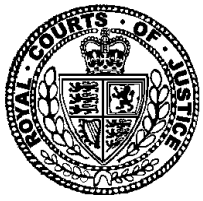

Neutral Citation Number: [2019] EWCA Civ 737

Case No: C1/2018/0793

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE KERR
[2018] EWHC 560 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2019

Before:

The Master of the Rolls
Lord Justice Lindblom
and
Lord Justice Irwin

- -

Between:

(1) R. (on the application of Thornton Hall Hotel Ltd.)
(2) Wirral Metropolitan Borough Council **Respondents**

- and -

Thornton Holdings Ltd. **Appellant**

- -

Mr Christopher Lockhart-Mummery Q.C. (instructed by **Gateley LLP**) for the **Appellant**
Mr James Strachan Q.C. (instructed by **Weightmans LLP**) for the **First Respondent**
Mr Alan Evans (instructed by **Wirral Metropolitan Borough Council**) for the **Second Respondent**

Hearing date: 5 March 2019

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Sir Terence Etherton M.R., Lord Justice Lindblom and Lord Justice Irwin:

Introduction

1. Was the court below wrong when it exercised its discretion to extend time for a challenge to be brought by a claim for judicial review against a planning permission granted more than five and a half years before the claim was issued? That is the question at the heart of this appeal.

2. The appellant, Thornton Holdings Ltd., appeals against the order of Kerr J., dated 23 March 2018, quashing the planning permission granted by the second respondent, Wirral Metropolitan Borough Council, on 20 December 2011 for the erection of three marquees on land within the Thornton Manor Estate, at Thornton Hough in the Wirral. Thornton Holdings owns Thornton Manor, a grade II* listed building, which has within its grounds an historic garden listed at grade II* in Historic England's Register of Parks and Gardens. The site is in the North West Green Belt and an Area of Special Landscape Value. Thornton Hall Hotel, which is owned and operated by the first respondent, Thornton Hall Hotel Ltd., is about 2 km to the south-east. Thornton Holdings and Thornton Hall Hotel are commercial rivals, competing for the business of hosting weddings and other events.

3. The planning permission of 20 December 2011 was granted and sent to Thornton Holdings without any conditions attached to it. Having discovered this only in July 2017, and believing the absence of conditions to have been a mistake and unlawful – because the council had in September 2010 decided to grant planning permission subject to conditions, including one limiting the permission to a period of five years – Thornton Hall Hotel issued a claim for judicial review in August 2017. The judge accepted that the necessary extension of time for bringing the claim should be granted, that the planning permission was unlawful, and that it ought to be quashed. Permission to appeal was granted by Lindblom L.J. on 31 July 2018.

The issues in the appeal

4. The appeal raises two main issues: first, in view of the delay of more than five and a half years, whether the judge erred in extending time for the claim to be brought, under CPR r.3.1(2)(a); and second, having regard to the substance of the claim, whether he was wrong not to exercise his discretion to refuse relief under section 31(6) of the Senior Courts Act 1981.

The planning permission

5. The judge described the site's relevant planning history (in paragraphs 7 to 22 of his judgment). It is not necessary to repeat his account of various withdrawn and unsuccessful applications for planning permission for the erection or retention of marquees and the council's efforts to enforce planning control, including the enforcement notice it issued on 14 April 2010 against the unauthorised use of the land for "the siting of a marquee alongside the Boating Lake within the curtilage of Thornton Manor …".

6. On 9 April 2010, when one marquee was still on the site, Thornton Holdings made an application for planning permission for the "[proposed] erection of three marquees within the Thornton Manor Estate at The Dell, The Walled Garden and at the Lake to be used for private functions and conferences" (application ref. APP/10/00445). They told the council that profits from the commercial use of the marquees would be used to restore the registered historic garden and maintain it over a period of 25 years – in planning parlance, a case of "enabling development". In a letter to the council dated 13 May 2010 from its planning consultant, Mr Gilbert of The Planning Consultancy, Thornton Hall Hotel objected. The application went before the council's Planning Committee on 21 July 2010, with a recommendation for refusal from the planning officer. The committee deferred its consideration for a site visit and further information on the financial argument underpinning the "enabling development" case. The application came back before the committee on 7 September 2010. The planning officer now recommended approval. In her report to committee she advised that "[the] limiting of the consent to a period of five years would enable realistic monitoring and review of the financial situation and prevent the establishment of inappropriate structures in the green belt for longer than necessary". English Heritage were no longer opposed to the application. Following the officer's recommendation, the committee decided that, if no direction to the contrary was made by the Secretary of State, planning permission should be granted, subject to 10 conditions and the completion of an agreement under section 106 of the Town and Country Planning Act 1990 for the works to the historic landscape.

7. The first of the 10 conditions, as recommended by the planning officer, was this:

> "This permission shall be for a limited period of five years only expiring five years from the date of issue of the decision notice."

The reason for its imposition was:

> "To enable the financial situation to be reviewed and minimise the impact on the green belt from the erection of the structures".

Other conditions required various matters to be approved before the marquees were brought into use. There was no condition requiring them to be removed at the end of the five-year period.

8. The committee's resolution that "the application be approved" was recorded in the minutes of the meeting, which also set out the 10 conditions in full, though not with the reasons for them.

9. On 23 September 2010 the Secretary of State decided not to call the application in. After that, progress in the negotiation of the section 106 agreement was slow. In May 2011 the council prepared a draft decision notice, which was going to be appended to the agreement. This document contained the 10 conditions the committee had resolved should be imposed. A further draft was produced in September 2011, also with the conditions. Both documents were published on the council's electronic planning register on its website. Eventually, on 11 November 2011, the section 106 agreement was executed. Under clause 4.1, it was conditional on "the grant of the Planning Permission", defined in clause 1 as "the full planning permission

subject to conditions to be granted by the Council pursuant to the Application a draft of which is set out in Schedule 2". That schedule comprised an undated draft of the decision notice, which included the 10 conditions and was signed by Mr Adderley, the council's Interim Director of Corporate Services. Schedule 3 contained Thornton Holdings' covenants, including a covenant to agree with the council and comply with "a detailed five year Works Programme ...". Schedule 5 included a programme of restoration work to the historic garden, extending to 2032.

10. No decision notice was issued by the council on 11 November 2011, or for some six weeks after that. The decision notice of 20 December 2011, which constitutes the formal grant of planning permission for the development, was on a standard form document. The "Council Decision Summary" stated that, in reaching the decision, the council had considered the proposal's "potential to support the long term viability of the estate and particularly the registered historic park and gardens (now identified declining and as being at risk)" and "the generation of an income stream" that "would enable the restoration of the registered gardens which [the council] considers constitutes the very special circumstances necessary to overcome the presumption against inappropriate development". It then stated:

> "Wirral Borough Council hereby grants Planning Permission for the development specified in the application and accompanying plans submitted by you subject to the following conditions ...".

However, no conditions were set out. Under the heading "Rights of Appeal" the decision notice stated:

> "If you disagree with any of the conditions in this decision, other than those which have been imposed to comply with Regulations made under the Town and Country Planning Act 1990, you are entitled to appeal to the Secretary of State. ...".

In the "Notes to Applicant", under the heading "Compliance with Conditions", it stated:

> "... The Council expects strict compliance with all conditions. Failure to do so may result in the service of a Breach of Condition Notice and prosecution by the Council."

The decision notice was signed by Mr Adderley, who was now the Acting Director of the council's Department of Regeneration, Housing and Planning.

11. On the same day, the planning permission was sent by post to Thornton Holdings' agent, Mr Landor, together with the documents and drawings submitted with the application for planning permission, all stamped "Approved". Mr Landor received it on 22 December 2011. It was not sent to Mr Gilbert. It was evidently placed on the planning register on the council's website, but the draft planning permissions of May and September 2011 were still there as well. Mr Landor says (in paragraph 6 of his witness statement dated 11 September 2017) that when he received the planning permission he "noted that it did not contain any planning conditions", and he "therefore checked the Council's public access website to see if the Decision Notice

was on the public record", which "[it] was". There were also, he says, "two other Decision Notices, which as far as [he] can recollect appeared to be "drafts"".

12. The website was evidently not checked by Thornton Hall Hotel or its agents at that stage, or for some time afterwards. In his witness statement dated 19 October 2017 Mr Gilbert says (in paragraph 4) that his "initial instruction" had been to "advise on the content of the application [for planning permission] and thereafter to submit a written objection to the application", and that subsequently he was "also instructed to make representations to the Government Office for the North West to seek to have the application called-in for determination by the Secretary of State". He goes on to say (in paragraphs 5 and 6):

> "5. The resolution to grant planning permission (the Resolution) was made by the Council's Planning Committee in September 2010, conditional upon a Section 106 Agreement being entered into. Once the Resolution had been passed, and our subsequent representation to the Government Office for the North West to have the application called in had been unsuccessful, there was no reason for me to be further involved and I had no client instructions to be involved further. Whether I agreed with the Resolution or not, it was going through a process that I could not influence or even monitor. As noted above, the Section 106 Agreement between the Council and [Thornton Holdings] took well over a year to complete. Neither [Thornton Hall Hotel] nor I had any involvement in these ongoing negotiations, and planning permission could not be issued pursuant to the Resolution until they had been completed and the Section 106 Agreement had been entered into. Understandably, I had no client instructions to monitor the Council's website, or to check it over a year after the Resolution was made (or indeed, at all) to establish whether planning permission had been granted in accordance with the Resolution. Such a service was not offered or paid for by [Thornton Hall Hotel].
>
> 6. In any event there was no reason why I should have needed to monitor the process because the terms of the Resolution were absolutely clear. …".

Subsequent events

13. It appears that between the grant of planning permission on 20 December 2011 and 17 May 2012 no fewer than three versions of the decision notice were on the council's website – the planning permission itself and the draft decision notices produced in May and September 2011. On 17 May 2012, however, these three documents were all taken down from the website and replaced by a single document in the form of a decision notice backdated to 11 November 2011, which purported to be the planning permission and contained the 10 conditions, including the one limiting the permission to five years. This document was signed by Mr Adderley, as Director of the council's Department of Regeneration, Housing and Planning – a post to which he had only been appointed in March 2012. It was not sent to Thornton Hall Hotel. We were told that it remains on the council's website even now.

14. In a letter dated 14 June 2012 the council's planning officer responsible for section 106 obligations, Mr Williams, wrote to Thornton Holdings pointing out that covenants in Schedule 3 to the section 106 agreement had not been complied with. There seems to have been no response to that letter. On 13 March 2013 an architect instructed by Thornton Holdings, Mr Doughty of SDA, submitted an application to the council for the approval of details to discharge several of the conditions on the "planning permission" dated 11 November 2011. The application form refers to a "site visit" attended by a council officer on 12 February 2013. The date of the decision was given as "11/11/2011", and the date when the development started as "NOV 2011". An application fee of £97 was paid. On 21 March 2013 the council granted two planning permissions for the installation of septic tanks and soakaways to serve the marquees. No time limit condition was imposed on those permissions. On 25 July 2013 the council granted a temporary planning permission for an extension to one of the marquees. Condition 1 on that permission limited it to a period expiring on 11 November 2016 – five years from the date of the "planning permission" dated 11 November 2011. The reason given for the imposition of that condition was "[to] minimise the impact on the green belt and to accord with the temporary consent for the marquee". No appeal was made against that decision. On 19 December 2014 Mr Gilbert sent an email to Mrs Day, one of the council's planning officers, asking whether she was able to confirm that "all relevant conditions on the original permission, ref: APP/10/00445, have been discharged[,] … [in] particular, conditions 4, 6, 7, 8 and 11", because he could "find no record online of any of these conditions being discharged …". Mrs Day responded in an email dated 29 January 2015, saying that "[the] discharge of conditions for APP/10/00445 remains an ongoing matter".

15. The marquees were not removed from the site before the fifth anniversary of the planning permission issued by the council on 20 December 2011. They are still on the site today.

16. On 6 March 2017 the solicitors acting for Thornton Hall Hotel wrote to the council urging it to act on breaches of planning control taking place on the site, the planning permission for the marquees having been granted "for a temporary period of five years", which had "expired in November 2016" (paragraph 6.6). In subsequent correspondence with Thornton Holdings, the council contended that the planning permission for the marquees had expired on 11 November 2016, and threatened enforcement action for their removal. At a meeting with the council on 5 May 2017 Thornton Holdings made it clear that they were now relying on the planning permission of 20 December 2011. On 11 May 2017 the council was advised by counsel that the planning permission granted on 20 December 2011 was the only valid permission. On 13 July 2017 the council's Senior Solicitor, Ms Rathe, sent the solicitors acting for Thornton Hall Hotel a copy of the report prepared by the Assistant Director of Environmental Services for the meeting of the Planning Committee on 20 July 2017. In that report the officer invited the committee to note that the planning permission had, "in error, been issued without planning conditions and that therefore this development can legally continue on site and is not subject to a condition that the development is for five years only" (paragraph 8.1), and also that "the current breaches of the s106 planning obligations are being actively pursued and, if necessary, appropriate legal proceedings will be taken to seek to ensure compliance ..." (paragraph 8.3). On 19 July 2017 Thornton Hall Hotel's solicitors sent a pre-action protocol letter to the council. On 20 July 2017 the Planning Committee noted the advice in the officer's report. The claim for judicial review was issued on 23 August 2017.

17. In his witness statement dated 21 September 2017 the council's Group Solicitor responsible for planning matters, Mr Hughes, says (in paragraphs 11 and 12):

> "11. [The council] has been unable to discover why the error occurred. As set out in the report prepared for [the council's] Planning Committee on 20th July 2017 … (paragraphs 1.2 and 6.1) it has been impossible to identify whether it was the result of a system error, a human error or a combination of the two. However, error there was. Moreover, the error permission was issued without authority. In those circumstances [the council] considers that the error permission is invalid and should be quashed. It does not therefore seek to resist [Thornton Hall Hotel's] application for judicial review but supports the same.
>
> 12. … [The council] has itself seriously considered whether it could achieve a judicial review of the error permission by the mechanism of a legal challenge to it brought in the name of the leader of [the council]. However, in the event, the leader was not willing to consent to such an arrangement, as explained in my letter dated 25 August 2017 to [Thornton Hall Hotel's] solicitors … ."

and (in paragraph 20):

> "20. In order to further understand what had happened, [the council] investigated its information management system to consider what its electronic records showed. The results of that investigation are embodied in the July [2017] Committee Report. The investigation revealed ... that, while a decision notice containing conditions bearing the date 11th November 2011 was to be found on [the council's] website, that decision notice had not been produced until 17th May 2012. There was no record of any such decision notice having been produced on 11th November 2011 ... . The investigation further revealed that it was also on 17th May 2012 that the decision notice bearing the date 11th November 2011 was placed on the website in replacement of three differing versions of the decision notice (including the error permission) then published thereon. [The council] has not been able to establish which officer or employee did this or why it was done but the (erroneous) assumption which appears to have been made thereafter was that there was a valid and effective decision notice of 11th November 2011 which informed [the council's] consideration of an application to discharge conditions, its approach to the Extension Permission and its later threat of enforcement action."

18. Thornton Holdings say they relied on the planning permission. They installed septic tanks and drainage, and continued to use the marquees for their business. The cost of the drainage works is described by their Commercial Director, Ms Tania Steel, in her witness statement of 2 January 2018 (in paragraphs 3 to 5). She also refers to "over 180 bookings for the marquees up to and including dates within 2020" (paragraph 6), for an estimated total of some 50,000 guests (paragraph 8). Mr Landor refers in his witness statement to a total of 164 weddings booked for the period from September 2017 to 2020 (paragraph 12). He also says that Thornton Holdings have "invested substantial time and money in the management and maintenance of the Manor

House and its grounds and gardens, including in excess of £400,000 in wages for gardeners and groundsmen alone since 2013" (paragraph 11).

The requirement for timeliness in challenging a grant of planning permission

19. CPR r.54.5(1) requires that a claim for judicial review must be issued "promptly" and "in any event not later than 3 months after the grounds to make the claim first arose". CPR r.54.5(5) now provides that in the case of a planning decision "... the claim form must be filed not later than six weeks after the grounds to make the claim first arose", but does not apply to planning permissions granted before 1 July 2013 (Civil Procedure (Amendment No.4) Rules 2013). Under CPR r.3.1(2) the court has power to extend time for the filing of a claim.

20. Section 31(6) and (7) of the 1981 Act provide:

> "…
> (6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –
> (a) leave for the making of the application; or
> (b) any relief sought on the application,
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

21. The approach the court should take when considering whether a claim for judicial review of a planning permission has been issued too late is well established. Some broad principles can be drawn from the relevant case law:

    (1) When a grant of planning permission is challenged by a claim for judicial review, the importance of the claimant acting promptly is accentuated. The claimant must proceed with the "greatest possible celerity" – because a landowner is entitled to rely on a planning permission granted by a local planning authority exercising its statutory functions in the public interest (see Simon Brown J., as he then was, in *R. v Exeter City Council, ex p. J.L. Thomas & Co. Ltd.* [1991] 1 Q.B. 471, at p. 484G; and in *R. v Swale Borough Council, ex p. Royal Society for the Protection of Birds* [1991] 1 P.L.R. 6). In such cases the court will only rarely accede to an application to extend time for a very late challenge to be brought (see Keene L.J. in *Finn-Kelcey v Milton Keynes Borough Council* [2009] Env. L.R. 17, at paragraphs 22 and 23; Sales L.J. in *R. (on the application of Gerber) v Wiltshire Council* [2016] EWCA Civ 84, at paragraphs 46 and 47; Lindblom L.J. in *Connors v Secretary of State for Communities and Local Government* [2017] EWCA 1850, at paragraph 87; Schiemann L.J. in *R. (on the application of Corbett) v Restormel Borough Council* [2001] J.P.L. 1415, at paragraphs

14 to 27, and Sedley L.J., at paragraphs 29 to 33; and Hobhouse L.J. in *R. v Bassetlaw District Council, ex p. Oxby* [1998] P.L.C.R. 283, at pp.296 to 301).

(2) When faced with an application to extend time for the bringing of a claim, the court will seek to strike a fair balance between the interests of the developer and the public interest (see Sales L.J. in *Gerber*, at paragraph 46). Where third parties have had a fair opportunity to become aware of, and object to, a proposed development – as would have been so through the procedure for notification under the Town and Country Planning (General Development Management Procedure) Order 2010 ("the 2010 Order") – objectors aggrieved by the grant of planning permission may reasonably be expected to move swiftly to challenge its lawfulness before the court. Landowners may be expected to be reasonably alert to proposals for development in the locality that may affect them. When "proper notice" of an application for planning permission has been given, extending time for a legal challenge to be brought "simply because an objector did not notice what was happening" would not be appropriate. To extend time in such a case "so that a legal objection could be mounted by someone who happened to remain unaware of what was going on until many months later would unfairly prejudice the interests of a developer who wishes to rely upon a planning permission which appears to have been lawfully granted for the development of his land and who has prudently waited for a period before commencing work to implement the permission to ensure that no legal challenge is likely to be forthcoming …" (see Sales L.J. in *Gerber*, at paragraph 49). When planning permission has been granted, prompt legal action will be required if its lawfulness is to be challenged, "unless very special reasons can be shown ..." (ibid.).

(3) Developers are generally entitled to rely on a grant of planning permission as valid and lawful unless a court has decided otherwise (see Sales L.J. in *Gerber*, at paragraph 55). A developer is not generally required "to monitor the lawfulness of the steps taken by a local planning authority at each stage of its consideration of a planning application". Such an obligation is "not warranted by the legislative scheme, which places the relevant responsibilities on the local planning authority", and "it would give rise to practical difficulties if applicants were required at each stage to check on the authority's discharge of its responsibilities". Applicants for planning permission are "entitled to rely on the local planning authority to discharge the responsibilities placed upon it", and "should not be held accountable for the authority's failure to comply with relevant requirements, at least where … they cannot be said to have caused or contributed to that failure by their own conduct" (see Richards J. in *R. (on the application of Gavin) v Haringey London Borough Council* [2004] 2 P. & C.R. 13, at paragraph 69).

(4) What is required to satisfy the requirement of promptness "will vary from case to case", and "depends on all the relevant circumstances". If there is a "strong case for saying that the permission was ultra vires", the court "might in the circumstances be willing to grant permission to proceed", but "given the delay, it requires a much clearer-cut case than would otherwise have been necessary" (see Keene L.J. in *Finn-Kelcey*, at paragraphs 25 to 29).

(5) The court will not generally exercise its discretion to extend time on the basis of legal advice that the claimant might or should have received (see Sales L.J. in *Gerber*, at paragraph 53).

(6) Once the court has decided that an extension of time for issuing a claim is justified and has granted it, the question cannot be re-opened when the claim itself is heard. Section 31(6)(a) of the 1981 Act does not apply at that stage, because permission to apply for judicial review has already been granted (see Lord Slynn in *R. v Criminal Injuries Compensation Board., ex p. A* [1999] 2 A.C. 330, at p.341A-G); and Sedley L.J. in *R. (on the application of Lichfield Securities Ltd.) v Lichfield District Council* [2001] EWCA Civ 304, at paragraph 34; and CPR r.54.13).

(7) The court's discretion under section 31(6)(b) requires an assessment of all relevant considerations, including the extent of hardship or prejudice likely to be suffered by the landowner or developer if relief is granted, compared with the hardship or prejudice to the claimant if relief is refused, and the extent of detriment to good administration if relief is granted, compared with the detriment to good administration resulting from letting a public wrong go unremedied if relief is refused (see, generally, Lord Goff of Chieveley in *R. v Dairy Produce Quota Tribunal, ex p. Caswell* [1990] 2 A.C. 738; and Sales L.J. in *Gerber*, at paragraphs 59 and 60, and 64 to 69). The concept of detriment to good administration is not tightly defined, but will generally embrace the length of the delay in bringing the challenge, the effect of the impugned decision before the claim was issued, and the likely consequences of its being re-opened (see Sales L.J. in *Gerber*, at paragraph 62). Each case will turn on its own particular facts and an evaluation of all the relevant circumstances (see Schiemann L.J. in *Corbett*, at paragraphs 24 and 25; and Hobhouse L.J. in *ex p. Oxby*, at pp.298, 299, 302 and 303).

(8) It being a matter of judicial discretion, this court will not interfere with the first instance judge's decision unless it is flawed by a misdirection in law or by a failure to have regard to relevant considerations or the taking into account of considerations that are irrelevant, or the judge's conclusion is clearly wrong and beyond the scope of legitimate judgment (see Sales L.J. in *Gerber*, at paragraphs 61 and 62). It may often be difficult to separate the exercise of discretion on remedy under section 31(6) from the considerations bearing on the discretion to extend time under, for example, CPR r.3.1(2)(a) (see Sales L.J. in *Gerber*, at paragraph 62). Care must be taken to distinguish in the authorities between cases where the court has exercised its discretion under section 31(6) and those where it has exercised its general discretion on remedy in a claim for judicial review (see, for example, Carnwath L.J. in *Tata Steel UK Ltd. v Newport City Council* [2010] EWCA Civ 1626, at paragraphs 7, 8, 15 and 16; and Sales L.J. in *Gerber*, at paragraph 64).

The judgment of Kerr J.

22. Kerr J. was satisfied that the extension of time for bringing the challenge should be granted. The delay had been "long", and he accepted it was "unusual, particularly in the planning

context, to allow a claim to be brought so late", but Thornton Holdings bore "considerable responsibility for the lateness of the claim because [they] knew of the error and chose to remain silent about it" (paragraph 47). The "extreme lateness of the challenge" was not "as prejudicial to the planning process as lateness usually is ...". The presence of the marquees was "not contrary to the intended scope of the planning permission and contrary to [the council's] decision until December 2016". It "only became malign, if at all, in late 2016, not in 2011" (paragraph 48). The council's error had been "discovered late". Had the claim been decided before the "five year time limit" expired, there would have been "negligible prejudice to [Thornton Holdings] or the public", and if Thornton Holdings "had not substantially contributed to the lateness of the discovery", he "might well have refused to grant the extension of time sought" (paragraph 49). On the facts, however, he found that "justice requires that the extension of time be granted so that the interest of the public in the integrity of the planning process is not excluded from consideration by this court", and that "[the] public interest lies in the court having power to rectify the error" (paragraph 50). He therefore granted the extension of time, and, because he was "easily satisfied" that the claim was "properly arguable", gave permission for it to proceed (paragraph 51).

23. As for the substance of the claim, the judge accepted that "any legal flaw arising from the omission of the intended conditions, including the five year time limit, did not prevent the planning permission from having legal effect, unless and until quashed by this court" (paragraph 52). The presence of the three marquees on the site had not been unlawful before 19 December 2016, "when the five year time limit expired or would have expired". However, the court had to decide "whether [it] should now grant relief which would alter that position for the future" (paragraph 55).

24. Kerr J. was in no doubt that it should. He referred to the "public interest" in correcting the council's error, which was, he said, "more important than the commercial interests of [Thornton Holdings] …" (paragraph 62). He was "not impressed" by the argument that Thornton Holdings would be prejudiced if relief were given. Their decision to accept bookings at a time when the marquees' presence on the site was "legally precarious" was made at their "own risk and peril" (paragraph 66). There would be "no detriment to good administration in rectifying the error". On the contrary, it was "detrimental to good administration that the marquees are still there" (paragraph 68). The fact that Thornton Holdings had entered into the section 106 agreement "embodying the omitted conditions, including the five year time limit", but had acted in the proceedings as if they were not bound by it, only compounded the "unconscionability" of their position (paragraph 70). The marquees "should not be there unless permitted to remain under a fresh and lawfully granted planning permission …" (paragraph 71). The claim therefore succeeded. The judge added that "neither [the council] nor [Thornton Holdings] emerges with much credit" (paragraph 72).

Did the judge err in extending time for the claim to be brought?

25. The extension of time sought in this case – an extension of more than five years from the date of the challenged decision – is, to use the judge's word, "extreme". That is undeniable. As the authorities show, it would only be in the most unusual circumstances that such an extension

would ever be granted (see, for example, Schiemann L.J. in *Corbett*, at paragraph 14; and Hobhouse L.J. in *ex p. Oxby*, at pp.294 to 296 and 302 to 303). It is, in our view, very important to emphasise this. One cannot say, however, that the court's power to extend time is automatically extinguished after any given period has elapsed. We are concerned here with a judicial discretion, not a fixed statutory limitation. A clear theme in the relevant case law, as one would expect, is that in every case where delay has occurred the court must look closely at all the relevant facts in the round. The facts will vary widely from case to case. In *Corbett* a total delay of six years was not in itself fatal to the granting of relief, but it was held that there was no longer a need to quash the planning permissions because they had in the meantime been modified by an order under section 100 of the 1990 Act, made by the Secretary of State, and a quashing order would deny the landowners the compensation due to them for the modification. In *ex p. Oxby* this court granted relief after a delay of about two years, during which the existence and facts of the unlawfulness infecting the local planning authority's decision emerged. Generally, of course, very late challenges will not be entertained. However, as Sales L.J. said in *Gerber* (at paragraph 49), in a particular case there may be "special reasons" to justify the extension sought. To say, as this court did in *Connors* (at paragraph 87), that an exercise of judicial discretion to allow "very late challenges" to proceed in planning cases will "rarely be appropriate" implies that sometimes it may be appropriate – and necessary in the interests of justice.

26. There can be no doubt that the circumstances of this case, viewed as a whole, are extremely unusual. Indeed, we would go further. They are unique. The question for us, however, is whether, in combination, they can properly be said to amount to an exceptional case for extending time to allow the challenge to be brought before the court. In our view, in agreement with the judge, they clearly can.

27. The first point to be made, and a crucial one, is that the scope of the proceedings in this case is not the usual scope of a claim for judicial review in the planning context. As Mr Alan Evans for the council accepted, and as the judge recognised, it is beyond dispute that the planning permission under challenge ought not to have been issued without its conditions. It was issued in that form without lawful authority. It was not the product of any resolution of the council or its Planning Committee. The document existed only because of an unfortunate mistake made by an officer of the council – by whom and how it is now impossible to discover. The resolution of the Planning Committee at its meeting on 7 September 2010 was in absolutely clear terms. The council did decide to grant planning permission for the proposed development, but the 10 conditions, including the restriction in condition 1 to a period of five years, were an inherent and indispensable part of that decision. The conditions decided upon were not, however, translated into the decision notice issued on 20 December 2011. Thus the decision notice does not faithfully represent, as in law it must, the outcome of the council's decision-making on the application before it. In fact, it misrepresents that outcome in a highly significant way, because it does not incorporate the restrictions and controls without which the council plainly would not have granted permission at all. None of this is in dispute. As Mr James Strachan Q.C. for Thornton Hall Hotel submitted, this case is therefore fundamentally different from the normal situation, where the challenge is to the lawfulness of a planning permission that does represent the true result of the local planning authority's decision-making process, and it is the substance of the decision-making that is under attack. Thornton Hall

Hotel is not contending that there was anything unlawful in the committee's decision, merely that it was demonstrably unlawful for the council to issue a permanent planning permission when it had resolved only to grant a permission limited in time.

28. This is not a case, however, in which the practical effect of the unlawfulness was immediate upon the grant of planning permission. By far the most significant difference between the decision notice issued by the council and the planning permission the committee had actually resolved to grant, and the only contentious issue in the claim, is the absence of condition 1 – the difference, that is, between a permanent planning permission and a temporary permission limited to a period of five years. Although the grounds for the challenge arose when the planning permission was issued on 20 December 2011, the real effect of the council's error in failing to impose condition 1 did not transpire until December 2016 – when the five-year period had passed, the presence of the marquees on the site would no longer have been authorised under the temporary permission, and the "financial situation" bearing on the case for "enabling development" was meant to be reviewed. Had the three marquees been put up in accordance with the planning permission the council actually decided to grant, their presence on the site for those five years would have been lawful.

29. We accept, as all three parties submit, that the council acted unlawfully in concealing its error. It initially attempted to put matters right by generating a fictitious decision notice and manipulating the planning register. Whether its intention was to reverse its error or to obscure it, the effect of the action it took was only to disguise what it had in fact done. It has not, however, resisted the claim. It could, of course, have done a good deal more than it has. It might, for example, have made use of its statutory power of revocation under section 97 of the 1990 Act, or its power to make a discontinuance order under section 102 – though this could have given rise to a claim for compensation by Thornton Holdings. It might have been able to deploy its powers of enforcement at an appropriate stage. It might have brought the matter before the court itself by a timely claim for judicial review issued in the name of a councillor – as was done, for example, in *ex p. Oxby*. It did none of those things, and even now it shows no such inclination. However, it now acknowledges that the decision notice it issued on 20 December 2011 was, and remains, clearly invalid. Far from resisting the challenge, or adopting a neutral stance, it has actively supported the claim, urged the judge to quash the planning permission, and has appeared in this court to resist the appeal. That is another highly abnormal feature of these proceedings.

30. It is also, we think, a factor of considerable weight in this case that Thornton Holdings were well aware from the outset that the planning permission had been wrongly issued, and knew precisely what the council's error had been. The section 106 agreement had been negotiated, drafted and completed on the basis of the committee's resolution. The resolution itself was clear, and the decision notice issued by the council obviously inconsistent with it. Having received that defective decision notice, Thornton Holdings did not query it with the council, subsequently acted as if the document dated 11 November 2011 was the grant of planning permission, sought to discharge conditions contained in that document, and only came to rely on the planning permission of 20 December 2011 after the five-year period had passed and the council was, at last, pressing for the marquees to be removed from the site. In exercising his discretion, the judge properly had regard to that conduct. This is as far as one could imagine

from the normal kind of case in which a developer receives and then relies upon a planning permission that embodies the relevant determination of the local planning authority, only for the lawfulness of the decision-making process itself to be called into question by a belated claim for judicial review – as, for example, in *Gerber* and *Gavin*.

31. In the circumstances, contrary to the argument presented to us by Mr Christopher Lockhart-Mummery Q.C. for Thornton Holdings, we cannot accept that they have suffered any material hardship or prejudice as a result of the delay in the claim being issued. Indeed, if anything, the delay worked in their favour, in the sense that it enabled them to take advantage of an unrestricted grant of planning permission that they knew the council had never resolved to grant. That too is a most unusual feature of this case, in sharp distinction to others – such as *Finn-Kelcey*, *Gerber* and *Connors* – where the court has rejected lengthy extensions of time. The reality is that, from December 2011 until the judge's order, Thornton Holdings had the benefit of a more generous grant of planning permission than would have been so if the council had not mistakenly issued the decision notice it did. If at any stage they were concerned about the risk of the council's error being discovered and a claim for judicial review being made, they decided to operate in the knowledge of that risk, and in spite of it. As Mr Strachan also pointed out, there was no evidence that the installation of the septic tanks and drainage in 2013 would not have been undertaken if the council had issued a planning permission conforming to the committee's resolution. The bookings for weddings and other events in the course of the five-year period, and afterwards, were taken by Thornton Holdings at their own risk, knowing from the outset that a defective decision notice had been issued without lawful authority.

32. On the particular, and highly unusual, facts of this case, we do not accept that the necessary extension of time should be denied because Thornton Hall Hotel did not take active steps of their own – which they could have done – to make sure that the council's officers had not fallen into the error of issuing a decision notice at variance with the resolution. The fact that Thornton Hall Hotel relied on the council's administrative competence in issuing a decision notice corresponding to the committee's resolution, and that they did not check the planning register to ensure that this was in fact done, is undoubtedly a relevant matter for the court to consider in the exercise of its discretion to extend time. Even if they had taken that step, however, the picture they would have found would have been at first confusing and later misleading – because there were three versions of the decision notice on the website throughout the period between 20 December 2011 and 17 May 2012, two of which reflected the committee's resolution by incorporating the conditions, and one of which did not, and on 17 May 2012 the decision notice of 20 December 2011 was taken down and a false one put up. Taking that into account, it cannot be said that the failure to check precisely what planning permission had been formally issued by the council outweighs the other considerations which, on the particular facts of the present case, point strongly to the extension of time being granted.

33. This conclusion is in no way inconsistent with the principles identified in the relevant authorities, including Sales L.J.'s observations in *Gerber* on what may reasonably be expected of landowners when proposals for development affecting their interests are made. Unlike the claimant in *Gerber*, Thornton Hall Hotel had been "reasonably alert" to the proposed development throughout the council's statutory decision-making process. They had been actively engaged in that process, as an objector, up to the point at which the council's decision

had been made, and afterwards when the Secretary of State was considering whether he should call in the application. They had done as much as the process allowed. They did not, we accept, take it upon themselves to police the council's performance of its statutory functions as local planning authority, including its duty under articles 29 and 31 of the 2010 Order to issue a decision notice, having determined the application for planning permission, or its duty under section 69 of the 1990 Act and article 36 to maintain an accurate planning register; and the council, for its part, was not obliged, under article 29, to send them – as well as Thornton Holdings as applicant – notice of the decision it had made. As we have said, however, had they taken such steps to police the council's conduct, they would have been faced with a confusing and later misleading picture.

34. At least until the five-year period had passed, the council's error was not betrayed by the fact that the marquees had been erected, which of itself was consistent with the committee's resolution. There was nothing about their presence on the site for those five years that would have alerted Thornton Hall Hotel, or anyone else who had objected to the proposal, to the fact that the council had issued a decision notice conflicting with its own decision, or to the fact that the conditions it had intended to impose on the planning permission had not been complied with. There is no evidence of Thornton Holdings having done anything on the land that would signal a failure on their part to implement the planning permission the council had decided to grant. On the contrary, it acted for much of the five-year period as if planning permission had been granted in accordance with the committee's resolution.

35. Unlike the developer in *Gerber*, Thornton Holdings cannot say that at any stage they were relying on a planning permission "which [appeared] to have been lawfully granted". On the contrary, they relied – though only after five years had passed – on a decision notice they always knew was defective. To this extent at least, they cannot say that they were ever in a state of ignorance or uncertainty, or that they acted to their detriment while they were. When the council's error was eventually exposed, and it was clear that Thornton Holdings were now seeking to rely on a planning permission issued in error and that the council was not going to take the initiative in rectifying its own mistake, Thornton Hall Hotel went ahead with reasonable speed in issuing their claim. As we have said, the thrust of the claim was not to impugn the council's decision itself, which was always certain and clear, but rather to bring before the court a decision notice that undid that certainty and clarity – as Thornton Holdings were aware.

36. Finally, this is clearly a case in which the interests of good administration, and indeed the credibility of the planning system, weighed compellingly in favour of the court having the opportunity to hear the claim and, if the claim succeeded, to deal with the council's error. If, as the council has readily acknowledged, the decision notice it issued was issued without lawful authority, it might fairly be described as the antithesis of good administration.

37. Taking everything together, therefore, and consistently with the approach of Sales L.J. in *Gerber*, we agree with the judge that this was a case where "very special reasons" do exist to excuse the delay, long as it was. In the circumstances here the judge was entitled, and in our view right, to grant the necessary extension of time for the claim to proceed. In doing so, he

made no error of principle. His approach was correct. It was consistent with the relevant principles in the authorities.

Was the judge wrong not to exercise his discretion to refuse relief under section 31(6) of the 1981 Act?

38. In our view there can be no question that, in substance, the claim for judicial review was well founded.

39. Though the facts are quite different, this case bears some similarity to *Norfolk County Council v Secretary of State for the Environment* [1973] 3 All E.R. 673, where the county council's committee had resolved to refuse planning permission and, by mistake, a planning officer sent the applicant a decision notice stating that permission had been granted; and to *Co-operative Retail Services Ltd. v Taff-Ely Borough Council* (1980) 39 P. & C.R. 223, where there had been no resolution to grant the backdated planning permission issued by an officer of the borough council, only a recommendation that the proposal be referred to a joint committee of the county and borough councils, with an indication that the borough council was in favour of permission being granted (see also Collins J. in *R. (on the application of Carroll) v South Somerset District Council* [2008] EWHC 104 (Admin), at paragraph 20; and Lord Glennie in the Outer House of the Court of Session in *Archid Architecture and Interior Design v Dundee City Council* [2014] SLT 81, at paragraph 53).

40. In *Norfolk County Council*, the local planning authority decided against the grant of permission. The officer who had produced the planning permission had no authority himself to make such a decision. His ostensible authority only went to his authority to transmit the decision which had been made. So there never was a decision to grant the planning permission that was issued. Lord Widgery C.J. said (at p.677E-F) that "[what] one hopes to achieve in a situation like this, where there has been an honest mistake, is that everybody shall end up in the position in which they would have been if no mistake had been made …". In *Taff-Ely Borough Council* Lord Denning M.R. described the grant of planning permission as "utterly invalid" (p.237). A grant of planning permission "issued by the clerk of his own head" was, he said, "no better than a grant that is issued by a mistake – issuing a grant instead of refusal, as in [*Norfolk County Council*] – or when the signature of the clerk has been forged, or written by a subordinate without any authority whatever". In all such cases "the purported grant is *ultra vires* and void and of no legal effect whatever". Until the reason for its invalidity is discovered – and pronounced on by the court – "people may in good faith have acted on it". The court might in its discretion "allow these actions to stand as between innocent third persons", but that "does not serve to validate the invalidity, or to resurrect the nullity …" (p.238).

41. Mr Lockhart-Mummery sought to distinguish those cases. He emphasised that the council had decided to grant planning permission, and had made that decision lawfully. It had issued a decision notice constituting the permission – though without imposing the conditions it had intended – and the permission was not bad on its face. He submitted that the judge ought not to have quashed it. He said that the judge's approach did not recognise the exclusively statutory nature of the planning system, a comprehensive code imposed in the public interest, in which

concepts belonging to private law have no part to play (see, for example, Lord Scarman in *Pioneer Aggregates (U.K.) Ltd. v Secretary of State for the Environment* [1985] A.C. 132, at p.140H to p.141C). He had not acted on the basic principles bearing on the judicial review of planning permissions. Decisive in the judge's reasoning was the fact that Thornton Holdings had kept silent about the council's error. In fact, the council had been aware of its mistake all along. It had replaced the decision notice it had put on its website with a false one, then effectively did nothing for more than five years. In the circumstances, Mr Lockhart-Mummery submitted, the permission should have been allowed to stand.

42. Mr Strachan submitted that the judge exercised his discretion to quash the planning permission impeccably. This is a case in which the interests of justice lay firmly in favour of quashing an unlawful planning permission (see Maurice Kay L.J. in *R. (on the application of Holder) v Gedling Borough Council* [2014] EWCA Civ 599, at paragraphs 28 to 31). On behalf of the council Mr Evans accepted that the quashing order was justified and necessary. There was no material distinction bearing on the court's discretion under section 31(6)(b) between a grant of planning permission that should not have been issued at all and one that ought not to have been granted without conditions imposed. The judge did not misunderstand the "statutory nature of the planning system". The conduct of Thornton Holdings – including their having chosen to "remain silent" about the council's error – was not irrelevant to his discretion to grant or refuse relief.

43. Again, we accept the submissions made by Mr Strachan and Mr Evans. The planning system is, as Lord Scarman said in *Pioneer Aggregates* (at p.140H), a "creature of statute". It operates in the public interest. It is subject to the supervisory role of the court to review grants of planning permission and order appropriate relief against those found to be unlawful. In adjudicating on the lawfulness of the decision, the court will not venture into the planning merits (see Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780E-H). However, in exercising its discretion on relief under section 31(6), it must necessarily consider the particular facts of the case before it, including the relevant circumstances and conduct of the parties involved (see Schiemann L.J. in *Corbett*, at paragraphs 14 to 17 and 20 to 25, and Sedley L.J., at paragraphs 29 to 33; and Hobhouse L.J. in *ex p. Oxby*, at pp.298 to 299 and 302 to 303).

44. Here, the permission issued by the council on 20 December 2011 was clearly not a lawful grant. As Mr Evans conceded on behalf of the council, the unconditional planning permission of 20 December 2011 was issued "without proper authority". It may be that the council's error was not as egregious as that of the local planning authorities in *Norfolk County Council* and *Taff-Ely Borough Council* – where there was no proper resolution to grant permission at all. However, the decision notice the council issued, as in those cases, was plainly issued without authority, and the error was a distinct error in its administrative conduct – the omission of all 10 conditions, including the one that was to limit the duration of the permission, which, as we have said, was clearly vital to the decision it had made. The error was not in the council's decision-making, but in the statutory notification of the decision made. Yet it vitiated the planning permission, and continues to do so. In short, this simply was not, and is not, the conditional planning permission the council's committee resolved to grant. The court's supervisory role is not limited to reviewing decisions to grant planning permission where the

substantive decision-making was itself unlawful, or some procedural step in the course of that decision-making was missed out or misperformed. It extends to the review of decisions where the permission would have been lawful but for the local planning authority's failure to set out in its decision notice the conditions it had decided to impose, and so was in breach of the statutory code, and unlawful, because it had failed to do that. That is this case.

45. In principle, therefore, this is clearly a case in which, leaving aside the delay, the court would generally not hesitate to quash the planning permission (see, for example, Carnwath L.J. in *Tata Steel*, at paragraphs 7, 8, 15 and 16).

46. As for the judge's exercise of his discretion on remedy under section 31(6)(b), this is, we think, one of those cases where the considerations relevant to the grant of relief are largely the same as those for the extension of time. We need not repeat what we have already said about that, except to say that in our view the judge did not overstep the line dividing the supervisory role of the court from the functions of the council, as local planning authority, under the statutory scheme. We reject the submission that in exercising his discretion he had regard to his own views on the planning merits; and also the submission that he gave "improper weight" to his own "subjective" views on the conduct of Thornton Holdings.

47. In the statement of facts and grounds, the relief sought (at paragraph 10) includes an order to quash the planning permission issued on 20 December 2011, a declaration "that the three marquees are unlawful", and a mandatory order requiring the council, within three months, to decide "whether to bring enforcement action requiring removal of the three unlawful marquees". It was open to the judge, in the exercise of his discretion under section 31(6)(b), to select one or more of those three forms of relief, or to craft a different remedy of his own. He chose simply to quash the planning permission.

48. Normally, in a case where such a long delay has occurred in a complaint of unlawfulness in a planning decision being brought before the court in a claim for judicial review, the court would not grant relief. Nothing we say in this judgment should be taken as suggesting the contrary. Equally however, we are in no doubt that, in the extremely unusual circumstances of this case, the judge was right not to withhold a remedy despite the very considerable delay in proceedings being begun.

49. There are three considerations in this case that tell strongly in favour of that conclusion. First, the council's mistake in issuing a decision notice that did not reflect its own lawful decision was and remains – as it concedes – an indisputable error. The decision notice mispresents the council's decision. If the planning permission were not quashed, this manifest unlawfulness would persist. Secondly, this is not the normal case where a landowner or developer is entitled to rely upon a permanent planning permission not promptly challenged before the court. In this case the very delay in issuing the proceedings, far from prejudicing the commercial interests of Thornton Holdings, had the effect of enabling them to enjoy to the full, and beyond, the fruits of the temporary planning permission the council had in fact decided to grant. Thirdly, given that the council's committee resolved to grant no more than a five-year temporary permission, if the decision had been properly translated into the decision notice, the marquees would not have had the benefit of planning permission after 20 December 2016 and a further grant of

planning permission would have been required for their retention. The effect of the quashing order, therefore, would not be to deprive Thornton Holdings of the value of the planning permission the council actually decided to grant. It would merely be to restore the position as it was when the decision itself was lawfully made.

50. We have considered whether, in view of the very lengthy delay, there are grounds for interfering with the judge's decision not to exercise his discretion to refuse relief in the form of a quashing order. We think not. We have in mind the observation of Carnwath L.J. in *Tata Steel* (at paragraph 16) that he "would need some persuasion that there is very much difference in practical terms between a declaration that a grant of planning permission is unlawful and the quashing of the permission". In this case our view is the same. Balancing all the relevant factors here – the obvious unlawfulness of the decision notice issued in December 2011, the length of time that elapsed before the claim was made, the fact that in September 2010 the council's committee had lawfully resolved to grant temporary planning permission to allow the "financial situation" to be reviewed after five years, and the fact that Thornton Holdings, through the council's error, had the advantage of avoiding that review and receiving an unrestricted permission the council never intended to grant – our view is that it was appropriate to grant an order to quash. This recognises the continuing unlawfulness in the council's false decision notice of 20 December 2011, and the retention of the marquees on the site without the necessary planning permission (see sections 55 and 57 of the 1990 Act). That situation is, in our view, inimical to the public interest in a fair, efficient and transparent planning system, in which all participants in the process, including objectors, and also the public, are able to rely on the local planning authority to issue a true notice of the decision it makes. Despite the lengthy delay, the judge's decision not to withhold relief was, we think, amply justified. The effect of that decision was both to undo an injustice and to sustain the public interest.

Conclusion

51. For the reasons we have given, the appeal must be dismissed. The opposite conclusion would not meet the justice of this particular case. No precedent is being set here. We stress once again that the court will not lightly grant a lengthy extension of time for a challenge to a planning decision by a claim for judicial review, nor will it lightly grant relief after a long delay. It will insist on promptness in bringing such challenges in all but the most exceptional circumstances. Here the circumstances are most exceptional. They are wholly extraordinary. This is a case where it can truly be said that the exception proves the rule.