

Neutral Citation Number: [2008] EWCA Civ 1067

Case No: C1/2008/1578

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Collins
CO/3453/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2008

Before :

LORD JUSTICE KEENE
LORD JUSTICE THOMAS
and
LORD JUSTICE HUGHES

Between :

	Andrew Finn-Kelcey	<u>Appellant</u>
	- and -	
	Milton Keynes Council	<u>Respondent</u>
	MK Windfarm Limited	<u>Interested Party</u>

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr P Stinchcombe (instructed by **Messrs Richard Buxton**) for the **Appellant**
Mr D Elvin QC & Mr R Turney (instructed by **Milton Keynes Council**) for the **Respondent**
Mr J Litton (instructed by Messrs Burges Salmon) for the **Interested Party**

Hearing date: Friday 29th August 2008

Judgment Lord Justice Keene:

Introduction:

1. This appeal concerns a planning permission granted by the respondent, the local planning authority, for a windfarm on land at Petsoe Manor Farm, Olney in Buckinghamshire. The appellant is a local landowner and farmer. He and others, including an organisation of which he is a member, called BLEW (“Bucks Lacks Enough Wind”), had objected to the planning application made by MK Windfarms Ltd, the interested party (“the IP”). The respondent authority granted planning permission on the 14 January 2008. On 10 April 2008 the appellant filed a claim form seeking permission to proceed with a claim for judicial review of that grant of planning permission. The matter came before Collins J at a “rolled-up” hearing on 3 July 2008, with the substantive claim to be dealt with if permission were granted, but by a decision dated 17 July 2008 the judge refused permission to seek judicial review. He did so both on the merits of the proposed claim and because of a lack of promptness as required by CPR 54.5(1). Permission to appeal against that decision was granted by Mummery and Stanley Burnton LJ on 15 August 2008, together with an order for expedition.

The Facts:

2. The development proposed consisted of a windfarm comprising seven wind turbines up to 125 metres in height, a substation and various related features, all for a period of 25 years, that being the operational life of the turbines. The application, dated 17 August 2006, was for full planning permission and was accompanied by an environmental statement, it being recognised that the proposed development was one which fell within Schedule 2 of the *Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999* (“the 1999 Regulations”) and which therefore required an environmental statement to be submitted.
3. Part of the environmental statement, which was a substantial document, consisted of a calculation of the energy which would be produced by the windfarm, which was then translated into a reduction of CO₂ and other emissions from conventional energy sources. An ingredient in that calculation as set out was a long-term wind speed calculation for the application site of 6.9 metres per second at the height of the hubs of the proposed turbines. That particular figure appeared in a report by a firm called the Wind Consultancy Service, prepared for the IP’s parent company, Your Energy Limited, and submitted as part of the environmental statement. It is clear from paragraph 2.1 of that report that these wind consultants had used wind data obtained from an anemometer mast on the site, a mast which had been erected in 2004 with planning permission in order to obtain such wind speed and direction data. The report refers to data for a period from December 2004 to the end of May 2006 but without setting out the detailed readings. At that stage, the raw wind data was not supplied to the respondent.
4. Subsequently by a letter dated 20 April 2007 the respondent requested further information

from the IP. A limited part of the information requested was sought formally under regulation 19 of the 1999 Regulations, a provision which I set out later but which empowers a local planning authority, if of the opinion that the environmental statement “should contain additional information in order to be an environmental statement”, to notify the applicant for planning permission, who is then required to provide such “further information”. The information sought under Regulation 19 in the present case related to three matters, none of which involved the provision of wind data.

5. However, the letter did request, on a non-regulatory basis, a number of other items of information. None of these concerned the assessment of energy production, possibly because the Secretary of State’s planning guidance as set out in Planning Policy Statement 22 (“PPS 22”) states as one of its key principles at paragraph 1(vi) that:

“Small-scale projects can provide a limited but valuable contribution to overall outputs of renewable energy and to meeting energy needs both locally and nationally. Planning authorities should not therefore reject planning applications simply because the level of output is small.”

6. Be that as it may, the non-regulatory requests did include one relating to the noise which the proposed development would create. This was a topic dealt with in the environmental statement submitted by the IP, the principal source of noise being the turbines themselves. The authority asked for “the calculation tables which were compiled in order to establish the cumulative noise levels at each receptor”.
7. The response both to the Regulation 19 request and to the non-regulatory requests came from the IP under cover of a letter dated 3 August 2007, sent to Mr Peter Joel, the respondent’s planning officer dealing with this proposed development. The relevant part of that letter reads as follows:

“I enclose 50 hard copies and 5 CD copies of the Supplementary Environmental Information (SEI) for Milton Keynes Wind Farm. This SEI addresses the points raised in your letter, received via email on the 28th of April.

The CD also contains the wind data file documents and the noise measurement data file documents, which are not printed as they are vast and considered to be only really useable in their electronic form. You are free to copy these CDs, if you are required, as part of the wind farm application process.”

8. There was some significance in that last sentence about copying the CDs, as until this date the IP had been unwilling to release the raw wind data except on certain conditions, despite requests from various objectors, because it was said to be commercially valuable

information. It seems that wind data was now provided as part of the response to the request for the noise calculations, since wind speed was a factor in those calculations. The Supplementary Environmental Information (“SEI”) provided in hard copy consisted of 16 appendices, A to P, preceded by a one-page overview and two tables. The function of the second of the tables was described in the overview, with reference to the respondent authority’s request letter of 20 April 2007:

“The Developer has tabulated this letter (shown in Table 2) and responded to each point accordingly, either in the table or with reference to the relevant Appendix of this SEI.”

9. Table 2 then set out the request and the response in tabular form, topic by topic. Under the heading “Noise”, the respondent’s request to which I have referred in paragraph 6 above was set out on the left hand half of the table, and on the right hand half the IP responded as follows:

“The raw wind data is shown graphically in Appendix N. The raw data is vast and has not been reproduced in the printed Appendix. The excel data sheets are available in the electronic version or on request.”

10. The evidence of Mr James Townsend, the IP’s project manager for this development, is that the raw wind data is indeed vast, amounting (if printed out) to 2,700 pages or approximately the contents of 5 lever arch files. He has produced as an exhibit a print-out of one day’s data, which would seem to confirm that.
11. A hard copy of the SEI was sent to BLEW and it was also put on the respondent’s planning files. The IP’s covering letter of 3 August 2007 was not put on the planning files. According to a witness statement made in these proceedings by Mr Joel (the planning officer concerned), he recalls placing that letter on his working files, which he then made available to objectors, including the appellant and other members of BLEW. According to the appellant and to Mr Peter Geary, a member of BLEW, members of the group inspected both the planning files and Mr Joel’s working files on several occasions between September and early December 2007 and did not see that letter. I do not believe that this court is in a position to determine what the explanation for that is.
12. The 5 CDs were not put on any of the respondent’s files but were retained by Mr Joel. According to his evidence, had anyone requested a copy he would have provided them with one, but nobody asked. The same was true of the Appendix N data.
13. In October 2007 BLEW lodged a detailed objection to the planning application, on grounds of noise effects, landscape and visual impact, health effects, impact on historic buildings, rights of way and ecology and other matters. Their objection also asserted that

the site had low average wind speeds that made it marginal for wind farms, with the consequence that the benefits of the development had been exaggerated. It was also said that the developer had refused to release the data recorded by the anemometer mast despite many requests.

14. The respondent caused a notice to be published in a local newspaper on 18 October 2007, stating that the Supplementary Environmental Information could be inspected at the respondent's planning department as from that date, and that copies could be purchased from Mr Townsend (address given) at a cost of £200 for a paper copy and £10 for a CD. An electronic copy of the SEI could be downloaded from an identified website.
15. The application came before the respondent's Development Control Committee on 17 December 2007. The respondent had engaged an independent firm of consultants with experience of windfarm developments, White Young Green, to provide specialist advice. They had access to the deposited wind speed data and had concluded that accepted methodologies both for monitoring wind speed and for predicting energy production had been used. The committee was informed of this in a lengthy report by the Head of Planning and Transportation, which covered the relevant planning policies and the merits of the proposal. It concluded with a recommendation that planning permission be granted, subject to conditions and a section 106 agreement.
16. On 15 December 2007, two days before the committee meeting, Mr Townsend, the IP's project manager, was contacted by Mr Lockley of Friends of the Earth, who were one of the supporters of the development, and told that a councillor on the committee had said that he had not seen the raw data relating to wind speed. The councillor, Mr Clark, was told that the information had been supplied to the respondent and it was forwarded to him electronically. Councillor Clark told the committee meeting on 17 December that he had had the information provided to him the evening before but had not been able to study or assess it carefully. Collins J rightly commented at paragraph 14 of his judgment that it was apparent that the committee was aware of the material's existence and that it had been considered by the respondent's consultants, White Young Green (since the report to committee said as much), but no request was made by anyone present to adjourn consideration of the application.
17. The committee meeting was attended by representatives of BLEW and by others, and Mr Geary was permitted to address the meeting on behalf of BLEW. His wife, Councillor Debbie Brock, the chairman of BLEW, was amongst others who spoke. The committee decided to grant planning permission for the windfarm, albeit by the narrow margin of 6 votes to 5. The respondent's standing orders included a provision whereby the full Council could rescind such a decision, principally on grounds concerning procedure and validity rather than on the substantive merits. On the day after the committee meeting, Councillor Brock submitted a motion for the rescission of the decision granting planning permission, on the ground that the committee had been provided with evidence "that was inaccurate, incomplete and potentially biased". It seems that the allegation of bias related to

the respondent's consultants, White Young Green, since Councillor Brock's motion also sought the appointment of a company or individual to advise the respondent "with no particular links to either windfarm developers or objector groups". Prior to the full Council meeting, White Young Green submitted a lengthy and vigorous rebuttal of any bias on their part. Nonetheless, when the appellant's solicitor wrote to the respondent's Head of Legal Services on 7 January 2008, complaining about the decision-making process, it was an alleged lack of independence on the part of White Young Green which was at the forefront of the complaint, rather than the absence of wind-speed data, which on the evidence before us did not form part of the case for rescission.

18. The full Council met on 8 January 2008 and decided not to rescind the decision of 17 December 2007. Consequently the planning permission was formally granted on 14 January 2008.
19. A pre-action protocol letter was sent by the appellant's solicitor on 26 February 2008, both to the respondent and to the I.P. Then the claim form seeking permission to proceed with a judicial review claim was filed on 10 April 2008.

The Issues:

A. Delay:

20. Collins J made it clear at the end of his judgment that he was refusing permission on the grounds of delay as well as on the claim's lack of substantive merit. He did so on the basis that it had not been made promptly. That is a reference to CPR 54.5(1), which governs claims for judicial review. It provides:

"The claim form must be filed –

(a) promptly; and

(b) in any event, not later than 3 months after the grounds to make the claim first arose."

21. As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in paragraph (a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily amounts to filing promptly: see *R v. Independent Television Commission, ex parte TV Northern Ireland Limited* [1996] J.R. 60, [1991] TLR 606 and *R v. Cotswold District Council, ex parte Barrington Parish Council* [1997] 75 P. and C.R. 515. The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker. As I put it in *Hardy v. Pembrokeshire County Council* [2006]

EWCA Civ 240, paragraph 10:

“It is important that those parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly.”

In that same case this court rejected a submission that the requirement in CPR 54.5(1) for an application for judicial review to be made “promptly” offended against the principle of “legal certainty” in European law.

22. The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In *R v. Exeter City Council, ex parte J.L. Thomas Co Ltd* [1991] 1 QB 471, at 484G, Simon Brown J (as he then was) emphasised the need to proceed “with greatest possible celerity”, as he did also in *R v. Swale Borough Council, ex parte Royal Society for the Protection of Birds* [1991] 1 PLR 6. Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are time limits on the validity of a permission will normally wish to proceed to implement it without delay. In the *Exeter* case, Simon Brown J referred to the fact that a statutory challenge under what is now section 288 of the Town and Country Planning Act 1990 to a ministerial decision must be brought within six weeks of the decision. Thus if a planning permission is granted by the Secretary of State on an appeal or a called-in application, the objector seeking to question the validity of that decision must act within six weeks, without there being any power in the court to extend that period of time.
23. That factor led Laws J (as he then was) to conclude in *R. v. Ceredigion County Council, ex parte McKeown* [1997] C.O.D. 463, [1998] 2 PLR 1 that it was nearly impossible to conceive of a case in which leave to move for judicial review would be granted to attack a planning permission when the application was lodged more than six weeks after the planning permission had been granted. That was perhaps a somewhat extreme statement of the position, and certainly it was rejected by the House of Lords in *R. (Burkett) v. Secretary of State for the Environment* [2002] UKHL 23, [2002] 1 WLR 1593, where Lord Steyn (with whom the rest of the Appellate Committee generally agreed) said at paragraph 53 that from the *McKeown* case

“the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a ‘six weeks rule’. This is a misconception. The legislative three months limit cannot be contracted by a judicial policy decision. ”
24. I would respectfully agree that, where the CPR has expressly provided for a three month time limit, the courts cannot adopt a policy that in judicial review challenges to the grant of a planning permission a time limit of six weeks will in practice apply. However, that does

not seem to me to rob the point made by Simon Brown J and others of all of its force. It may often be of *some* relevance, when a court is applying the separate test of promptness, that Parliament has prescribed a six weeks time limit in cases where the permission is granted by the Secretary of State rather than by a local planning authority, if only because it indicates a recognition by Parliament of the necessity of bringing challenges to planning permissions quickly. There are differences between the two situations: for example, where the Secretary of State grants a permission, an objector is entitled to be notified of the decision, which is not the case where a local planning authority grants the permission. Thus where in the latter case an objector is for some time unaware of the local authority decision, the analogy is less applicable. That was not the situation in the present case, where BLEW and its supporters, including the appellant, were very well aware of the decisions by the respondent's committee and then by the full Council. My point is simply that, while there is no "six weeks rule" in judicial review challenges to planning permissions, the existence of that statutory limit is not to be seen as necessarily wholly irrelevant to the decision as to what is "prompt" in an individual case. It emphasises the need for swiftness of action.

25. What satisfies the requirement of promptness will vary from case to case. In *Burkett* the House of Lords held that the three months period runs from the formal grant of planning permission, rather than from the resolution of the local authority to grant, and so in the present case the three months ran from 14 January 2008. The claim form was filed on 10 April 2008 and so was just within the three months period. But was it made "promptly"? The answer to that question depends on all the relevant circumstances. Knowledge of a resolution to grant permission will often be relevant to whether a person has acted promptly, even though time does not formally run until the grant of permission. In the present case, the appellant and those associated with him were aware of the committee's decision on 17 December 2007 to grant permission (it having delegated power to do so) as soon as that decision was made. Certainly, there was then a resolution seeking rescission of that decision, but that was rejected on 8 January 2008, again as BLEW and the appellant knew full well. Yet no claim form was lodged until 10 April 2008.
26. In the course of the argument, Mr Stinchcombe appearing on behalf of the appellant conceded that there is in the evidence put before this court "no express explanation" for the delay. That in itself is remarkable, given the numerous witness statements lodged on behalf of the appellant. Mr Stinchcombe speculated that the delay may have come about because the case raised issues of technical complexity and the appellant, together with BLEW, may have needed to scrutinise the wind data to see if it might have had any significant effect on the outcome of the planning process. The problem with that line of argument is not merely the absence of evidence to that effect but in addition the existence of positive evidence (a) that no request for the wind data was made on behalf of the appellant until a letter from his solicitor dated 29 May 2008, after the claim form had been lodged, and (b) that the technical experts acting on behalf of the appellant were only instructed in August 2008, *long* after the claim form had been lodged. Its lodging simply cannot have been held up pending the carrying out of technical analysis.

27. Two other points are advanced on behalf of the appellant on this issue of delay. It is pointed out that a pre-action protocol letter was sent on 26 February, threatening judicial review. That is certainly relevant. But the notes to CPR 54.5 in the White Book state that the obligation to comply with the pre-action protocol does not remove the obligation to bring the claim promptly, and the appellant's solicitor, experienced in such litigation, would have been aware of that. Such a letter is no substitute for the lodging of a claim form. Secondly, it is argued that the delay should not be seen as serious, given the length of time which the respondent had taken in dealing with the planning application. That I find wholly unconvincing. The length of time taken by the planning authority in reaching a decision may well, from the IP's standpoint, have made it all the more important that any challenge be raised quickly.
28. There is in that connection another factor which bears upon this issue. In public law cases one is particularly concerned with the public interest, and as Sir John Donaldson MR put it in *R. v. Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763, at 774H – 775B:

“Good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary.”

That proposition is of general application. But in the present case there is in existence a particular consideration because of the nature of the proposed development. PPS 22 stresses the importance of renewable energy projects, referring to the UK target of generating 10 per cent of electricity from renewable energy sources by 2010, so as to comply with its international obligations entered into by the Government. As Sullivan J said in *R (Redcar and Cleveland Borough Council) v. Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1847 (Admin)

“The need for promptness in challenging planning decisions within this policy framework is particularly acute. Delay in challenging decisions in respect of renewable energy projects is more than usually prejudicial to good administration.”

I agree. That policy context was known to the appellant and BLEW, since it was summarised in the planning officer's report to committee.

29. In all the circumstances, I conclude that Collins J was correct in finding that this claim had not been lodged promptly and so did not comply with CPR 54.5. That, of course, is not necessarily the end of the matter. There may be considerations which mean that it is in the public interest that the claim should be allowed to proceed, despite the delay and the absence of any explanation for that delay. If there is a strong case for saying that the permission was ultra vires, then this 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. I turn therefore to consider the substantive merits of the

claim, which asserts a breach of both domestic and European law.

B The Substance of the Claim:

30. The principal alleged breach concerns the availability to objectors of the raw wind data. Before Collins J., it appears to have been assumed on all sides that the applicable domestic law was primarily to be found in the 1999 Regulations (see paragraph 2, ante) in the form in which they stood as a result of amendments contained in the *Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006* (“the Amendment Regulations”). Those amendments required the local planning authority to send to those to whom the environmental statement had been sent any further information required under regulation 19 and also any other information relating to the environmental statement provided by the applicant. The wind data had not been sent by the respondent, which conceded that there had been a breach of the regulations in their amended form. The IP did not concede that there had been a breach, but Collins J found that there had and his judgment thereafter concentrated on the issue of whether it would have made any difference to the respondent’s decision if there had not been such a breach.
31. There is now no dispute that the hearing before Collins J proceeded on an erroneous legal basis. The Amendment Regulations only applied to planning applications lodged or received by a planning authority on or after those regulations came into force on 15 January 2007: see Regulation 1(3). Consequently the amendments contained therein did not and do not apply to the planning application for the Petsoe Manor Farm windfarm, since that application was lodged on or about 17 August 2006. It is governed by the 1999 Regulations in their unamended form. There was some suggestion in the appellant’s skeleton argument that the respondent should not be allowed to retract its concession in the lower court as to breach of the Regulations, but this was not pursued orally before us. In my view, that was a wise course to adopt. Apart from the fact that the IP had made no such concession below, this court cannot proceed on a legal basis which it knows to be erroneous. We cannot apply the Amendment Regulations when we are well aware that they, by their very terms, are not applicable.
32. A different argument was advanced before us by Mr Stinchcombe. He referred to the fact that the Amendment Regulations were made in order to implement in domestic law the provisions of Directive 2003/35/EC, and that by Article 6 thereof Member States were required to bring into force the necessary laws, regulations and administration provisions so as to comply with the Directive by 25 June 2005. All that is true, and I have no doubt that, where a Member State has failed to comply by the due date, the provisions of the Directive are to be seen as having direct effect: see *R v. Durham County Council, ex parte Huddleston* [2000] 1 WLR 1484. But Mr Stinchcombe seeks to go further and to argue that the United Kingdom’s own Amendment Regulations should be read as if they applied to all planning applications made after 25 June 2005, the date for compliance with the Directive.

33. I cannot accept that that is appropriate. The Amendment Regulations contain an express provision, Regulation 1(3), which makes them applicable to applications lodged or received

“on or after the date these Regulations come into force.”

They came into force on 15 January 2007, as Regulation 1(1) expressly states. It goes beyond mere interpretation to seek to hold those Amendment Regulations as coming into force on 25 June 2005 when Parliament has expressly provided a different date: it amounts to a judicial amendment, as it would if one were to remove the words “the date these Regulations come into force” from Regulation 1(3) and to substitute “the 25 June 2005”. This court cannot properly do that, and Mr Stinchcombe was unable to cite any authority to support such a course of action. If, as is the case, this country failed to implement the Directive by the due date, the answer is to be found in the doctrine of direct effect of the provisions of the Directive itself, not in some judicial alteration to the later domestic legislation.

34. It follows that, so far as domestic regulations are concerned, this appeal turns on the 1999 Regulations unamended. The relevant provision thereof is Regulation 19(1), which states:

“19. – (1) Where the relevant planning authority, the Secretary of State or an inspector is dealing with an application or appeal in relation to which the applicant or appellant has submitted a statement which he refers to as an environmental statement for the purposes of these Regulations, and is of the opinion that the statement should contain additional information in order to be an environmental statement, they or he shall notify the applicant or appellant in writing accordingly, and the applicant or appellant shall provide that additional information; and such information provided by the applicant or appellant is referred to in these Regulations as “further information”.”

By paragraph 3 of that Regulation, the authority which has received such further information must publish a notice in a local newspaper, identifying by various details the planning application and development concerned, and stating also

“(d) that further information is available in relation to an environmental statement which has already been provided; [and]

(e) that a copy of the further information may be inspected by members of the public at all reasonable hours.”

The notice must also state where and until when such further information may be inspected, that copies may be obtained and, if a charge is to be made for a copy, the

amount of the charge.

35. By Regulation 19(4)

“The recipient of the further information shall send a copy of it to each person to whom, in accordance with these Regulations, the statement to which it relates was sent.”

36. There is a potential dispute as to whether the appellant or BLEW come within the categories of persons to whom Regulation 19(4) applies. My own view is that they did not, because the phrase “in accordance with these Regulations” must be given some force, so that the persons are those to whom the Regulations require a copy of the environmental statement to be sent, and not merely those to whom it happens to have been sent on a voluntary basis. But it is unnecessary to determine that point in these proceedings, because Regulation 19(4) cannot in any event avail the appellant. It only applies to “further information” as defined in Regulation 19(1), that is to say, information provided by an applicant in response to a notification sent by the planning authority in the exercise of its Regulation 19(1) powers. In the present case, there is no doubt that the provision by the IP of the wind data was in response to a non-regulatory request, not an exercise of Regulation 19(1) powers. Mr Stinchcombe conceded in argument that the noise information request (which gave rise to the provision of the wind data) was not made under Regulation 19. That being so, there can have been no breach of the 1999 Regulations.

37. The appellant then seeks to rely on the *Environmental Information Regulations 2004* (“the 2004 Regulations”) and in particular Regulation 5 thereof. These regulations are not specific to material relevant to planning applications but are of more general application. Nonetheless, they would seem to include such material within their ambit. Regulation 5 provides, subject to certain other provisions, that a public authority holding environmental information

“shall make it available on request.”

This, as all the parties recognised, imposes no greater obligation than arises from the direct effect of the provisions of Directive 2003/35/EC, amending the earlier Directives 85/337/EEC and 97/11/EC, which themselves gave rise to the United Kingdom’s 1999 Regulations. I can therefore turn to the provisions of those European Directives.

38. The appellant contends that there has not been in the present case substantial compliance with Article 6 of Directive 85/337/EC in its amended form. In particular, it is argued that there has been a breach of Article 6(3), which in its material parts states:

“Member States shall ensure that, within reasonable time-frames,

the following is *made available* to the public concerned:

...

...

...

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.” (emphasis added).

39. There is no dispute that the raw wind data supplied by the IP in response to the request for more information about the calculation of noise levels fell within the terms of subparagraph (c) of Article 6(3). The obligation of the respondent therefore, as under the domestic 2004 Regulations, was to make the wind data, once received by it, available to the public concerned. As Mr Stinchcombe acknowledged, there is no requirement under the Directive for such information to be *sent* to persons such as the appellant. But it has, he submits, to be reasonably available.
40. The appellant’s case is that it proved impossible to obtain the raw wind data. The CDs lodged with the respondent were not contained within the planning files. BLEW and its supporters had been seeking such data since 30 January 2007 and, although that was before it had been supplied to the respondent on 3 August 2007, the respondent should have treated this as a standing request. Representatives of BLEW inspected the respondent’s files on a number of occasions between September 2007 and the 17 December 2007 committee meeting and found no wind data. Nor was it on the IP’s website, which merely comprised the SEI as provided in hard copy to the respondent. It is therefore submitted that this wind data was not made available in a way which could be found by energetic and persistent requests.
41. It seems to me that the way in which technical information is “made available” is bound to vary and these days will often consist of the use of some electronic format, whether on CD, memory stick or some other method. There can be no objection to that, but it means that the traditional planning file, well-suited to hard copy paper documents, will not always be easy to use for such electronic material. No doubt the CDs sent by the IP could have been put into some plastic sleeves in the file, but there can in principle be no objection to such items of information being kept separately by a planning authority, so long as the file itself indicates their existence and availability. It is little different from the way in which physical models of a proposed development, more common in the past than today, have generally been dealt with. The important thing in such cases is that those interested should

be informed that the material is available.

42. I am prepared to assume for present purposes that the covering letter of 3 August 2007 from the IP to the respondent, referring to the CDs with the wind data, may not have been on the files in the planning department. But what was on file was the SEI with its summary table, Table 2. That explicitly referred to the raw wind data, which it described as vast, and it then stated that the Excel data sheets were available in the electronic version or on request: see paragraph 9, ante. The evidence is that no-one on behalf of BLEW or the appellant between 3 August 2007 and the grant of permission on 14 January 2008 requested that wind data. A Mr Reeves, a supporter of BLEW, did go so far as to point out to the IP that the Appendices following Appendix J of the SEI were missing from the IP's website and the website was duly updated; he then downloaded this onto a CD of his own, including Appendix N. But as he must have been aware on inspection, it did not contain the wind data, the Excel data sheets, and yet he did not seek that data. Mr Stinchcombe frankly concedes that the importance of the statement in Table 2 of the SEI may have been missed. It is suggested in the evidence filed on behalf of the appellant that this may have been because it came under the heading "Noise", but that does not assist the appellant. Noise impact was at the forefront of the objectors' case, and in any event the data was referred to under that heading because that was the topic in connection with which the respondent had requested the data.
43. I conclude that the SEI gave a sufficient indication to any interested reader that there was raw wind data available and that it could be obtained on request. In those circumstances the information was made available in the sense required by the 2004 Regulations and by the European Directive. It follows that there was no breach of either. It is therefore unnecessary to consider the issue of discretion and whether there might have been a different outcome, had the objectors sought and obtained the information.
44. The remaining and very much secondary part of the appellant's claim asserts that the reasons given by the respondent for granting permission for the windfarm were ambiguous and obscure and that objectors were prejudiced as a result. The argument turns on the first two sentences of the Summary of Reasons contained within the formal planning permission. Those read as follows:

"The planning application has been determined, taking into account relevant Development Plan policies, national planning policies and all other material considerations and addressing the balance of benefits and disadvantages associated with the proposal. The proposal on balance is not regarded to have a detrimental impact on ecology and wildlife habitats, cultural heritage, highway/air safety, residential amenity or landscape character and the enjoyment of the countryside."

The reasons then go on to refer to certain benefits the development is likely to provide.

45. It is submitted that it is not clear from these reasons whether the respondent was saying that the development would not have materially adverse effects or that such effects would be outweighed by the benefits. The first sentence refers to addressing the “balance of benefits and disadvantages”, while the second states that there will not be a detrimental impact on the various relevant planning consideration.
46. I do not find this a persuasive argument. The first sentence of the Summary of Reasons seems to be setting out, in very general terms, the approach which the respondent was adopting and, indeed, which it was and is required to adopt to any planning application. Part of that general approach is to weigh benefits against disadvantages. But what the Summary then goes on to state, with sufficient clarity, is that the proposal was not regarded as having a detrimental impact on the identified interests. Undoubtedly, that meant not a materially detrimental impact. That accorded with the case put to the respondent by the IP, a case which the respondent was entitled to accept. Just as with decision letters produced by the Secretary of State and his inspectors on planning appeals, so with reasons given by a local planning authority for granting a permission, one should not require them to have been formulated with the precision to be expected of a Parliamentary draftsman. They need to be adequate and in my judgment these reasons were.

Conclusion:

47. Even had there been the necessary promptness in lodging this claim for judicial review, I would not have granted permission to proceed on the substantive merits of the claim. It follows from that that the appellant falls far short of establishing the sort of clear-cut case which would be necessary to persuade the court to override the breach of CPR 54.5(1), given that this was a claim not filed promptly. Consequently, though in part for reasons different from those given by Collins J, I would dismiss this appeal.

Lord Justice Thomas:

48. I agree.

Lord Justice Hughes:

49. I also agree.