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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Musgrave Retail Partners (NI) Ltd's Application (Leave stage) [2012] NIQB 109

2012 No. 112330/01

IN THE MATTER OF AN APPLICATION BY MUSGRAVE RETAIL PARTNERS NORTHERN IRELAND LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF THE ENVIRONMENT (PLANNING SERVICE) MADE ON 11 JULY 2012

MAGUIRE J

Introduction

[1] In this case Musgrave Retail Partners (Northern Ireland) Limited ("the applicant") seeks leave to apply for judicial review in respect of two grants of planning permission to Rossdale Developments Limited (who I will refer to herein as "the developer" or as "Rossdale"). The grants were given on 11 July 2012 and were in respect of an –

(i) application for the construction of a supermarket on lands at 11 Lineside, Coalisland, Co Tyrone along with car parking facilities and a new roundabout; and

(ii) application for the demolition of existing offices at Lineside House, Lineside, Coalisland, County Tyrone to provide car parking ancillary to the supermarket application.

[2] The respondent to these proceedings is the Department of the Environment for Northern Ireland (hereinafter "the Department") which is the authority responsible for the grant of planning permissions.

[3] The applicant is a company which, to use its own description, "is primarily involved in wholesaling groceries to independent retailers operating under the Supervalu, Centra and MACE brands throughout Northern Ireland". It operates a Supervalu supermarket in Coalisland at the present time and therefore in various ways would be likely to be affected by the grant of the planning permissions.

[4] The developer is a limited liability company set up to deliver the construction of the supermarket project in Coalisland. Newell Stores Limited is the only shareholder in Rossdale and the directors in Newell are also the directors of Rossdale. Newell describes itself as a family business and it seems clear that it has other supermarket outlets in Northern Ireland.

Mr Scoffield QC appeared for the applicant, Mr McLaughlin for the intended respondent and Mr Beattie QC and Mr Lyness for the developer. The court is grateful to them for their well researched and helpful oral and written submissions.

The application for judicial review

[5] The application for judicial review was made on 9 October 2012 – just two days within the elapse of a period of three months from the grant of the permissions. It seeks an order of certiorari to quash the permissions or, in the alternative, certain declarations. The applicant does not pursue any issue of interim relief. The grounds on which relief is sought are extensive. They contain mostly grounds which arise as a matter of the operation of domestic law but two of the grounds relate to alleged failures of the Department to comply with requirements of EU law. This distinction is relevant for reasons which appear below.

[6] The statement of the applicant's grounds is, of course, found in full in its Order 53 statement. It will suffice for the purposes of the current narrative to note that the domestic law grounds include a range of complaints about the Department's decision-making process, including allegations that the Department should not have validated the applications; should not have permitted amendments to same; had failed to discharge its duty of enquiry into them, especially in respect of the effects on neighbouring properties and in respect of contamination issues at the site; had left out of account material facts or misdirected itself; had acted unreasonably in various ways; had pre-determined the applications; had acted with apparent bias; had wrongly permitted the effective extinguishment of a public right of way through the application site; and had failed to give any or adequate reasons for its decision.

[7] The EU law grounds assert that the applications, individually or cumulatively, require Environmental Impact Assessment ("EIA") but, in breach of, inter alia, community law the Department failed to carry out such an assessment. In

the alternative, it is alleged that the Department wrongly failed to consider its discretion to require EIA under Regulation 3(a) of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999.

The course of the leave hearing

[8] The course taken by the parties at the leave hearing was in outline as follows:

(i) The Department and the developer both conceded that in respect of all of the grounds for judicial review set out in the Order 53 statement an arguable case sufficient to meet the leave threshold in judicial review existed.

(ii) The Department and developer both alleged that nonetheless the court should refuse leave on the ground that the application had not been made promptly as required by Order 53 Rule 4 of the Rules of the Court of Judicature.

(iii) The Department and the developer maintained that there should be no question of the court extending the time in which the applicant could initiate these proceedings, the applicant having acted without promptitude. In particular, it was alleged by the developer that it would be considerably prejudiced if time was extended for reasons which will be set out below. This was, the developer argued, a very strong argument for not granting any extension of time.

(iv) The applicant maintained that it had acted within the promptitude requirement contained in Order 53 Rule 4. However, even if this was not so, the applicant argued that so far as necessary the court should extend the time within which the application for judicial review could be sought. In any event, the applicant argued that the time limit for a challenge in respect of EU grounds was three months and, accordingly, the application had been made in respect of those grounds within that period. As, in those circumstances, the application would proceed on the EU grounds in any event, the applicant argued that even if the domestic law grounds fell foul of the delay requirements and even if the court was not minded to extend time in respect of them it nonetheless should exercise its discretion to enable all issues to be ventilated at a full hearing.

(v) Finally the Department and the developer argued that in respect of the EU grounds the court should not grant leave on the basis that because of the prejudice to the developer relief would be inappropriate in any event. If this was wrong, and the court granted leave on the EU grounds, the Department and the developer argued that it should restrict any grant of leave strictly to those grounds and should resist any temptation to allow the domestic law grounds back into the case.

[9] The approach of the court necessarily has been shaped by the course of the leave hearing. In particular, the court accepts the concession which has been made about the existence of an arguable case on all grounds and proposes to act upon it.

[10] Finally at this stage the court notes that on the issue of the prejudice to the developer an important sub-theme raised by the applicant was the extent to which, if at all, the court should take such prejudice into account – as it is alleged by the applicant that the developer in various respects has run roughshod over requirements of planning law.

Promptitude

[11] There is no dispute between the parties that in respect of the applicant's domestic law grounds of challenge the initiation of an application for judicial review must take place promptly after the date when the grounds for the application first arose. The starting point, for the running of time, is well settled and is the date when the planning permissions were granted. In this case that date was 11 July 2012.

[12] In fact the applicant's application for judicial review was not initiated until 9 October 2012. The question therefore arises as to whether it was initiated promptly.

[13] The need for the speed in the initiation of judicial review proceedings has long been recognised. Primarily this is because decisions by public authorities will usually have impacts on the rights and interests of third parties who are affected by them. There is, in these circumstances, an obvious need for any challenge to the legality of public law decision-making to occur without delay and it is important that a point in time is arrived at at which it can confidently be said that a public law decision is beyond question.

[14] In areas such as the grant of planning permission the need for early certainty is well recognised and the courts have generally adopted the view that the requirement of promptitude as the criterion reconciling the need for finality in this sphere with the ability of an applicant to challenge a planning permission should be interpreted with a degree of strictness. This has been recognised in numerous cases and was expressed in clear terms in the Court of Appeal in Northern Ireland in Re Hill's Application [2007] NICA 1 by Kerr LCJ (as he then was) when he said at paragraph [33] that there was "need for great expedition in the presentation of applications for leave to apply for judicial review in planning cases". The same approach has also been taken by courts in England and Wales, as evidenced for example, in Finn-Kelcey v Milton Keynes Borough Council [2008] EWCA Civ 1607 at paragraphs [21] to [25] and R (Berky) v Newport City Council [2012] EWCA Civ 378 at paragraphs [34]-[35] and [49].

[15] While every case will depend on its own facts, and there is no rule of thumb as to what constitutes a timely application, great expedition will normally require that the application be made well within the outer time limit for judicial review applications of three months. This will especially be so if the challenger is an entity which is well aware of a trade competitor's application for planning permission and has objected to it and monitored its progress.

[16] In the present case it is clear that the applicant falls clearly within the category just mentioned. It objected to the various planning applications made by the developer in respect of the building of a supermarket at Coalisland including the two applications for planning permission at issue in these proceedings. It engaged planning experts to monitor the progress of the developer's applications and it was in correspondence with the Planning Service about them. Many of the points giving rise to the judicial review challenge had been rehearsed by the applicant with the Department prior and subsequent to the grant of the planning permissions. In short, the applicant was an entity familiar with the main issues now raised in the judicial review prior to the grant of the planning permissions to the developer and had plenty of time in advance of the actual date of grant to have begun preparation for a legal challenge.

[17] Notwithstanding the above, as it turned out, no challenge was mounted for nearly three months even though it is clear that such a challenge was being talked about by the applicant in correspondence with the developer as far back as 22 June 2012. The applicant, moreover, plainly was in receipt not just of professional planning but legal advice.

[18] In these circumstances the court concludes without difficulty that the application for judicial review in this case was not initiated promptly. It follows from this finding that as regards domestic law grounds of challenge these can only proceed if the court exercises its discretion to extend the time for the making of the challenge.

Time and EU grounds

[19] The court is satisfied that the promptitude requirement referred to above does not apply to the EU grounds of challenge in this leave application. The reasoning behind the distinction between domestic law and EU grounds of challenge is one which derives from the operation of the certainty and effectiveness principles contained in EU law. The criterion of promptitude is viewed as incompatible with these as in effect it is viewed as erecting a discretionary time limit. While this approach originates in authorities in the European Court of Justice dealing with public procurement such as Uniplex (United Kingdom) Ltd v NHS Business Services Authority (C–406/08) [2010] PTSR 1377 the reasoning has now been applied to the test of promptitude in the context of judicial reviews in the planning context where EU grounds of challenge are at issue. The court considers that the distinction is now well established and that accordingly it should accept it. Indeed none of the parties

argued before the court that it should do otherwise. Authorities which demonstrate its operation in the planning context include R (Buglife) v Medway Council [2011] EWHC 746 at paragraph [63]; R (U and Partners (East Anglia) Ltd) v Broads Authority [2011] EWHC 1824 Admin at paragraphs [37] and [38]; and R (Berky) v Newport City Council [2012] EWCA Civ 378 at [34], [49] and [63] .

[20] The effect of recognising the existence of a distinction between the time requirements for judicial review as between the domestic grounds of challenge and the EU grounds is that in the latter case the applicant has three months from the starting time (this again being the date of the grant of the permissions) in which to seek judicial review on those grounds. It follows, in this case, that as regards the EU grounds of challenge the applicant had until 11 October 2012 to mount a challenge on those grounds. It, in fact, did so on 9 October 2012 and therefore was within the time limit governing EU grounds.

[21] In these circumstances the applicant *prima facie* appears to be entitled to leave on these grounds. I will deal below with arguments advanced by the Department and the developer to the effect that notwithstanding the existence of the distinction, the court should nonetheless refuse leave on the EU grounds.

Should the court extend the time in respect of the domestic grounds?

[22] Given the finding of the court of lack of promptitude in respect of the applicant's domestic law challenge, the applicant contends that the court should in the exercise of discretion under Order 53 Rule 4 extend the time on the basis that there is good reason to do so.

[23] In considering this issue the court takes account of the totality of circumstances surrounding this application for judicial review but in particular it has identified three particular issues of importance in this case. These are:

(i) Whether the applicant can demonstrate a reasonable excuse for applying late.

(ii) Whether in this case there would be particular hardship or prejudice to the developer if leave was granted.

(iii) Whether the public interest requires that the application should be permitted to proceed.

These three issues were the subject of extensive oral and written submissions on behalf of all of the parties at the leave hearing and I will therefore comment in particular on them.

Good excuse

[24] The applicant filed an affidavit from an associate solicitor Carley Chapman which had the object of explaining any delay in mounting its judicial review application in this case. The court has carefully considered that affidavit. It does not propose to set out its contents here. However the court considers that the affidavit does not demonstrate that there was a good excuse for the delay in mounting this judicial review application. In the court's view the affidavit demonstrated a much too casual approach to the initiation of the proceedings and fails to account for significant passages of time during which little, if anything, was being done to move speedily to a point where proceedings could be filed with the court. Given the nature of the challenge in this case, the resources of the applicant and the applicant's state of knowledge of the permissions to be challenged and its access to legal and other advice, this is not a case where one could write off delay simply on the ground that mounting a judicial review is a difficult or complex matter.

Prejudice to the developer

[25] Much of the argument before the court related to this factor. It is not in dispute that the court in considering the exercise of discretion for this purpose can properly take into account prejudice to third party interests, here the developer's interests, but, on the facts, the applicant mounted a frontal attack on the behaviour of the developer with a view to persuading the court that it should leave out of account, or heavily discount, the developer's alleged prejudice.

[26] The court considers that it should first consider the issue of the extent of the developer's prejudice before addressing the argument of the applicant that the court should discount it.

[27] As regards the issue of the developer's prejudice extensive affidavit evidence was filed by the developer. Reference is made to the affidavits of Kenneth Crothers, a chartered surveyor, James Maneely, the design and project leader, Louise Corbett, a chartered accountant and Colm Conway, one of the directors of Rossdale. In addition, photographs were handed in at the leave hearing which depict the position in respect of the progress of construction on the site on the day prior to it. This evidence in general terms tended, in the court's view, to demonstrate that very substantial sums of money had been invested by the developer in the project; that a considerable percentage of this money had come from bank loans; that these loans were supported to an extent by personal guarantees of individual directors; that the work on the site had substantially been progressed, indeed the greater part of the project had already been built; and that in the circumstances delay to the point at which income would be generated by the project would be a serious set back for the developer. In addition, the court was also informed of the developer's belief that if matters proceeded on time the project may benefit from a substantial urban development grant from the Department for Social Development. On the other hand, there may be a risk to the realisation of this grant if there are delays or question marks raised about the project reaching a timely fruition.

[28] There was no substantial challenge to the affidavit evidence referred to above.

[29] On this issue the court has little hesitation in concluding that it is likely that if an extension of time is granted to the applicant so that it can raise the domestic grounds for judicial review this will prejudice the developer in some ways potentially but in other ways more immediately. The extent of the prejudice which may be caused, the court is satisfied, would be substantial given the circumstances already described. The prejudice factor is therefore a strong reason, in the court's estimation, against the grant of an extension of time.

[30] The court now addresses the applicant's argument that in effect it ought to discount the developer's prejudice. This argument centred on the behaviour of the developer and focused on alleged failures by the developer to act consistently with the requirements of planning law. While it would be right to acknowledge that the applicant's challenge in this regard was put in wide terms going back to a date even before the impugned permissions had been sought, with the developer being depicted as deliberately running roughshod over the legal requirements, three key allegations were made which were said to instance what, in the applicant's view, was more generally occurring. These allegations were that:

(i) The works were commenced by the developer prior to the permissions being granted.

(ii) The main works were commenced in breach of Condition 11 of the main permission in that this required the construction of a new mini roundabout in advance of the commencement of substantive construction work and was ignored.

(iii) The building has not been constructed in accordance with the details of the relevant permission. This relates to an increase in the floorspace by including a new internal mezzanine floor for the purpose of moving staff accommodation to this location from the groundfloor; to an increase in floorspace to the rear close to the boundary with neighbours; and to an increase in floorspace to the side close to the boundary with the adjoining doctor's surgery.

[31] The developer's position as regards the applicant's allegations in this area of the case was one of either outright denial of the accuracy of the allegations or essentially pleas in mitigation in respect of those occasions where breaches had occurred. In particular it was suggested to the court that as regards (i) above, the work began earlier than the actual grant because the site prior to the beginning of the works when it consisted of derelict buildings was being used as a place where a range of undesirable or antisocial activities were being carried on. By beginning the works at the time when it did (circa 12 June 2012) the developer considered it could end or limit those activities, especially by demolishing buildings on the site, and so meet concerns expressed to it by the Council (as recently to the beginning of the

works as 4 June 2012) and police. As regards (ii) above it was suggested that no real harm resulted from the approach the developer took. It was not denied that Condition 11 had been breached. The roundabout however had now been built. Finally as regards (iii) above it was suggested that the insertion of a mezzanine floor which was not within the approved drawings was perfectly lawful and that other deviations from the permission were of limited significance. In any event it was argued that the developer was in the process of regularising any deviations from the permission by means of a further planning application which was before the Department but which had not yet been decided.

[32] The Department was of the view that the developer in respect of all of the matters referred to above was in breach of planning law but felt that the first had been cured by the grant of planning permission within a matter of a few weeks; the second likewise had been cured in that the roundabout in question has now been constructed; and that the third might be cured in the future if the application for what the Department described as a retrospective permission was granted.

[33] On the specific issues which the applicant has raised the court is of the view that in respect of each the developer acted with scant regard for the legal position.

[34] In respect of these matters the court's conclusion is that the developer took the actions complained of to advance its own interests. It suited it to begin the work early, though the court cannot exclude that it may in acting as it did have intended to kill two birds with one stone, and have palliated the Council in respect of the antisocial behaviour at the site, while at the same time stealing a march by acting before planning permission for the works had actually been granted. It suited the developer to ignore the sequencing required by Condition 11, probably by being able to truncate the actual time needed for all the site works and it suited the developer to build the supermarket in a way which would in some respects deviate from the precise requirements of the permission given. The approach taken by the developer in the court's view does it no credit.

[35] The question for the court in these circumstances is whether it should regard the developer's behaviour viewed broadly and taken as a whole as being such as to cause the court to disregard the prejudice which the court has found would arise to the developer if time is extended.

[36] On this issue the court is of the view that, notwithstanding that it disapproves of the conduct of the developer in relation to the matters referred to above, it would be unduly harsh if it were now to leave out of account or substantially discount what it has already described as substantial prejudice.

[37] Without condoning the sort of behaviour referred to, the court considers that it should take into account a number of factors which lessen the potency of the applicant's complaints in this area of the case. Firstly, while the court accepts that the developer once the permissions had been approved by the Council on 11 June 2012

could not conclude that legally the permissions inevitably would be granted, it was probably not unrealistic for it to have been confident that the permissions would soon be given. Secondly, it is a fact that once the permissions were given in July 2012, the developer became at liberty to start the work provided it kept within the terms of the permission. Thirdly while the sequencing requirement in Condition 11 was not attended to, there is force in the points that the relevant road works have now been achieved and that it was not substantially in doubt at any stage that they would be completed. From a purposive perspective, little damage has been done. Fourthly, the court is aware that the deviations from plan are now the subject of a retrospective application. Fifthly, the court is mindful of the Department's enforcement powers which may yet be used to enforce the terms of the permission, if necessary: see the affidavit of James Fawcett, the Department's deponent at paragraphs 7-13.

[38] The court moreover has been told by counsel for the developer (reiterating an averment at paragraph 11 of Mr Conway's affidavit) that if the retrospective application should fail the developer will ensure that the final construction will conform to the details of the permission granted.

[39] In view of the above the court declines to accept the applicant's invitation to leave out of account the developer's prejudice. While one approach might be to disregard some of the prejudice where it can sensibly be linked to particular unlawful acts on the part of the developer, the court considers that the better approach is to look at the issue in the round taking into account the legitimate desire of the developer to advance the works as soon as possible. In the court's estimation there was no reason why once the permissions came through the developer could not have started work and if it had started work in mid-July and adhered to all of the relevant conditions the court is satisfied that much of the work which has now been completed would in that event also have been completed. In this scenario, in the court's view, substantial prejudice, though perhaps not as great prejudice, would have accrued by the time of this application for leave in any event.

[40] In the circumstances the court is not minded to ignore or discount the prejudice factor as the applicant has invited it to do.

Public interest factors

[41] The third factor referred to at paragraph [23] above relates to the public interest in allowing the application to proceed. The applicant argued that it was important to ensure that planning permissions which are or are alleged to be unlawfully obtained are scrutinised by the court at a full hearing in the interests of ensuring the vindication of the rule of law. In particular in this case, it was argued that some of the issues – such as in relation to traffic regulation and contamination of the site – involved questions of public safety in respect of which there was a special need for the court's scrutiny.

[42] The developer, on the other hand, argued that the subjects of traffic regulation and contamination on the development site have already been extensively considered and have been dealt with in reports submitted by the developer.

[43] The court does not find the applicant's invocation of the rule of law persuasive in the present context. The promptitude requirement itself is a reconciliation of different public interests, especially those enabling challenges to proceed and those related to the finality of decision-making. A line has to be drawn somewhere and once drawn it is intended to operate to determine when ordinarily an application for judicial review should not proceed as being out of time. While in certain circumstances time can be extended, the object of the rule overall is to bar access to the court by late applicants. This inevitably will entail the consequence that issues of the legality of public authority decision-making which could become the subject of legal argument and a full judicial review if raised in a timely manner, are not heard. This is simply a normal consequence of the operation of a time bar. While no doubt there might be circumstances where the desirability of hearing a challenge on public interest grounds might be so compelling as to promote the extension of time, this application does not, in the eyes of the court, appear to be such a case. The arguments in this case appear, on the contrary, to have a limited focus and importance. The court does not consider that it should extend time merely on the basis that by failing to do so it may be permitting potential illegalities to be perpetrated.

[44] Nor in this case does the court consider that it is necessary to extend time because of the existence of what might be view as unresolved issues of traffic management or contamination. In respect of the former, there appears to be some evidence, in particular, that the issue of the movement of articulated lorries in and out of the site and the impact this may have on other traffic has not finally be determined. But in respect of this issue the court does not consider that it is of sufficient weight or significance that the public interest requires it to be determined in these proceedings. As to the latter, the issue of contamination on the site, this appears to have received attention by the developer but it looks as if queries arising in the course of the consultation process have not been addressed or finalised. On this issue, however, the court has seen nothing to suggest that in fact any substantial issue of contamination exists and, as before, the court is not of the view that the issue is one of sufficient weight or significance that the public interest requires it to be determined in these proceedings.

Conclusion on extension of time issue

[45] The court concludes taking account of all of the points for and against an extension of time that this is not a case where, in relation to the domestic grounds of challenge found in the Order 53 statement, it should extend the time pursuant to Rule 4.

Refusal of leave on EU grounds

[46] As noted hereinbefore for the reasons set out the court has concluded that the applicant's two EU grounds of challenge are within time. *Prima facie*, there is no reason why leave in respect of those should not be granted.

[47] The Department and the developer, however, submit that the court should not grant leave in respect of these grounds. This submission is based on the prejudice to the developer if leave is granted. In essence it is argued that the court should not grant leave because at the end of the full hearing, if the applicant's EU grounds were made out, the court would not grant any relief in view of the prejudice to the developer which would arise. The Department and the developer say that legally this course of action is open to the court and that factually the argument for taking this course is compelling.

[48] The applicant argues on lines directly the reverse of these submissions and contends that there is no legal authority in the court to refuse leave in respect of the EU grounds since in this sphere the challenge was brought within the three months governing time limit. Moreover, the applicant says, there is no way the court could properly conclude that on the facts of this case as known now that a court at a final hearing, if it found for the applicant, would deny relief.

[49] On this issue the court accepts the applicant's submission in respect of the facts and is inclined to accept that in this case the court is obliged to grant leave where the application (on EU grounds) is taken within the time limit applying to it.

[50] In respect of the facts, the court is conscious that at this stage it is in a weak position to arrive at any certain view about the likely outcome of the applicant's challenge on EU grounds. At this stage the court has not seen any evidence from the Department in respect of the matter and has received no submissions from the Department. While it has seen evidence about the prejudice to the developer, assuming these grounds of challenge were made out, this would have to be balanced with the courts findings in respect of the EU grounds and how these findings impacted on the interests which the EIA process is designed to protect. The vantage point of the court at this time in the court's estimation provides an insufficiently wide view for it to start drawing conclusions about whether a court at full hearing would exercise any discretion it has to refuse a remedy.

[51] The legal issue of whether the court has power to decline leave on the basis of the respondent's and the developer's joint submission probably may not need to be finally concluded in view of the court's view of what it could do in the light of the current factual knowledge it possesses. However, if the court was required to take a view now on this issue it would be inclined to follow the approach of Collins J in R (U and Partners (East Anglia) Limited) v Broads Authority and Environmental Agency and the majority view (Moore-Bick LJ and Sir Richard Buxton) in the Court of Appeal in England and Wales in Berky *(supra)*. While the court appreciates that recently the Supreme Court's decision in Walton v Scottish Ministers [2012] UKSC 44

shows (at paragraphs [124] – [143] and [155] – [156]) a degree of readiness to break free from the rather restrictive position of the House of Lords expressed in Berkeley v Secretary of State for the Environment (No 1) [2001] 2 AC 603 as regards the ability of the court to refuse relief in judicial review in the context of EU challenges in the planning area, the court regards Berky and U and Partners as the more appropriate and specific guide to the issue now before it.

Adding the domestic grounds to the EU grounds

[52] The applicant has argued that if the court was going to grant leave in respect of the EU grounds it would be sensible and convenient, given that the litigation is proceeding in any event, to add in the domestic grounds so that all matters could be ventilated.

[53] The court does not favour this approach. It considers that the law has developed in recent times a clear distinction between EU and domestic law grounds in this context. This has been recognised in cases such as U and Partners (see paragraph [46]) and Berky (see paragraphs [35] and [53]) with the result that the different regimes which apply to different grounds of challenge have been maintained. It seems to the court that in view of this it should not on the basis of the sort of argument now advanced undermine this approach by pragmatically letting back in grounds which, if the normal rules are applied, are excluded on time grounds, particularly where the court has decided in respect of the domestic law grounds not to extend time. The challenge with the domestic grounds included, the court considers, is a broader and wider challenge that it would be if confined to the EU grounds and it sees no reason why it should require the Department and the developer to have to defend the challenge on grounds which the applicant could have litigated if it had acted promptly as required by law.

Conclusion

[54] In all of the circumstances of this application by the applicant for leave to apply for judicial review, the court concludes that it should grant leave in respect of the applicant's EU grounds which are grounds 3 (b) and 3 (c) in the Order 53 statement but otherwise to refuse leave in respect of other grounds.