must be dismissed.