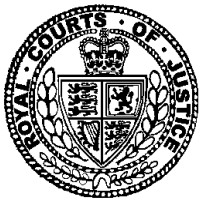

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Neutral Citation Number: [2021] EWHC 646 (Admin)

Case No: CO/2368/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

The Queen on the Application of
CROYDE AREA RESIDENTS ASSOCIATION

Claimant

and

NORTH DEVON DISTRICT COUNCIL

Defendant

and

PARKDEAN HOLIDAY PARKS LIMITED

Interested Party

- -
- -

Mr Richard Turney and Mr Alex Shattock (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Peter Wadsley (instructed by **North Devon District Council**) for the **Defendant**
Mr James Maurici QC and Ms Heather Sargent (instructed by **Herbert Smith Freehills LLP**) for the **Interested Party**

Hearing dates: **4 and 5 March 2021**

- -

Approved Judgment

Mrs Justice Lieven DBE :

1. This is an application for judicial review to quash the grant of planning permission to the Interested Party on 27 January 2014 for the use of lodges, static caravans and touring caravans at Ruda Holiday Park, Croyde, Braunton Devon ("the Holiday Park"). It can be seen from that opening sentence that the decision under challenge is very long outside the normal 6 week period for judicial review of planning decisions set out in CPR54.5.

2. The Claimant is an unincorporated association established with the purpose of protecting and preserving the area, including Croyde and the surrounding countryside, as one of outstanding national beauty. The Interested Party is the owner and operator of the Holiday Park. The Defendant is the Local Planning Authority ("LPA").

3. The issues that arise in this case are:

   a. Is the claim statute barred by reason of s.284 of the Town and Country Planning Act 1990 ("TCPA");

   b. If it is not statute barred, should an extension of time be granted;

   c. Even if an extension of time is granted, should relief be refused in any event.

4. Both the Defendant and the Interested Party accept that the 2014 planning permission was unlawful. The Defendant further accepts that the permission should be quashed. The Interested Party argues that it should not be quashed.

5. The Holiday Park is a large one with separate areas for lodges, tourers, static caravans, camping and various amenity spaces, and it lies close to Croyde Bay Beach. It has been in existence for many years. On the northerly elevation of the site are several fields, including one known as the Service Field, which lies to the North East of the Holiday Park. Historically there has been no camping or caravans on the Service Field and holidaymakers at the site did not have access to it until 2020.

6. The Holiday Park and the area within the 2014 planning permission, which extends well beyond the Holiday Park, lies within the Area of Outstanding National Beauty ("AONB").

<u>The Planning History</u>

7. In October 2013, the Interested Party applied to the Defendant for planning permission for an "extension of the time limits during which the holiday park may be open" (Application ref 56528).

8. It is clear from the Planning Statement accompanying the 2014 application, and the subsequent consultation responses, that this application was viewed by all parties as an application for changing opening times only. The Planning Statement notes:

> *"1. This Application seeks to extend the open period of the Holiday Park.*
>
> *2. This Application has three elements:-*

> *2.1 The timber clad lodges presently have Planning Permission to permit them to be open between 15st [sic] March and 15th January of the following year.*
>
> *This Application seeks to increase the open period of these lodges such that the usable open period will be between 1st February and 15th January of the following year.*
>
> *…"*

The Planning Statement then set out the details of the existing opening hours and why those hours restricted the Park's ability to operate.

9. On 27 January 2014, planning permission was granted by the Defendant by a delegated decision of its Officer ("the 2014 permission"). The description of the development in the 2014 permission was:

> *"Application to allow the use of the lodges, static & touring caravans between 01 February & 15 January each year and to allow use of swimming pool, club house & other communal facilities on the park within these revised opening periods (amended description) at Ruda Holiday Park Moor Lane Croyde Braunton."*

10. The Defendant's decision report accompanying the decision notice stated:

> *"This planning application does not propose increasing the amount of holiday accommodation or associated facilities in this area, only to be able to use the holiday accommodation over an increased time within the year…"*

11. It is clear from the Officer's report that the Defendant's Officer, in granting permission, intended the grant to affect the opening times of the existing holiday accommodation only. The application was considered and determined on that basis.

12. The 2014 permission was subject to four conditions. The first condition required the permission to be begun not later than the expiration of 3 years from the date of grant. The second condition was:

> *"The development hereby permitted shall be carried out in accordance with the plans submitted as part of the application, number 6800-LP and received on 21st October 2013 ('the approved plans')."*

13. Plan 6800-LP is a site location plan. As noted above, it mistakenly shows a large area of land edged red, including land which is owned by the Interested Party but not used for camping and caravans (including the Service Field), and c.12 hectares of land owned by third parties. The Interested Party currently owns c.6 hectares of green undeveloped land inside the red line and a further c.4.5 hectares in addition to that which was limited to tented camping and tented and/or touring areas. It appears from this that roughly 22 hectares of land were included within the red line which before 2014 had no permission for caravans or lodges to be stationed.

14. Condition Three provided:

> *"The timber clad lodges, static and touring caravans occupying the site relating to this permission shall be used for the provision of short let holiday accommodation operating only between the 1st February and 15th January the following year. They shall not be occupied as permanent dwellings and shall not be occupied by any one person for a period exceeding 28 days in any calendar year. The owner or operator shall maintain a register of occupants for each calendar year. This shall be made available on request for inspection by any duly authorised officer of the [LPA]".*

15. Condition Four provided:

> *"The swimming pool, clubhouse and other communal facilities hereby approved shall only be open between the 1st February and 15th January the following year."*

16. The fact that the 2014 application was never intended to extend the area of the Holiday Park and that the inclusion of the Service Field (and other land) within the red line was a mistake is accepted by the Defendant and the Interested Party. It appears that the red line was simply drawn in the wrong place and the LPA failed to spot the error.

17. In November 2016, the Interested Party submitted a planning application to extend the Holiday Park including stationing some 50 caravans within the Service Field (application ref 61826) ("the 2016 application"). It is therefore clear that at this point the Interested Party did not consider that the 2014 permission granted anything other than what had been applied for, namely an extension of the opening hours of the existing buildings and structures on the site.

18. The 2016 application was controversial and met objection from (amongst others) the National Trust and the regional AONB Partnership Officer. Their view was that the proposal failed to preserve the appearance of the AONB. The Interested Party amended the application to provide for 22 caravans to be stationed on the Service Field; and amended it again to reduce to 12 static/lodge caravans. The 2016 application was eventually withdrawn by the Interested Party in December 2017.

19. In January 2018, the Interested Party applied for a Lawful Development Certificate ("LDC") under s.192 TCPA for the siting of caravans on the Service Field. The central contention in the LDC application was that the 2014 permission permitted the use of the entire red line area on plan 6800-LP for the stationing of caravans.

20. The LDC application was refused by the Defendant by delegated decision on 31 May 2018. The Interested Party appealed this decision at the end of November 2018 and the appeal was heard by an Inspector by way of a hearing in February 2020. The single issue which arose in the appeal was essentially a question of law, namely the effect of the 2014 permission. The Defendant maintained that the 2014 permission did not have the effect claimed. However, the Inspector allowed the appeal and granted the LDC on 21 February 2020.

21. I will refer to the detail of the various periods below, but the present challenge was lodged on 3 July 2020.

The Grounds of Challenge

22. The Claimant advances four grounds of challenge to the 2014 permission. Most unusually these grounds of challenge are not disputed by the Defendant or the Interested Party and do not lie at the centre of this case. It is therefore appropriate for me to deal with them relatively shortly.

23. Ground One is that the Defendant erroneously granted permission for a different purpose and in respect of a different area of land than it intended. The Interested Party was applying for the alteration of the operational season of the Holiday Park, not for extension of the Area. The Defendant therefore failed to take into account a material consideration, namely that the permission which it inadvertently granted would significantly extend the area of the permission.

24. In my view it is plain that this Ground must succeed. The Defendant self-evidently failed to take into consideration the impact of extending the Holiday Park well outside its existing boundaries because the Defendant did not realise that was the legal effect of the permission. It is hard to conceive of a more obvious failure to take into account material considerations.

25. Ground Two is that the grant of permission did not comply with the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The permission fell within Schedule 2 of the Environmental Impact Assessment Regulations as permitting a permanent holiday park well in excess of 1 hectare and therefore should have been subject to a screening decision. I accept that it is highly likely that the decision would have been that this was Environmental Impact Assessment development.

26. Again, in my view, this Ground must succeed. The correct procedures were not undertaken. This has some relevance to the issue of an extension of time because the error here is one that involves a breach of EU law. However, the caselaw does not suggest any material difference to the issue of delay in respect of breaches of EU law from "domestic" law, and therefore I do not consider the nature of this error of law makes any real difference to the delay analysis below.

27. Ground Three is the unlawful assessment of the development by the Defendant. The development as consented is contrary to a number of development plan policies. As at 2014 the most relevant policies were ENV1, ENV2, ENV3, ECN10 and EC11 of the North Devon Local Plan 1995-2011, all of which were inconsistent with the development being allowed.

28. The Defendant's grant of permission again undoubtedly involved them failing to apply s.38(6) of the Planning and Compulsory Purchase Act 2004 by assessing the issue of policy compliance; s.85 of the Countryside and Rights of Way Act 2000 in failing to have regard to the purpose of conserving and enhancing the AONB; and a number of elements of national policy in the National Planning Policy Framework in relation to the impact on the AONB, countryside, flooding and highways.

29. These matters were not considered by the Defendant and again this must amount to an error of law in the grant of the permission.

30. Ground Four is that the application contained a certification that the Interested Party was the sole owner of the land which was the subject of the application. In fact it was not, and a large part of the land was owned by others. In principle this is an error of law, although it is fairly common for permissions to be upheld even where this type of error is made. This Ground is therefore not quite as clear cut as the first three. However, given the scale of the error, and the fact that at least one of the landowners, the National Trust, would have been adamantly opposed to the development, the failure to properly certify might well be an operative error of law. Given the strength of the other Grounds, I do not need to determine this matter.

31. As I have made clear above, neither the Defendant nor the Interested Party dispute that the 2014 permission was granted in error of law and therefore itself was unlawful. I entirely agree with this analysis. The issue in the case is what happens next.

Issue One - The Statutory Bar Argument

32. The Interested Party, but not the Defendant, argues that the permission cannot now be quashed because there is a statutory bar which protects it from challenge. Mr Maurici's argument is that the effect of the statutory provisions and the grant of the LDC means that the Court is barred from quashing the 2014 permission.

33. Section 284(1) of the TCPA states as relevant:

> *"284 Validity of development plans and certain orders, decisions and directions.*
>
> *(1) Except in so far as may be provided by this Part, the validity of—*
>
> *…*
>
> *(f) any such action on the part of the Secretary of State as is mentioned in subsection (3),*
>
> *(g) a relevant costs order made in connection with an order mentioned in subsection (2) or an action mentioned in subsection (3),*
>
> *shall not be questioned in any legal proceedings whatsoever."*

34. Section 288(1) (b) and (4B)(c) state:

> *"288 Proceedings for questioning the validity of other orders, decisions and directions.*
>
> *(1) If any person—*
>
> *…*

(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

…

(4B) An application for leave for the purposes of subsection (4A) must be made before the end of the period of six weeks beginning with the day after—

…

(c) in the case of an application relating to an action to which this section applies, the date on which the action is taken;"

35. Section 192 states:

"192 Certificate of lawfulness of proposed use or development.

(1) If any person wishes to ascertain whether—

(a) any proposed use of buildings or other land; or

(b) any operations proposed to be carried out in, on, over or under land,

would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(3) A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

> *(c) give the reasons for determining the use or operations to be lawful; and*
>
> *(d) specify the date of the application for the certificate.*
>
> *(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."*

36. Section 195 provides that the LPA can grant a certificate and s.195(2) sets out the Secretary of State's powers on appeal:

> *"195 Appeals against refusal or failure to give decision on application.*
>
> *…*
>
> *(2) On any such appeal, if and so far as the Secretary of State is satisfied—*
>
> *(a) in the case of an appeal under subsection (1)(a), that the authority's refusal is not well-founded, or*
>
> *(b) in the case of an appeal under subsection (1)(b), that if the authority had refused the application their refusal would not have been well-founded,*
>
> *he shall grant the appellant a certificate under section 191 or, as the case may be, accordingly or, in the case of a refusal in part, modify the certificate granted by the authority on the application."*

37. Mr Maurici argues that the effect of these provisions is that the planning permission upon which the lawfulness of the use in s.192 is presumed cannot itself be challenged. This is because to do so would be to question the validity of the LDC granted under s.195, contrary to the restriction (or privative provision) in s.284(1). He argues that if the planning permission is quashed, but the LDC stands (as it must do by s.284), either the legal position will be wholly unclear, or the Interested Party is deprived of the benefit of the LDC.

38. Mr Maurici relies by analogy on *R (Childs) v First Secretary of State* [2006] JPL 1326 and *R (Lymington River Association) v SSCLG* [2014] EWCA Civ 1190 as situations where the Court has rejected challenges as attempts to avoid the effect of the time limits in s.284 and s.288. Neither of the cases concerns the legal issue which arises here, and *Lymington River* was, as Sullivan LJ said, a blatant attempt to avoid the time limit by relying on exactly the same ground but under the Habitats Directive to seek to compel the Secretary of State to revoke the permission. I do not consider it provides much assistance to the legal issue I have to decide.

39. Mr Maurici also relies on *R (Government of France) v RB of Kensington and Chelsea* [2017] 1 WLR 3206 at [52] where the Court of Appeal comment on the effect of a s.191 certificate. However, the issue in that case was the difference between a certificate of lawfulness of existing use as opposed to proposed use, and whether the

certificate was the only way to establish lawfulness. I do not consider it to assist on the issue in the present case.

40. Mr Turney submits that on the clear words of the statute, the bar in s.284 only applies to the LDC and not to any planning permission upon which it is based. It is worth remembering at this point that LDCs will not always, and indeed often will not, rest on lawfulness stemming from a planning permission. The lawfulness which is certified will frequently be the result of the effluxion of time provisions rather than a pre-existing planning permission.

41. His simple argument is that the Interested Party is seeking to extend the words of s.284 to cover the legality of the planning permission when that is not what the statute actually says.

42. There is no caselaw directly on this point. However, the Claimant relies on *Staffordshire CC v Challinor* [2008] 1 P&CR 10 where the Court of Appeal was considering the effect of a CLEUD (a lawful development certificate in relation to existing use or development) granted under s.191 TCPA, as opposed to the present case which concerns an LDC for proposed use under s.195. The issue was the effect of the CLEUD on civil proceedings brought against the landowner where an enforcement notice had been served. The case turned on the nature of the "conclusive presumption" in s.191(6), which is equivalent to that in s.192(4). It is material to note that s.191(6) says *"the lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed".* There is no reference to "material change" as there is in s.192(4) because a CLEUD is dealing with the lawfulness of an existing not the proposed use.

43. At 54-56 Keene LJ said:

> *"54. Such a certificate may have the practical effect of reducing the amount of investigation into the past use of the land required of a court in subsequent proceedings, as Mr Smith argues. But it would not necessarily avoid such a requirement. A CLU only certifies that the use in question was lawful on the specified land at a particular point in time, namely the date of the application for the CLU: see section 191(4) and (5)(d). The conclusiveness of the presumption in section 191(6) relates only to the lawfulness of the use at that date. It will not always be an answer to a subsequent enforcement notice, even if it is raised on appeal, because the use may not have continued until the date of the issue of the notice: see the cases referred to in paragraph 31 of this judgment. That appears to have been the view of the inspector in the present case in respect of the use of the land as a plant hire contractor's yard, even though that had been the first of the two uses covered by the CLU.*
>
> *55. Indeed, it has been held in the M and M (Land) Ltd case that a use certified by a CLU can be abandoned, despite section 191(6). It was held there that*
>
> *"... section 191(6) does no more and no less than declare conclusively that at the point of time that the certificate refers to, that particular use is lawful in that it operates like a planning permission for a change of*

> *use which endures for the benefit of the land and makes a particular use lawful and then is spent. However, as I have said, the authorities are quite clear that that does not stand in the way of a permitted change of use being abandoned. … A use permitted can be abandoned: a use that has been dignified with a certificate of lawful use can also be abandoned, notwithstanding the words of section 191(6)."*
>
> *56. That decision in the High Court seems to me to be right and to accord with the other authorities to which I have just referred. It indicates both that the existence of a CLU does not necessarily overcome the problems facing a court if a subsequent challenge to an enforcement notice could be mounted and also that a CLU is only "conclusive" in a limited sense. The purpose of section 285(1), namely to resolve issues such as existing use rights as part of the process of appeal to the Secretary of State, could still be undermined if a CLU could be relied on at a later stage. There could be a considerable interval of time since the issuing of the CLU, during which time a site may have undergone a complex sequence of uses."*

44. This analysis supports Mr Turney's argument that the LDC can only establish lawfulness on the particular date. Where there is a subsequent change which alters in a material way the planning position, then the LDC may no longer operate to conclusively presume lawfulness. So, for example, the use in question might be abandoned, which would then deprive the site of the lawfulness set out in the LDC.

45. The Claimant's argument based on ***Challinor*** is further supported by the reference in s.192(4) to the lawfulness being conclusively presumed *"unless there is a material change, before the use is instituted…."*. Mr Turney says the material change here would include the quashing of the planning permission. Therefore, the statute contemplates that there could be a material change, before the lawful use is implemented, which would stop the presumption of lawfulness in the LDC.

46. Mr Maurici argues that the "material change" referred to in s.192(4) must be a material change on the land, e.g. a material change of use. However, I do not see why this should be correct. As Keene LJ said, there might be a revocation or an abandonment of the use before implementation. Either event would remove the effect of the LDC. I cannot see why, on the words of the statute, a material change could not be the quashing of an earlier planning permission.

47. Mr Turney argues that if an LDC is sought in respect of a use under a planning permission, which is valid at the date of the application, then the LDC must be granted. However, that says nothing about the situation in which the planning permission is subsequently quashed. In any case where the planning permission is granted unlawfully it is necessarily valid until quashed. He argues that the Planning Inspector had no jurisdiction to consider the validity of the planning permission and therefore had to proceed on the basis that it was valid. He refers to the last sentence of DL11 of the Inspector's decision, where the Inspector said: *"What the Council thought it was determining in 2014 and what it then granted permission for, are two different matters".* However, Mr Turney does accept that an application could have been made for judicial review of the planning permission and a stay of the determination of the LDC sought. This is plainly correct, but such pragmatic

considerations have little if anything to do with the statutory construction issue before me although they are relevant to the delay issues which I deal with below.

48. At this point there is an argument between Mr Maurici and Mr Turney as to what "the use" is that is referred to in s.192(4). Mr Turney argues that it must be the use certified in the LDC, namely the use of the Service Field for the stationing of caravans. Whereas Mr Maurici argues it is the use in the planning permission. This issue is relevant because the use in the planning permission, namely the change in operating hours, has undoubtedly been implemented. The use in the certificate, namely the use of the Service Field for the stationing of caravans, has not. Therefore, for the purposes of s.192(4), Mr Maurici argues that the use has been implemented whereas Mr Turney argues it has not.

49. In my view "the use" in s.192(4) must be the use set out in the certificate. Otherwise the "use" in the opening words of s.192(4) is different from the "use" that is instituted before the material change. That would make no sense whatsoever. Therefore, in my view "the use" for the purposes of s.192(4) has not been implemented.

50. Mr Turney submits that the privative provision in s.284 should be narrowly construed, because it is a form of ouster clause, and the caselaw establishes that ouster clauses should be strictly construed. Mr Maurici argues that s.284 is not an ouster clause, it is a time limit for challenges with a privative provision and as such it should be construed in accordance with its purpose. Both relying on competing caselaw.

51. In *Hillingdon v Secretary of State for Transport* [2017] 1 WLR 2166 Cranston J rejected a challenge to the National Policy Statement on runway capacity on the ground that s.13 of the Planning Act 2008, which provided that such challenges could only be brought at a later stage of the process, was not an ouster clause and therefore did not need to be construed narrowly, see [48].

52. In *Manydown v Basingstoke and Deane DC* [2012] JPL 1188, the Court was considering the scope of s.113 of the Planning and Compulsory Purchase Act 2004 which is a provision similar to s.284 TCPA in its effect. Lindblom J said at [81]:

> *"In my view Mr Price Lewis postulated too broad a scope for s.113(2). As with any statutory ouster of the court's jurisdiction, one must interpret this provision strictly in accordance with the words Parliament has chosen for it. This principle was recognised in Hinde, where it was stressed that s.113 must be construed according to its own terms. I also think it is important to notice the difference in statutory language between the ouster provision in s.113 and the one that previously applied to challenges to local plans. Section 284(1) of the 1990 Act applied to a local plan "whether before or after the plan … has been approved or adopted". Such words do not appear in s.113 of the 2004 Act."*

53. I was also referred to *R v Hinckley BC ex p Fitchett* [1997] 74 P&CR 52 and *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 on the correct approach to the construction of provisions that seek to limit the power of the court to consider a challenge to a relevant order. However, all these cases will to a considerable extent depend on the precise nature of the statutory scheme and the statutory words. The statutory scheme in *Privacy International* is completely different

from that I am considering, and the approach to the privative provision there is of little assistance to me. Although ***Fitchett*** was a planning case, the limitation in issue was completely different from that in s.284.

54. I accept Mr Turney's argument on the statutory bar issue. The starting point on any statutory construction argument must be the words of the statute. The simple point here is that s.284 does not on its words debar a challenge to the planning permission which underlies the grant of an LDC. Therefore, Mr Maurici's argument has to rest on giving the provisions a purposive construction so (he says) as not to undermine the effect of s.284.

55. In terms of the approach to construction here, s.284 is not an ouster provision, properly understood. Such a provision, in its purest form, is such as was in issue in ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147 where the jurisdiction of the court was wholly removed. The cases cover a range of statutory provisions which might be considered to be partial ousters. The provision in ***Privacy International*** ousted the jurisdiction of the court, albeit there was an appeal to the Investigatory Powers Tribunal. On the other hand, the provision in ***Hillingdon*** only restricted the jurisdiction of the court to a certain stage in the National Policy Statement process. Neither covers precisely the situation here.

56. In my view, it is appropriate to take a cautious approach to extending a statutory limitation on challenge, as is given in s.284 to the LDC, to a different legal order, the planning permission. If I accepted Mr Maurici's argument I would be extending s.284 to a legal document which the statute does not protect.

57. I am concerned that Mr Turney's argument does result in the undermining of the LDC, and therefore might be said to undermine the purpose of the statutory provision. However, in my view there are two answers to this. Firstly, it is clear from ***Challinor*** and from s.192(4) that the LDC does not create absolute certainty of the lawfulness of the use going forward in any event. The statute envisages that there may be a material change which removes the certified lawfulness and I see no reason why the subsequent quashing of a planning permission should not be such a material change. Secondly, the mischief that Mr Maurici relies upon can in my view be dealt with by the exercise of the court's discretion not to quash if on the facts of the case that is the appropriate response. It would be a highly unusual, if not exceptional, situation where the court would quash a planning permission where the effect was to remove the benefit of an LDC. As I explain below, I consider this to be such an exceptional case. However, in the vast majority of cases the existence of the LDC will be an overwhelming reason not to quash the planning permission.

58. For these reasons I consider that the court does have jurisdiction to consider the challenge.

Issue Two - Delay and extension of time

59. There is no doubt this claim is brought way outside the 6 week time period for judicial review of decisions under the Planning Acts set out in CPR54.5(5). The correct approach to such applications has recently been considered by the Court of Appeal in ***R (Thornton Hall Hotel Ltd) v Wirral MBC*** [2019] P.T.S.R. 1794. The Court decided that time should be extended, and relief granted, in proceedings to quash a planning

permission brought 5.5 years after the permission had been granted. The intention of the planning authority had been to grant a permission to allow the use of marquees for weddings for a period of 5 years. In fact, the authority had failed to attach the intended conditions such that the unintended effect of the permission was to grant a permanent permission. The Court (Sir Terence Etherton MR, Lindblom and Irwin LJJ) at [20] referred to s.31(6) and (7) of the Senior Courts Act 1981:

> *"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."*

60. They held at [21]:

> *"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 in R v Exeter City Council, Ex p JL Thomas & Co Ltd [1991] 1 QB 471 , 484G; and in R v Swale Borough Council, Ex p Royal Society for the Protection of Birds [1991] 1 PLR 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 LJ in Finn-Kelcey v Milton Keynes Borough Council [2009] Env LR 17 , paras 22 and 23; Sales LJ in R (Gerber) v Wiltshire Council [2016] 1 WLR 2593 , paras 46 and 47; Lindblom LJ in Connors v Secretary of State for Communities and Local Government [2018] JPL 516 , para 87; Schiemann LJ in Corbett v Restormel Borough Council [2001] JPL 1415 , paras 14–27; Sedley LJ at paras 29–33; Hobhouse LJ in R v Bassetlaw District Council, Ex p Oxby [1998] PLCR 283 , 296–301.*

(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 LJ in Gerber's case [2016] 1 WLR 2593 , para 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 (Development Management Procedure) (England) Order 2010 (SI 2010/2184)—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 LJ in Gerber's case, para 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": Gerber's case, para 49.

(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 LJ in Gerber's case, para 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 (Gavin) v Haringey London Borough Council [2004] 2 P & CR 13 , para 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 LJ in Finn-Kelcey's case [2009] Env LR 17 , paras 25–29.

(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 LJ in Gerber's case [2016] 1 WLR 2593 , para 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 of Hadley in R v Criminal Injuries Compensation Board, Ex p A [1999] 2 AC 330 , 341A–G; and Sedley LJ in R v Lichfield District Council, Ex p Lichfield Securities Ltd [2001] PLCR 32 , para 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 for England and Wales, Ex p Caswell [1990] 2 AC 738 ; and Sales LJ in Gerber's case [2016] 1 WLR 2593 , paras 59 and 60, and 64–69. 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 reopened: see Sales LJ in Gerber's case, para 62. Each case will turn on its own particular facts and an evaluation of all the relevant circumstances: see Schiemann LJ in Corbett's case [2001] JPL 1415 , paras 24 and 25; and Hobhouse LJ in Ex p Oxby [1998] PLCR 283 , 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 LJ in Gerber's case, at paras 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 LJ in Gerber's case, at para 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 LJ in Tata Steel UK Ltd v Newport City Council [2010]

EWCA Civ 1626 at [7], [8], [15] and [16]; and Sales LJ in Gerber's case, at para 64.

On the facts, the Court held that the first instance judge had been correct to extend time in that case.

61. The Court of Appeal in *Thornton Hall* carried out a comprehensive review of all the relevant cases and it is not necessary for me to go back through much of that earlier caselaw. It is necessarily the case that a decision whether to extend time will be very fact specific, although it is appropriate to start from the position that it is of great importance that Claimants act promptly, particularly in cases that concern challenges to planning permissions.

62. In *Usk Valley v Brecon Beacons National Park* [2010] 2 P&CR 14 Ouseley J quashed the planning permission 4 years after it was granted. Time had been extended by Wyn Williams J at the permission stage, so all that Ouseley J was considering was the issue of whether to exercise the discretion not to quash under s.31(6) of the Senior Courts Act 1981. He said at [161] that the evidence of hardship was weak, as was the Claimant's evidence on justification for the extensive delay. He then said: *"What is decisive to my mind therefore is that the permission is invalid and should in principle be quashed in the absence of strong contrary reasons."* I treat these words with some care as they predate *Thornton Hall.* The correct approach for me must be to go through the factors in *Thornton Hall* and taking those into account seek to strike a fair balance.

63. Mr Maurici argues that the onus lies on the Claimant to justify all the delay. Further, not just would very special reasons be needed (*R (Gerber) v Wiltshire Council* [2016] 1 WLR 2593 [49]) but, given the length of the delay here, exceptional circumstances would be required. He highlights two points in particular. Firstly, that legal advice is not a justification for delay, *Thornton Hall* [21(5)] and *Gerber* [53]. Secondly, that waiting for an alternative course or remedy, here waiting for the Defendant to decide whether to revoke or modify the permission, is again not a justification for delay.

64. In respect of *Thornton Hall* he refers to the fact the Court of Appeal said the facts of the case were "unique" and a key factor in the decision was that the developer and the LPA had sought to hide the error which led to the unlawful planning permission. In contrast, the Interested Party here had been entirely open about what had occurred and what action it was taking.

65. The relevant periods in this case can conveniently be divided into three.

1.1 "The First Period": from the date of the 2014 permission (27 January 2014) until the Defendant consulted on Interested Party's application for the LDC in early 2018.

1.2 "The Second Period": from consultation on the LDC in early 2018 until the Appeal Decision was made on 21 February 2020; and

1.3 "The Third Period": from the date of the Appeal Decision (21 February 2020) until the claim form was filed on 3 July 2020.

66. The overall period of "delay" here is exceptionally long, some 6.5 years. However, this figure in itself is somewhat misleading. For the first 4 years ("the First Period") it is accepted by the Interested Party that the Claimant had a good reason for the delay. The chronology shows quite clearly that the Interested Party itself did not think that the planning permission had the effect ultimately accepted by the Inspector. This is shown beyond any doubt by the 2016 application for a fresh planning permission for the Service Field which would have been unnecessary if the 2014 permission had the legal effect subsequently argued for.

67. Therefore, the Claimant's failure to challenge the 2014 permission during this period is entirely reasonable and explicable. For the First Period this is not a case of a litigant failing to act with due diligence or relying on the default of others. There was no reason to believe that there was any reason or ground on which to seek to challenge the 2014 permission. However, I accept Mr Maurici's argument that the fact the First Period is long does not lessen the burden on the Claimant to justify any later delay.

68. The Second Period runs from the point when the Interested Party was known to be asserting that the effect of the permission was to allow caravans to be placed on the Service Field to the grant of the LDC by the Inspector. Mr Turney argues that there was no basis for the Claimant, or any of its members, to seek to challenge the 2014 permission during this period because they and the Defendant were arguing that it did not have the legal effect contended for by the Interested Party. Indeed, the Defendant had refused the LDC application on 31 May 2018 and it would therefore have been wholly inconsistent for them to challenge the permission during this period.

69. Mr Maurici submits this analysis is wrong because various people, including members of the Claimant, were arguing in respect of the LDC application that the 2014 permission was unlawful. Therefore, the opponents of the permission were aware of the issue and a challenge could and should have been brought at that stage. A number of consultees on the LDC raised the fact that the National Trust had not been consulted in 2014, even though their land was included within the red line, and that was a ground to challenge the validity of the permission.

70. Mr Maurici argues that the Claimants had to make an election at this stage whether or not to challenge the permission following the analysis in ***Shoesmith v Ofsted*** [2011] PTSR 1459. He argues that the Claimant should have asked for the LDC application to be adjourned pending the determination of a challenge to the 2014 permission. I do not think that the analogy works as the factual position in ***Shoesmith*** was so different. Critically Ms Shoesmith knew she had a choice of legal route in order to pursue her case and knew she had to take action. In the present case the Defendant made a decision wholly favourable to the Claimant's position and as such there would have appeared to have been no reason to bring a challenge to the 2014 permission at that stage as the Interested Party's argument as to the legal effect of that permission had been rejected by the Defendant.

71. Mr Turney submits that the lawfulness of the 2014 permission could not have been raised in the LDC consideration process. This is correct in the sense that neither the Defendant nor the Inspector had the power to quash the 2014 permission. However, the lawfulness of the 2014 permission did in my view go to whether the LDC should be granted. Plainly if it was unlawful then no LDC should be granted. In those circumstances, the Claimant, or someone else, could have sought judicial review of

the 2014 permission before the LDC was granted. If such a challenge had been brought then in all probability it would have been stayed pending the outcome of the LDC appeal. That is one factor that I will take into account below when going through the *Thornton Hall* considerations.

72. The Third Period is the most problematic for the Claimant, although it is a relatively short period within the context of the 6 year overall period. I accept Mr Maurici's argument that each period of delay has to be separately considered and justified. When the LDC was granted, the Claimant took legal advice and decided not to challenge the LDC. Ms Young sets out the timeline in her witness statement and makes the point that the LDC decision came shortly before the start of the Covid-19 lockdown and it was difficult in those early months to arrange virtual meetings and thus for a group such as the Claimant to make a decision. Although I do not consider this an overwhelming factor, I do take into account the fact that it is a significant decision for a group such as the Claimant to bring a judicial review and it can potentially expose the members to financial risk. Therefore, the difficulties posed by Covid, particularly to local residents some of whom were elderly, is a factor in the delay issue. The Claimant decided to seek to persuade the Defendant to modify or revoke the permission and it was only when the Defendant refused to take that course that the claim was lodged.

73. As was the case in *Thornton Hall* at [46], the factors here that go to delay, and extension of time, also go to relief. I will therefore consider those factors before trying to undertake an overall balancing exercise.

74. The prejudice to the Interested Party from quashing is set out in three witness statements of Mr Griffiths and an agreed position statement. There is some direct incurred financial loss from the cost of applying for the LDC and then appealing, and some associated costs of applying for the further planning permission granted in January 2021. There are much larger future losses that the Interested Party seeks to rely on. If the 2014 permission was upheld and 50 caravans/lodges were developed on the site there would be a gross annual income of over £1m per annum. Mr Griffiths also says that future financing options for the Holiday Park might be negatively impacted because there would be financing advantages from the larger park. Given the subsequent grant of planning permission for the extended hours there is no longer any issue of prejudice from that impact if the 2014 permission is quashed. I note that there is no longer any loss from quashing in respect of the extended hours because a planning permission has now been granted that replicates that aspect of the 2014 permission.

75. I give considerable weight to the lost expenses of applying for and appealing the LDC because those are costs incurred by the Interested Party. However, although the loss of future income if the permission is quashed is a relevant consideration, in my view it is appropriate to give that less weight than money spent in reliance on a permission which is then quashed. If the Interested Party does retain the permission here, then the financial benefit is as a result of a very serious planning error which should never been made and a permission which the Interested Party did not seek. As the Claimant describes it, the Interested Party gained a "windfall". If the windfall itself, as opposed to any financial reliance that they have placed upon it, is removed by quashing, then it seems to me little weight should be attached to that consequence.

76. The Interested Party also relies on the loss of future jobs if the Service Field is not developed and the loss to the local economy. Those are real issues and I give them some weight. However, it is relevant that it is close to inconceivable that the 2014 permission would have been granted if the impact had been understood. Therefore, in any "planning balance" the jobs and economic benefits would have been extremely unlikely to have outweighed the planning harm from the development.

77. Mr Maurici also relies on harm to good administration if the permission is quashed. His principal argument is that the result would be a wholly uncertain legal position in respect of the Service Field and that planning uncertainty is harm to good administration. He relies on *Gerber* at [60] and the reference to *R v Dairy Produce Board ex p Caswell* [1990] 2 AC 738 where Lord Goff said at p.749-750:

> *"I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. This is because applications for judicial review may occur in many different situations, and the need for finality may be greater in one context than in another. But it is of importance to observe that section 31(6) recognises that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking the question whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently of matters such as these. In the present context that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened. In the present case, the court was concerned with a decision to allocate part of a finite amount of quota, and with circumstances in which a re-opening of the decision would lead to other applications to re-open similar decisions which, if successful, would lead to re-opening the allocation of quota over a number of years. To me it is plain, as it was to the judge and to the Court of Appeal, that to grant the appellants the relief they sought in the present case, after such a lapse of time, would be detrimental to good administration …"*

78. On the other side of the balance Mr Turney says that there would be prejudice to good administration if a planning permission as harmful and blatantly unlawful as this one is allowed to stand. He relies on [36] of *Thornton Hall*:

> *"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."

79. In determining whether to extend time and whether to exercise my discretion under s.31(6) not to grant relief, I consider the factors are effectively the same under each heading.

80. This is in my view a unique and exceptional case. That is because the factors on both sides of the balance are extreme. The starting point is that the extension sought is over 6 years, an exceptionally long time for such a challenge and for any judicial review. I note however that the reason the period is so unusually long is that the impugned part of the permission, the extension of the site, has still not been implemented. This is highly unusual, indeed normally a permission not implemented for this period of time would have lapsed. The reason it has not in this case is that nobody, including the Interested Party, realised the effect of the permission for the first 4 years.

81. The first 4 years are agreed by all parties to be justifiable, however that does not detract from the overall length of delay, or the need to justify each part. The reasons for delay during the Second Period are strong, although not overwhelming. The Claimant could have tried to judicially review the 2014 permission before the LDC was granted, but it would have appeared quite unnecessary to do so and would have involved a convoluted legal position by the Claimant of arguing the opposite of what its members were saying to the LDC inspector. The best legal advice would have been to lodge a claim and then ask for it to be stayed, but I understand why that might have been viewed as unnecessary. I think this delay was reasonably justifiable, although it is still relevant to the overall balance.

82. The Third Period of delay has much less justification for the reasons I have set out above, and I take this into account in the overall balance. The Claimant should have lodged a challenge immediately after the LDC was granted. The fact that they may well have received poor legal advice and thought it appropriate to wait for the Defendant to decide whether or not to revoke or modify are not good reasons for delay.

83. There is great importance in challenges to planning permission being made with "the greatest possible celerity". This is in the public interest and in the interests of the holders of the permission. The Interested Party is entitled to rely on the grant of permission. However, the prejudice from any reliance on the grant here is real but relatively limited, i.e. the cost of the LDC application and the incidental costs. The real prejudice is the loss of the permission itself. However, that gain was itself unlawful as is conceded and should never have been granted. I would have given great weight to any losses that had been incurred, but in my view future financial gain should be given relatively little weight. The same can be said for future jobs and local economic benefit.

84. Although there is some prejudice to good administration from the late challenge, this is not the same as the type of prejudice that arose in ***Caswell*** where there was a scheme of quotas which would be made much more difficult to administer if a late quashing was allowed.

85. The overriding factor in my view is the harm that would flow from upholding the planning permission. The site is in the AONB in a highly prominent location. The visual material shows the impact if only the Service Field was developed, but the even greater harm if the whole of the red line application site was developed. Mr Maurici accepts that the effect of his argument must be that caravans could be stationed across the entire area. Although I take into account that I have no evidence of the likelihood of that happening; that the Interested Party has only indicated an interest in placing caravans on the Service Field; and that it may well be in relation to National Trust land that covenants would prevent its development, the wider potential harm is relevant.

86. However, even if I only take into consideration the development of the Service Field, that is a significant intrusion into the AONB, contrary to a host of local and national policies. This case is in my view a more extreme version of *Thornton Hall* – the interests of the credibility of the planning system weighs heavily in favour of quashing the permission. It would be very hard to explain to a member of the public why a permission which was granted in complete error and where the developer has now got a permission which gives him what he originally sought, i.e. the extension of operating times, should not be quashed.

87. Therefore, taking all the relevant factors into account and applying both *Thornton Hall* and *Gerber,* I consider this to be an exceptional and indeed unique case in which it is appropriate to extend time and to quash the 2014 permission.

88. I will deal with any issues concerning relief, if that is not agreed, in further submissions in writing.