



IN THE COURT OF APPEAL, CIVIL DIVISION

021778

REF: C1/2011/0265



GARNER & ORS –v– ELMBRIDGE BOROUGH COUNCIL & ORS

**ORDER made by the Rt. Hon. Lord Justice Carnwath**

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

**Decision: granted, refused, adjourned.** An order granting permission may limit the issues to be heard or be made subject to conditions.

Granted in part (listed building and reasons issue); refused on other issues. PCO: appellants costs limited to £6000; 1<sup>st</sup> respondent £17000 + VAT. No costs as between appellants and other respondents.

**Reasons**

**Permission to appeal**

1. Notwithstanding the cogency of Ouseley J's reasoning, the "Listed Building and Reasons Ground" (skeleton 8.3.11 paras 2.1-14) raises arguable issues of some general importance as to the precise content of the section 66 duty, whether the judge was right to infer that it had been discharged by the council, and as to the adequacy of reasons on this aspect.
2. The "Flood Risk ground" (*ibid* paras 3.1-13) is not realistically arguable for the reasons given by Ouseley J. Since the Information Tribunal's decision confirmed that of the Information Commissioner, made in August 2010, it cannot be relied on to justify the introduction of a new financial viability case at this late stage.

**Protective costs order**

3. The general approach, including the principle of a two-way cap, has been determined by this court in the earlier appeal. That is not materially affected by the recent ECJ decision (C-240-09). I note the points made in Mr Buxton's submissions in reply (15/3/11) on the principles generally, including on the issue of reciprocal costs. These issues are part of the wider debate arising from the recognition by the government and the courts of the practical importance of Aarhus principles, and the need for an effective response to them, which cannot be resolved in the context of the present case.
4. The council (first respondent) has agreed to a PCO limiting the appellant's potential liability to £6,000 and its own to £17,000 plus VAT. Those figures represent reasonable limits having regard to the PCOs previously made, and to the restricted issues on which I am granting permission to appeal. The court is armed with all the relevant material, including admirably clear arguments for the claimant, and a comprehensive treatment of all the issues by Ouseley J. I find it hard to see any justification for further expenditure (for solicitors or counsel) on the scale suggested in Richard Buxton's letter of 9<sup>th</sup> March 2011.
5. It is reasonable to direct also that there should be no orders for costs as between the appellant and the other respondents.

**Expedition**

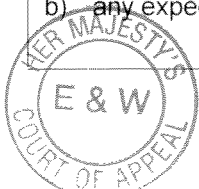
6. I have noted the respondents' representations about the prejudice caused by further delay. The hearing should be expedited to come on as soon as reasonably practicable.

**Information for or directions to the parties**

Except with leave of a single LJ, any applications arising out of this order (whether for permission to appeal or otherwise) will be adjourned to be dealt with at the hearing of the appeal.

**Where permission has been granted, or the application adjourned**

- a) time estimate (excluding judgment)
- b) any expedition - To be heard as soon as possible.



Signed: *By the Court*  
Date: 28<sup>th</sup> March, 2011

**DATED 28TH MARCH 2011  
IN THE COURT OF APPEAL**

GARNER & ORS

- and -

ELMBRIDGE BOROUGH COUNCIL & ORS

**ORDER**

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