Neutral Citation Number: [2020] EWHC 45 (Admin)

Case No: CO/3279/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2020

Before :

MRS JUSTICE LIEVEN DBE

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Between :

AIREBOROUGH NEIGHBOURHOOD DEVELOPMENT FORUM	**Claimant**
- and –	
LEEDS CITY COUNCIL	**Defendant**
- and –	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
(2) AVANT HOMES (ENGLAND) LIMITED	
(3) GALLAGHER ESTATES LIMITED	**Interested Parties**

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Jenny Wigley (instructed by **Town Legal LLP**) for the **Claimant**
Juan Lopez (instructed by **Leeds City Council Legal Services**) for the **Defendant**
Matthew Fraser (instructed by **Walker Morris LLP)** for the **Second Interested Party**
James Corbet Burcher (instructed by **Shoosmiths LLP**) for the **Third Interested Party**

Hearing dates: 12th December 2019

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Approved Judgment

Mrs Justice Lieven DBE :

1. This case concerns an application under s.113 of the Planning and Compulsory Purchase Act 2004 by Aireborough Neighbourhood Development Forum (the Forum) challenging the decision of Leeds City Council, (the Council) dated 10 July 2019 to adopt the Leeds Site Allocations Plan (the SAP). The issue before me on the preliminary issue, is whether the Forum has the capacity to bring the claim. The Council and the Second and Third Interested Parties argue that as an unincorporated association the Forum does not have legal capacity to bring the claim.

2. The Claimant was represented before me by Ms Wigley; the Defendant by Mr Lopez, the Second Interested Party by Mr Fraser and the Third Interested Party by Mr Corbet Burcher.

3. The background to the Forum is explained in the second witness statement of Jennifer Kirkby. It was formally constituted in March 2014, and its aims and objectives include the good planning of the Aireborough neighbourhood.

4. The Forum has a written constitution, a bank account, a steering group and an identifiable membership. It was designated as a Neighbourhood Forum by the Defendant under s.61F of Town and Country Planning Act 1990 (the TCPA) on 15 July 2014. Under the statute the designation lasts for five years and therefore expired on 15 July 2019. The Forum had applied to the Council for re-designation on 13 July 2019 and that application remains outstanding. There was a good deal of debate between those representing the Forum and those representing the Council as to why the application to redesignate had not yet been determined, but I cannot see that has any impact on the decision I have to make. It is not in issue that the Forum was not designated on the date the claim was made in the High Court.

5. One of the objectives of the Forum is to prepare, in partnership with the Council, an effective Neighbourhood Plan, as a statement of the needs and visions of the Aireborough Neighbourhood Plan area. The Forum made representations throughout the SAP process on what the nature of future development within its area should be, including what sites should be allocated and for what form and scale of development.

6. The SAP is a Development Plan Document (DPD) which has been prepared by the Council and which, as the name suggests, sets out its proposed allocations for planning purposes of land throughout the Leeds area. It has a very important future role in the planning process in Aireborough, because it is part of the development plan for the purposes of s.38(6) of the PCPA, and as such its allocations or non-allocations will be a highly material matter in future planning decisions.

7. The claim is a challenge to the SAP brought under s. 113 of the Planning and Compulsory Purchase Act 2004 which states, as relevant;

> *"(2) A relevant document must not be questioned in any legal proceedings except in so far as is provided by the following provisions of this section.*
>
> *(3) A person aggrieved by a relevant document may make an application to the High Court".*

8. It is relevant to note at the outset that the challenge is a statutory challenge, not a judicial review, and there is a statutory time limit of 6 weeks, s.113(3B). The 6 week time limit is a strict one, and is not amenable to the more flexible approach to the time limits in judicial review.

9. The Defendant and the Second and Third IPs argue that the Forum does not have legal capacity to bring this claim. Mr Lopez's principal argument is that the Forum is an unincorporated association and as such it is not a "person" aggrieved. He places strong reliance, particularly in his Skeleton Argument, on the fact that the Claimant is no longer a designated neighbourhood forum under the statute. His secondary argument is that on the specific facts of the case, even if in principle an unincorporated association could be a person aggrieved, the Forum is not such a person.

10. The Defendant and IPs' case turns on an analysis of the caselaw on this issue and it is therefore necessary to set that caselaw out in some detail. It is agreed by all parties that there are cases at High Court level which reach different conclusions on the question of whether an unincorporated association can bring a judicial review. Mr Fraser for the Second IP, adopts Mr Lopez's argument but also focuses on an argument that there is a distinction between whether an unincorporated association can bring a judicial review and whether it can bring a statutory challenge. Mr Corbet Burcher supports these arguments.

11. The three cases which deal with the specific point of whether an unincorporated association can bring a judicial review are, in order of time, *R v Darlington BC ex p Association of Darlington Town Taxi Owners* [1994] COD 424 (Auld J); *R v Leeds City Council ex p Alwoodley Golf Course* [1995] NPC 149 (Harrison J); and *R v Traffic Commissioners of the North Western Traffic Area ex p Brake* [1996] COD 248 (Turner J). I have been taken to full transcripts of all three judgments. There are also a number of cases which touch on, though do not decide, the point and further authorities where it has been assumed that an unincorporated association can bring a judicial review without argument. There is only one case before me which concerned a statutory challenge rather than a judicial review, *Williams v Devon CC* 2015 EWHC 568 and 2016 EWCA Civ 419.

12. The first case in time where the point arose was a decision of Sedley J in *R v London Borough of Tower Hamlets ex p Tower Hamlets Combined Traders Association* [1994] COD 325. Unfortunately I do not have the full judgment, but only a digest. It is therefore not possible to determine the degree to which the issue was fully argued. However, the digest says;

> *"(1) The status of the applicant. In principle it did not matter that the application was an unincorporated association lacking legal personality since out of its constituent associations could be spelt the names of individuals who constituted the association."*

13. In *Darlington*, Auld J was considering a challenge to the decision of the Council to limit concessionary fares. The Council applied to set aside the grant of leave for judicial review on the grounds that the Association was not a legal person and therefore the judicial review proceedings were not properly constituted. Auld J found for the Council on the issue. The most relevant parts of his analysis are as follows;

> *"The general rule, as stated in Halsbury's Laws, 4th Ed., Vol. 9, paragraph 1201, citing London Association for the Protection of Trade v. Greenlands Ltd. [1916] 2 AC, 15, HL , is that, subject to certain well recognized exceptions of which this is not one, unincorporated associations cannot sue or be sued in their own name. The researches of counsel have not identified any case in which the court has held that an unincorporated association is capable of applying for judicial review. Mr. Beloff referred me to R. v. Liverpool City Council, ex p. Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299, CA , a case in which an unincorporated association was permitted to apply for a prerogative order. However, it appears to have been assumed that the applicant association was capable of applying for relief, the question being whether it was a "person aggrieved", as was then the test. Lord Denning MR, with whom Roskill LJ and Sir Gordon Willmer agreed, said, at 308–9:*
>
> *"The taxi cab owners' association come to this court for relief and I think we should give it to them. The writs of prohibition and certiorari lie on behalf of any person who is a 'person aggrieved', and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him: see Attorney General of the Gambia v. N'Jie and Maurice v. London County Council. The taxi cab owners' association here have certainly a locus standi to apply for relief."*
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> *See also the succeeding application for judicial review by the same association: R v. Liverpool City Council, ex p. Liverpool Taxi Fleet Operators' Association [1975] 1 WLR 701, DC .*
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> *"In my judgment, the question of capacity is one for dispositive decision at the leave or setting aside of leave stage. The court should not merely consider whether it is sufficiently arguable to grant or not to disturb the grant of leave, as the case may be. It precedes and is quite distinct from the issue of locus or sufficient interest. It is not, therefore, affected by the guidance of the House of Lords R. v. Commissioners of Inland Revenue, ex p. National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617 , namely, that, save in the simplest cases, that threshold question should be reserved to the substantive hearing where it can be considered in the legal and factual context of the issues raised by the application. Sufficiency of interest may well depend upon the factual and legal context of the case. Capacity, in the sense whether a purported applicant for leave to apply for judicial review is a person who can institute such proceedings does not. In law, subject to certain exceptions, none of which applies here, an unincorporated association is not a person capable of instituting proceedings whatever the factual context and legal issues raised.*

> *"In my judgment also, capacity is not just a private law or contractual concept, as suggested by Mr. Bear. There is nothing to that effect in the National Federation of Self-Employed and Small Businesses Ltd case or in R. v. Hammersmith and Fulham LBC, ex p. People Before Profit Ltd. (1981) 80 LGR 322 , per Comyn J., which Mr. Bear cited in support of his argument that locus, not capacity, is the only question for consideration here. In both cases locus, not capacity, was the issue, and it is noteworthy that in both the applicant was a limited company, in the latter case formed specifically for the purpose of applying for judicial review.*
>
> *"The question whether an initiator of proceedings is a person recognized by the law is likely to be of considerable importance on, for example, the matter of costs or, as here, the requirement of a cross-undertaking as to damages in the event of the case going against him. Mr. Bear suggested that any problem of costs could be overcome by recourse to Section 51 of the Supreme Court Act , which, he said, gives the court power in its discretion to order costs against person not on the record, and that the difficulty of exacting a cross-undertaking as to damages could be met by making the grant of interim relief conditional on a sum of money being brought into court. However, the possibility of the court in the proper exercise of its discretion looking to individual members of an unincorporated association to pay costs in the event of failure of the association's claim, or the possibility in some cases of seeking security in advance from those members, cannot sensibly be an argument for ignoring the association's legal incapacity to institute proceedings."*

14. In *Alwoodley* Harrison J was considering an application by Alwoodley Golf Course, an unincorporated association, for leave for judicial review at a contested leave hearing. He was referred to the judgment in *Darlington* and said;

> *"Before dealing with the merits of the application, however, I should first deal with the question of the applicant's legal capacity to bring these proceedings. The capacity of an unincorporated association to apply for judicial review was considered by Auld J, as he then was, in **R** v Darlington BC **Ex** p Association of Darlington Taxi Owners and Darlington Owner Drivers' association (1994) COD 424. I have been provided with a transcript of the judgment in that case.*
>
> *"In a carefully reasoned judgment Auld J decided that an unincorporated association does not have capacity to apply for judicial review. Mr Barrett, who appeared on behalf of the applicant in this case, accepted that was the effect of the decision but he submitted that it was wrongly decided. He drew my attention to **R** v London Rent Assessment Panel, **ex parte** Braq Investments Ltd [1969] 2 All ER 1012, [1969] 1 WLR 970, which had not been referred to in the Darlington case, where Lord Parker CJ, rejected a submission that an application for consideration of a fair rent was invalid because it was made by an unincorporated association whose status was unknown to the law and thus was incapable of acting as agent for the tenants. It was held that*

> *the application was valid because it was possible to spell out from the association's title the names of its members which would include the tenant or the agent.*

> *"That case, however, involved an application for certiorari and it was an application made by a limited company, not an unincorporated association. The issue about the unincorporated association related to the validity of a prescribed application form for registration of a fair rent, not for judicial proceedings.*

> *"I was also referred to an extract from the judgment of Sedley, J, in **R** v London Borough of Tower Hamlets, **ex parte** Tower Hamelts Combined Traders' Association (Unreported 19 July, 1993) which was also not referred to in the Darlington case. That case did involve an application for judicial review by an unincorporated association and reference was made in the judgment to the Braq Investments case, although that case had not been referred to in argument.*

> *"I do not understand Sedley J, in the Tower Hamlets case, to be deciding that an unincorporated association can apply for judicial review. In fact, he referred to the necessity for a legal person to be the applicant and, in that case, no objection was taken to the association acting as, or being represented in the proceedings by, the secretary. I therefore do not find anything in those two cases to which I have been referred to suggest that the Darlington case was wrongly decided.*

> *"Mr Barrett made a number of further submissions in a valiant and able attempt to show that the Darlington case was wrongly decided but I have not been persuaded by those arguments. In my view the Darlington case was correctly decided. It follows that the **Golf Club** is not a legal person and that these proceedings are not therefore properly constituted."*

15. In *Brake* Turner J was considering an application to set aside leave on the grounds of lack of capacity. He considered the *Darlington* decision in detail but decided not to follow it. He was referred to *Alwoodley* but it seems that he was only given a short note of the report and did not have a transcript, so he could not analyse the reasoning within it. He referred to *Darlington* and then *Tower Hamlets Combined Traders* and the *Liverpool Taxi Fleet* case and said;

> *"It has to follow that, if the argument addressed to me on behalf of the respondent in the present case is correct, the decision in the Liverpool Corporation case was wrong, and the application ought not to have been entertained, because there was no jurisdiction to grant relief to an entity not known to the law. The next case was one in the Divisional*

Court between essentially the same parties. The case is R v Liverpool City Council ex parte Liverpool Taxi Fleet Operators Association [1975] 1 All ER 379, [1975] 1 WLR 701. It is unnecessary to cite any passage from the judgments since they are entirely silent as to the point on jurisdiction. Given the decision in the earlier case, this need cause no surprise. On the other hand it would be an occasion for considerable surprise if the court wrongly assumed that it had jurisdiction when the true position was that it had not. In the later case of R v Secretary of State for Social Services and anor ex parte Child Poverty Action Group and anor [1990] 2 QB 540, [1989] 1 All ER 1047 CA, no argument was addressed to the court on the issue of jurisdiction to entertain the application at the suit of an unincorporated body. The court itself appears to have been content to assume that it had such jurisdiction. Were these decisions all arrived at per incuriam, or did they proceed on the basis that the position in public law is different from that in private law? If so, it may be asked why this should be so?

"In the case of a private law action, it is fundamental that a private law right has been violated. Private law rights can only be enjoyed by those who possess the characteristics of a legal person. Similarly, it is necessary, in such a case, that, the defendant who is asserted to have infringed that legal right, has the characteristics of a legal person. The situation in public law cases may be different. For a case to lie in public law, it is the actions or decisions of a body amenable to public law that are called into question. The process by which that has been done, both historically and since the Act of 1981, has been the device of the Crown calling into question the legality of the decisions, as well as the processes by which such decisions have been reached both of inferior tribunals and central as well as local, governmental bodies. The dispute is, thus, procedurally and technically between the Crown and the public body. The means whereby that dispute is then subjected to the courts processes is by initiation by an "applicant (who) has a sufficient interest in the matter to which the application relates"; see Ord 53 r 3(7). Thus, it will not be in every case that an individual applicant need assert that any right of his has been infringed, rather it is that by the unlawful manner in which a body amenable to public law has reached its decision, or the unlawfulness of the decision itself, they have been directly or indirectly affected by that decision.

.....

"It follows that this view is consistent with the proper assumption of jurisdiction by the courts in the Liverpool Taxi cases which were not, therefore, decided per incuriam. It is difficult to envisage that courts of such distinction should have overlooked such a fundamental and essential point. In terms of legal analysis, it can be postulated that an applicant with sufficient interest is not "suing ... in his own name" (See London Association Case supra) but is invoking the powers of the court to exercise its supervisory jurisdiction to quash, curb or correct decisions of bodies subject to public law. The personal rights of individual applicants, as in the present case, may never be in play. I am thus persuaded that I have respectfully to differ from the decision of Auld J to the contrary effect in the Darlington Taxicab Case. For fuller

> *reasons than those identified by Sedley J in the Tower Hamlets case I conclude that it is inappropriate to set aside the leave already given. For completeness, I should mention that a report in the case of Alwoodly Golf Club v Leeds City Council [1995] NPC 149 was placed before the court. It is of so exiguous a character as not to be of any assistance to me."*

16. There are then a series of cases where the applicant/claimant was an unincorporated association and the courts proceeded on the basis that the claimant did have capacity. I quite accept Mr Lopez's submission that one needs to be cautious about placing reliance on cases where a court has simply assumed a matter, or it has gone by concession, without any express consideration. However, there is in my view a distinction between such cases generally, and those where the court's jurisdiction is in issue. As is obvious, a court cannot proceed without jurisdiction and therefore it is a matter which any court must consider and be satisfied of, of its own motion. As Turner J said in ***Brake***, jurisdiction cannot be assumed or consented to. Further, as I will explain, the cases where it has been assumed that the Court has jurisdiction because the unincorporated association has capacity, include some of the most experienced and senior judges of their day. The proposition that they wrongly assumed jurisdiction is a surprising one.

17. In R v *Liverpool Corporation ex Liverpool Taxi Fleet Operators Association* 1972 AC 299, the Court of Appeal was considering an application by the Association for leave to apply for prohibition, mandamus and certiorari in respect of decisions concerning the number of taxi licences that should be granted. The Court was considering both the substantive issue, and whether the Association was a "person aggrieved" for the purposes of deciding whether they were entitled to be granted the prerogative writs of prohibition and certiorari, see Lord Denning at p.308H. The case is something of an illustration of the scale of the development of public law since 1972, and the Court was addressing "locus standi" as opposed to strictly capacity, but what Lord Denning says at 309-310 remains relevant;

> *The taxicab owners' association come to this court for relief and I think we should give it to them. The writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved," and that includes any *309 person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him: see Attorney-General of the Gambia v. N'Jie [1961] A.C. 617 and Maurice v. London County Council [1964] 2 Q.B. 362 , 378. The taxicab owners' association here have certainly a locus standi to apply for relief.*

Lord Justice Roskill, and Sir Gordon Willmer agreed.

18. In *R v MAFF v British Pig Industry Support* Group 2001 ACD 3, Richards J cited Darlington and Brake and then said;

> *"For my part, I do not think that there is any overriding requirement for an applicant for judicial review to have legal personality but it is important in such a case that adequate provision should be made for the protection of the Respondent in costs."*

19. There are a large number of cases where the legal ability of an unincorporated association to bring a judicial review has simply been assumed. Many of these are referred to in *De Smith* 8th Ed at 2-014 and footnote 49, which says;

> *In English law, unincorporated associations generally lack legal capacity to sue or be sued in their own name. In some claims for judicial review brought by unincorporated associations it has been held that this is a bar to permission being granted. A different approach has been adopted in other cases, where either no issue as to the legal capacity of the claimant has been being taken, or the chairman, secretary or other member of the association was recognised as representing the association. Indeed, it is possible formally to seek an order under CPR Pt 19.6 that a claim be begun or continued with one party representing the interests of others who have the same interest in the claim.Given that the unincorporated status of a defendant has not been regarded as a bar to being subject to and defending judicial review proceedings, a flexible approach is appropriate.49*

> ***Foot note 49*** *Unincorporated associations have been allowed to be claimants in many cases, see e.g. R. v Ministry of Agriculture, Fisheries and Food Ex p. British Pig Industry Support Group[2000] Eu. L.R. 724; R. (on the application of West End Street Traders Association) v Westminster City Council[2004] EWHC 1167 (Admin); [2005] B.L.G.R. 143; R. (on the application of Western International Campaign Group) v Hounslow LBC[2003] EWHC 3112; [2004] B.L.G.R. 536; R. (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence[2003] EWCA Civ 473; [2003] Q.B. 1397; R. (on the application of British Aggregates Associates) v Customs and Excise Commissioners[2002] EWHC 926 (Admin); [2002] 2 C.M.L.R. 51; R. v Coventry City Council Ex p. Coventry Heads of Independent Care Establishments (CHOICE)(1997–98) 1 C.C.L. Rep. 379.*

20. In some of these cases the claimants included not just the unincorporated association but also named individuals, and in those circumstances, it would have been academic for anyone to argue that the association did not have capacity, because the case would have been properly constituted in any event. However, there are others where the unincorporated association was the sole claimant and therefore the court would have had no jurisdiction to hear the case if the association did not have capacity. The most notable in my view is *Association of British Civilian Internees Far Eastern Region v Secretary of State for Defence* (commonly known as *Abcifer)* [2003] EWCA Civ 473. ABCIFER was an unincorporated association, as is noted in the first line of the judgment. The case in the Court of Appeal was heard by Lord Phillips MR, and Lord Justices Schiemann and Dyson. The Appellants were represented by David Pannick QC, Michael Fordham and Ben Jaffey, and the Secretary of State by Philip Sales and Karen Steyn. If the argument before me is correct then this case proceeded despite an absence of jurisdiction, apparently unnoticed by the Court, and not raised by the Secretary of State's counsel. Even if the Secretary of State had decided not to take a jurisdictional point, the Court itself has to be satisfied it has jurisdiction. It is inconceivable in my view that the Court of Appeal, made up of three judges highly experienced in public law, proceeded on a misapprehension about their jurisdiction. They plainly assumed, albeit without any argument to the contrary, that an unincorporated association could bring a judicial review.

21. The only case which the parties have identified where there was an issue concerning an unincorporated association in a statutory challenge rather than a judicial review was *Williams v Devon CC* 2015 EWHC 568 and EWCA Civ 419. In that case the claim was brought by Sustainable Totnes Action Group (STAG) pursuant to the Road Traffic Regulation Act 1984 and was made on 21 August 2014. On 9 February 2015 HHJ Cotter (sitting as a Deputy High Court Judge) made an order under CPR19.6 that a list of persons be filed to stand as representative as members of the Claimant. The Defendant argued that STAG was an insufficiently certain group of individuals to constitute an unincorporated association. In his order of 9.2.15 HHJ Cotter had set out the following reasoning;

> *In English law unincorporated associations generally lack the capacity to sue or be sued in their own name. However in Judicial review claims (which this is not) a flexible approach has been taken in a number of cases (see generally De Smith's Judicial Review paragraph 2-012); sometimes with a named individual, being the chairman, secretary or other member of the association recognised as representing the association. However, in my judgment it would usually be necessary even in a Judicial Review claim that the Defendant has some protection as to costs if an unincorporated association is to be a claimant (see R-v-Ministry of Agriculture Fisheries and Foods ex parte British Pig Industry Support Group [2000] EuLR 724 at 108).*
>
> *Given the changing identity of the group (prior to the formation of the company) there is force in the Defendant's assertion that there appear to be no well settled unincorporated association. In such circumstances, and in the absence of further evidence the court is entitled to consider STAG a nominal Claimant and given the comments made about protection from adverse costs, one that is unlikely to be*

> *able to pay the Defendant's costs (see CPR 25.13(2)(f)). Hence the application for security for costs.*
>
> *However in my judgment there surely must be, at the very least, an identifiable core group of individuals who make up (and made up at the time of the issue of the claim) the entity known as STAG. The group has been represented throughout and (regardless of the detail of professional obligations) I would expect that legal representatives would know at any given time who retained them, such a matter being obviously relevant to a number of issues not the least of which are the obtaining of instructions, a fortiori when views may differ within a "loose" group, to whom a duty of care is owed and the person or persons to sue if fees are not paid. Indeed were litigation to be pursued with out an identifiable client or group of clients the legal representatives could even be exposed to an application pursuant to section 51 Senior Courts Act 1981 that they be responsible for the costs.*

22. Then at [54] the Judge said;

> *(i)It seems to me that this case highlights the importance of a group considering its nature and standing before commencing litigation including judicial review. I am well aware of the fact that in Judicial review claims (which this is not) a flexible approach has been taken in a number of cases (see generally De Smith's Judicial Review paragraph 2-012). However, a claim can proceed by representative claimant or claimants or through a company set up for the purpose (subject to security for cost issues and potentially a challenge as to standing), but the choice to issue as an unincorporated association is to be avoided; notwithstanding that it has happened in some judicial review cases without status being questioned.*

23. The issue in the case was therefore somewhat different to the issue before me. However, it is important to note that not just did the Judge obviously think that the claim could in principle be brought by an unincorporated association, see [54], but more importantly he allowed the addition of named claimants after the expiry of the statutory challenge period. If Mr Fraser was right and there was a critical distinction between judicial review and statutory challenge because in judicial review there is a flexible limitation period and thus claimants could always be substituted and time extended, that is not the case in a statutory challenge where there is an absolute time bar for challenges. Therefore if a claim brought by STAG was simply invalid because of lack of capacity, then it would not be possible to substitute claimants after the challenge period expired.

24. *Williams* went to the Court of Appeal where the Defendant/Respondent argued that Ms Williams should not have been substituted. At [30-31] Jackson LJ said;

> *30.Mr Whale has put his arguments today very clearly for the assistance of the court. The first issue is whether the judge fell into error in allowing the action to proceed in the name of Ms Williams, when*

> *initially it had been commenced by the Sustainable Totnes Action Group. Mr Whale submits that Sustainable Totnes Action Group is not a legal person. The action, therefore, never got off the ground properly and that must be an end to the proceedings.*
>
> *31. I do not accept that submission. It seems to me that Part 19 of the Civil Procedure Rules ("CPR") caters for the problem which has arisen in this case. Ms Williams is and always has been a member of the Sustainable Totnes Action Group. She ought to have been named as claimant at the outset. In my view, the judge properly exercised his powers under CPR Part 19 in substituting Ms Williams as claimant. These rules exist to enable the court to resolve the matters in issue, not to throw up unnecessary technical obstacles.*

25. Therefore, the Court of Appeal did not accept that the claim was invalid at the outset. The argument being advanced before me might be said to be the type of "unnecessary technical obstacles" referred to by Jackson LJ.

26. The Defendant and IPs also rely on *Eco-Energy (GB) v First Secretary of State* (2005) 2 P&CR 5, where in a claim under s.288 of the Town and Country Planning Act 1990 Collins J had struck out the claim on the basis that EE Ltd was not a person aggrieved for the purposes of the Act. EE appealed and argued that they were a person aggrieved, and that alternatively the individual, Mr Clarke, should be substituted. Buxton LJ rejected the appeal and on substitution at [26] pointed out that in a s.288 challenge once the time period has expired the court has no jurisdiction to question the validity of the planning application. He then said [26-28];

> *"26. Not only are there the considerations already deployed, but also Miss Lieven drew our attention to the well-known case of Smith v East Elloe Rural DC [1956] A.C. 736 . There the House of Lords held as, in my judgment correctly, set out in the headnote of that report that once the s.288 period had expired, the court had no jurisdiction to question the validity of a planning application.*
>
> *27.That view of course binds us. If the court has lost jurisdiction in respect of a matter, not only is this not a section that falls under s.19.5(1)(c), but also and in any event the court is deprived of any ability to give further consideration of the proceedings. That was the view taken by Hobhouse L.J. in respect of a limitation period under the Hague Rules in Payabi v Armstel Shipping Corp [1992] Q.B. 907. I respectfully agree. For that reason, as well as for the reason that s.288 does not fall under s.19.5(1)(c), the CPR , para.19.5, do not apply to this case.*
>
> *28. Even if I am wrong about that, any attempt to apply para.19.5(3) to this case falls down. First of all, looking at para.19.5(3)(a) it is simply not the case that EE Ltd was "named in the appeal in mistake for Mr Clarke". There was no mistake about the person of EE Ltd. The mistake (if any) was about the capacity of EE Ltd to bring the proceedings.*

There is very clear authority that that is not the type of mistake that falls under s.19.5(3)(a).”

27. Mr Fraser, in particular, argues that statutory challenge is different from judicial review, because in judicial review there is always the possibility of substitution of claimants, even outside the three month time limit. He argues that may be why the Court in many of the cases has not been troubled about jurisdiction because all that would need to be done is substitute a new claimant. But, he argues, statutory challenge is different because if the original claimant did not have capacity, then the court has no jurisdiction to substitute after the statutory time limit has expired, see *Eco-Energy*.

28. The parties’ principal submissions divided along the lines of Mr Lopez, Mr Fraser and Mr Corbet Burcher arguing that the reasoning of Auld J in *Darlington* should be preferred, and Ms Wigley arguing that that of Turner J in *Brake* was more detailed. Ms Wigley submitted that there was an important distinction between private and public law claims, as explained by Turner J. She said that in judicial review the issue was really one of locus or standing to challenge the decision of the public authority, rather than whether the claimant had legal capacity. That is why the judges, including some of the most senior of their day, invariably focus on standing not capacity. Ms Wigley also argued that in the cases where the court has found it necessary to substitute or add a claimant where the action was brought by an unincorporated association, this was always for practical reasons, such as security for costs or uncertainty over the membership of the association. *Darlington* and *Alwoodley* are the only cases where it is has been held that an unincorporated association has no capacity to bring a judicial review, and these cases have in practice not been followed since the mid 1990s. Ms Wigley also relied, albeit quite lightly, on the Aarhus Convention and the need to ensure that there is proper protection of the right to public participation.

Conclusions

29. In my view Ms Wigley is correct and an unincorporated association does have capacity to bring both a judicial review and a statutory challenge. I agree with Turner J that there is a critical distinction between private and public law litigation. In private law the individual has to be able to show that they have a legal right which has been infringed, therefore it is fundamental that they have legal capacity to sue. In contrast the critical question in judicial review or statutory challenge is whether the claimant is a person aggrieved or has standing to challenge, which is not a test of legal capacity but rather one of sufficient interest in the decision not to be a mere busybody. The claim is “*invoking the powers of the court to exercise its supervisory jurisdiction of the court to quash curb or correct decision of bodies subject to public law. The personal rights of individual applicants, as in the present case, may never be in play”,* see *Brake*. Therefore, the legal capacity of the claimant is not a critical component of the court having jurisdiction in a judicial review or statutory challenge.

30. Where different judges of the same level have reached different conclusions on a point, then the general approach is to follow the last in time, see Denning J in *Minister of Pensions v Higham* [1948] 2 KB 153, and *Colchester Estates v Carlton plc* [1986] 80. In the latter case Nourse J at p.85F said that the general rule should be to follow the later case, unless the third judge was convinced the second was wrong, for example because a persuasive authority had not been followed.

31. I also take into account the wider public policy issues which have over time led to a more flexible approach to the issue of standing. Groups of residents or interested people, may choose to group together to make representations, or attend inquiries, on a matter of interest and importance to them. This is particularly the case in matters concerning planning or the local environment, where the nature of the impact may often fall most directly on a group of people living in a particular area. It would be unfortunate if the law prevented them challenging the decision which they had participated in, in the same grouping as they had made the representations. I accept that the Aarhus Convention is not an overwhelming factor, because challenges can still be brought by individuals, but it and the general policy position would support a finding that a claim can be brought by an unincorporated association.

32. It might be argued that the simple answer to the issue in this case lies in the Schedule to the Interpretation Act 1978, wherein the definition of "person" "includes a body of persons corporate or unincorporate". This is subject to s.5 of that Act, which applies these definitions "unless the contrary intention appears". There is no reason in my view, why in the context of public law, and the Planning and Compulsory Purchase Act 2004 in particular, the contrary should appear. It is not necessary for the statutory scheme, and in terms of procedural protections such as security for costs or certainty of membership, these can be appropriately dealt with under the CPR.

33. I am fortified in this view by the wide range of judges, including some of the most eminent judges specialist in public law, who have assumed that an unincorporated association can bring a claim. I accept that if a point is not argued then another court should be slow to take a view on what the judge(s) must have assumed. However, jurisdiction is fundamental and any court would and should raise the issue if it doubts its jurisdiction. I do not accept that so many judges would have assumed jurisdiction if they had not been entirely confident that the unincorporated association had capacity to bring the claim. On this point it is relevant that the role of unincorporated associations in judicial review and issues around their ability to pay costs, changes of membership and their role at previous stages are common issues in judicial review, which lawyers and judges are well aware of. I am not prepared to assume that multiple judges have simply "missed the point", and proceeded without jurisdiction by oversight.

34. I do not accept Mr Fraser's alternative submission that even if an unincorporated association can be a claimant in a judicial review they cannot be in a statutory challenge. Firstly, the Interpretation Act definition points firmly in the opposite direction, and as I have already explained the contrary intention does not appear. Secondly, the Court of Appeal in ***Williams*** did not suggest that there was any such difference, and assumed that the claim was valid when lodged. Thirdly, none of the cases I have referred to suggest that the courts' acceptance of the unincorporated association as a claimant rested on the fact that other parties could be substituted. Fourthly, it would in my view be most unfortunate if there was a significantly different rule in judicial review to statutory challenge, given that the two can sometimes arise in closely aligned circumstances. If the statute forced that conclusion then that would be different, but here it plainly does not do so.

35. As I understand Mr Lopez's alternative submission, it is that because the Forum is no longer statutorily designated its functions have fallen away and therefore as a matter of fact it is no longer a person aggrieved. He argues that if the body has to be designated under the Act then an undesignated forum is not a person aggrieved under the Act. I do not think that this argument is correct. The Forum is a local body with a constitution and purposes relating to the good planning of Aireborough, whether or not it is designated under the PCPA. It sought designation under the statute because that gives it a particular statutory function and certain procedural rights, but the fact that that role and function had ended at the date of the claim, does not mean that its more wide-ranging purposes do not continue to apply. If it had never been designated then there would be little doubt that it was a person aggrieved within the meaning of the PCPA, and in my view that continues to apply now.

36. I therefore reject the application that the Forum does not have capacity to bring this claim. I allow the application to add two individual claimants, but I do not consider this to be necessary for the validity of the claim.