

EIR: EIR reg 12(5)(e) – commercial confidentiality exception –
EIR reg 12(1)(b) – public interest balance in a planning context

***BRISTOL CITY COUNCIL v INFORMATION COMMISSIONER and
PORTLAND AND BRUNSWICK SQUARES ASSOCIATION***

**Case Number: EA/2010/0012
24 May 2010**

Cases:

Coco v AN Clark Engineers Ltd [1969] RPC 41

R (on the app of Cummins) v LB Camden [2001] EWHC 1116 (Admin)

Facts

In October 2007 developers applied for permission to develop a site in Bristol. As part of the scheme they required conservation area consent for the demolition of one of the buildings on the site and lodged with the Council a viability report designed to show that it would not be viable to redevelop the building. The viability report was not published by the Council and on 28 January 2008 a local residents' group opposed to the demolition (the second respondent) requested sight of the viability report under EIR. The Council refused to supply it relying on reg 12(5)(e). In June 2008 planning permission was granted for the scheme; in September 2008 the second respondent started judicial review proceedings to quash the permission which were in due course adjourned pending the outcome of the appeal in this case. The second respondent's complaint to the Information Commissioner was upheld on the basis that reg 12(5)(e) did not apply. The council appealed.

Issues

On appeal, the issues were:

- (1) Whether reg 12(5)(e) did apply
- (2) If so, whether the public interest in maintaining that exception outweighed the public interest in disclosure.

Findings

(1) To come within reg 12(5)(e): (a) the information in question must be "commercial or industrial" (b) it must be subject to confidentiality provided by law (c) to protect a "legitimate economic interest" and (d) disclosure would adversely affect such confidentiality. The real issue related to (b). The Tribunal received evidence on the point which was not before the Commissioner going to the question posed in the *Coco v AN Clark* case as to whether the information was "imparted in circumstances importing an obligation of confidence". Although nothing about confidentiality had been said at the time by the developer or the council the Tribunal accepted evidence that the council always regarded

documents like the viability report as being confidential and that the developer submitted it on this basis in this case and that it was reasonable to do so. On the facts therefore the information in the viability report was “subject to confidentiality provided by law” and it was necessary for the Tribunal to consider issue (2).

(2) The Tribunal found that in the circumstances of this case the public interest balance was in favour of disclosure. The important points relied on by the Tribunal were:

(a) the fact that the information was directly relevant to a specific environmental decision about the demolition of a protected building which was imminent and controversial, an especially important factor given the clear policy of the planning regime that such decisions should be taken with the fullest public participation and that there should be “clear and convincing evidence” to justify a decision to demolish;

(b) it was a fact that the council itself owned part of the development site and this feature gave rise to a need for “particular scrupulousness” on its part (R (on app Cummins) v LB Camden);

(c) although it was theoretically open to the second respondent to make its own enquiries and submit evidence to the council about viability the reality was that there is in general a mismatch between the resources available to a residents’ group and a developer;

(d) the fact that the developer said nothing express about confidentiality at the time indicated a lack of great sensitivity and the degree of risk and possible damage to its economic interests appeared to the Tribunal fairly limited;

(e) the viability report was created specifically as part of the evidence necessary to obtain conservation area consent; different considerations may apply to such a report put forward as part of a negotiation of a section 106 agreement, for example.

Conclusion

The appeal was dismissed and the council ordered to supply the viability report.