Neutral Citation Number: [2018] EWHC 1933 (Admin)

Case No: CO/5876/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2018

Before :

MR JUSTICE DOVE

- -

Between :

Maximus Networks LTD	**Claimant**
- and -	
SSCLG	**Defendant**
- and -	
(1) Southwark London Borough Council and (2) London Borough of Hammersmith and Fulham	**Interested Parties**

- -

Rupert Warren QC and Richard Moules (instructed by **Brecher LLP**) for the **Claimant**
Richard Kimblin QC and Mark Westmoreland Smith (instructed by **GLD**) for the **Defendant**

Hearing date: 9th May 2018

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Approved Judgment

Mr Justice Dove :

The facts

1. The claimant is an electronic communications code system operator and, as part of its enhancement of telecommunications infrastructure, it sought to expand coverage of its services by making applications for the installation of infrastructure in the form of telephone kiosks pursuant to Part 16 Class A of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("The GPDO"). The development which is permitted by virtue of Class A is described in the GPDO in the following terms:

> "PART 16
>
> Communications
>
> Class A – electronic communications code operators
>
> Permitted development
>
> A. Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—
>
> (a) the installation, alteration or replacement of any electronic communications apparatus,
>
> (b) the use of land in an emergency for a period not exceeding 6 months to station and operate moveable electronic communications apparatus required for the replacement of unserviceable electronic communications apparatus, including the provision of moveable structures on the land for the purposes of that use, or
>
> (c) development ancillary to radio equipment housing."

2. The Class is qualified by a number of restrictions on the permitted development right. It is also subject to a number of conditions, including conditions as to the requirements of the application and restrictions on commencing development by way of a prior approval process within condition A.3. This part of the GPDO provides as follows:

> "**A.3**—(1) The developer must give notice of the proposed development to any person (other than the developer) who is an owner of the land to which the development relates, or a tenant, before making the application required by sub-paragraph (3)—
>
> (a) by serving a developer's notice on every such person whose name and address is known to the developer; and

(b) where the developer has taken reasonable steps to ascertain the names and addresses of every such person, but has been unable to do so, by local advertisement…

(3) Before beginning the development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting and appearance of the development.

(4) The application must be accompanied—

(a) by a written description of the proposed development and a plan indicating its proposed location together with any fee required to be paid;

(b) by the developer's contact address, and the developer's email address if the developer is content to receive communications electronically;

(c) where sub-paragraph (1) applies, by evidence that the requirements of sub-paragraph (1)

have been satisfied; and …

(6) The local planning authority must take into account any representations made to them as a result of consultations or notices given under paragraph A.3, when determining the application made under sub-paragraph (3).

(7) The development must not begin before the occurrence of one of the following—

(a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(b) where the local planning authority gives the applicant written notice that such prior approval is required, the giving of that approval to the applicant, in writing, within a period of 56 days beginning with the date on which they received the applicant's application;

(c) where the local planning authority gives the applicant written notice that such prior approval is required, the expiry of a period of 56 days beginning with the date on which the local planning authority received the application under sub-paragraph (4) without the local planning authority notifying the applicant, in writing, that such approval is given or refused; or

(d) the expiry of a period of 56 days beginning with the date on which the local planning authority received the application without the local planning authority notifying the applicant, in

> writing, of their determination as to whether such prior approval is required."

3. The present claim when commenced concerned 367 of these applications made around February 2017 to various London Boroughs which were refused prior approval within the 56 days provided by the legislation. By the time the matter came before the court issues in relation to many of the appeals had been resolved. Thus, at the time of the hearing only 53 of the appeals remained the subject of this litigation. The appeals which remain in issue were those concerning the first and second interested parties.

4. In relation to the applications to the first interested party the applications were validated but the first interested party failed to make a decision within the 56 day period. It is accepted and was uncontroversial that where that occurs there is a right of appeal under section 78 of the Town and Country Planning Act 1990 for confirmation that the permitted development right has vested. This was confirmed as a consequence of the decision of this court in Winters v SSCLG [2017] EWHC 357 (Admin).

5. In relation to the applications made to the second interested party the applications were not validated. The second interested party noted that there had been a failure to comply with condition A.3(1) and A.3(4)(c) in that the applications were not accompanied by evidence that the developer had given notice of the proposed development to any person who was an owner of the land to which the development related before the application was submitted. The failure to validate became contentious, as the claimant contended that since the land the subject of the application was in the ownership of the highway authority who were also the local planning authority there was no need for compliance with this condition. The claimant therefore contended the applications had been lawfully made. The second interested party responded to that contention in a letter dated 23rd May 2017 in the following terms:

> "In your letter, you confirm that your client does not have any legal interest in any of the application sites. As such condition A.3 (1) applies. The obligation imposed by this condition is that "any developer must give notice of the proposed development to any person (other than the developer) who is an owner of the land to which the development relations (sic), or a tenant, before making the application" [cont..]. The notion of person in all legislation also includes other legal entities.
>
> Notwithstanding legal issues of whether the highway authority and the local planning authority are the same legal entity, the legislation is explicit that the Developer Notice must be provided before making the application. Therefore, the application cannot be deemed to be notice itself. Had it been intended to have been interpreted any other way the obligation would have been drafted differently.
>
> It is clear from your letter than no Developer Notice has been served, as no lawful application for prior approval has been submitted to the Local Planning Authority for consideration.

> For the avoidance of any doubt, even if your client has served a Developer Notice to comply with condition A.3(1), evidence would need to be submitted with the application to achieve compliance with condition A.3(1)(c). In the absence of this evidence, your client' applications remain invalid.
>
> You request that the Local Planning Authority supply you with details of land owners. Given the points above this request is considered erroneous, you will need to rely on your own investigation.
>
> Finally, you state that in the absence of there being third party ownership your client considers that they have deemed consent. Given the clear evidence of failure to comply with the legislative requirements, any work your client chooses to carry out is at their own risk and may result in enforcement action being taken against them. Furthermore, should work start before a lawful application is made, the prior approval application process will no longer be available to your client for that development and a full planning application would be required."

6. On 8th August 2017 the claimant's solicitors wrote to the Planning Inspectorate ("PINS") advising them that there was likely to be the submission of a large number of appeals associated with these applications, and enclosing a letter and associated advice addressing the issue of the need for developer's notice in the light of the failure of the second interested party to validate the applications and providing views as to how the volume of appeals which were anticipated might be sensibly handled. On 15th August 2017 Ms Jackie Anderson, a Casework Validation Manager, responded to the claimant's solicitors requesting sight of the letter from the second interested party in respect of the issues about validation. The claimant's solicitor responded on 23rd August 2017 providing a copy of the second interested party's letter and confirming that the approach taken on the developer notice point was the same for all of the applications which had been submitted. Thereafter on 1st September 2017 Ms Anderson requested that the appeals were submitted in tranches of 8 and providing a proforma table for the claimant to complete in relation to the documentation accompanying the appeals.

7. On 20th September 2017 paper copies of the appeals were delivered to and signed for by PINS, and thereafter electronic copies were also submitted. On 29th September 2017 Ms Anderson wrote to the claimant's solicitor in the following terms:

> "We have now reviewed these applications following the submission of the appeals (as delivered on 20 September) and alongside the information supplied in your email of 23 August. It appears that you took the same approach in respect of the 'developer's notice for all 390 applications and for all boroughs and we have not seen anything to contradict this.
>
> In view of the above we have concluded that the failure to comply with the requirements of paragraph A.3(1) and

> A.3(5)(c)) of the GPDO renders each of the applications are [sic] invalid and we therefore have no jurisdiction to determine these appeals. We are unable to take any action on the appeals, unless of course you are able to provide us with evidence that you have met the above mentioned requirements."

8. On 5th October 2017 the claimant's solicitor wrote to PINS inviting them to reconsider their decision and reiterating the arguments rehearsed in the counsel's opinion which had been previously furnished to them addressing the notice point. This request for reconsideration of the decision was responded to by PINS on 9th November 2017 in the decision which forms the basis of this application. Having set out the issue in relation to the developer notice Mr Tom Warth set out PINS decision on behalf of the defendant in relation to this issue in the following terms:

> "Paragraph A.3(1) of Part 16 of Schedule 2 to the GPDO provides that:
>
> *"Before making the application required by sub-paragraph (4), the developer must give notice of the proposed development to—*
>
> *(a) any person (other than the developer) who is an owner of the land to which the development relates, or*
>
> *(b) a tenant of an agricultural holding any part of which is comprised in the land to which the application relates."*
>
> Paragraph A.3(5)(c) of Part 16 of Schedule 2 to the GPDO provides that relevant applications must be accompanied by "evidence that the requirements of sub-paragraph (1) have been satisfied where applicable".
>
> Section 79 of the Town and Country Planning Act 1990 ("the 1990 Act") provides that on an appeal under section 78 the Secretary of State may allow or dismiss the appeal, or reverse or vary any part of the decision of the local planning authority and may deal with the application as if it had been made to him in the first instance.
>
> Accordingly, it is open for the Secretary of State to consider the validity of the original application. If he were to take the view that the application was not valid then the Secretary of State would not have jurisdiction to entertain the substantive appeal (see *R v Secretary of State for the Environment, Transport and the Regions ex parte Bath and North East Somerset District Council* [1999] 1 WLR 1759).
>
> Section 327A of the 1990 Act is in clear mandatory terms. It provides:

> "(1) *This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—*
>
> *(a) the form or manner in which the application must be made;*
>
> *(b) the form or content of any document or other matter which accompanies the application.*
>
> *(2) The local planning authority must not entertain such an application if it fails to comply with the requirement.*"
>
> This section is not addressed in your advice. However, it is quite clear that an application must comply with the statutory requirements. This post dates *Main v City of Swansea* (1985) 49 P. & C.R. 26.
>
> Therefore, following receipt of the appeals, it was for the Secretary of State to decide whether or not the applications were valid ones. Based on the correspondence referred to above, and in the absence of receipt of evidence to the contrary, the Inspectorate has taken the view that neither paragraphs A.3(1) or A.3(5)(c) of Part 16 of Schedule 2 to the GPDO were complied with in relation to the applications and that, therefore, the applications are invalid. It follows (see ex parte *Bath and North East Somerset* above) that the Secretary of State does not have jurisdiction to entertain the appeals.
>
> By virtue of section 79 of the 1990 Act, the fact that some local planning authorities may have accepted the applications as valid does not preclude the Secretary of State from making his own decisions as to the validity or otherwise of the applications, which can only be made following receipt of related appeals.
>
> I must also respond to your ill-founded suggestion that our decision on the validity of the applications may have been "driven ….. by resourcing concerns". This is simply not the case; the Inspectorate takes its role in upholding a robust planning appeals system very seriously and does not take decisions on whether to accept appeals based on the resources available to it."

9. On 23rd November 2017 in response to PINS decision the claimant's solicitors wrote a pre-action protocol letter to the defendant. A response to the pre-action protocol letter was provided by the defendant's solicitors on 11th December 2017. The substance of that response was set out in the following terms:

> "Your case is that the Secretary of State was wrong to decline to determine the appeals on the basis of your client's failures to

give requisite notice and failure to provide evidence that notice was given.

Section 79 of the Town and Country Planning Act 1990 ("the 1990 Act") provides that on an appeal under section 78 the Secretary of State may allow or dismiss the appeal, or reverse or vary any part of the decision of the local planning authority and may deal with the application as if it had been made to him in the first instance.

Accordingly, it is open for the Secretary of State to consider whether or not to entertain the applications/ appeals. The Secretary of State did so in this case. The question, therefore, is whether or not the Secretary of State's consideration of that issue was lawful.

The Secretary of State's decision was simply an exercise of his planning judgment. In the absence of receipt of evidence to the contrary, the Secretary of State through the Planning Inspectorate took the view – and you appear to agree – that neither of paragraphs A.3(1) or A.3(5)(c) of Part 16 of Schedule 2 to the GPDO were complied with in relation to the applications. **In short, a** required element of the applications was missing in all cases. In light of these failures and having regard to section 327A of the 1990 Act, he concluded that the applications are invalid. That was a conclusion which was open to the Secretary of State.

To be clear, the Secretary of State's position is not reliant on reading down section 327A of the 1990 Act so as to bar him from finding the applications are valid in circumstances where requirements have not been met. The Secretary of State is aware of the ***Main*** line of authority. This is not a question of whether an error in the application process vitiates a subsequent grant of planning permission. Rather the Secretary of State was simply exercising his original jurisdiction under section 79 of the 1990 Act as to whether or not the planning application is valid.

In coming to that decision, the Secretary of State noted and has taken into account the suggestion you make that the mischief against which the relevant requirements are directed has not been offended and no party has been prejudiced.

However, (a) precisely because the requirements were not fulfilled the Secretary of State is not in a position properly to judge whether or not there has been any prejudice and (b), in any event, none of the points raised in Maximus's advice overcomes the complete failure to engage with a statutory requirement.

> The Secretary of State has an obligation to uphold the planning system. Permitting applicants to pick and choose requirements they believe they need to follow would be damaging to the planning system as a whole."

10. On 14th December 2017 the claimant wrote to the defendant indicating that it intended to serve developer notices on the relevant Councils as land owner and seeking confirmation from the defendant's solicitors that this was a pragmatic way forward which would enable PINS to process the appeals. There was however a subsequent telephone conversation in which it was made clear by his solicitors that the defendant would not review the decision of 9th November 2017. Thereafter on 18th December 2017 the claimant sought the defendant's confirmation that as a consequence of the defendant's decision the fees which had been paid in respect of the applications would be refundable as a consequence of regulation 14(3) of the Town and Country Planning (fees for applications, deemed applications requests and site visits) (England) Regulations 2012 ("The 2012 Regulations"). Those regulations provide as follows:

> "14.—(1) Where an application is made to a local planning authority for their determination as to whether the prior approval of the authority will be required in relation to development under Schedule 2 to the General Permitted Development Order (permitted development)(31) a fee shall be paid to that authority of the following amounts— …
>
> (b)for an application under Part 24 of that Schedule (development by electronic communications code operators)(33), £385.
>
> (2) Where the local planning authority who receive the fee in accordance with this regulation—
>
> (a)are not the local planning authority who have to determine the application; and
>
> (b)forward the application to that authority, they shall remit the fee to that authority at the same time as they forward the application to them.
>
> (3) Any fee paid pursuant to this regulation shall be refunded if the application is rejected as invalid. "

11. The first interested party has retained and refuses to refund the fees submitted with the applications which were made to them. The claimant seeks a declaration that the fees must be refunded under Regulation 14(3) of the 2012 Regulations.

The Grounds in brief

12. The claimant advances three Grounds for the court's consideration. The first Ground is that the decision of 9th November 2017 was unlawful on the basis that the defendant, or PINS on his behalf, failed to recognise that there was a discretion to be exercised and approached the decision on the basis that the defendant had no

alternative other than to reject the appeals as founded upon invalid applications. Properly understood the decision simply did not involve the exercise of any discretion: the decision from PINS simply stated that because there had been non-compliance the appeals had to be rejected as invalid and failed to exercise any discretion or give any consideration to whether discretion should be exercised so as to permit the appeals to proceed. The claimant submits that it is clear on the basis of the authorities that the defendant has a discretion to exercise as to whether or not to allow an appeal to proceed notwithstanding some failure to comply with the legal requirements of the application. It was an error of law, given that that discretion existed, for PINS to refuse to validate the appeals without giving any consideration to whether or not the discretion should be exercised.

13. Ground 2 is the contention that even if PINS did, in reality, recognise that there was a discretion which had to be exercised as a consequence of the legislative framework and authorities which are set out below, the discretion was in fact exercised irrationally. The reality was that the owner to be notified in accordance with the formal requirements of the GPDO were, in truth, one and the same organisation as that to whom the application had been made, with the exception of a limited number of applications where Transport for London ("TfL") were the owners. Thus there could be no conceivable prejudice as a consequence of the default in the case. Furthermore, the reasons that were offered in the pre-action protocol letter were circular. It was said in the pre-action protocol letter that the defendant did not know (in the absence of compliance with the requirements) whether there had been any prejudice or not, and thus it appeared to assume that there was some prejudice on an entirely evidence free basis. The points raised in relation to failure to engage with the statutory requirement also did not address the question of prejudice. The contention that the defendant had an obligation to uphold the planning system failed to engage with the question of whether there had actually been any prejudice on the facts of the particular case. In those circumstances the exercise of the discretion to reject the applications was Wednesbury unreasonable.

14. Ground 3 relates to the failure to reimburse fees and the need for a declaration that in the event that the court concludes that the defendant was correct to determine that the applications were not valid, and the appeal should not proceed, that pursuant to the 2012 Regulations the fees paid should be reimbursed.

The relevant legal principles

15. The right to appeal against certain planning decisions, including those in relation to these applications for prior approval, is contained with section 78 of the Town and Country Planning Act 1990. The determination of appeals is governed by section 79 of the 1990 Act which is expressed in the following terms:

> "79 Determination of appeals.
>
> (1)On an appeal under section 78 the Secretary of State may—
>
> (a)allow or dismiss the appeal, or
>
> (b)reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not),

> and may deal with the application as if it had been made to him in the first instance."

16. It can be seen that in section 79(1) of the 1990 Act there is a discretion for the defendant to allow or dismiss the appeal or reverse of vary the decision of the local planning authority, and also a discretion to "deal with the application as if it had been made to him in the first instance". Furthermore, under section 79(6) it appears that the defendant has a discretion to decline to determine the appeal, or proceed with its determination, if it emerges during the determination of an appeal that planning permission could not have been granted by the local planning authority.

17. Prior to turning to the authorities in which the approach to these discretions has been considered it is appropriate at this point to make reference to section 327A of the 1990 Act which was referred to within the decision of 9th November 2017. That provides as follows:

> "327A Applications: compliance with requirements
>
> (1)This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—
>
> (a)the form or manner in which the application must be made;
>
> (b)the form or content of any document or other matter which accompanies the application.
>
> (2)The local planning authority must not entertain such an application if it fails to comply with the requirement."

18. It is to be noted at this stage that Mr Kimblin QC, on behalf of the defendant, did not contend that section 327A applied to the defendant when exercising his appeal jurisdiction in the same way that it applied to a local planning authority considering the application as it were at first instance. He did not suggest that as a consequence of section 327A the defendant was bound not to entertain an application which did not comply with the requirements relating to the form or manner in which an application was to be made. He did, however, submit (as set out below) that the strictures of section 327A were relevant, and should carry significant weight, in any exercise of discretion undertaken by the defendant in respect of procedural defects in the form and content of an application.

19. At the forefront of the submissions of Mr Warren QC, who appeared on behalf of the claimant, was the line of authorities commencing with the Court of Appeal's decision in Main v Swansea City Council [1984] 49 P&CR 26. That was a case concerning a factual error in a certificate of ownership which was required to accompany an application for planning permission. The land comprised in the application included land which was owned by person or persons unknown. Under section 27 of the Town and Country Planning Act 1971 it was necessary when applying for planning permission in those circumstances for a certificate to be provided stating that the applicants had taken such steps as were reasonably open to them to ascertain the names and addresses of the owners of that part of the land and that the requisite notice

had been published in the local newspaper. These failings in the application documentation required by the legislation led Parker LJ to the conclusion that there was a defect in the certificate "sufficient to enable a court to strike down the subsequent grant in certain circumstances"; however, the defects were not such as to render the grant of a complete nullity and it was a question for the court's discretion as to whether or not relief should be granted. Having given consideration to the House of Lords decision in London & Clydesdale Estates LTD v Aberdeen District Council [1980] 1 WLR 182 Parker LJ went on to observe in his judgment as follows:

> "In our judgment, the most significant observation in Lord Hailsham's speech, indeed in the whole of the Clydesdale case, is that the court must consider the consequences in the light of a concrete state of facts and a continuing chain of events. This recognises that the court looks not only at the nature of the failure but also at such matters as the identity of the applicant for relief, the lapse of time, the effect on other parties and on the public and so on."

20. The case of Main has been applied in a number of subsequent cases concerned with defects in the documents required in order to comply with the requirements relating to applications for planning permission. In R (on the application of Pridmore) v Salisbury District Council and Another [2004] EWHC 2511 Newman J dealt with a challenge to the grant of planning permission where the claimants, who were owners of land affected by the application, had never received the notification required by the legislation (see para 13). Newman J gave his decision in the case at paragraphs 39-41 in the following terms:

> "39. In my judgment the conduct of Mr Docking and/or his agent on his behalf disclose a cavalier disregard for the mandatory requirements in connection with a statutory certificate. It is one thing to fail to give notice to an unidentified owner of part of the land, as in the case of Main, but it is quite another to certify that prior notice of an application has been given, when it was known that no such notice has been given. More than that, as I am satisfied on the evidence, it is yet worse to certify that notice has been given on a stated date (2nd December) when no notice had been given on that day or at all.
>
> 40. I have concluded that for the Court, in these circumstances, to exercise its discretion so as to preserve the benefit of the planning permission granted to Mr Docking would come close to undermining the mandatory scheme of the legislation. Nor can I see that the law as stated in Main anticipates saving voidable grants of planning permission from being quashed where there has been a deliberate failure to comply with the mandatory requirements of the scheme of the legislation to which the local planning authority, acting in good faith, has been party and where, operating under an error of law, it has gone on to press, unnecessarily, for prompt and timeous determination. In the case of Main , the applicant for relief was

> not the owner affected by want of notice and the allegation of acting with knowledge of the false certificate was rejected.
>
> 41. More than that, I reject the suggestion that it is clear no prejudice has occurred. It is not a convincing answer to the Pridmores' complaint, which is that more time was required to consider the amended plan, for the Council to assert that the matter now raised in these proceedings should have been raised earlier and/or that they should have asked for more time at the time they saw the amended plan. The suggestion misses the substance of the complaint. It is because they had too short a period of time to consider the amended plan that the Pridmores now suggest they failed to realise that points on the available turning space could have been made by reference to the amended plan. For that reason, the issue has been raised in these proceedings."

21. Another example of the application of the approach from the case of Main is the case of R (on the application of Park Pharmacy Trust) v Plymouth City Council and Another [2008] EWHC 445 (Admin). In that case Sullivan J (as he then was) declined to exercise his discretion to quash a planning permission when there had been an error in the name provided on the application form leading to a misdescription of the identity of the applicants. Sullivan J concluded that there was "no possible basis" for exercising the discretion to quash the planning permission because of this mistake made in the completion of the application form. A further example is provided by the decision of Crane J in R (on the application of Wembley Field LTD) v London Borough of Brent [2005] EWHC 2978 in which a breach in the contents of a notice pursuant to regulation 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulation 1999 was treated by the judge as having given rise to no possible prejudice, leading to the conclusion that the court should exercise its discretion not to quash.

22. Lastly in connection with the Main line of authority, the claimant places reliance on the decision of HHJ Steven Davies sitting as a Deputy Judge of the High Court in R (on the application of O'Brien) v West Lancashire Borough Council [2012] EWHC 2376 (Admin). That case concerned a failure to comply with the procedural requirement to notify a landowner whose land was affected by the application for planning permission which led to the grant of consent under challenge. The judge, in addressing the question of what the consequence of non-compliance with the required notification and certification of owners was, set out both the case of Main and also that of Pridmore. He concluded from those authorities that the issue, given that it was conceded that the requirements for notification and certification had not been complied with, was whether or not he should exercise his discretion to quash the planning permission in the light of that error.

23. The claimant relied upon section 327A of the 1990 Act to contend that there was no discretion in the court to excuse a failure to comply with the notification and certification requirements and therefore the permission must be quashed. At paragraph 42 of his judgment the Judge concluded that there was no obvious difference of substance between section 327A and section 65(5) of the 1971 Act which was its predecessor. Thus he concluded that the court retained a discretion to

quash even in circumstances where pursuant to section 327A the Local Planning Authority should not have been entertaining an application because of a failure to comply with the requirements for making an application.

24. I have no doubt that the Judge's conclusion in that respect was entirely correct. Whether as part of an application for judicial review or, as here, as part of an application under section 288 of the 1990 Act, the court will always retain a discretion as to whether or not to grant relief. Section 327A of the 1990 Act makes clear that the local planning authority has no discretion to waive or overlook failures to comply with the requirements provided by the legislation for the proper formulation of an application. By implication it makes clear that if a local planning authority were to do so that would amount to an error of law justifying the court's intervention. However, the court will always retain a residual discretion as to whether or not to grant relief in the form of quashing the planning permission, a discretion which will be exercised bearing in mind a wide range of considerations.

25. The case of O'Brien illustrates the point. At paragraphs 79-84 of the judgment in O'Brien the judge drew together a variety of points leading him to the conclusion that notwithstanding the defects in the application the court ought not to quash the consent. Those factors included the absence of bad faith; the fact that the claimant was not an owner of any part of the site; the fact that the person who was the landowner who was directly affected by the non-compliance had no intention of ever making any representations on the application; the fact that the claimant was aware of the application and had taken the opportunity to provide comments upon it and further that there had been delay (albeit not significant) in bringing the application before the court. Having regard to these factors the judge declined to exercise his discretion to quash.

26. The breadth and range of the factors which the judge took into account in the case of O'Brien in concluding that the court should not exercise its discretion in the claimant's favour to some extent underlines the central submission made by Mr Kimblin on behalf of the defendant in relation to this line of authorities grounded in the case of Main. His submission is that each of these cases is essentially concerned with the court's exercise of its discretion to quash, and not any exercise of discretion by the Secretary of State in the appeal process under section 79 of the 1990 Act. In cases where there have been failures to comply with the statutory requirements to formulate a valid planning application there may be some types of factors which are material both to the exercise of discretion in a subsequent application for judicial review to quash a consequential grant of planning permission, and also in the context of the exercise of the defendant's discretion under section 79 if the matter comes before the defendant on appeal. The question, for instance, of the extent and nature of any prejudice to persons affected by the non-compliance may be germane to both discretions. However, it is not in my judgment possible to equate the two exercises of discretion in terms of the factors that may be material. In particular there are a variety of factors which might bear upon a court's exercise of discretion which will simply not be relevant or arise in the context of an appeal. Thus, the Main line of authorities is not of direct relevance to the questions which arise in this case. Of far greater relevance are those cases which have been decided in the direct context of appeals to the Secretary of State.

27. The case of R v Secretary of State for the Environment, Transport and the Regions ex parte Bath and North East Somerset District Council [1999] 1 WLR 1759 concerned an application for planning permission and listed building consent made to Bath and North East Somerset District Council ("the authority"). The authority formed the view that insufficient detail had been provided with the application and they refused to register it. The applicant appealed under section 78 of the 1990 Act to the defendant on the basis of a failure to determine the applications. The defendant directed PINS to undertake an inquiry into the appeals, at which point the authority sought judicial review and an order preventing the defendant from holding the inquiry on the basis that there was no jurisdiction to hear the appeal given their view that a valid application had not been lodged. The Court of Appeal concluded that the authority did not have exclusive jurisdiction to determine the validity of a planning application, and on an appeal against non-determination the defendant had jurisdiction to consider whether or not the application was invalid. In giving the leading judgment of the Court of Appeal, with which the other members of the court agreed, Pill LJ drew attention to observations made by Schiemann LJ in the case of Geall v Secretary of State for the Environment 78 P&CR 264 in dealing with the question of whether or not in that case PINS were entitled on behalf of the defendant to conclude that the failure to pay a fee in support of a ground (a) appeal entitled a refusal to consider that ground of appeal on the basis that a prerequisite for the ground (a) appeal had not been fulfilled. Schiemann LJ observed as follows:

> "If the local planning authority refuse what purports to be an application for planning permission and the applicant wishes to appeal, he will need to rely on section 78(1). In such circumstances it will be common ground between the applicant and the local planning authority that what purports to be an application is indeed an application. A question might arise as to whether the Secretary of State has jurisdiction to entertain the appeal if he takes the view that the purported application is not an application. The question is unlikely to arise often in practice, but in my judgment, if the Secretary of State takes that view then he has no jurisdiction to entertain the appeal — until such time, if any, as his decision that the purported application is no application, is quashed by way of judicial review.
>
> If the local planning authority decides not to process the application but declares the application invalid the applicant can challenge that decision by judicial review. The Act has not provided for an appeal against the decision to declare the application invalid. If the applicant tries to appeal under section 78(2), in order to bring himself within the section he will have to assert that he is a person who has made an application for planning permission. If he does so assert, a question will arise as to whether the Secretary of State has jurisdiction to determine whether the applicant is a person who has made an application for planning permission. Again, the question is unlikely to arise often in practice, but in my judgment, if the Secretary of State takes the view that no application for planning permission has been made, then he has no jurisdiction

> to entertain the appeal — until such time, if any, as his decision that the purported application is no application, is quashed by way of judicial review. If, on the other hand, the Secretary of State takes the view that an application for planning permission has been made then, in my judgment, the Secretary of State is under a duty to entertain the appeal …."

28. Against the background of those observations Pill LJ reached his conclusions in the Bath case in the following terms:

> "I have however come to the conclusion that a right of appeal does arise even when the local planning authority have formed the opinion that the application is invalid. The applicant is entitled to have the opinion of the Secretary of State on the question of validity. I reach that conclusion upon a purposive construction of the statutes and a consideration of the scheme as a whole. With the notable and long-standing exception that there is no statutory right of appeal against a grant of planning permission by a local planning authority, it provides, in a variety of situations, an appeal to the Secretary of State. In addition to a right of appeal against planning decisions and failure to take planning decisions, the planning act provides for appeals against enforcement notices, certificates of lawful use or development, tree preservation order consents, advertisement consents, appeals against tree replacement requirements and appeals against information requirements of the planning authority. In addition, the Secretary of State has the power under section 77 of the planning act to call in planning applications. The scheme of the Act gives a status to the Secretary of State such that a construction of statutory provisions dealing with appeals which has the effect of conferring exclusive jurisdiction on the local planning authority does not fit easily with that scheme.
>
> As the judge pointed out, it is not stated in terms in the statutory provisions that the local planning authority is the sole arbiter upon validity. Regulation 3 of the 1988 Regulations does not purport to make the local planning authority the sole judge of what plans, drawings and information are necessary to describe the development. (In this respect, the appellants are on stronger ground on the listed buildings act which does include the expression "such other particulars as may be required by the [local planning] authority".)
>
> The case turns upon the meaning of the word "application" in section 78 of the planning act and section 20 in the listed buildings act. In my judgment, and in the context of the statutes, it includes an application which the local planning authority consider to be invalid under the Regulations. The words "which the local authority consider to be valid" should not be read into section 78 of the planning act and section 20 of

> the listed buildings act to govern the word "application". A determination of invalidity by the local planning authority does not exclude the right of appeal to the Secretary of State on the question of validity. The applications in this case remained applications for the purpose of triggering the operation of the appeal provisions in the legislation notwithstanding the view of the local planning authority that the applications were invalid.
>
> Though I have reached the conclusion by a somewhat different route, it follows that I agree with the views expressed by Schiemann LJ in Geall and with the conclusion of the judge in the present case. The Company was not restricted to a remedy by way of judicial review."

29. The case of Parker v Secretary of State for Communities and Local Government and others [2009] EWHC 2330 (Admin) was directly concerned with the exercise of the discretion comprised in section 79(6) of the 1990 Act. The appeal which was under challenge in that case concerned an outline application for the erection of fisherman's cabins and other ancillary buildings and facilities. Permission was granted by the Inspector who determined the appeal, and subsequently challenged in this court by an interested third party objector. An issue emerged at the outset of the inquiry in relation to whether or not the appellant's Design and Access Statement contained the necessary details required by the (then) Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2006. The Inspector considered this issue, and whether or not further detailed material should be accepted so as to secure compliance with the requirements of the 2006 Order, in paragraphs 1 and 2 of the appeal decision in the following terms:

> "1. On 10 August 2006, The Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2006 gave effect to provisions in the Planning and Compulsory Purchase Act 2004. These require design and access statements for most types of applications and implement changes to the application process for outline planning permission including the redefinition of reserved matters and in particular, a greater level of minimum information to allow the impact to be understood and evaluated. The appellant confirmed at the start of the Inquiry that in accordance with these changes, the application was submitted with layout, scale, appearance, landscaping and access reserved for subsequent approval.
>
> 2. The appellant submitted further illustrative drawings before the start of the Inquiry which provided information on the internal layout and location of the cabins and internal layouts and 3 design options for the facilities building (plans A2 – A11). Information on the scale parameters of all the proposed buildings was submitted on a table (Document 4) during the Inquiry. It was also confirmed that site layout drawing No. 339/97/10/B remains correct from the previous application. Having regard to all this information together with the

> supporting statement supplied by the Council by Humberts Leisure on 6 March 2007, I did not consider that there was sufficient information for the inquiry to proceed or that anyone's interests would be prejudiced."

30. In the subsequent challenge to the appeal decision it was submitted on behalf of the claimant "that the discretion given to the Secretary of State in section 79(6) is intended merely to allow the Secretary of State to deal with an appeal that is bound to fail". Mr Keith Lindblom QC (as he then was) sitting as a Deputy Judge of the High Court rejected that submission. He concluded that the statutory discretion was not conferred in such a limited way nor was it, he concluded, necessary to construe the discretion so narrowly. The conclusions which the Judge reached in relation to the submissions that there was an error of law in connection with the failure to satisfy the legal requirements for a valid Design and Access Statement were set out by the judge in paragraphs 30-31 as follows:

> "30 After sitting through five days of evidence and advocates' submissions, in the course of which the proposals were thoroughly scrutinized, the Inspector can hardly be faulted for concluding that he was well equipped to make the decision it was his duty to make. He had before him the information he required to discharge the task of considering the physical and visual characteristics of all the elements of the proposed development, in their context. He was able to follow, in substance, the guidance in sections 2 and 3 of Circular 01/2006 . He had all the information he needed to be able to consider the design principles and concepts applied to the development, which is the defined purpose of a design and access statement under paragraph (2)(a) of article 4C. He could be — and plainly was — satisfied on the question underlying paragraphs (2)(b) and 4 of article 4C, namely how issues relating to access to the development have been dealt with. He had had explained to him through the application documents and materials, amply elucidated by evidence and submissions, the matters required of a design and access statement in paragraph (3)(a) of article 4C, namely the specific principles and concepts applied to the amount, layout, scale, landscaping and appearance of the development, and in paragraph 3(b), namely the steps taken to appraise the context of the development and how the design of the development took that into account in relation to the proposed use and each of the aspects specified. Thus, in my view, the Inspector was manifestly able to judge the principle of the outline proposals before him and the likely effects of the development on its surroundings.
>
> 31 I therefore accept Mr Warren's submissions on this part of the claimant's challenge. The Inspector was not in breach of any statutory or procedural requirements applying to him. He did not misapprehend the requirements of the GDPO. The application for outline permission before him was not invalid.

> He dealt with it properly, in accordance with the law. Section 79 of the 1990 Act empowered him to conduct himself as he did. And I see nothing in the submission made by Mr Hill that the Inspector never formed the opinion that the Council as local planning authority could not have granted planning permission. As Mr Warren submitted, once the proposals were in the hands of the Inspector he was not bound by any provision dictating how he was to deal with the GDPO and the proposals' compliance with it. As paragraphs 1 and 2 of the decision letter show, the Inspector was satisfied that he had an application and an appeal before him which he could determine lawfully in accordance with the statutory scheme. And that is what he did. This ground of the claimant's application therefore fails."

31. In the light of the material set out above I am entirely satisfied that in the context of an appeal both section 79(1) and section 79(6) of the 1990 Act provide the defendant with a discretion to conclude at the outset of an appeal whether or not the application upon which it is founded is valid and also to decline to determine the appeal if it emerges that, for instance, provisions of the GPDO in respect of requirements for a valid application have not been complied with. By the same token, since this is a discretion, it is open to the defendant to conclude that it is appropriate to continue to process the appeal and accept it as valid notwithstanding breaches of the requirement if it is appropriate to do so. In exercising that discretion whilst the Main line of authorities may be of some relevance they are plainly not on all fours with the exercise of discretion with which section 79 is concerned. Those cases concerned the exercise of the court's discretion as to whether or not to quash a defective planning permission, and the range of factors which may be material to the consideration of that discretion may very well be far more extensive that those factors which would be relevant to the exercise of discretion under section 79. Plainly, when exercising the discretion under section 79 the question of whether or not prejudice might arise from the failure to comply with the statutory requirements may very well be a factor in play. The extent and nature of the breach concerned will also be very likely to be a factor. Beyond that it is difficult to be prescriptive as to the considerations which may be material to the exercise of the discretion as it will inevitably be a fact sensitive exercise, varying in its considerations from case to case. It is against the background of that analysis that the submissions in this case fall to be evaluated.

Submissions and Conclusions

32. It will be recalled that Ground 1 of the claimant's case is the contention that properly understood the decision which the defendant reached on 9th November 2017 did not acknowledge any discretion, and proceeded upon the basis that the defendant had no discretion to exercise in concluding whether or not to accept that the appeal was valid. Mr Warren correctly points out, as established from the authorities above, that section 79 of the 1990 Act provides the defendant with a discretion to exercise as to whether or not to accept an appeal even if it is found to be wanting in relation to any procedural aspect. This discretion arises both under section 79(1) which contains a wide discretion for the Secretary of State to allow or dismiss an appeal, reverse or vary the local planning authority's decision or any part of it, and deal with the application as if made to the defendant in the first instance. A discretion also arises

under section 79(6) which provides that the defendant has a discretion to decline to determine an appeal or proceed with its determination if it emerges during the course of the appeal's determination that the local planning authority could not have granted planning permission. Whilst Mr Kimblin on behalf of the defendant sought to disaggregate these two elements of discretion as potentially arising at the outset of the appeal under section 79(1) or during the course of the appeal under section 79(6), I accept the submission of Mr Warren that in reality there is no such temporal distinction to be drawn. The statutory provisions simply describe what is the nature and extent of the defendant's discretion to deal with the procedural and formal requirements of an application before the defendant on appeal.

33. Mr Warren submits that the language of the decision of 9th November 2017 betrays a misconception on the part of the defendant that there was no discretion to consider the appeals. He draws attention to the way in which the letter simply asserts in his submission that on the basis of invalidity the Secretary of State does "not have jurisdiction to entertain the appeals".

34. Having considered this submission, and examined the totality of the decision of 9th November 2017, I have reached the conclusion that the contentions advanced are without substance. It needs to be borne in mind that this was an administrative decision and thus an overly forensic scrutiny of its terms would be inappropriate. It is particularly pertinent in my judgment that, without being a detailed legal treatise, the decision sets out the nature of the statutory discretion set out in section 79 and summarises the decision of the Court of Appeal in Bath v North East Somerset. I am unable to accept that what follows in terms of PINS' decision involves a complete negation of the exercise of discretion under section 79. The decision goes on to note the view that had been formed that there had been a failure to comply with the formal requirements in relation to notice under part 16 of schedule 2 of the GPDO and in my judgment that is not evidence of PINS assuming that they only have power to conclude that there was no jurisdiction to entertain appeals, but rather explaining their justification for concluding in applying section 79 of the 1990 Act that the applications have not been valid and therefore the appeals should not be entertained.

35. In my judgment a fair reading of the decision leads to the conclusion that it is a concise analysis of the basis upon which PINS were declining to accept jurisdiction in respect of the appeals, rather than an assertion that PINS had no power at all to do anything other than refuse to accept the appeals. True it is that, unlike the pre-action protocol letter, the decision of 9th November 2017 did not delve into or engage with the claimant's contention in relation to prejudice, but it needs to be recalled that the defendant was under no duty to give reasons and indeed no reasons challenge is mounted by the claimant in this case. Against this background I am unable to conclude that there is any evidence to suggest that at the time when PINS reached their decision they failed to appreciate that there was a discretion to be exercised under section 79 as to whether or not the appeals could be accepted. Indeed, in my judgment, the evidence is to the contrary in that the decision itself was careful to spell out the nature of the exercise under section 79 of the 1990 Act involving the discretion which has been analysed above. It follows that I am unable to accept the claimant's arguments in relation to Ground 1 and it must be dismissed.

36. I turn then to the contentions under Ground 2. Under this Ground it is contended that even if PINS had in reality recognised there was a discretion to be exercised under the

legislative framework pursuant to the authorities which have been set out above, that discretion was in fact exercised irrationally. Mr Warren on behalf of the claimant contends that the reality was in relation to nearly all of these applications that the land owner was in fact the self-same organisation or that to whom the application had been made namely the relevant local authority who were the local planning authority for the purposes of the application. Both in his submissions in support of the case and also in the written material provided to PINS it was maintained that there could be no conceivable prejudice to any landowner in the circumstances since they had in truth been notified on the basis that the application was made to the same organisation. On the basis that there could be no prejudice at all, no reasonable decision-maker in the position of PINS could properly refuse to exercise the section 79 discretion to entertain the appeals.

37. In addition, it was submitted by Mr Warren that the pre-action protocol letter corroborated the irrational exercise of discretion by PINS in this case. He drew attention in particular to the final two paragraphs from the pre-action protocol letter set out above. He submitted that the first reasoning in the penultimate paragraph was circular. It was he submitted misconceived for the defendant to contend that "because the requirements were not fulfilled the Secretary of State is not in a position properly to judge whether or not there has been any prejudice". This was circular reasoning in that it purported to conclude that there was prejudice in circumstances where none had been demonstrated and none could be relied upon as a consequence by the defendant. In that the defendant was reaching a conclusion in relation to prejudice and the exercise of discretion without knowing whether or not there had been any this was a conclusion which was both unsubstantiated by any evidence and also irrational. Furthermore, the second reason provided in the penultimate paragraph based on a justification that the Secretary of State had to uphold the planning system was similarly misconceived as it was not directed to the real issue in the case namely, whether there was any justification for not exercising the discretion in the claimant's favour so as to permit the appeals to be considered. This generic argument could not provide a sensible or coherent basis for the exercise of the defendant's discretion.

38. It is in my judgment an ambitious task for a claimant to successfully attack an exercise of procedural discretion of this kind on the basis of irrationality. The starting point for considering the validity of the claimant's submissions must be, firstly, the necessary concession that the legal requirements set out in paragraphs A.3(1) and A.3(5)(c) of part 16 of schedule 2 of the GPDO are clear and straightforward and had not been complied with by the claimant in this case. The failure to comply with the procedural requirements was clear cut. Furthermore, I accept the submission of Mr Kimblin on behalf of the defendant that whilst the provisions of section 327A of the 1990 Act were not directly binding on the defendant, the fact that the local planning authority would have had no discretion in respect of these procedural formalities pursuant to that section was a material part of the background to the exercise of discretion as noted in the decision of 9th November 2017. There was therefore in my judgment a strong justification in the clear provisions of the statutory framework, and the strictures placed upon the local planning authority in respect of procedural requirements, for the conclusion reached by PINS that they should stand by those procedural requirements in the case of these appeals.

39. These points, of course, do not directly engage with the detail of the claimant's submission that no prejudice could conceivably arise where the local planning authority and the landowner were one and the same organisation. In my judgment, however, that contention depends upon a considerable over-simplification. As was observed by the defendant in the pre-action protocol letter it is simply not possible to conclude that there has been no prejudice by the failure to adhere to the procedural formalities in circumstances where they have not been complied with. It is a matter of common knowledge, in particular to those concerned with public administration, that a local authority may have a variety of interests in terms of its functions, not all of which can be assumed to be represented by its functions as a local planning authority. A local authority as a land owner may have very different interests and concerns to take account of in exercising its powers to own and control land. It cannot be assumed that when an application of this kind is made to a local planning authority that the element of the local authority exercising its planning functions will automatically or of necessity consult that part of the council concerned with protecting its interests as a land owner or automatically be aware of all matters which the department responsible for safeguarding the council's interests as land owner would wish to draw to their attention. Certainly that assumption is not contained within the statutory framework which, uncontroversially, by implication provides for the separate notification of the land owner when it is a local authority as part and parcel of the formalities for the application itself. Thus in my view the succinct observation made in the penultimate paragraph of the quote from the pre-action protocol letter set out above was apposite. It is a wholly unproved hypothesis that simply because the local planning authority is part of the same organisation as the affected landowner no prejudice from failing to notify the land owner could conceivably arise. It may be that the local authority as land owner would have different concerns and observations to draw to the attention of the local planning authority exercising its development control functions. I am unable to accept therefore that this observation in the pre-action protocol letter betrays circular reasoning or an irrational approach.

40. Similarly in my view the observation made in the final two paragraphs of the quotation about the claimant's complete failure to engage with the statutory requirements and the defendant's obligation to uphold the planning system do not in my judgment betray any irrationality in the defendant's approach. It is trite to say that the statutory requirements contained within the GPDO are there to be observed and there for good reason. In exercising this discretion PINS were entitled to rely upon the clear-cut failure to comply with the statutory requirements in declining to exercise a discretion in the claimant's favour. Indeed, once it had been concluded that there was no substance in their argument that no possible prejudice could arise as a consequence of their failure the approach taken by the defendant was entirely appropriate.

41. It should be noted that PINS exercise of discretion arose in circumstances where following Ms Anderson's letter of 29th September 2017, and prior to the decision of 9th November 2017, no offer was made by the claimant to undertake the required notification procedure nor was the notification procedure perfected by undertaking that task. True it is that the requirements set out in paragraph A.3 of part 16 of schedule 2 of the GPDO require that notice should be given to the land owner prior to the making of the application. However, as pointed out during the course of argument, had in fact that notification occurred even after the letter of 29th September 2017 the claimant would have had the potential for a far more cogent argument in respect of

the section 79 discretion based upon absence of any prejudice on the basis that in fact, albeit late, notification had occurred so that land owners could raise within the context of the appeal any representations they wished to raise in respect of the proposed development. Had that step been taken it would then, obviously, have been a further fact sensitive exercise for the defendant to decide whether or not to exercise the discretion under section 79 in the claimant's favour. Nonetheless it is important to appreciate that the rationality of the decision of 9th November 2017 falls to be considered on the basis that no attempt had been made, even on a late basis, to comply with the statutory formalities required by the GPDO.

42. It follows from what has been set out above that I am unable to accept that the decision which PINS reached on 9th November 2017 was irrational as contended by the claimants. In my judgment the decision was one which fell within the bounds of reasonable decisions which were open to PINS on the basis of the available material.

43. I turn finally to Ground 3. This is the contention that pursuant to regulation 14(3) of the 2012 Regulations where an appeal has been declined on the basis that the application was invalid the fee should be refunded. It is contended that a determination on appeal that an application was not valid, and therefore jurisdiction in relation to the appeal is declined, places the application within the scope of regulation 14(3), and on the basis that, therefore, the application was invalid and fell to be rejected the fee should be refunded. It is correct to observe that whilst the defendant had no direct interest in this point Mr Kimblin, effectively as amicus curiae, accepted that this analysis of regulation 14(3) was appropriate and that properly construed regulation 14(3) applied where an appeal which had been rejected on the basis of an invalid application fell within the scope of the rejection of an application as being invalid leading to the necessity for the fee to be refunded. I accept in this respect the claimant's submissions. In my view where, as here, the defendant concludes that an appeal is to be rejected on the basis that application is invalid (and he declines to exercise his discretion under section 79 to nonetheless continue to consider the appeal) then that is in effect a conclusion that the application was and should have been rejected as invalid and therefore falls within the scope of regulation 14(3) of the 2012 Regulations. It follows the claimant's case in relation to Ground 3 should succeed, leading to a declaration that in respect of those applications made to the first interested party they are entitled to have their fees refunded.