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Court of Appeal

Regina (Berky) *v* Newport City Council and others

[2012] EWCA Civ 378

2012 Feb 28; March 29

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Carnwath, Moore-Bick LJJ, Sir Richard Buxton

Judicial review — Delay — Refusal of relief — Claim for judicial review based on breach of European Union law — Whether court having discretion to refuse relief where delay in bringing proceedings — Senior Courts Act 1981 (c 54), s 31(6) — CPR r 54.5(1)

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On 26 January 2011 the defendant, the local planning authority, granted planning permission for a supermarket development project, having concluded that no environmental impact assessment ("EIA") was required under the relevant European Union Directive. On 26 April 2011 the claimant lodged judicial review proceedings seeking to challenge the local authority's decision on the grounds that (i) the decision not to require an environmental statement was erroneous in law, (ii) the decision-making process was tainted by real or apparent bias, and (iii) the decision to grant

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permission contrary to the planning officer's advice was irrational or inadequately reasoned. No letter before action had been sent and work on the site had already begun. The judge refused permission to proceed with the claim on the three substantive grounds and also because the claim had not been brought "promptly" as required by CPR r 54.5(1).

The claimant appealed against the refusal of permission on the substantive grounds and on the ground, inter alia, that the requirement to bring proceedings "promptly" was contrary to European Union law principles of certainty and

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effectiveness since it rendered the limitation period discretionary and thus undermined the effectiveness of the transposition into domestic law of the relevant European Union legislation, as held in *Uniplex (United Kingdom) Ltd v NHS Business Services Authority* (C-406/08) [2010] PTSR 1377.

Richard Harwood (instructed by *Richard Buxton Solicitors, Cambridge*) for the claimant, Eduard Berky.

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Ian Albutt (instructed by *Head of Law and Standards, Newport City Council, Newport*) for the defendant, Newport City Council.

Michael Fordham QC and *James Maurici* (instructed by *Gordons LLP, Bradford*) for the first interested party, Wm Morrison Supermarkets plc.

The second interested party, Linc-Cymru Housing Association, did not appear and was not represented.

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The Court of Appeal, dismissing the appeal on the substantive grounds, gave the following opinions on the question whether the principle in the *Uniplex* case limited the court's discretion under section 31(6) of the Senior Court's Act 1981 to refuse relief on grounds of delay.

CARNWATH LJ (with whom Moore-Bick LJ and Sir Richard Buxton dissented on the issue) said that under *Uniplex (United Kingdom) Ltd v NHS Business Services*

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Authority (C-406/08) [2010] PTSR 1377 (confirmed in *Commission of the European Communities v Ireland* (Case C-456/08) [2010] PTSR 1403) it was held, in the field of public procurement, that an undefined test analogous to that of promptness offended the European principles of certainty and effectiveness. The High Court had held that the *Uniplex* principle applied also to a challenge on EIA grounds: see *R (Buglife—the Invertebrate Conservation Trust) v Medway Council* [2011] Env

LR 515, paras 61–63 and *R (U & Partners (East Anglia) Ltd) v Broads Authority* [2012] Env LR 157, paras 37–47. The reasoning of the Court of Justice of the European Union in the *Uniplex* case was directed to the commencement of proceedings, and ought not to be read as limiting the discretion conferred by section 31(6) of the Senior Courts Act 1981 in relation to remedies. As Lord Goff of Chieveley said in *R v Dairy Produce Quota Tribunal, Ex p Caswell* [1990] 2 AC 738, 747: "section 31(6) simply contains particular grounds for refusing leave or substantive relief, not referred to in [RSC Ord 53, r 4(1)], to which the court is bound to give effect, independently of any rule of court". Lord Hope of Craighead, too, in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1 WLR 1593, para 66, did not think it objectionable

> "for an applicant who must be taken to have acquiesced in the decision which he seeks to bring under review, or whose delay has been such that another interested party may be prejudiced, to be told that his application cannot proceed because he has delayed too long in bringing it".

Those considerations applied with force in the instant case. The claimants would have been well aware of the economic significance of the proposal and the importance attached to it by a majority of the council and many others, as well as its significance to the planning of the area. There was no convincing explanation for their failure to commence proceedings, or even send a letter before action, until the very end of the three-month period. Section 31(6) of the 1981 Act gave the court a general discretion to refuse relief for undue delay. The proceedings were not commenced promptly. The judge was entitled to hold that in respect of the domestic grounds, permission should be refused on those grounds alone. Even if that was not a sufficient ground for refusing a challenge on the EIA argument, His Lordship would have refused permission on the basis that it did not provide a realistically arguable basis for challenging the validity of the permission. In respect of all three grounds, relief should be refused in any event because there had been undue delaying leading to prejudice both to other interests and to good administration and because it had not been shown what benefit in practical terms the claimants expected to gain from quashing the permission (paras 34, 38–40, 43).

MOORE-BICK LJ said that the principle to be derived from the *Uniplex* case [2010] PTSR 1377 was that rules limiting the period within which proceedings might be brought to vindicate rights deriving from Community law had to be certain in order to ensure that the law was capable of effective enforcement. His Lordship was unable to accept that the *Uniplex* decision was concerned only with the time allowed for commencing proceedings and did not affect the court's power under section 31(6) of the 1981 Act to withhold remedies. The power to withhold relief arose whenever there had been undue delay, which on the basis of Lord Goff's speech in *R v Dairy Produce Quota Tribunal, Ex p Caswell* [1990] 2 AC 738 occurred whenever there had been a failure to comply with the requirement of the rules to commence proceedings promptly. Moreover, the power under section 31(6) to withhold a remedy on the grounds of undue delay was one to be exercised in accordance with the judgment of the court in the individual case. As a result, relief might be refused on the grounds of delay in commencing proceedings, if the court thought that appropriate, despite the fact that the three-month time limit had not been exceeded. That seemed to his Lordship to infringe European Union law principles of certainty and effectiveness just as much as a rule which required proceedings to be brought promptly (paras 49–53).

SIR RICHARD BUXTON said it was quite clear from the *Uniplex* case that the Court of Justice regarded any intervention by a court in the determination of a limitation period as an impermissible exercise not of judgment but of discretion, though there was some doubt as whether the court had taken full account of the

implications for the national legal order of the extension of its ruling to all types of administrative acts. The Court of Justice's objection to the promptitude requirement was that it deprived the objector of an effective remedy. In the planning context, as exemplified by the instant case, it would be difficult to say under the normal use of language that the claimant did not have an effective remedy, in the sense that the procedural rules did not make it impossible for him to exercise his rights. All that he was required to do was to assert those rights with a promptitude appropriate to the administrative issues at stake. Whether adjudication on that issue of promptitude created the uncertainty and discretionary power perceived by the court in the *Uniplex* case would need to be determined in the light of national judicial practice, in a manner exemplified by the speech of Lord Hope in the *Burkett* case [2002] 1 WLR 1593. The wider implications of the need for an effective remedy in the specific context of planning therefore merited reconsideration: but in view of the terms of the judgment in the *Uniplex* case that reconsideration could not be undertaken without recourse to the Court of Justice. In a case in which the point did not need to be decided the parties should not be put to the trouble and expense of taking the issue to the European court (paras 71–77).

JOHN SPENCER, Barrister