IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Nos. AC-2023-BHM-00010s.
CO/1742/2023

Neutral Citation Number: [2023] EWHC 2439 (Admin)

Royal Courts of Justice

Tuesday, 12 September 2023

Before:

MR JUSTICE EYRE

B E T W E E N :

TELFORD AND WREKIN COUNCIL — Claimant

- and -

(1) SECRETARY OF STATE
FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) GREENTECH INVEST UK (1) LTD — Defendants

Timothy Leader (instructed by **Legal Services Telford and Wrekin Council**) for **the Claimant**.

Riccardo Calzavara (instructed by **Government Legal Department**) for **the First Defendant**.

The Second Defendant did not appear and was not represented.

J U D G M E N T

(Approved Transcript)

MR JUSTICE EYRE:

Introduction.

1 These proceedings are a planning statutory review pursuant to section 288 of the Town and Country Planning Act 1990 of a decision of the First Defendant made on 27th March 2023.

2 The claim form was filed on 4th May of this year and so within six weeks of the decision. However, it was issued by the Court on 15th May 2023 more than six weeks after the decision. The Claimant served it on 19th May 2023, again more than six weeks after the decision.

3 The matter comes before me for determination of the questions of: (a) whether the claim form was served in time with the consequence that the court has jurisdiction, or (b) whether, if the claim form was not served in time and the court otherwise lacked jurisdiction, I should grant an extension of time.

The Chronology.

4 On 27th March of this year the First Defendant granted planning permission on appeal, contrary to a recommendation of the inspector, for a solar farm on land in the area of the Claimant, the Telford and Wrekin Council.

5 The claim form was filed on 4th May 2023.

6 Monday, 8th May was the Coronation Bank Holiday, subject to that it was the expiry of the six week deadline for filing and the First Defendant says it was also the expiry of the six week period for service of the claim form.

7 It seems that until today counsel had not noticed that 8th May was the Coronation Bank Holiday. However, they have helpfully both addressed the effect of that. For the First

Defendant, Mr Calzavara accepts for the purposes of today that filing and service of the claim form on 9th May 2023 would have been in time and would have complied with the requirements of section 288 of the 1990 Act and of Practice Direction 54D to which I will turn in a moment. That concession was on the footing of the House of Lords decision in *Mucelli v Albania* [2009] UKHL 2 and the approach set out there by Lord Neuberger at paragraph 84.

8 I note in passing that, although the fact of the 8th May being a bank holiday means that it is accepted that filing and in particular service on 9th May would have been good service, it also means that the Claimant when it filed the claim form on 4th May cannot have expected the claim form to be issued on 8th May.

9 The claim form was not, in fact, issued until Monday, 15th May and on the same day the First Defendant's solicitors emailed the Claimant saying that although unsealed copies of the claim form had been sent to them there had, as yet, been no service on the First Defendant.

10 At 5.37 p.m. on 16th May a copy of the sealed claim was sent by email but not to the address which the First Defendant had stated on his website was the address for service by email.

11 At 5.24 p.m. on 18th May Miss Kanish, solicitor for the First Defendant, contacted the Claimant's legal team pointing out that the sending of the email to her and to the addresses to which it had been sent was deficient service. That resulted in an email sent at 7.22 p.m. on 18th May serving the First Defendant at the correct address. The certificate of service records service as being on 19th May. It may well be that, in fact, service is to be taken as being on 18th May but it matters not for these purposes.

12 The First Defendant acknowledged service on 19th May and, on 9th June, applied for a declaration that the court had no jurisdiction because there had not been timeous service of the claim form. Alternatively, the First Defendant sought an extension of time for filing of the Summary Grounds of Resistance. There is no dispute before me that if the First

Defendant's application for a declaration fails, or if the Claimant obtains an extension of time for filing of the claim form, then the First Defendant should be given an extension of time for service of the Summary Grounds of Resistance.

13 Lang J made an order on 5th July providing for the listing of this hearing; providing, at paragraph 1 for the Claimant to file and serve within 28 days a witness statement setting out a full account of the filing and service of the claim, together with any submissions in response to the First Defendant's submissions; and at (c) that:

> "If so advised, an application for an extension of time for service of the claim without prejudice to the primary submission that the claim was served in time."

14 The Claimant's application for an extension of time was made on 26th July.

The Applications and the Contentions in Summary.

15 It will be apparent from the foregoing history that the applications before me are the First Defendant's application for a declaration that the court has no jurisdiction because of the claim form being out of time; his alternative application for an extension of time for the Summary Grounds of Resistance; and the Claimant's application for an extension of time in the event that the Claimant's primary submission that the claim form was in time is unsuccessful.

16 The contentions, in brief, are as follows. I note at this stage the concision and clarity of the submissions on both sides.

17 For the Claimant Mr Leader says that the claim form was served in time. There is, he says, a lacuna in the rules where a party files a claim form under section 288 in the six week period, but where the court does not issue it in the same period, and thereby prevents service of an issued claim form in the six week period. He says that the position is a novel one with no previous authority directly on point. He contends that the court should give a purposive

reading to CPR 54 and to the Practice Direction thereto and apply in circumstances such as those of this case the timing envisaged by CPR Rule 54.7, so that service within seven days of issue of the claim form was effective.

18 Mr Calzavara, for the First Defendant, says there is no lacuna in the rules; that Practice Direction 54D provides a complete code; and that a party must file and serve a section 288 claim form within the period of six weeks from the decision in question. Such a party must allow itself time to do both those things and a failure to do both of them in the six week period means that a claim is not in time.

19 In terms of the approach to be taken to an extension of time it is accepted that I am to apply CPR rule 3.1(2)(a) but that in doing so the application of that provision is to be governed by the requirements set out in CPR rule 7.6(3). The Claimant says that applying those to the circumstances of this case should lead to the grant of an extension of time. The First Defendant says that the Claimant has simply failed to meet the pre-conditions of rule 7.6(3) such that the court does not even get to the stage of having a discretion to exercise.

The Applicable Provisions.

20 Section 288 provides for planning statutory reviews. Section 288(4A) requires an application to obtain the leave of the court, and (4B) provides that: "An application for leave for the purposes of subsection (4A) must be made before the end of the period of six weeks beginning with . . [the date of the decision]".

21 In terms of the CPR I need not recite, but have in mind, the terms of the overriding objective.

22 Rule 3.1(2)(a) contains the power for the court to:

> "extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)."

23 Rule 7.5 provides the period of four months for service of a claim form under Part 7.

24 Then rule 7.6 provides:

> "(1) The Claimant may apply for an order extending the period for compliance with rule 7.5", and then at (3):
>
> "If the Claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made
>
> under this rule, the court may make such an order only if –
>
> (a) the court has failed to serve the claim form; or
>
> (b) the Claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
>
> (c) in either case, the Claimant has acted promptly in making the application."

25 In *R(The Good Law Project) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355, [2022] 1 WLR 2339 the Court of Appeal considered the interrelation between CPR rules 3.1(2)(a) and 7.6(3) in the context of judicial review claims. The position is that when considering an extension of time of a judicial review claim form the application is governed by rule 3.1(2)(a) because rule 7.6 only applies to extension of a Part 7 claim form. However, the principles of rule 7.6(3) are to be applied to govern the rule 3.1(2)(a) determination as Carr LJ, with whom Underhill LJ agreed, said at para.85:

> "As for extensions of time for service of a judicial review claim form, whilst CPR 7.6 does not directly apply, its principles are to be followed on an application to extend under CPR 3.1(2)(a). Thus, unless a Claimant has taken all reasonable steps to comply with CPR 54.7 but has been unable to do so, time for service should not be extended."

26 I will not set them out *in extenso* but I also have regard in particular to the approach and reasoning enunciated by Carr LJ at paragraphs 38, 41, 80 and 83 of her judgment.

27 In *Halton Borough Council v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 293 (Admin), [2023] PTSR 1125, HH Judge Stephen Davies, sitting as a High Court Judge, addressed the position in respect of section 288 statutory reviews. He concluded that the *Good Law* approach was to be applied to extensions of time for such reviews, saying, in the latter part of paragraph 52 of his judgment and having referred to *Good Law*:

> ". . . as I have already said, there is no logical basis for treating statutory review cases any differently from judicial review cases on this point, and since Corus is not authority to the contrary, it would not be proper for me not to apply the approach in *Good Law* to the current case and I do so."

28 At paragraphs 53 to 55 Judge Stephen Davies expressed reservations as to the position indicating that, but for authority, he might have taken a different approach. However, he then explained that even if the approach to be taken was that under rule 3.1(2)(a) unconstrained by reference to 7.6(3) and applying the well-known *Denton v TH White Ltd* [2014] EWCA Civ 906 principles it would probably make no difference in reality to the outcome given the importance that was to be attached to prompt applications in planning cases.

29 It is common ground before me that Judge Davies was right, and that the *Good Law* approach is to be applied to applications for extension of time in respect of section 288 claims. I am satisfied that the concession and agreement was correctly reached and respectfully find Judge Stephen Davies' reasoning on the point compelling.

30 Before Judge Davies it had been accepted that the CPR 7.6(3) requirements were not made out but he also explained at paragraphs 59 and 65 that, even if he had taken the *Denton v TH White* approach, he would not have extended time in that case, noting at 59:

> ". . . that any delay measured in a day or more in serving a claim for statutory review such as this cannot be other than serious and significant. That is because of the importance attached to service of the claim form within the period required by the statute. . ."

31 At paragraph 65 Judge Davies made the point that the Claimant there had left the filing of the claim form until one or two days before the last date for filing and service, and said that this:

> "was plainly an unnecessary risk to take since it needed the co-operation of the court to obtain a service copy of the sealed claim form. . ."

32 I have to remember, as Mr Leader pointed out, that in both these cases, and in the case of *Corus UK Limited v Erewash Borough Council* [2006] EWCA Civ 1175, [2007] 1 P&CR 22, the court had issued the claim form within the relevant period.

33 Part 1 of CPR 54 deals with non-planning judicial review claims, and rule 54.7 provides that the claim form must be served on the defendant within seven days after the date of issue.

34 Part 2 of CPR 54 consists of rules 54 2.1, 2.2, 2.3 and 2.4, and is concerned with planning court claims defined as being 'planning judicial review' and 'statutory review'.

35 Rule 54 2.3 says:

> "These rules and their Practice Direction shall apply to Planning Court claims unless this section or a Practice Direction provides otherwise."

36 I note in passing that, in context, those words must be an indication that the entirety of Part 54 applies to such claims save to the extent that that section of Part 54, or a Practice Direction under that section, provides otherwise.

37 There is a Practice Direction under that section of Part 54 namely Practice Direction 54D.

38 By paragraph 1.2 that practice direction provides that: "'planning statutory review' means a claim for statutory review under *inter alia* s.288.

39 Paragraph 4 deals with service and related matters. 4.1 provides: "The Part 8 procedure must be used in a claim for planning statutory review".

40 Then paragraph 4.2 says:

> "A Part 8 claim form must be used and must be filed at the Administrative Court within the time limited by the statutory provisions set out in paragraph 1.2."

That being section 288 of course.

41 Paragraph 4.8 says

> "The claim form must be served on the appropriate Minister or government department and, where different, on the person indicated in the following table . . ."

And then provides for the persons on whom there must be service.

42 Then at paragraph 4.11 the Practice Direction provides:

> "The claim form must be served within the time limited by the relevant enactment for making a claim for planning statutory review set out in paragraph 1.2."

Was the Application served in Time?

43 So the effect of paragraph 4.11 unglossed and looking at its language without more is that an application under section 288 must be both filed and served within the period of six weeks from the decision in question.

44 The Claimant, however, says that matters are not that straightforward. It says that there is a lacuna in Part 2 of CPR 54 and in PD54D because paragraph 4.11 does not contemplate the situation where service of the claim form in time is impossible by reason of the failure of the court to issue the claim form within the six week period. Mr Leader makes the point that this issue is a novel one and that it was not addressed in *Corus, Good Law* or *Halton* because in each of those cases the claim form had been issued by the court before the expiry of the relevant period. He says that the effect of the lacuna can be to cause injustice and/or absurdity because a claimant who has filed the claim form within the permitted six week period may be unable to comply with paragraph 4.11 through no fault of the claimant's own but because of delay on the part of the court. Mr Leader says that this warrants a purposive reading of CPR 54 having regard to the overriding objective and to the power of the court to

adopt an interpretation which avoids absurdity as approved by Lord Kerr in *R v (McCool)* [2018] UKSC 23 at paragraph24, adopting and approving a passage from *Bennion on Statutory Interpretation*.

45 In addition, Mr Leader says that the various references in Part 54 and in the Practice Direction to the Practice Direction supplementing that part mean that it is legitimate to have reference to CPR 54 as a whole including rule 54.7. He says that the court should approach the matter on the footing that where the failure to serve within the six week period and the consequent non-compliance with paragraph 4.11 is because the court has not issued within the six week period a claim form which was filed within that period then service of the claim form is to be governed by CPR 54.7. This would have the consequence that service within seven days of issue by the court will be good service.

46 Further to the invocation of the need to avoid perceived absurdity and the lacuna to which I have just referred, the Claimant made a number of additional points. First, it is said that section 288 and paragraph 4.2 of Practice Direction 54D provide a six week period for filing of the claim form and that the Claimant is entitled to use all that period for filing. Next, it is said that in circumstances where the courts and the rules require procedural rigour; impose tight time limits; and create high hurdles to be surmounted before an extension of time is granted then it is incumbent on the court service to have in place systems which operate promptly. The court is required, Mr Leader says, to have a system which enables and ensures prompt attention to claims so that those claims which need handling promptly are so handled. This should be the position even if the need for urgency is not flagged up by a claimant or another party. The court should have a system in place which enables the court to see that a claim form is of a particular kind and that it requires urgent attention and then to give it that attention. Mr Leader accepted that this approach could not be invoked if a claimant filed a claim form after close of business at the end of the six week period. He also accepted it could not be invoked if a claimant filed a claim form at a time when there was

realistically no time left for the issuing of that claim form by the court. Mr Leader said that, realistically, a half day period should be sufficient for the processing of a claim form, and that a claimant who files within the six week period but not right at the end in the sense of less than half a day before the end of the period should not be penalised.

47 In addition, Mr Leader pointed to the nature of the Claimant. It is a public body with what Mr Leader said was an inevitable risk of an inability to take decisions as quickly as a private individual or a non-public body might be able to do. That was because of the need for democratic and political input into the consideration of matters. The difficulty with that argument is that many of the persons or bodies bringing applications under section 288 will be public bodies, and Parliament, in setting out the six week period in section 288, and the Rules Committee in drawing up the Rules and the Practice Direction, are to be taken to be well aware of that, No distinction was drawn, either in the statute or in the Rules, between a section 288 application brought by a private individual (on Mr Leader's analysis able to start proceedings at the click of the fingers) and a public body needing committee approval or the like to commence proceedings.

48 The First Defendant, through Mr Calzavara, says that Practice Direction 54D provides a complete code. A party seeking to bring a statutory review must take account of the timings and, in particular, of the requirement to both file and serve in the six week period. There is no lacuna, the First Defendant says, and to the contrary there is a potential prejudice to defendants if time is extended because of delay on the part of the court.

49 For the following reasons, I accept the First Defendant's analysis.

50 In my judgement PD54D is clearly intended as a complete code to govern the filing and service of section 288 applications and, indeed, other statutory reviews, and I am satisfied that it can operate properly as such a code.

51 The proper interpretation of PD54D is to be undertaken having regard to the great importance of urgency in these matters and to the short time limits in statutory review cases concerned with planning decisions. Parliament, in imposing the six week limit in section 288, and the Rules Committee, in making reference to that in the Rules and the Practice Direction, are to be regarded as having taken account of that public interest. It is to be remembered that delay in terms of challenges to planning decisions, such as that of the Secretary of State here, has an effect not just on good public administration but also on those who have been given permission on those who have been refused permission and on those who wish to arrange their affairs on a particular basis.

52 The provisions of paragraph 4.11 are clear. The application under section 288 must be filed and served within a six week period. A claimant must proceed on the basis that he, she, or it needs to act sufficiently quickly so as to be able to do both, that is both file and serve, in the six week period. The consequences are potentially harsh in the sense of being firm and causing severe consequences for a party who does not comply because such a party loses the opportunity to bring the statutory review but they are not by any means unworkable and the position is clear. The situation is not one of absurdity even taking account of the wide interpretation which is to be given to absurdity by reference to the paragraph I have quoted in the decision in *McCool.* There is, in my judgement, simply no need to go outside the clear meaning of paragraph 4.11 of the Practice Direction.

53 Turning to the Claimant's subsidiary factors and to factors subsidiary to my main reasons. The Claimant's approach would generate uncertainty. In particular it would have an effect on those who have received permission or who wish to arrange their affairs on the basis of a particular permission having been granted or decision made. Those persons are entitled to proceed on the basis that if no claim has been served within the six week period then that is the end of the matter unless the strict requirements for an extension of time are met. Under the Claimant's analysis there would be scope for argument as to whether the claim had been

filed in sufficient time for the court to issue. That would cause uncertainty in terms of the defendant minister and a defendant recipient of permission not knowing whether they could rely on the end of the six week period. There would also be uncertainty as to whether filing at say 12 noon on the last day of the six week period was sufficient or whether there had to be filing at 9 a.m. that day or some other time.

54 In addition it is simply unrealistic to say that the court should have a system for moving an application to the top of the pile and treating it as urgent so as to ensure issuing within 48 hours or thereabouts (slightly less than that would have been needed in this case) of filing when there has been no notification to the court of the particular urgency of the matter in question. Such a system would require the court staff not only to appreciate that the claim form is making an application under section 288 and I go this far to agree with Mr Leader that such identification would be a straightforward enough exercise. However, it would then be necessary for there to be a system of putting all section 288 applications in a special fast track to be dealt with within, say, 24 hours of filing or indeed on Mr Leader's analysis, if half a day is sufficient, by close of business on the day of filing. Alternatively it would be necessary for the court staff to consider the particular claim form; to look in the claim form for the date of the decision under challenge; to calculate six weeks from that date; and then to work out when the claim needs to be issued so as to enable service within the six week period. Not only is the analysis of what would be required in terms of the court staff unrealistic it also ignores the difference between judges applying the rules set out in statute and in the CPR and court staff funded by, and directed by civil servants under the direction of the Lord Chancellor.

55 It is also relevant that in a scenario such as this, the Defendants, and in particular here the Second Defendant, are not responsible for the delay on the part of the court. It is not clear why the adverse consequences of what is said to have been delay on the part of the court should fall on the Defendants causing them to lose the protection of the strict six week

period rather than on the Claimant particularly as the Claimant can avoid the adverse consequences by filing at an earlier point in the six week period.

56 That brings me to the next point which is that I am persuaded that my interpretation of paragraph 4.11 and of CPR 54 as a whole is neither contrary to the overriding objective nor unjust. It is open to a claimant in circumstances such as those here to flag the urgency of the application when the claim form is filed and to chase the court for the claim form to be issued. Mr Leader says that there is no obligation on a claimant to do that. That is right but it does mean that a claimant who chooses not to take such steps is failing to do so deliberately having already chosen to file the claim form late in the six week period. Such a claimant is deliberately leaving matters in the hands of the court in circumstances where it is open to the claimant to seek to prevent delay or to encourage expedition on the part of the court by flagging up the urgency of an application or by chasing the court. That is something that a defendant in these circumstances has no scope for doing. Not only is a defendant not obliged to get in touch with the court and say: "By the way, you know the claim form that the claimant has filed, please get on with it and issue it", but there is no real scope for a defendant taking such a step.

57 A claimant which has filed a claim form in good time and/or has acted energetically to alert the court to the urgency of the matter and to the need for urgent treatment of the application is very likely to have been found to have taken all reasonable steps, certainly in the former instance, and in those circumstances would have a good prospect of getting an extension of time. The fact that a claimant has six weeks to file does not mean that the claimant can escape the risk of being out of time to serve if that claimant waits until the end of the six week period and does so knowing that the six week period is the period for service as well as filing.

58 It follows that the claim form is out of time.

Should an Extension be granted?

59 I have already quoted the words of Rule 7.6(3), but they bear repetition. The court may only make an order for extension of time after the period for service has expired: where "the court has failed to serve the claim form", which does not arise here, or where the claimant has both "taken all reasonable steps to comply with rule 7.5" – in the circumstances here that should be read as “to comply with PD54D” – "but has been unable to do so"; and "has acted promptly in making the application."

60 Here, Mr Leader says the Claimant filed in time and had done all that it could. When the claim form was issued by the court after the six week period then the Claimant necessarily could not comply with PD54D 4.11 and so the steps taken after that are irrelevant. "Reasonable steps" must, he says, relate to steps taken before the end of the six week period. I agree with that up to a point. I agree that the only steps relevant to whether the pre-condition in rule 7.6(3)(b) has been met are steps within the six week period. Other steps may, however, in the fullness of time be relevant to the exercise of the court's discretion if the pre-conditions for an extension have been established. That is because it is to be remembered that the effect of rule 7.6(3) is not to say that an extension will inevitably be granted if the steps set out there have been taken but to say that unless those steps are taken the court does not even get to the stage of exercising its discretion.

61 Here I am satisfied the Claimant did not take all reasonable steps within the six week period. The filing was on Thursday, 4th May, right at the end of the six week period in circumstances where 6th and 7th May were a Saturday and a Sunday respectively and 8th May was a bank holiday. So the Claimant must have known that for the claim form to be issued in time it would have to be issued by close of business on Friday, 5th May. There is no evidence, and it is not suggested, that anything was done at the time of filing to alert the court to the need for urgent action. There was nothing by way of saying to the court: 'We are right up against the limit, please put this at the top of the pile, please issue it urgently'. There

is no suggestion that there was any chasing of the matter on either 4th or 5th May. Those were steps which could have been taken, and which could easily have been taken and which were reasonable steps to take.

62 The reality is that here those acting for the Claimant did not appreciate the gravity of the position and the rigour of the time limit. As a consequence they did not take steps to address the need for the claim form to be issued in time with sufficient urgency.

63 Moreover, the second pre-condition is not made out. The Claimant has not acted promptly in making the application. Lang J's order was not providing or determining that issuing the application within the period of 28 days from the date of her order would necessarily amount to having acted promptly for the purposes of rule 7.6(3)(c). Conversely, what Lang J was doing was saying that if the Claimant was to make such an application it had to do it in that 28 day period. A failure to do so would have meant that the application had not been issued in the period provided by the court and, at least potentially, there would be need to seek relief from sanction and an extension of that time.

64 The application here was not made promptly. The Claimant could have applied for an extension of time on 9th May. At the start of business on 9th May it was open to the Claimant to realise that the six week period had expired and that the claim form had not been issued. The Claimant could then have applied to the court for an extension of time to the period Mr Leader now says is appropriate, say, seven days after issue. It was equally open to the Claimant to make such an application on 15th May when the issued claim form was received. The Claimant could then have applied saying: "We have received this on 15th May, please may we have an extension?" Instead of taking those steps in May of this year the Claimant waited until 26th July to apply for an extension of time even though time had expired on 8th or potentially 9th May 2023. It follows that the requirements of rule 7.6(3) are not satisfied, and there is no scope for an extension of time.

65 I note, for the sake of completeness, that the fact that the Claimant had served unsealed versions of copies of the claim form on the First Defendant before the six week period and at incorrect email addresses is not relevant at this stage. Those considerations might have been relevant to some extent if I had got to the stage of having a discretion to exercise in terms of an extension of time but I have not got to that stage and, therefore, they simply cannot affect the conclusions I have already set out.

Conclusion.

66 It follows that the claim form is out of time. In the absence of an extension of time the court has no jurisdiction and, for the reasons I have just explained, I refuse the application for an extension of time.