Neutral Citation Number: [2011] EWHC 1824 (Admin)

Case No: 11043/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 July 2011

Before :

Mr Justice Collins

- -

Between :

R(U & Partners(East Anglia) Ltd)	Claimant
- and -	
The Broads Authority	Defendant
The Environment Agency	Interested Party

- -

Mr Gregory Jones, Q.C. & Mr Ned Westaway (instructed by **Steeles Law**) for the **Claimant**
Miss Lisa Busch (instructed by **the Solicitor to the Environment Agency**) for the **Interested Party**

Hearing dates: 5 & 6 July 2011

Judgment Approved by the Court

For handing down
(Subject to editorial corrections)

Mr Justice Collins:

1. Flood protection for the 30,000 hectares of the Norfolk Broads has been a long standing problem. The Environment Agency (EA) was established by Section 1 of the Environment Act 1995 and from the coming into force of that Act on 28 July 1995 it became responsible for flood defences, a responsibility which had hitherto been carried by the National Rivers Authority. It was decided that there should be what was called a Broadland Flood Alleviation Strategy. This was reflected in the Broads Local Plan which was adopted in May 1997 following a public inquiry held in 1996. Policy INF5 sets out the framework which the defendant, the local planning authority for the Broads, will apply for assessing any application for planning permission in furtherance of the Strategy. It provides:-

> "Policy INF5 Broadland flood alleviation strategy
>
> In considering the Environment Agency's proposed Broadland Flood Alleviation Strategy, the Broads Authority will seek to ensure that the following issues are fully incorporated:
>
> a) minimising the risk to people and property, both in the defended and undefended areas;
>
> b) adequate protection for the natural resources of the area, including the water environment, the wildlife habitats and species;
>
> c) adequate protection of the quality of recreation and navigation in the Broads;
>
> d) adequate protection for grazing marshes to ensure the continued viability of farming within the Environmentally Sensitive Area scheme;
>
> e) investigation and implementation of opportunities for environmental enhancement, for example by habitat creation or rond regeneration;
>
> f) investigation and implementation of opportunities for recreational and navigational enhancement;
>
> g) investigation and implementation of opportunities to enhance the visual amenity and landscape of the Broads, from land and water, having regard to local character;
>
> h) minimising any significant adverse impact on local communities and on the Broads landscape, wildlife and waterways from development required to implement the strategy;
>
> i) minimising any significant adverse effects on the residential amenities of occupiers in the surrounding area from development required to implement the strategy."

2. The EA has, in carrying out its functions, to conserve flora, fauna and geographical and physiographical features of special interest and to protect the economic and social well being of communities in rural areas generally and if they are affected by any proposed development. It was decided that a programme involving the strengthening of existing and where necessary the construction of new flood banks over a 20 year period was required. On 27 February 2001 the EA entered into an agreement (a public private partnership or PPP) with a company named Broadland Environmental Services Ltd (BESL) in order to carry out the programme. It has been called the Broadland Flood Alleviation Project (BFAP).

3. There were some 240 kilometres of flood-banks which would need attention. While the EA has compulsory powers, it is its policy to try to obtain the consent of landowners to the carrying out of all necessary works on their lands. That has generally been successful. As will become apparent, the claimant has not co-operated in this regard and has not allowed BESL or the EA to come onto the land which it owns to take samples or to carry out any works. There is of course no obligation on the claimant to permit any third party to have access to its land.

4. The BFAP has been implemented through 40 separate schemes, described as compartments, which deal with different parts of the Broads. The claimant owns an area of land known as Peto's Marsh. This, measuring 80 hectares, is, despite its name, in use for arable farming. Compartment 28 deals with the improvement of the defences affecting Peto's Marsh and other land including two SSSIs.

5. In May 2004 BESL's land agent Mr Falcon contacted Mr Kerkhof, who was the claimant's representative. Mr Falcon sought permission to enter Peto's Marsh to carry out surveys and tests. Mr Kerkhof indicated that the claimant objected to the part of compartment 28 which dealt with the 800 metres or so at the southern end of Peto's Marsh, which would affect Peto's Marsh and which involved taking part of the claimant's land. It seems that the objection was primarily to the taking of the land.

6. Accordingly, it was decided to divide compartment 28 into two phases. Phase 1 involved all the works other than those to the defences affecting Peto's Marsh. Phase 1 was completed in 2006, whereupon attempts were made to meet with or at least to get some response from Mr Kerkhof. These were unsuccessful: Mr Kerkhof failed to respond to letters. By November 2007 the alleviation works were becoming critical. Mr Kerkhof was informed that emergency works would have to be carried out. On 4 December 2007 he was given notice that a soil investigation would take place. This prompted a response which consisted in a refusal to allow access. A meeting was eventually held in April 2008. The possibility of building a new defensive wall was raised and Mr Kerkhof promised to notify BESL of the landowner's view. He did not.

7. As a result of all this, the EA decided that it would carry out Phase 2 by constructing a new defensive wall and leaving the existing defence to Peto's Marsh for the claimant to maintain as it considered appropriate. The EA would cease to have any responsibility for it. On 16 February 2009 Mr Mitchelmore, EA project manager, wrote to Mr Kerkhof informing him of this decision. The letter informed him:-

> "We would have to construct a flood wall on a new alignment to protect neighbouring land, but Peto's Marsh would not benefit from this new defence. You would probably have to make arrangements with the Internal Drainage Board for your land to be drained following the construction of the new defence …"

The letter concluded:-

> "I am writing to notify you that we will now be proceeding with our plans to construct this new flood defence and to cease any further maintenance work to the defences around Peto's Marsh once this new defence is completed."

8. The EA then proceeded to seek planning permission for the new flood defence from the defendant. On 28 July 2010 that permission was granted. The claimant seeks by this claim to have that permission quashed. A considerable number of grounds are relied on in contending that the defendant failed to act lawfully. Broadly, they fall under two headings. First, it is submitted that there was a failure to comply with the requirements of the Town and Country Planning (Environment Impact Assessment) Regulations 1999 which transposed into domestic law the provisions of Directive 85/337/EEC as amended, on the assessment of certain public and private projects on the environment. The failure lay in the decision of the defendant that no Environmental Impact Assessment was required and so none was provided. Secondly, it is submitted that the committee were wrongly advised that the risk of flooding to the claimant's land was not a planning consideration and that an alternative proposal put forward and for which planning permission was being applied need not be considered. There is also a submission that the reasons given to the grant of permission fail to comply with Article 22 of the Town and Country Planning (General Development Procedure) Order 1995.

9. The defendant has not sought to defend this claim and has not appeared before me. The EA has through summary grounds of defence and Miss Busch's skeleton argument sought to uphold the permission. The claim was lodged on 21 October 2010, a week or so within the maximum period of 3 months permitted by CPR 54.5(1), which provides:-

> "The claim form must be filed –
>
> (a) promptly; and
>
> (b) in any event not later than 3 months after the grounds to make the claim first arose."

The EA was not, it is said, aware of the possibility of a claim until it received the pre-action protocol letter which, albeit it is dated 24 September 2010, was not received by it until after 28 September. In the meantime, work had been commenced on 24 August 2010 on the new defensive wall and some £130,000 has, it is said, been expended. Thus the EA has suffered prejudice and this has resulted from the undue delay in making this claim.

10. Because of the delay argument, Lindblom J decided that there should be a rolled-up hearing. As will become apparent, I do not find that the delay argument prevails. Accordingly, I grant permission and dispense with all subsequent procedural requirements save that the claimant must pay the fee which is exigible when permission is granted.

11. Since Miss Busch, while not abandoning the defence to the merits of the claim, very properly found it difficult to challenge some of the grounds pursued by Mr Jones, I can deal with the matter somewhat more briefly than would otherwise have been required. In addition, it will not be necessary to reach formal conclusions or to deal with points which will not be in any way determinative of the claim. One such is the argument that the reasons given for the grant of permission do not comply with Article 22. Mr Jones recognised that if he failed to persuade me that any of his other grounds succeeded and he was left with the reasons challenge, the planning permission would not be quashed even if I were persuaded that there was non-compliance with Article 22. Suffice it to say that the reasons are somewhat jejune, but may just be sufficient. It is very much a borderline case.

12. Mr Jones has put forward five separate grounds for saying that there was a failure to comply with the Directive and the 1999 Regulations.

13. On 18 November 2009 the EA though BESL made a formal request for a screening opinion. The development was within Schedule 2 to the 1999 Regulations since it was to be carried out in a sensitive area. A sensitive area is defined to include the Broads. It is EIA development if it is 'likely to have significant effects on the environment by virtue of factors such as its nature, size or location.' Schedule 3 to the Regulations sets out various criteria which must be taken into account in deciding whether Schedule 2 development is EIA development and so an Environmental Impact Assessment is required. I do not need to set them out in any detail. It is to be noted that cumulation with other development and the environmental sensitivity of the geographical areas likely to be affected are to be taken into account. Those areas include SSSIs and wetlands (Schedule 3 Paragraphs 1(b) and 2(c)(i) and (v)). The development itself falls within Paragraph 10(h) of the Table in Schedule 2 as flood-relief works.

14. Regulation 5 of the 1999 Regulations enables a person who is minded to carry out development to request a screening opinion from the relevant planning authority. He is required to provide information which includes a 'brief description of the nature and purpose of the development and of its possible effects on the environment' (Regulation 5(2)(b)). The letter of 18 November 2009 annexed drawings showing details of the proposals and a copy of the BESL's consultation leaflet. It stated:-

> "The proposed crosswall is approximately 800m long and will allow abandonment of over 300m of the existing defence around Peto's Marsh."

15. It said that the landowner had been notified of this, but that the EA would continue to monitor the condition of the bank, and in particular a specified part of it, to ensure that there was no risk to navigation on the River Waveney if the piling deteriorated. It was said that the Suffolk Wildlife Trust and Natural England supported the proposed crosswall 'as this will provide flood defence to the SSSI and will also create the potential for Peto's Marsh to become more connected to the river in the future, providing habitat benefits.'

16. The defendant replied on 10 December 2009. The letter concluded that the proposal "is not significant in the context of the Regulations and does not require an EIA". The reasoning leading to that conclusion is subjected to a number of criticisms by Mr Jones. The author of the letter seems not to have looked at the drawings properly since she asserts in the second paragraph that the measurements of the bank are '800m long and 2m wide x 2.8m high'. Those measurements become in the fourth paragraph '2m in height and 2.8m width over a length of 800m'. In fact it is 12.8m wide and about 2m high. She says that it 'does not meet the threshold criteria of a site area in excess of 1 hectare as set out in Schedule 2, however those thresholds are indicative only'. She is referring to Column 2 of the table which sets out the applicable thresholds and criteria to establish that the development is within Schedule 2. For 10(h) the area of the works must exceed 1 hectare. However, that is irrelevant in the context of this case since it is Schedule 2 development because it is to be carried out in a sensitive area. In any event, Mr Jones told me, and no suggestion was made that he was incorrect, that the area was in fact 4.2 hectares.

17. Those errors are some importance since, as the author of the letter states:-

> "In considering the character of the development the Local Planning Authority must consider matters including the size of the development, cumulation with other development and the use of natural resources'.

Reference is made to circular 02/99 which gives guidance on how LPAs should approach consideration of whether development requires an EIA. The Circular contains in Annex A what are

described as 'Indicative Thresholds and Criteria for Identification of Schedule 2 Developments Requiring EIA'. It notes at the outset:-

> "The criteria and thresholds in this Annex … are only indicative. In determining whether significant effects are likely, the location of the development is of crucial importance. The more environmentally sensitive the location, the lower will be the threshold at which significant effects will be likely."

Paragraph A24 deals with flood relief works and states:-

> "The impact of flood relief works is especially dependent upon the nature of the location and the potential effects on the surrounding ecology and hydrology. Schemes for which the area of the works would exceed five hectares or which are more than 2km in length would normally require EIA."

18. Since the author's erroneous view was that the area of the works was only 1 hectare as opposed to 4.2 hectares, her error is of some significance. She describes the proposed works as being 'of low scale and spread over a large site area, with minimal land development and low impact in landscape and ecological terms'. And she said that the development 'would not have a significant impact on the land use of the surrounding area, the location or the qualities for which the area was designated. The proposal would not affect the local hydrology in any significant way nor is it considered that it would impact on the adjacent areas of ecological interest.'

19. The development would result in the abandonment by the EA of maintenance of the existing protection to Peto's Marsh. One of the effects of this would be to cause a greater risk of flooding of Peto's Marsh and so interference with and possibly an end to its being able to be used for arable farming.

20. The author of the letter deals with Peto's Marsh as follows:-

> "It is noted that there are additional impacts on the adjacent land which would arise as a consequence of the proposal, namely the abandonment of the existing defences, however this does not constitute development for which planning permission is required and hence is outside the scope of the this Screening Opinion. It is concluded that the character of the development is not significant in the context of the Regulations. "

21. Mr Mitchelmore in his first statement says that the crosswall will 'hydrologic ally isolate an area of arable farmland where the existing perimeter flood defences will no longer be maintained by the Authority'. The EA seeks to uphold the defendant's approach by arguing that the proposals themselves would not have any significant impact on Peto's Marsh and that the abandonment of the existing defences was not a relevant environmental effect but, as it is put, a 'contingent corollary' and that in any event the EA could cease to maintain any defences without the need for planning permission and so such abandonment would not be development which could require an EIA.

22. The original proposal before the claimant's refusal to allow work on its land was to set back the existing defences. But, as the claimant was warned, the substituted development in the form of the crosswall would result in an abandonment of the existing defences and could, as Mr Mitchelmore himself has said, have a hydrological impact on Peto's Marsh. Thus one of the effects of the development would be to expose Peto's Marsh to a risk of greater flooding which could have a significant impact on the claimant's ability to use it for arable farming. There are a number of authorities which make it clear that a purposive approach should be adopted to the Directive: that of course is entirely consistent with the approach of the European Court of Justice. It means that not only should the effects of a number of developments, if it is apparent that they must be considered as a whole, be taken into account but also effects which may not result directly from the development in question but are indirectly caused by it. That is the position here and it was undoubtedly wrong to disregard the effect on Peto's Marsh since the scheme which the development was advancing included the abandonment of the existing defences and thus added risk of flooding to Peto's Marsh.

23. An EIA is concerned with the effects of a development on the environment. These may be beneficial as well as adverse. It is important that both adverse and beneficial effects, if significant should be identified since the LPA will have to exercise its judgment in deciding whether the development should be permitted. That all significant effects must be taken into account was decided by Elias J in *BT v Gloucester CC* [2002] 2 P&CR 33. There is nothing in the screening opinion which indicates that this was done since there were obvious beneficial effects on the SSSIs and land to the south of Peto's Marsh resulting from the development. And, although the point has not been directly raised, it may

well be that the development in both Phases 1 and 2 of Compartment 28 should have been considered as a whole to see if overall it would have had a cumulative effect.

24. The screening opinion further states:-

> "The proposal for the construction of an 800m length of flood defence bank using excavation material would have a small scale and local impact which is reversible."

While facing the difficulty of not having any evidence or explanation from the defendant, Miss Busch was unable to enlighten me when I enquired how the impact could be reversed. That observation seems to me to be unintelligible.

25. Mr Jones sought to argue that the cumulative effect of the whole 40 compartments should have been considered. That goes too far. I see no reason why each compartment should not have been properly regarded for the purposes of EIA consideration as separate unless it was apparent that two or more did have effects which should as a matter of fact have been regarded as linked. There is no evidence to support such an approach as regards Compartment 28.

26. The EA applied for planning permission on 4 February 2010. Included with the application was an Environmental Report. This is not a substitute for an EIA if an EIA was required. It noted that 'most of the BFAP planning applications are subject to formal EIA due to the scale and nature of the works'. It also observed that Peto's Marsh already regularly flooded during the winter so that without the improvement of the existing defences or the construction of a crosswall the remainder of the marshes, including the SSSIs, would become more susceptible to flooding. It seems to me to follow from this that the development in question (which had to be a crosswall rather than strengthening the existing defences because of the claimant's failure to permit any work on its land) would have significant beneficial effects. The conclusion in the Report that the proposed construction would reduce the risk of significant flooding into Compartment 28 including that which could affect the SSSIs points clearly in the same direction.

27. In the report to the Committee, the officer states in Paragraph 7.8:-

> "The proposal will not remove existing flood defences adjacent to the river and these will continue to offer some protection to Peto's Marsh (although in the longer term their effectiveness will reduce unless action is taken by the landowner) … The new defence will however limit risk to areas to the south of the new crosswall including the SSSIs, enhancing protection to the majority of the compartment."

In Paragraph 7.9, this is said:-

> "The existing flood defences protect two SSSIs from flooding. Without enhanced flood defence there is an increase (sic) risk of damage to these areas, which have such a national/international importance. The scheme would not provide any additional protection from the risk of flooding of Peto's Marsh (a non SSSI area). Whilst it is recognised that this may limit its potential use of Peto's Marsh during certain periods as outlined above the proposal will not prevent its continuing agricultural use and will positively enhance protection for other agricultural land and SSSIs."

It is difficult to conclude that at the very least the positive effects of the development are not significant.

28. The defendant's errors do not stop there. The defendant's committee was given advice by its solicitor when it considered the application. The advice us recorded thus:-

> "The Solicitor advised members that they would need to view the application from a planning perspective. In particular they needed to consider the access requirements and whether the scheme would interfere with the objector's lawful vehicular access. In relation to the concerns over viability of farming on the retained area of Peto's Marsh, this needed to be considered from a planning point of view. This was not a planning consideration. Many of the concerns expressed were land law issues and not planning considerations. She emphasised that although another application was submitted, this did not preclude the present scheme being determined. The application had to be considered on its planning merits.

> Both applications might be permitted. It would be up to the parties concerned to negotiate."

An adverse effect on neighbouring land resulting from a development will normally be a planning consideration. The solicitor was clearly wrong to advise the committee to disregard it.

29. Mr Jones relied too on the failure to have regard to the alternative scheme put forward by the claimant. An alternative proposal can be a relevant consideration if there are clear planning objections to the application in question and the alternative is said to overcome those objections. In *R(Langley Park School for Girls Governing Body) v Bromley LBC* [2010] 1 P&CR 10, which concerned a proposal for an alternative siting and design of a development, Sullivan LJ observed at paragraph 45:-

> "Where there are clear planning objections to a proposed development eg because it would injure the openness and visual amenity of those contrary to Policy G2, the more likely it is that it will be relevant, and it may in some cases be necessary to consider whether that objection would be overcome by an alternative proposal."

The claimant's scheme involved strengthening of the existing defences, which was what the EA had originally wanted to do. The evidence before me indicated that there were objections to it from the EA since it would not in its view achieve a satisfactory result. But there were planning objections to the application, by the claimant, namely interference with its right of way, an inability because of the new crosswall to access Peto's Marsh with combined harvesters and the flooding risk. One member of the committee wanted to defer consideration to enable both schemes (the claimant had applied for planning permission for its scheme) to be considered together.

30. It is unnecessary for me to reach a concluded view on this point. Suffice it to say that there is in my view considerable force in the argument put forward by Mr Jones.

31. I come therefore to consider delay. Mr Jones makes the point that in its letter of 18 March 2010 which was before the committee the claimant's solicitor had said in Paragraph 3.4:-

> "You will of course appreciate that were the Broads Authority to fail to have regard to material considerations to which it should have regard and grant planning permission for the proposed development that decision would be open to review by the Courts."

That is, of course, correct, but it is a general statement and it cannot be used to counteract a failure to put the EA on notice that a challenge to the lawfulness of the decision to grant planning permission was a realistic possibility.

32. Following the grant of permission, the claimant entered into negotiations with the EA to endeavour to overcome difficulties of access to Peto's Marsh. The claimant was particularly concerned that none of its land should be taken for ramps which were to be constructed to enable vehicles, in particular, combined harvesters, to get over the new crosswall. In addition, what was called the 'marshalling yard', namely the area for manoeuvring vehicles once over the wall, needed improvements. The claimant wanted the EA to relocate the new wall to produce the necessary changes. On 20 August 2010 the civil engineer who was acting on the claimant's behalf wrote to BESL stating:-

> "Will you please arrange to relocate the barrier wall so as to avoid unnecessary imposed change in the activities at Peto's Marsh. It is appreciated that this requirement will entail a further planning application and delay to the flood defence programme."

At no time during the negotiations were the EA advised that a challenge to the lawfulness of the grant of permission was a possibility.

33. The EA commenced work on building the new wall on 24 August 2010. No application or threat of an application to stop the work was made. However, the claimant sought legal advice and on 24 September 2010 a pre-action protocol letter was sent to the defendant. It was copied by way of an email to Mr Mitchelmore to BESL. However, for some reason it was not picked up until after 28 September 2010. On that day BESL wrote to the claimant's civil engineer in reply to his letter of 20 August agreeing to his proposal and annexing drawings which set out the necessary revisions. Unfortunately, by then the lawyers were involved and the claimant correctly considered that there was a strong case to challenge the lawfulness of the grant of planning permission. In answer to the pre-action protocol letter, the defendant declined to agree to judgment saying that it would defend any claim. It has for good reason not done so.

34. The EA says that it has spent £130,000 doing work before the claim was lodged or intimated by the letter of 24 September 2010. Thus it has suffered serious prejudice. It had no advance warning that a claim might be made and in the circumstances the claim has not been made promptly. Reliance is placed on the decision of the Court of Appeal in *Finn Kelcey v Milton Keynes Council* [2009] Env LR 17. The Court stated that the importance of acting promptly applied with particular force in cases which sought to challenge the grant of planning permission. There was a claim in *Finn Kelcey* that there had been a breach of the 1999 Regulations, but that claim was rejected.

35. The recipient of a planning permission is entitled to proceed to carry out the approved development and will often want to proceed without delay. That was the position here since there had been delays which seriously concerned the EA in dealing with Compartment 28. In *Ceredigion CC ex p McKeown* [1998] 2 PLR 1, Laws J had said that it was nearly impossible to conceive of a case in which leave to move for judicial review would be granted to attack a planning permission when the application was lodged more than six weeks after the planning permission had been granted. This was because an appeal against refusal of planning permission has to be lodged within six weeks. Similarly, an appeal against a grant of permission by the Secretary of State has to be made within six weeks. The six weeks runs from notification of the decision. This limitation was not approved by the Court of Appeal in *Finn Kelcey*, but it was considered to be of some relevance in deciding on promptness. But the court did say that if there was a strong case for saying the decision was ultra vires, permission might be granted albeit it would otherwise have been refused because of lack of promptness.

36. Mr Jones submitted that since judicial review was a remedy of last resort, it was reasonable for the claimants to negotiate with the EA to try to avoid litigation. Certainly negotiation to avoid litigation is to be encouraged, but it is not to be regarded as an alternative remedy. It could not excuse a failure at least to indicate that litigation would be likely so that the EA was aware that if it began to implement the permission it would be at risk of wasted expenditure if the planning permission was quashed. In fact, the negotiations were, as has been indicated, on the basis that the new wall could be constructed but that its route should be varied and there were works to be done to improve the claimant's marshalling yard. What has been constructed so far cannot affect what was accepted by the EA in the letter of 28 September 2010.

37. I am in the circumstances satisfied that the claim was not brought promptly. However, there are two reasons why that will not mean that permission is refused. The first is the strength of the case put forward by the claimant. The grant of planning permission was clearly ultra vires. The second is that there has been a breach of the Directive and there are decisions of the ECJ which indicate that Community Law does not permit a time limit within which any proceedings must be brought which may depend on the exercise of judicial discretion. The limit must be certain since otherwise the protection of rights derived from Community Law would not, it is said, be effective. But if a certain time limit is not met, Community Law does not require that a decision be set aside even if it was made in breach of the law: see *Köbler v Austria* [2004] QB 848 at paragraph 38 and *Kapferer Schlank & Schick GmbH* [2006] ECR 1-2585 at paragraphs 19 to 22.

38. The decision of the ECJ particularly in point is *Uniplex (United Kingdom) Ltd v NHS Business Services Authority* [2010] PTSR 1377. The claimant had tendered unsuccessfully for a public supply contract and alleged that there had been a breach of the public procurement rules. The defendant resisted the claim on the ground that it had not been bought in time in accordance with the provisions of the Public Contracts Regulations 2006 which transposed into domestic law Council Directive 89/665 EEC. Regulation 47(7) provided so far as material:-

> "Proceedings under this regulation must not be brought unless … (b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought."

The similarity to CPR 54.5 is all too obvious.

39. The Court heard another case at the same time which raised the same point, *Commission of the European Communities v Ireland* [2010] PTSR 1403. The Irish limitation rule which applied (Order 84A(4) of the Irish Rules of the Superior Courts) provided:-

> "[an] application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity 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 such period."

While the wording is not identical to that contained in Regulation 47(7)(b) of the 2006 Regulations, it has the same effect. It is to be noted that the Irish Rule 84, which deals with judicial review, provides by 84(21)(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, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

Thus the English and the Irish provisions are to all intents and purposes identical (save for the extension to six months in Ireland where certiorari is sought).

40. Article 1 of the Directive 89/665/EEC provides, so far as material:-

> "(1) The Member State shall take the measures necessary to ensure that, as regards [relevant] contract award procedures … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible …
>
> (3) The Member State shall ensure that the review procedures are available … at least to any persons having or having had an interest in obtaining a particular … contract and who has been or risks being harmed by an alleged infringement. In particular, the Member State may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review."

41. The ECJ has consistently held that Member States may in the exercise of their procedural autonomy introduce reasonable time limits for bringing proceedings. These limits must comply with the principles of equivalence and effectiveness: see for example *Asturcom Telecommunicaciones SL v Rodriguiez Nogueira* [2010] 1 CMLR 865 Paragraph 41. While Article 1 of the Directive 89/665/EEC expressly refers to the principles, they will always in any event apply. There is no problem with the principle of equivalence: it simply means that the rules must be the same both for domestic and other member states. But the Court in *Uniplex* decided that Regulation 47(7)(b) contravened the principle of effectiveness.

42. The Court's reasons for their conclusion are set out 39 to 43 of its judgment in *Uniplex.* It decided that the provisions of Regulation 47(7)(b) gave rise to uncertainty since 'the possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made "promptly" within the terms of the provision.' In Paragraph 42 it said:-

> "… [A] limitation period whose duration is placed at the discretion of the competent court is not predictable in its effect. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665."

43. In the *Ireland* case, the same approach was adopted. In Paragraph 62 the court made the point that the objective of rapidity did not permit member states to disregard the principle of effectiveness. It was noted in Paragraph 64 that Ireland had submitted that the Irish Courts interpreted and applied Order 84A(4) in conformity with the requirements of the Directive. The argument, the court said, referred 'to the significant role played by case law in common-law countries such as Ireland.' The Irish judge was a member of the court. Furthermore, the point was made that no Irish court had to date dismissed any claim as being out of time which had been brought within the three-month limitation period but not at the earliest opportunity. But that did not save the provision since the Court decided that Order 84A(4) gave rise to uncertainty. The Court continued in Paragraphs 74 and 75:-

> "74. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made "at the earliest opportunity" within the terms of that provision.
>
> 75. It is not possible for parties concerned to predict what the limitation period will be if this is left to the discretion of the competent court. It follows that a national provision providing for such a period does not ensure effective transposition of Directive 89/665."

44. It was suggested that *Uniplex* and *Ireland* were limited to Directive 89/665. As the citations from those cases show, this limitation cannot be justified. The Court was making the point that the principle of effectiveness was breached by a limitation provision which lacked certainty and so such a provision could not represent a proper transposition of a Directive which required that a person who claimed that action adversely affecting him was in breach of the Directive could take proceedings to challenge it. That was the conclusion reached by HH Judge Thornton Q.C. in *R(Buglife) v Medway Council* [2011] EWHC 746 (Admin): see paragraph 63 of his judgment. Miss Busch unsurprisingly did not feel able to put forward any submissions to the contrary.

45. I am far from persuaded that the Court's decisions are satisfactory. It said that it had put before it arguments based on the importance of case law in the common law system. The judge's discretion is not exercised arbitrarily and *Finn-Kelcey* makes the position clear. But the court seems to have thought that any possibility of the exercise of discretion by a judge contravened the principle of effectiveness. With hindsight, it is unfortunate that Laws J's attempt to limit the time within which a claim should be brought so as not to fall foul of promptness to six weeks was disapproved by the House of Lords. Having regard to the importance of promptness in challenging grants of planning permission, serious consideration should in my view be given to amending CPR 54.5 so as to impose a six week limit for all such challenges.

46. Mr Jones argued that in any case to which the Directive 85/337 applied the *Uniplex* approach should prevail even if there was compliance with the Directive but a challenge was made on other grounds. That argument I reject. Apart from anything else, it would be contrary to the decision in *Finn-Kelcey* and to the provisions of CPR 54.5.

47. I would only add that the EA cannot rely on s.31(6) of the Senior Court Act 1981 since it only applies if there has been undue delay. If the claim was brought within the three month period which, following *Uniplex*, must be permitted, there is no undue delay.

48. I therefore cannot refuse permission on the ground that the claim was not brought promptly nor can I apply s.31(6) in the EA's favour. Thus the planning permission must be quashed.

49. While it is of course for the defendant's committee to decide the renewed application, it is entitled to regard as material that the decision to construct a new wall rather than strengthen the existing defences was made because of the claimant's failure to answer correspondence and to allow the EA to enter its land. If, as I assume will happen, the EA makes the application it agreed to make in the letter of 28 September 2010, the committee will know that the claimant did not object to it. It will follow that there are no planning objections to it (assuming no other body changes its mind) and so the claimant's alternative application (if made) will not need to be considered. And the committee will no doubt bear in mind that a substantial sum of public money has been spent on the works already lawfully and properly carried out by the EA in reliance on the permission of 28 July 2010. I would only add that it would be sensible for the EA to produce an EIA which should probably consider the effects of both Phases 1 and 2 to be entirely safe.