Neutral Citation Number: [2024] EWHC 2458 (Admin)

Case No: AC-2023-LON-000112

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2024

Before :

TIM SMITH
(sitting as a Deputy High Court Judge)

- -

Between :

FARNHAM TOWN COUNCIL	**Claimant**
- and –	
SECRETARY OF STATE FOR LEVELLING UP HOUSING & COMMUNITIES (1)	**Defendants**
WATES DEVELOPMENTS LIMITED (2)	
WAVERLEY BOROUGH COUNCIL (3)	

- -

David Blundell KC and Siân McGibbon (instructed by **Wellers Hedleys)** for the **Claimant**
Michael Fry (instructed by **Government Legal Department**) for the **First Defendant**
Sasha White KC and Anjoli Foster (instructed by **Cripps LLP**) for the **Second Defendant**
The **Third Defendant** did not appear and was not represented

Hearing dates: 16th and 17th July 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 3 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR TIM SMITH (sitting as a Deputy High Court Judge):

Introduction

1. This claim is a statutory challenge brought by the Claimant under section 288 of the Town & Country Planning Act 1990 ("the 1990 Act") against a decision by one of the First Defendant's planning inspectors to allow the Second Defendant's appeal and grant it planning permission.

2. The issues for determination include not only a challenge to the lawfulness of the decision but also the questions of whether the court can, and, if so, should, extend time for the service of proceedings after they were served late.

Background facts

3. The Second Defendant ("Wates") applied to the Third Defendant ("the Council") for planning permission for the development of two parcels of land on each side of Waverley Lane near Farnham ("the Site"). The Site sits at the edge of the Surrey Hills Area of Outstanding Natural Beauty ("AONB").

4. The AONB was designated in 1958 and its boundaries have remained unchanged since that date. However in May 2021 the responsible authority, Natural England, announced a review of the AONB boundaries. Part of that review included a proposal to enlarge the boundaries in an area known as the Wey Valley Farnham Extension ("AONB Extension"). Part of the Site falls within the AONB Extension and so it is, in technical language, a "candidate area for designation" within the AONB.

5. Statutory consultation on the boundary review took place between 7 March 2023 and 13 June 2023, although the outcome of the consultation is not yet known. If the consultation results support the proposed inclusion of the relevant part of the Site within the AONB then the boundary would be changed formally by means of a Variation Order submitted to the Secretary of State for confirmation.

6. The Site has been the subject of a number of planning applications in the past. In March 2018 a planning appeal against the refusal of permission for 157 dwellings on the Site was dismissed by the First Defendant, contrary to the recommendation of his appointed Inspector. Subsequently a planning application for 146 dwellings was refused by the Council on 10 July 2020. This refusal was not appealed.

7. Most recently Wates applied to the Council for outline planning permission for the development of 146 dwellings on the Site. All matters save for means of access were reserved for later approval. This application was refused by the Council on 11 November 2022. Wates appealed against the refusal.

8. The appeal by Wates against this latest refusal was heard by a planning inspector, Ms Lesley Coffey ("the Inspector"), appointed by the First Defendant ("the Secretary of State"). The decision on the appeal was delegated to the Inspector. She heard evidence at a public inquiry between 18-21 April 2023, undertaking a site visit on 21 April. The Claimant submitted written representations objecting to the development proposals but did not appear at the public inquiry.

9. By her decision letter ("DL") dated 3 July 2023 the Inspector allowed the appeal. Planning permission for the development was thereby granted subject to conditions ("the Decision").

Background to the current proceedings

10. I consider in more detail later the basis for the Inspector's decision. Firstly it is necessary to consider the procedural history to the current challenge.

11. Following receipt of the DL the Council considered whether to mount a legal challenge to it. Ultimately it decided not to do so.

12. Meanwhile the Claimant was also considering whether to bring its own challenge against the Decision. Pursuant to its Standing Orders it convened an extraordinary meeting to take place on the evening of 8 August 2023. At that meeting a resolution was passed authorising the bringing of a challenge against the Decision.

13. The challenge to the Decision was brought pursuant to section 288 of the 1990 Act. Section 284(3)(b) of the 1990 Act provides that this is the only means available to challenge the Decision. Technically it is therefore a "statutory challenge" (also known as an application for "statutory review") and not a judicial review. I draw attention to this distinction for reasons which will become apparent later.

14. The two grounds of challenge may conveniently be summarised as (1) a failure by the Inspector to have regard to a material consideration, namely the wording of policy FNP10(c) of the Farnham Neighbourhood Plan, and (2) a failure to give sufficient reasons for the decision to allow the appeal despite the conflict with policy FNP10(c).

15. The requisite time periods involved in a statutory challenge brought under section 288 are specified in the section itself, as supplemented by the relevant provisions of the Civil Procedure Rules. The derivation of those time limits requires a careful tracing through the relevant provisions, as set out in more detail below, but for present purposes it suffices to note that it was common ground between the parties that by virtue of s288(4B) of the 1990 Act a challenge must be both commenced and served within a period of 6 weeks beginning the day after the date of the DL. The last day of the period was therefore 14 August 2023.

16. The claim was filed by the solicitors acting for the Claimant on 14 August 2023. But service on the Secretary of State, Wates and the Council was not attempted until 16 August. Even then service on the Secretary of State did not accord with the requisite procedures and proper service on him was only effected on 18 August 2023.

17. An explanation of what happened is provided, with commendable candour, through the witness statement of Craig Batko. Mr Batko is a solicitor with the law firm acting for the Claimant. Owing to the absence of a colleague on holiday it fell to him to issue and serve the proceedings. Having issued the proceedings on 14 August his witness statement goes on to record:

> "The Court confirmed by email that the claim had been issued just before 4pm that day. I believed at the time that I would have a period of time after issue to serve

> the proceedings, not appreciating at the time that the deadline to serve was in fact that day as well.
>
> Our Counsel … emailed me on 16 August to find out if service had been done and if not then I would need to serve immediately and make an application to extend the time for service because service should have been by 14 August as well. I immediately arranged for postal service on the First and Second Defendant which was done on 16 August 2023 and arranged for the Claimant to attend the offices of the Third Defendant to serve personally there. Later that day I arranged for certificates of service to be filed which should be on the court file. Our application to extend the time for service was also made on 16 August 2023 and the application notice returned to us by email bearing the Court's seal dated that day.
>
> I regret that it was not until 18 August 2023 that I was made aware … that I could and maybe should serve on the First Defendant by email. I immediately arranged for this to be done. I also emailed the issued proceedings and bundles to the Second Defendant that day and I arranged for two further certificates of service to be filed at Court confirming email service on 18 August 2023 and those certificates of service will also be on the Court file"

18. It is common ground that Mr Batko should have served proceedings on the Secretary of State by email to a designated email account, and that service on the Secretary of State did not therefore take place until 18 August 2023. There is a dispute between the Claimant and Wates as to whether there was any obligation to serve the proceedings on Wates at all, but it is unnecessary for me to resolve that dispute given the agreement between all the parties that service was not effected fully until the later date on which proper service upon the Secretary of State took place by email.

19. Realising the error Mr Batko made an application to the court for a retrospective extension of time within which to effect service. Both the Secretary of State and Wates resist the application.

20. There are thus two matters for the Court to determine:

    a) Whether the Claimant is to be granted permission to extend time for service of the proceedings, and

    b) If so whether permission to proceed with the statutory review should be granted (permission now being required by virtue of section 288(4A) of the 1990 Act)

21. The case came initially before Julian Knowles J on the papers. By his order dated 5 January 2024 he directed that both matters be heard at a rolled up hearing. It was on this basis that the case came before me.

22. As a brief post-script before considering the outstanding matters in detail I note that the separate question of Aarhus cost protection put in issue by Wates was dealt with on the

papers shortly before the hearing by Timothy Corner KC (sitting as a Deputy High Court Judge). The parties acknowledge that his order dated 28 June 2024 disposed of all outstanding questions related to cost protection.

Application to extend time for service

23. It is appropriate to deal firstly with the Claimant's application to extend time for service of the claim. Self-evidently if this application fails then the claim fails with it.

24. The extension of time application is opposed by both the Secretary of State and by Wates. Both submit primarily that the court has no power to extend time for service. In the alternative both submit that the court should decline to extend time even it has the power to do so.

25. I put to Mr David Blundell KC for the Claimant that there are therefore two obstacles to his application, which could conveniently be characterised as "could I extend" and "should I extend", and he accepted that both obstacles needed to be surmounted.

Could I extend?

26. The answer to this question turns on the correct interpretation of the relevant provisions of the Civil Procedure Rules, as informed by the way in which these or equivalent provisions have been interpreted by the courts.

The Law

27. As I note above section 288(4B) of the 1990 Act requires that any application for leave to proceed with a statutory challenge must be made to the court:

> "... before the end of the period of six weeks beginning with the day after –
>
> …
>
> (c) in the case of an application relating to an action to which this section applies, the date on which the action is taken"

28. The period for issuing proceedings thus starts to run one day after the date of the decision letter and that time limit is absolute save in exceptional circumstances (the authority for this proposition being the judgment of Lindblom LJ in Croke v Secretary of State for Communities and Local Government [2019] EWCA Civ 54).

29. Part 54 of the Civil Procedure Rules deals with both judicial review and statutory review claims. Section II of Part 54 covers rules 54.21 to 54.24 under the heading "Planning Court".

30. Rule 54.21(1) provides that Section II applies to "Planning Court claims" which are defined in rule 54.24(2):

> "(2) In this Section, 'Planning Court claim' means a judicial review or statutory challenge which
>
> (a) involves any of the following matters -
>
> …
>
> (i) planning permission …."

31. Rule 54.23, headed "Application of the Civil Procedure Rules", then provides:

> "These Rules and their practice directions will apply to Planning Court claims unless this section or a practice direction provides otherwise"

32. On the subject of practice directions rule 54.24 then provides:

> "Practice Direction 54D makes further provision about Planning Court claims, in particular about the timescales for determining such claims"

33. Practice Direction 54D reiterates, at paragraph 1.1, that:

> "This Practice Direction supplements Part 54 . It applies to Planning Court claims and appeals to the Planning Court"

34. Paragraph 1.2 then provides:

> " In this Practice Direction "planning statutory review" means a claim for statutory review under –
>
> …
>
> (b) section 288 of the Town and Country Planning Act 1990"

35. Paragraphs 4.8 to 4.11 then deal with the requirements for service of a claim covered by this Practice Direction. Of these, paragraph 4.11 is the most relevant to the facts of the case. It 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"

36. A combination of these provisions in Part 54 and Practice Direction 54D thus establishes that a statutory challenge under section 288 must be both issued and served within 6 weeks.

37. Both Part 54 and Practice Direction 54D are silent on the critical question in this case about whether the time for service can nevertheless be extended on application to the court.

38. I have been referred extensively to two Court of Appeal authorities said to be relevant to the question and upon which the parties rely to varying degrees. These are the cases of Corus UK Ltd v Erewash Borough Council [2006] EWCA Civ 1175 and R (on the application of the Good Law Project) v Secretary of State for Health and Social Care [2022] EWCA Civ 355. Each of these cases also refer to other provisions of the Civil Procedure Rules outside of Part 54 and its Practice Directions which are said to be germane to the question of extensions of time.

39. Corus related to a statutory challenge to the adoption of a development plan document, pursuant to section 287 of the 1990 Act. Although the subject matter of the challenge differs from a challenge under section 288 the statutory provisions are substantially similar. In particular, in Corus the proceedings also had to be both commenced and served within a 6 week period.

40. In Corus the statutory review proceedings were served three days late. The claimant applied to the court to extend time for service. At first instance McCombe J agreed to extend time, relying on the power in rule 3.1(2)(a) of the Civil Procedure Rules. Rule 3.1(2)(a) provides that:

> "Except where these rules provide otherwise the court may:
>
> (a) 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)"

41. The defendant appealed arguing that rule 3.1(2)(a) had no application to the facts of the case; that the proper approach was governed by rule 7.6 when read with rule 7.5; that on the facts Corus could not satisfy any of the criteria in rule 7.6; and that as such an extension of time should not have been granted.

42. At that time rules 7.5 and 7.6 read as follows:

> "7.5
>
> (1) After a claim form has been issued it must be served on the defendant.

(2) The general rule is that a claim form must be served within four months after the date of issue.

(3) The period for service is six months where the claim form is to be served out of the jurisdiction

…

7.6

(1) The claimant may apply for an order extending the period within which the claim form may be served.

(2) The general rule is that an application to extend the time for service must be made:

(a) within the period for serving the claim form specified by rule 7.5; or

(b) where an order has been made under this rule within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for service of the claim form 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 been unable to serve the claim form; or

(b) The claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and

(c) In either case the claimant has acted promptly in making the application"

43. The defendant's appeal was dismissed. The Court of Appeal held that, properly construed, rule 7.6 was not engaged and that nothing prevented the Judge from exercising a discretion to extend time for service pursuant to rule 3.1(2)(a). Having reached this conclusion Laws LJ, delivering the leading judgment, made the following observation at [19]:

> "I should add that I see nothing in this result which sits uneasily with the overriding objective of the CPR. Judges will exercise their discretion whether or not to extend time for service under CPR 3.1(2)(a) in accordance with the overriding objective, which will require them of course to have regard to the statutory policy that these cases be subject to minimum delay, a policy demonstrated by the absolute 6-week time limit for issue of proceedings. On the other hand, they will have regard also to the general public interest in having viable challenges to decisions of public authorities ventilated in proceedings"

44. By contrast Good Law involved a claim for judicial review rather than statutory review. In those circumstances the timing for issue and service is split, with rule 54.7 of the

Civil Procedure Rules allowing for the service of proceedings to take place within 7 days after the date of issue. Nevertheless on the facts of the case errors in the service of proceedings meant that service was not effected correctly within this 7 day period and so was also late.

45. At first instance O'Farrell J held that rule 7.6 did not apply in judicial review proceedings but that in any event none of the criteria in rule 7.6(3) could have been met on the facts. It had been agreed by the parties at first instance, and repeated by them on appeal, that if rule 7.6 were engaged then rule 3.1(2)(a) could not be.

46. The Court of Appeal in Good Law held by a majority that O'Farrell J was correct in her conclusion that strictly rule 7.6 did not apply to judicial review claims, with the result that rule 3.1(2)(a) did. However, giving the leading judgment for the majority in the Court of Appeal, Carr LJ (as she then was) agreed with the outcome but not with the Judge's reasoning. She held at [78]-[81]:

> "78. Having reached the conclusion that CPR 7.6 was not engaged, the Judge turned to Good Law's application under CPR 3.1(2)(a). She did so by reference to the principles identified in Denton v White in the context of an application for relief from sections under CPR 3.9 which, as settled in Hysaj, apply in the same way and with the same rigour to an application under CPR 3.1(2)(a).
>
> 79. However and fundamentally, the court in Denton v White was not addressing relief from sanctions (or extensions of time) in the context of service of originating process. As set out above, applications for extensions of time for service of Part 7 and Part 8 claims do not fall under CPR 3.1(2)(a) (but under CPR 7.6). There is nothing to suggest that the court in Denton v White (or Hysaj) had in mind failures in service of originating process and applications for extensions of time for service of any claim of any sort, including judicial review claims …
>
> 80. The question then is how the discretion in CPR 3.1(2)(a) to extend time for service of a judicial review claim should be exercised. There is no good reason why the requirements under CPR 7.6(2) for a retrospective extension of time to serve a Part 7 or Part 8 claim form should not apply equally to a judicial review claim, and every reason why they should. Indeed, Good Law's skeleton referred to its application for an extension of time under CPR 3.1(2)(a) being made "by analogy to CPR 7.6". As set out above, promptness is an essential requirement in any judicial review claim, and particularly in a procurement challenge. The time limit of seven days for service of a judicial review claim is (far) shorter than the time limits for service of Part 7 and Part 8 claims. It would be wholly counter-intuitive in those circumstances for the extension regime for judicial review claims to be more lenient than that applicable to Part 7 and Part 8 claims.
>
> 81. On this approach, there was no justification for an extension of time for service of the claim form. Good Law had not taken all reasonable steps to comply with CPR 54.7. Thus, whilst the Judge erred in her approach on the application under CPR 3.1(2)(a), it was an error in Good Law's favour. The outcome, namely

> dismissal of the application to extend time for service of the judicial review claim, remains the same"

47. Carr LJ's overall conclusion on the relationship between rules 3.1(2)(a) and 7.6 was therefore as follows, at [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"

48. As I have noted above, Good Law was a case involving a judicial review rather than a statutory review. Nevertheless the principles enunciated by Carr LJ in relation to applications for an extension of time for service have been considered by this court in several subsequent planning cases involving statutory review.

49. The first such case was Halton Borough Council v Secretary of State for Levelling Up Housing and Communities [2023] EWHC 293 (Admin), a decision of HHJ Stephen Davies sitting as a Judge of the High Court. The case involved a statutory challenge to a costs decision brought under section 288(1A) of the 1990 Act.

50. As with the facts of the present case, in Halton Borough Council the claim was issued within time but no attempt was made to serve it until after the 6 week period had expired. Service was effected one day late. The reason for this appears to derive from the same mistake made by Mr Batko in the present case, namely the erroneous assumption that the procedure applicable to statutory review was the same as that applying to judicial review and hence that a further 7 days after issue was allowed for the claim to be served. The parties cited both Corus and Good Law but the claimant conceded that if the approach in Good Law were found to be applicable to the present case the claimant could not demonstrate that it had taken all necessary steps to comply with rule 7.5.

51. Having considered both Corus and Good Law Judge Davies preferred the approach of the latter and he followed it in his case. Whilst recognising that there were subtle differences between the procedures adopted in judicial review and statutory review he concluded that there was no good reason for declining to follow the approach in Good Law in statutory challenges as well as judicial reviews. At [52] of his judgment he held as follows:

> "In my judgment, whilst I am not strictly bound to apply either Corus or Good Law, since: (a) the former did not decide that in a statutory review claim it was not permissible to apply CPR 7.6 by analogy; whereas (b) the latter did not decide that in a statutory review case, as opposed to the judicial review cases to which it directly referred, the court was required to apply CPR 7.6 by analogy, nonetheless since, 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"

52. The second case is Telford and Wrekin Council v Secretary of State for Levelling Up Housing and Communities [2023] EWHC 2439 (Admin), a decision of Eyre J. In this case the claimant sought to challenge an appeal decision of the Secretary of State pursuant to section 288 of the 1990 Act. It filed a claim form with the court within the 6 week challenge period, on 4 May 2023, but the claim was not issued by the court until 15 May 2023 which was outside the 6-week period. The claimant served the claim on 19 May which was also outside the 6-week period.

53. Both Corus and Good Law Project were cited to Eyre J, as was the judgment of HHJ Davies in Halton Borough Council. Commenting on the latter, Eyre J held as follows at [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"

54. The claim was dismissed.

55. The third case is Aurora Properties (UK) Limited v Welwyn Hatfield Borough and the Secretary of State for Levelling Up Housing and Communities [2024] EWHC 1213 (Admin), a decision of Mould J. This claim involved a statutory challenge to the adoption of a development plan document under section 113(3) of the Planning and Compulsory Purchase Act 2004. Those are provisions which are substantially similar to section 287 of the 1990 Act (being the relevant statutory challenge provisions considered in Corus). The claim was issued in time but was served late.

56. Mould J was referred to the judgments in Good Law, Halton Borough Council and Telford and Wrekin Council. In considering them he concluded at [52]:

> "I am not bound either by HHJ Davies or by Eyre J, but I should follow them unless I clearly consider their approach to be wrong in principle. I do not consider their approach to be wrong in principle. On the contrary, in my judgement, it is clearly correct to apply the approach stated by Carr LJ in [85] of Good Law Project to applications for an extension of time for service of claims for planning statutory reviews. Claims under section 113 of the 2004 Act are an obvious example of that class of claim"

57. For completeness I should record that there is a fourth case – Home Farm Land Limited v Secretary of State for Levelling Up Housing and Communities [2023] EWHC 2566 (Admin) - in which Lang J also considered the approach commended in Good Law that was relied upon in Halton Borough Council. None of the parties in the claim before me placed as much emphasis on this case as they did the other three, primarily because Lang J found that the claim in question was not filed within the requisite time period and this conclusion alone was sufficient to dispose of the case, although she did then also consider the implications of the claim not being served in time either. For these reasons I agree that Home Farm does not have a material bearing on this part of the case.

58. Having set out the relevant law I turn now to the arguments of the parties in this case on the question of "could I extend?". At the outset I wish to express my gratitude to all Counsel for the clarity of their written and oral submissions.

Claimant's submissions

59. For the Claimant Mr Blundell KC's primary submission was that Corus was binding on this court and should be followed. Unlike Good Law it dealt specifically with the circumstances of a statutory challenge rather than a judicial review, and the provisions of section 287 of the 1990 Act considered in Corus are for all practical purposes identical to the provisions of section 288 falling to be considered in this case. In the absence of any prior authority on the point, he submitted, the Court of Appeal in Good Law was (as he chose to characterise it) "painting on a blank canvas". Corus was not cited before the Court of Appeal in Good Law.

60. Mr Blundell further submitted that the cases of Halton Borough Council, Telford and Wrekin Council and Aurora Properties, which all applied the rationale in Good Law by analogy to cases involving statutory challenges, were (with due respect) wrongly decided. They are in any event not binding authorities on this court as decisions of first instance and I am not obliged to follow them if I agree that they were wrongly decided.

61. Mr Blundell added that the wording of the Civil Procedure Rules in force at the time Corus was decided is basically unchanged now. The requirements of rule 94 from the Rules of the Supreme Court were still that a claim must be issued and served within 6 weeks after the relevant date. The equivalent provisions now are paragraphs 4.2 and 4.11 of Practice Direction 54 alongside which Part 54 must be read. Rules 7.5 and 7.6 are also in substance still basically the same.

62. Mr Blundell relied upon [13]-[14] of the judgment of Laws LJ in Corus as framing the question to be answered, noting in particular from [14] that the question was to be answered as a matter of construction:

> "13. Thus the question for decision may be framed in this way: is CPR 7.6 a rule applicable to all claims, including Part 8 claims, so that it is "appropriate" to apply

> it where application is made to extend the time for service in a Part 8 claim constituted by an application under section 287 of the 1990 Act?
>
> 14. For my part, I cannot see that it is. As a matter of construction, the provisions of CPR 7.6 are only engaged in a case in which "the period for serving the claim form specified by rule 7.5 " applies. This is because the claimant may apply for an extension of time for service while the period specified by rule 7.5 is still running (see 7.6(2)(a)); or if he already has obtained such an order under 7.6(2)(a) he may apply while the extra time given by that order is still running; 7.6(2)(b). If he applies at a time later than that contemplated by 7.6(2)(a) or (b), he is fixed with the stringent conditions of 7.6(3). "The period for serving the claim form specified by rule 7.5 " can in my judgment only be the period of four months specified in 7.5(2) or the period of six months specified in 7.5(3). Simply put, rule 7.5 does not specify any other period. I see no justification for rewriting rule 7.5 so as to interpret the period specified by rule 7.5 set out in 7.6 as referring to the time for service given in this case by RSC Order 94 rule 1.2"

63. Mr Blundell emphasised in particular the conclusion of Laws LJ at [16]:

> "16. In those circumstances, I would hold that the judge was right to conclude that 7.6 had no application to the case. It is not engaged by PD8 paragraph 2.1. That being so, there is nothing else to displace CPR 3.1(2)(a), which accordingly applies to the case"

64. Mr Blundell further cautioned that, unlike the position in judicial review cases (where the Court has a power to extend time for the issue of proceedings beyond the specific periods in CPR 54.5), applying the rationale of the Court of Appeal in Good Law to statutory challenges means that there is no opportunity for the public interest to influence the exercise of a discretion to extend time. It is accepted that the 6 week period for the issue of statutory challenge proceedings is absolute (see Croke). But if the same period were to be an absolute limit for the service of statutory challenge proceedings as well then the public interest can never allow even the most merit-worthy claims to proceed.

65. So far as rule 7.6 regarding extensions of time for service is concerned Mr Blundell conceded that the Claimant could not show that any of the criteria in rule 7.6(3) were met within the period of 6 weeks. The application to extend time was made after expiry of the 6 week period. But he noted that rule 7.6(2) is expressed in these terms:

> "(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –
>
> (a) within the period specified by rule 7.5 …"

and that the only periods actually specified in rule 7.5 are the period of four months (rule 7.5(1)), extending to six months where service is to be effected outside of the

jurisdiction (rule 7.5(2)). Thus – submitted Mr Blundell – on a proper reading of rule 7.6 alongside rule 7.5 it is arguable that the cut-off period after which applications to extend time for service can no longer be made is actually four months not six weeks. The Claimant's application, although submitted after more than six weeks, still fell within the four month period referred to in rule 7.5(1) and hence the stringent criteria in rule 7.6(3) do not apply because they are only relevant to applications made outside the time allowed for service.

66. So far as the Halton Borough Council decision is concerned Mr Blundell's first submission was that any comments relevant to a statutory challenge under section 288 are strictly obiter because the court there agreed that the claim could be converted into one for judicial review rather than statutory review. Mr Blundell also drew attention to the agreed common ground in the case which, he submitted, provides relevant context for the comments made later in the judgment – see in particular [33]:

> "**Issue One - which rule applies to the s.288 claim – CPR 3.1(2)(a) or CPR 7.6 by analogy?**
>
> 33. It is common ground that in Corus it was decided that in relation to a s.287 challenge the decision fell to be made by reference to CPR 3.1(2)(a) and not CPR 7.6 because, on a proper construction, CPR 7.6 only applies to cases of service under CPR 7.5, and CPR 7.5 does not apply to statutory review claims. It is also common ground that in Good Law the decision was to precisely the same effect in relation to a judicial review challenge, arrived at by the same process of reasoning notwithstanding that Corus was not referred to or cited to the court in Good Law"

67. Moreover Mr Blundell emphasised [47] of the judgment from which it was plain, he submitted, that there had been no consideration by Judge Davies of the differences between judicial review and statutory review, nor was there evidently any argument that the time for service of proceedings in a statutory review case should be capable of being extended by reference to the public interest:

> "47. Whilst the defendant is able to say that this emphasis on the importance of adhering to the statutory time limit is consistent with the approach in Good Law, equally the claimant may argue that the reference to the general public interest of viable challenges to public decisions being ventilated in proceedings is inconsistent with the approach in Good Law since, under the approach in that case, such a factor would be excluded as not to be found within CPR 7.6 itself"

68. Finally Mr Blundell noted that the conclusion of Judge Davies in Halton Borough Council was evidently one he reached with some misgivings, and that he was right to have reservations about the consequences flowing from his judgment. In this respect Mr Blundell referred to the Judge's remarks at [54]:

> "For what it is worth I would, if unconstrained by authority, with very great diffidence confess to some misgivings as to whether it can be right to apply CPR 7.6 as applying by analogy to applications to extend time for service of a claim form in judicial review and statutory review cases, if that has the effect that the principles applicable to applications under CPR 3.1(2)(c) and to relief from sanctions are completely excluded. Since rule 3.9 requires the court to "consider all the circumstances of the case", including – but not exclusively - the need "(a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders", it would seem to me to be inappropriate to hold that all considerations other than those to be found in CPR 7.6 should be completely excluded from consideration"

69. In relation to Telford and Wrekin Council Mr Blundell noted from [29] of the judgment that it had been common ground that Halton Borough Council was correct, and that this must colour the weight to attach to the judgment.

70. Finally in relation to Aurora Properties Mr Blundell noted that it was an extempore judgment of Mould J, and that whilst he had acknowledged correctly that he was not strictly bound to apply the decisions in Halton Borough Council or Telford and Wrekin Council Mould J was wrong to conclude that their approach was correct in principle.

71. In summary Mr Blundell submitted that the court should acknowledge the substantive difference which Parliament has created between on the one hand judicial review (a common law remedy) and on the other hand statutory review (a creature of statute). He also emphasised that a consequence of following the approach of Good Law was that the public interest had no role to play in rescuing merit-worthy proceedings where the deadline for service had been missed, even if only by a few days, and that the public interest would thereby be excluded as a consideration from every stage of a statutory challenge where applications were made to extend time.

Secretary of State's submissions

72. For the Secretary of State Mr Fry advanced two alternative submissions on the question of "could I extend?". The first was that, correctly understood, there is no substantive conflict between Corus and Good Law. The second was that even if there is a conflict Corus can be distinguished.

73. As to the first submission Mr Fry noted the observations of Judge Davies in Halton Borough Council at [38]-[40] which, he submitted, endorses the view that Corus and Good Law are compatible with one another.

74. Moreover, submitted Mr Fry, although the Court of Appeal in Good Law rejected the contention that if rule 7.6 were engaged then rule 3.1(2)(a) is not, they nevertheless concluded that when exercising the discretion afforded by rule 3.1(2)(a) the criteria in rule 7.6 should be applied by analogy (see the passage at [80] quoted above). There is

nothing extraordinary in the court establishing rules to guide the exercise of its discretion and that is precisely what happened here, thus there is no incompatibility between Corus and Good Law.

75. As to his alternative submission Mr Fry noted that Good Law was decided 15 years after Corus and that much had changed in the Civil Procedure Rules in those intervening 15 years. In particular the passage at [14]-[16] of the Court of Appeal judgment in Corus illustrates the rules upon which the Court relied for its conclusions there:

> "14. … As a matter of construction, the provisions of CPR 7.6 are only engaged in a case in which "the period for serving the claim form specified by rule 7.5 " applies. This is because the claimant may apply for an extension of time for service while the period specified by rule 7.5 is still running (see 7.6(2)(a)); or if he already has obtained such an order under 7.6(2)(a) he may apply while the extra time given by that order is still running; 7.6(2)(b). If he applies at a time later than that contemplated by 7.6(2)(a) or (b), he is fixed with the stringent conditions of 7.6(3). "The period for serving the claim form specified by rule 7.5" can in my judgment only be the period of four months specified in 7.5(2) or the period of six months specified in 7.5(3). Simply put, rule 7.5 does not specify any other period. **I see no justification for rewriting rule 7.5 so as to interpret the period specified by rule 7.5 set out in 7.6 as referring to the time for service given in this case by RSC Order 94 rule 1.2.**
>
> 15. **The use in 7.5 of the expression "the general rule" cannot produce a different result**. I should say that Mr Hogan placed this expression at the forefront of his submissions on construction. He said that this use of language where it appears in 7.6(2) allows 7.6 to accommodate different periods for service, but this argument is in my judgment erroneous. The use of the expression "the general rule" in 7.6 is only there to contrast the principal or paradigm case of an application to extend, which is given by 7.6(2), with the special or particular case, which is given by 7.6(3). The pattern is the same in 7.5. The general rule in 7.5(2), four months, is contrasted with the particular case in 7.5(3), six months. **The specificity of the 4-month or the 6-month period in 7.5 is unaffected.**
>
> 16. **In those circumstances, I would hold that the judge was right to conclude that 7.6 had no application to the case. It is not engaged by PD8 paragraph 2.1. That being so, there is nothing else to displace CPR 3.12(a)**, which accordingly applies to the case" (the emphasis is Mr Fry's)

76. Mr Fry submitted that the Civil Procedure Rules have since been amended in a way which is material to the Court's conclusion in Corus. Practice Direction 8 was withdrawn in October 2022. Practice Direction 54 now makes clear that Part 8 is to be read as being modified by what Practice Direction 54D now says, including importantly as to time limits. Practice Direction 54 now imports the absolute 6-week time limited. In addition, when Part 8 specifies that rule 7.5 applies in relation to time limits it is clear that rule 7.5 must now be read as modified by Practice Direction 54 (i.e. replacing the default periods of four and six months with the statutory period of 6 weeks). This means that, as Mr Fry put it, the chain of logic underpinning the Court of Appeal's judgment

in Corus is broken and no longer has application after the amendments made to the Civil Procedure Rules since 2006.

77. By reason of the above, submitted Mr Fry, whilst accepting that I am not bound by Halton Borough Council, Telford and Wrekin Council or Aurora Properties if I consider them to be wrongly decided, each of them was in fact correctly decided.

Wates's submissions

78. For Wates Mr White KC adopted the submissions made by Mr Fry for the Secretary of State.

79. In addition he emphasised that Section IV of Practice Direction 54D establishes the requirement (paragraph 4.1) that the Part 8 procedure be used for statutory review claims. Paragraph 4.2 further requires that:

> "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"

The statutory provisions set that time limit at 6 weeks and, submitted Mr White, it would be a nonsense if the provisions of paragraph 4.2 applied to issue but not also to service of the claim.

80. Mr White also noted the authorities which followed Good Law and which relied upon its rationale in statutory challenge proceedings. These, he submitted, were all correctly decided and there was no reason for me to depart from them.

Discussion and Conclusions

81. As a starting point it is correct to note that Corus dealt with a statutory challenge and Good Law with a judicial review challenge, hence at first blush Corus is more obviously relevant to the facts of this case than is Good Law. Is it the case that Corus is binding on me, though, as Mr Blundell for the Claimant urges?

82. For the Secretary of State Mr Fry has identified a number of changes made to the Civil Procedure Rules since Corus was decided in 2006. He submits that these changes are significant and that they alter the baseline against which Corus was decided.

83. Rules 7.5 and 7.6 are now expressed differently. Rule 94 of the Rules of the Supreme Court no longer has effect and PD8, which was relied upon in part by Law LJ at [16] of his judgment in Corus, has been withdrawn. By contrast the careful tracing by Mould J in Aurora Properties of the provisions of Part 54, read together with Practice Direction

54 (a practice direction which has also come into effect since Corus was decided), illustrates how the time limits in statutory review cases are to be understood and how rules 7.5 and 7.6 must now be read in light of them.

84. It seems to me that the critical building blocks in the analysis are now as follows:

a) Paragraph 1.1 of Practice Direction 54D makes clear that "This Practice Direction supplements Part 54. It applies to Planning Court claims and appeals and to the Planning Court"

b) Paragraph 4.1 of Practice Direction 54D then states that "The Part 8 procedure must be used in a claim for planning statutory review. Part 8 applies with the modifications set out in [Section IV]" and

c) Most importantly of all paragraph 4.11 of Practice Direction 54D now provides that "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"

85. The Part 8 procedure applies to statutory challenges (as it does to many other types of case) subject, now, to amendments made by Part 54 or Practice Direction 54D. Practice Direction 54D paragraph 4.11 notes expressly that the claim form must be issued and served within the 6-week period specified in section 288. My reading of paragraph 4.11 is that it therefore operates to displace the periods of four months and six months referred to in rule 7.5, which apply only to Part 8 claims where the procedure is not amended by Part 54 and Practice Direction 54D. That is also a logical conclusion because otherwise the only two periods referred to expressly in rule 7.5 – four months and six months – bear no relevance to a statutory challenge brought under section 288.

86. The introduction of Practice Direction 54D therefore represents a critical difference between the rules in force and interpreted in Corus and the rules applicable now. PD 54D is the reason why it is no longer the case (in the words of Laws LJ at [14] of Corus) that:

> "'The period for serving the claim form specified by rule 7.5 can in my judgment only be the period of four months specified in 7.5(2) or the period of six months specified in rule 7.4(3). Simply put, rule 7.5 does not specify any other period. I see no justification for rewriting rule 7.5 so as to interpret the period specified by rule 7.5 set out in 7.6 as referring to the time for service given in this case by RSC Order 94 rule 1.2"

87. The re-writing has now been done for us by PD 54D. This is sufficient basis to be able to distinguish Corus in the present case.

88. So far as Good Law and its application to statutory challenges goes, whilst I have identified that there is a difference between statutory challenges and judicial reviews I

agree with the submission made by Mr Fry for the Secretary of State that what both Corus and Good Law say are not wholly at odds with one another. Both cases agree that the rule to be applied to an application for the extension of time for service is rule 3.1(2)(a). Good Law simply goes further in adding that when such an application pursuant to rule 3.1(2)(a) is considered by the Court the criteria in rule 7.6 should be applied by analogy.

89. Much was made by Mr Blundell of the differences in the evolution of judicial review and statutory review. What he says may well be fair comment but it is also correct to observe that since Corus was decided the statutory review and judicial review procedures have been brought closer together. One example is that Part 54.5 now makes more concrete provision for the timescale within which a planning judicial review claim must be brought to replace the previous measure of "promptly and in any event within three months". The six week period for judicial reviews now specified in rule 54.5(5) matches that for planning statutory challenges. Another example is that by virtue of section 288(4A) of the 1990 Act, introduced with effect from October 2015 by the Criminal Justice and Courts Act 2015, the leave of the court is now required before a statutory challenge under section 288 can proceed (mirroring the procedural requirement for leave in judicial reviews). Whilst there are still some differences between them the direction of travel is bringing the two procedures closer together.

90. Mr Blundell is correct to note that Corus was not cited in Good Law but neither is that altogether surprising as Corus was not a case involving judicial review. But as to the treatment of Corus in light of Good Law, respectfully I would adopt the observations and conclusions of HHJ Stephen Davies in Halton Borough Council at [38]-[40]:

> "38. In the circumstances, I entirely accept the defendant's submission that, unless Corus is authority against, there is every reason why this court should follow the approach in Good Law in relation to a statutory review case.
>
> 39. I have already noted that the decision on whether CPR 7.6 or CPR 3.1(2)(a) applied was argued and decided in exactly the same way in Corus as it later was in Good Law. There is no indication whatsoever that the second argument that CPR 7.6 should be applied by analogy was made in Corus, where the principal judgment was given by Laws LJ. Indeed, it is apparent from paragraphs 13 onwards that the argument based on the construction of CPR 7.6 was the only argument addressed in relation to CPR 7.6. Although Mr Hunter fastened on the reference in paragraph 13 as to whether it was "appropriate" to apply CPR 7.6, suggesting that this showed that a wider question was being addressed, as Mr Williams said it is apparent from paragraph 12 that this wording was simply referring back to the use of that word in CPR PD8 paragraph 2.1. Having disposed of this argument, Laws LJ proceeded at paragraph 21 to address the "second submission" that the first instance judge's exercise of his discretion was flawed, but it is apparent that none of the arguments advanced involved an argument that he ought to have applied CPR 7.6 by analogy.
>
> 40. It follows in my judgment that it cannot credibly be said that this point was expressly argued or decided in Corus"

91. Halton Borough Council is one of the cases which preferred the Good Law approach of applying the rule 7.6 criteria by analogy to the approach in Corus. All of those cases have been first instance judgments. Mr Blundell is therefore correct to submit, relying upon R v HM Coroner for Greater Manchester ex parte Tal [1985] QB 67, that I am not strictly bound to follow them if I consider them to be clearly wrong.

92. However I am satisfied that each of those cases was correctly decided.

93. Halton Borough Council is the key decision, both because it came first in time but also because it set out a rationale which the subsequent cases then broadly adopted. Whether or not Mr Blundell is correct to submit that the conclusions in the case are strictly obiter, given the overall outcome in the case, I nevertheless agree with the rationale. The key passage seems to me to be [52] of Judge Davies's judgment:

> "In my judgment, whilst I am not strictly bound to apply either Corus or Good Law, since: (a) the former did not decide that in a statutory review claim it was not permissible to apply CPR 7.6 by analogy; whereas (b) the latter did not decide that in a statutory review case, as opposed to the judicial review cases to which it directly referred, the court was required to apply CPR 7.6 by analogy, nonetheless since, 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"

94. I agree with this summary for the reasons given.

95. Essentially the same conclusion was reached by Eyre J and Mould J in (respectively) Telford and Wrekin Council and Aurora Properties and for this reason I agree with the decisions in those cases too.

96. Mr Blundell drew attention to the misgivings evidently harboured by Judge Davies in Halton Borough Council and expressed at [54] of his judgment. If Judge Davies and I were to part company at all then, respectfully, it is over whether the outcome gives rise to any misgivings. For my part I do not consider that it should.

97. I refer back to the judgment of Lindblom LJ in Croke v Secretary of State for Communities and Local Government [2019] EWCA Civ 54 at [44]:

> "The context here is the statutory scheme for planning, which includes arrangements for challenging the validity of certain planning decisions"

98. As has been noted above, Croke dealt with the separate question of the timing for issue rather than the timing for service. But the identification by Lindblom LJ that we are

here talking about the operation of a statutory code rather than the common law is, in my judgment, significant.

99. Mr Blundell submitted that a consequence of my siding with Good Law in preference to Corus is that at no point in the initiation of proceedings can the public interest be brought to bear in favour of a claimant who brings his claim out of time. This, he submitted, should suggest that where – per Croke - discretion cannot be exercised at the time of issue a more benign approach is justified at the point of service, and that this should be contrasted with judicial review cases where time for issue of proceedings can be extended by the court (and hence the approach to extensions of time for service can afford to be more strict).

100. But in my judgement it simply does not follow that, just because in statutory challenge cases the rules regarding the timing of issue is strict, therefore the rules regarding the timing of service must be more forgiving. I prefer the conclusion that the court's discretion to extend applies to neither procedural step because statutory challenges are intended to hold claimants to a higher standard than those embarking on the common law remedy of judicial review. The statutory language is clear (and, we must assume, deliberately so) that six weeks means six weeks.

101. At [31] of Croke Lindblom LJ held:

> "Leaving aside the so-called "Kaur principle", and subject to any limited scope there may be on human rights grounds for the court, in exceptional circumstances, to countenance proceedings being brought after a statutory time limit has passed, there is no room here for the exercise of judicial discretion. Parliament has provided a strict time limit of six weeks for the making of an application under section 288 . Subsection (4B) does not, in its own terms, admit any exception to the absolute time limit it lays down. **As a matter of straightforward statutory interpretation, the time limit is precise, unambiguous and unqualified. The statutory language is mandatory. It requires an applicant to make his application within the specified period.** The application for leave to bring such a challenge "must be made before the end of the period of six weeks beginning with the day after … the date on which the action is taken" (my emphasis). There is no reference to considerations such as a requirement to act "promptly" or to make the application without "undue delay". **It seems clear therefore, as has been repeatedly recognised in the case law, that Parliament intended to avoid the uncertainty and inconsistency likely to occur if the time for making an application under section 288 was subject to the court's discretion**" (my emphasis)

102. Logically I see no reason why these observations should apply with any less force when the window sought to be extended is not the issue of statutory challenge proceedings but the service of them.

103. As for concerns over the implication that any consideration of the public interest is thereby precluded in statutory challenge cases, again the comments of Lindblom LJ in Croke at [34] are apt. He noted that the public interest cuts both ways. Statutory challenge cases are:

> "…. proceedings affecting the interests of several parties – sometimes a large number – which is not unusual when a legal challenge is made to a planning decision. Such decisions, no matter how large or small or how controversial the development may be, will always engage the public interest. Challenges to the decisions of the Secretary of State or an inspector on an appeal will often affect the interests not only of the developer and landowner and the local planning authority but also of third parties who have objected to or supported the proposal. In proceedings of this kind, certainty and consistency in the operation of fixed statutory time limits are particularly important. Such time limits enable all potential parties to the proceedings, including those who have objected to a proposed development as well as the applicant for planning permission and the local planning authority whose decision has been upheld or overturned, to know where they stand, and to act – or refrain from acting – accordingly. They ensure that any challenge to the decision will be brought within a finite period. They treat all parties equally from the outset"

104. For the reasons I have given above, I respectfully endorse the comments of Carr LJ at [85] of Good Law and I agree with the application of those principles to statutory challenge proceedings as was found in the subsequent cases of Halton Borough Council, Telford and Wrekin Council and Aurora Properties.

105. The effect of this is that the Claimant's application to extend time for the service of proceedings under rule 3.1(2)(a) must by analogy import the criteria in rule 7.6. Mr Blundell sensibly conceded that if these criteria were to be applied the Claimant could not satisfy them on the facts.

106. It follows that the answer to the question "could I extend?" must be no.

107. That conclusion is sufficient to dispose of the case. If – as I have found – the court is not able to extend time for the service of proceedings then the claim must fail. However, in deference to the detailed arguments of Counsel on the remaining points in the case (and recognising that the Claimant may try to take this case further) I have summarised the arguments of the parties and indicated what my conclusions would have been had those issues been determinative.

Should I extend?

108. If I had concluded that I did have a discretion to extend time, would I have exercised that discretion in favour of the Claimant?

Claimant's submissions

109. For the Claimant Mr Blundell notes that the delay in this case was just four days for service on the Secretary of State and just two days for Wates. He draws a favourable comparison with the circumstances in Corus, relying in particular on the comments of McCombe J in his judgment at first instance ([2005] EWHC 2821 (Admin)) when he said at [21]:

> "I do not consider that it would be at all just to refuse an extension of time for two or three days to challenge an action of a public authority that is potentially unlawful, where the error was of the nature that occurred here"

110. Mr Blundell further submitted, by reference to the judgment of McCombe J at [13], that the relevant factors for the court to consider are:

> "[13] … the explanation proffered for the delay, the length of the delay, whether prejudice had been caused to the other party, the paramount considerations of the interests of justice, namely the applicant's prospects of success, and that it would only be in rare circumstances, that the court's discretion was likely to be exercised to extend time"

111. In relation to delay Mr Blundell submitted that the delay has candidly been explained in witness evidence as being attributable to an error on the part of the Claimant's solicitors, and that upon being made aware of the error the solicitors made an application to the court for an extension of time immediately. He added that it would be unfair for the Claimant and those constituents it represents to have to suffer the consequences of the error by its solicitors, especially in circumstances where upon any resultant claim against the advisers:

> "… the consequences of a breach of duty and the measure of damages might be extremely difficult to calculate, even if a breach is established" (per McCombe J in Corus at [20])

112. Mr Blundell submits that none of the other parties in the case asserted prejudice at the outset, although the Secretary of State now relies upon the loss of an "accrued procedural limitation defence" (per Halton Borough Council at [66]) as evidence of prejudice. In truth, though, submits Mr Blundell, the delay caused by the error is measured in days and results in minimal prejudice to the defending parties. He contrasts this with the very real prejudice said to be suffered by the Claimant if the claim is shut out on procedural grounds, namely the loss of an opportunity to challenge a decision that will have long-lasting consequences for the area and render entirely redundant part of the potential extension to the AONB boundaries, a decision on which is currently in the last stages of consideration. He drew an analogy with the conclusion of McCombe J at first instance in Corus at [19], in which the acknowledged importance of certainty

in planning challenges was subordinated to the need to hold public authorities to account for unlawful acts.

113. Drawing these various factors together and applying them to the criteria identified by McCombe J in [13] of Corus Mr Blundell submitted that on the facts of this case (1) the length of delay was minimal, (2) by contrast the impact that will be experienced will last for many years, this being the first occasion in decades that the AONB boundary in this location has been reviewed, (3) that there is a clear explanation of the reason for the delay. The Claimant's solicitors do not try to avoid admitting their error but the Claimant itself is an innocent party and it would be wrong for the consequences of this error to be visited upon the Claimant, (4) the merits of the case are strong and justify the court granting an indulgence to the Claimant to explore what the Claimant asserts is a clear and obvious error on the part of the Inspector, and (5) for these reasons the interests of justice weigh overwhelmingly in favour of an extension. The costs position is also at worst neutral given that the case before me has proceeded as a rolled-up hearing. The most that can be said against the Claimant is that there would be a loss of a limitation defence but the prejudice to the defendants is minimal owing to the very short period of delay and the fact that the Claimant acted with all due expedition once the error resulting in the delay had been identified.

Secretary of State's submissions

114. Mr Fry referred to previous case-law which had emphasised the importance of compliance with statutory time limits, many of which had ruled against extensions for even shorter periods than are necessary in this case. An example is the case of Home Farm referred to above. Accepting that the comments of Lang J were strictly obiter, Mr Fry nevertheless submitted that the identification by Lang J of the seriousness of delays (for example at [31]) is relevant context applicable to the present case.

115. Similarly in Halton Borough Council, where the delay was just one day, Judge Davies concluded at [59] that:

> "Regardless of the shortness of the delay, it seems to me 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"

116. As regards the reason for the delay Mr Fry also relied upon Halton Borough Council at [63]-[65] for the conclusion that errors by legal advisers – characterised there by Judge Davies (at [64]) as "careless mistakes" – do not constitute good reasons for extending time. Mr Fry invited me to reach the same conclusion as Judge Davies, that ([66]):

> "A delay of even a day is serious because it means that the defendant has an accrued procedural limitation defence which will be lost if relief is granted. There is no good reason for the delay"

117. Countering Mr Blundell's application of the facts to the criteria identified by McCombe J in Corus, Mr Fry submitted that (1) a delay of four days is significant, (2) the explanation offered does not excuse the error, and the fact that it is hard for the Claimant to fix the consequences of the error does not mean that the error should be forgiven, (3) on the question of prejudice the delay is palpable and is exacerbated by the delay in the Claimant making its application to extend time, (4) the prospects of success for the substantive claim are poor, and (5) the interests of justice weigh in favour of the Claimant being held to the strict statutory deadline. The Claimant cannot complain of being hard done by when the only thing it needed to do to have its substantive grievance ventilated before the court was to commence and serve proceedings in time.

118. For these reasons Mr Fry submitted that I should not exercise a discretion to extend time even if I were able to.

Wates's submissions

119. Mr White for Wates endorsed the submissions made by Mr Fry for the Secretary of State.

120. He added that in planning challenges there needs to be some form of hurdle in order to bring discipline to such public law litigation, and that if the court were entitled to exercise its discretion to extend time a claimant bears a heavy burden of proving that the discretion should be exercised in its favour.

121. To a large degree, submitted Mr White, the Claimant has been the architect of its own misfortune. Mr Batko's witness statement sets out in full the chronology of events. It reveals (paragraph 4) that the Claimant had been in discussions with one of Mr Batko's colleagues about a potential challenge "for a few weeks" prior to Mr Batko becoming involved. Counsel was instructed late, with the result that there was very little time between receiving the draft grounds of challenge from her and then having to issue and serve the proceedings. The fact that there was early uncertainty about whether the Council would mount its own challenge to the decision was irrelevant, submits Mr White; faced with a known short challenge period the only prudent thing for the Claimant to do was to make contingent preparations in case a challenge in its own name became necessary. That would have allowed Mr Batko a period of grace to confirm his understanding of the procedural requirements and would, in the circumstances, have revealed his misunderstanding before it was too late.

122. Mr White adopts the complaint made by Mr Fry about the loss of an accrued limitation defence which, he submits, prejudices Wates to the same degree as it does the Secretary of State. Wates has a hard-won planning permission which it has not felt able to implement yet owing to this claim.

Discussion and Conclusions

123. Case-law makes it clear that there are various factors to be considered by the court in deciding whether to exercise a discretion to extend time for service. They include the amount of delay, the reasons for it, the prejudice to the other parties if an extension is granted, the overall merits of the claim, and an overall appraisal of where the interests of justice lie. All must be considered. No one factor is determinative.

124. On the face of it the period of delay appears short. It is four days for the Secretary of State and less for Wates, but these ostensibly short periods need to be judged against a window for commencement and service which, at six weeks, is itself short by comparison with periods for the issue and service of other types of claim.

125. The conclusions reached in other cases are of limited assistance because they are necessarily fact-sensitive, nevertheless the theme running through them is that any delay, however short, is serious and significant (to borrow the phrase used by Judge Davies in Halton Borough Council) and requires a strong justification.

126. Mr Blundell relies upon the conclusion of McCombe J at first instance in Corus when he condoned a delay of one day. For the reasons given above the court should be wary about placing undue weight on the conclusions reached in other cases, but whilst Mr Blundell is correct to submit that the interests of justice there overrode the prejudice caused by delay the context needs to be noted carefully. McCombe J was evidently influenced at least in part by the need to hold public authorities to account for arguably unlawful decisions but this tipping of the balance followed a concession by the defendant local authority that the claim was properly arguable (see [19]). There has been no such concession here, indeed the merits of the claim are – as one sees from the discussion below – strongly refuted by both the Secretary of State and Wates.

127. The reason for the delay has been set out clearly in the evidence. The Claimant's solicitors do not shrink from the fact that the delay results from their incorrect reading of the rules. In oral argument Mr White submitted that the Claimant's Counsel, Ms Siân McGibbon, must also bear some responsibility for the error. It is unclear what (if anything) that would have added to the court's overall assessment, but in any event I decline to make such a finding. Mr Batko has provided a witness statement explaining the circumstances leading to the error. He accepts full responsibility for it. He might have tried to syndicate the blame for it. That he did not do so is to his credit. There is nothing in the evidence from which the court can reasonably infer that any part of the blame attaches to Ms McGibbon.

128. I acknowledge that the errors by the Claimant's solicitors have excluded their claim from consideration. That may appear unfair. However that appearance needs to be judged against two factors in particular.

129. Firstly I share the scepticism of Judge Davies as to whether "careless mistakes" should justify the grant of an extension of time. I also note the comments of McCombe J in Corus about the difficulties in the Claimant now obtaining meaningful redress for the negligence of its advisers, but – respectfully – I struggle with the concept that

difficulties in monetising the loss to the Claimants should be seen as a reason to forgive the error. Prejudice in this instance is binary. If it is not suffered by the Claimant then it is suffered by the defendants. Transferring prejudice from one to the other in circumstances such as these would seem to me to lead to a perverse outcome.

130. Secondly there is some force in Mr White's submission that the harm here is at least in partly self-inflicted. The Claimant would have been known at the outset that if the Decision were to be challenged a claim would need to be settled quickly to meet the six-week deadline, and it should also have been appreciated that service would need to be effected within that six-week period as well. It will also have seen that the legal advice to the Council was that it would struggle to sustain any grounds of challenge, and from this should have inferred that a challenge by the Council was unlikely to materialise.

131. The evidence confirms that the Claimant was in discussion with its solicitors about a potential claim some time before the deadline expired and yet the claim was not compiled and issued until the very end of the challenge period. It is apt to recall the judgment of Lord Sumption in Barton v Wright Hassall LLP [2018] UKSC 12 at [23]:

> "A person who courts disaster in this way can have only a very limited claim on the court's indulgence"

That observation was made in the context of a litigant in person. In my judgement it must apply with even greater force where a party is professionally represented.

132. To Mr Blundell's submission that the Decision if left unchallenged will set the tone for the area for a generation or more, I would observe that this case is far from unique in that fact. Permission for any development will, if implemented, set the tone for an area for at least the design life of the buildings permitted. What is more, as will be seen from the discussion below the Inspector reached her decision fully in the knowledge of the proposed changes to the AONB boundary and the implications which the development would have for the AONB in this location if the boundaries were expanded.

133. A discussion of the merits of the claim follows in the next section of this judgment but it suffices to note for now that the merits of the claim do not weigh materially in favour of the Claimant's application to extend time.

134. In my judgement the interests of justice weigh firmly in favour of refusing an extension of time. It is in the public interest that there be certainty and finality around planning decisions and that any challenge to a planning decision must therefore be brought promptly. There would need to be powerful grounds to justify an extension of time. There are none. The delay in this case arises solely from an error on the part of the Claimant's advisers. Whilst the Claimant itself thereby suffers prejudice from being shut out of its claim, allowing an extension of time in these circumstances would serve

to transfer that prejudice to the defending parties. That would lead to a perverse result. The merits of the claim and the consequences of the Decision do not displace that conclusion.

135. For all of the above reasons I conclude that, had I enjoyed a discretion to extend time for service, I would not have exercised it in this case.

The Substantive Claim

136. I turn finally to the substance of the claim and consider what I would have decided had an extension of time been granted.

137. The hearing before me took place as a rolled up hearing. The Order of Knowles J made some observations about the underlying merits but did not determine arguability.

138. In considering the substantive merits it is necessary to isolate certain elements of the factual background, which I do below.

The Decision

139. As I have noted above, Wates's appeal against the Council's refusal of planning permission was heard by the Inspector at a four-day public inquiry. The Claimant did not appear at that inquiry but submitted written representations instead.

140. The statutory development plan for the area including the Site is comprised of the Waverley Local Plan read with the Farnham Neighbourhood Plan ("Neighbourhood Plan"). The Neighbourhood Plan was formally adopted in April 2020. Its policies – and one in particular, FNP10 - are especially relevant to the Claimant's challenge.

141. Policy FNP10 of the Neighbourhood Plan provides as follows:

"***Policy FNP10 Protect and Enhance the Countryside***

Outside of the Built Up Area Boundary, as defined on Map A, priority will be given to protecting the countryside from inappropriate development. A proposal for development will only be permitted where it would:

a. *Be in accordance with Policies FNP 16, FNP 17 and FNP 20 in the Neighbourhood Plan or other relevant planning policies applying to the area,*
b. *Protect the Green Belt,*
c. *Conserve and enhance the landscape and scenic beauty of the Surrey Hills Area of Outstanding National Beauty and its setting – including those areas of Great Landscape Value under consideration for designation as AONB,*

d. *Retain the landscape character of, and not have a detrimental impact on, areas shown on Map E as having high landscape value and sensitivity and Map F Old Part as having high landscape sensitivity and historic value; and*

e. *Enhance the landscape value of the countryside and, where new planting is involved, use appropriate native species"*

142. Mr Blundell for the Claimant places special emphasis on paragraph c. and the words "… including those areas of Great Landscape Value under consideration for designation as AONB". Those words encompass the Site which, as I have noted above, is in part a candidate area for designation within the enlarged AONB after Natural England's 2023 consultation.

143. At DL12 the Inspector recorded the "Main Issues" in the appeal as follows:

> "The main issues in respect of this proposal are:
>
> - The effect of the proposed development on the character and appearance of the surrounding area;
>
> - Whether any conflict with the development plan is outweighed by any other matters, including the housing land supply position and the benefits of the proposal"

144. The Inspector recorded the representations of Natural England on the appeal at DL22-23:

> "22. Natural England has commenced a review of the Surrey Hills AONB boundary. It advises that the site is located partly within/ within an area which Natural England has assessed as meeting the criterion for designation as an AONB (known as a Candidate Area for Designation) and may be included within a boundary variation to the Surrey Hills Area of Outstanding Natural Beauty (AONB). It confirms that this assessment process does not confer any additional planning protection, however, the impact of the proposal on the natural beauty of this area may be a material consideration in the determination of the appeal.
>
> 23. The statutory consultation on the proposed extension to the Surrey Hills AONB review commenced on 7 March 2023 for a 14 week period ending on 13 June 2023. It is understood that Natural England would expect to submit a Variation Order to the Secretary of State for a decision by August 2023 on the extended areas. Therefore, there is no certainty that the boundary changes currently proposed would form part of the recommended review, or that the Secretary of State would confirm the variation order. Natural England advises that following the issuing of the Variation Order, but prior to confirmation by the Secretary of State, a Variation Order would carry great weight as a material consideration in planning decisions. In this case the Variation Order has not been submitted and I afford the consultation document limited weight"

145. Neighbourhood Plan policy FNP10 was analysed by the Inspector at DL50 in the following terms:

> "50. The site is located outside of the built-up area boundary where Policy FNP10 seeks to protect the countryside from inappropriate development. The proposal does not come within any of the categories of development permitted outside the built-up area boundary and would therefore not comply with Policy FNP10. There would also be a breach of criterion d) of this policy in that the appeal site comes within an area of high landscape value and sensitivity as defined by the Farnham LCA, although for the reasons given above, I afford this matter limited weight. In addition, there would be a breach of criterion e) in that it would not enhance the landscape value of the countryside. I therefore conclude that there would be conflict with Policy FNP10 as a whole"

146. The Inspector's overall conclusions, so far as they are relevant to this claim, are found in the section of the Decision Letter from DL87-97. On that basis she allowed the appeal.

Grounds of challenge

147. There are two substantive grounds of challenge to the Decision:

a) Ground 1: failure to take a material consideration into account, specifically a breach of Policy 10(c) of the Neighbourhood Plan; and (further and in the alternative)

b) Ground 2: failure to give sufficient reasons for allowing the appeal notwithstanding the asserted conflict with FNP10(c)

The Law

148. There is no significant dispute between the parties about the underlying legal principles.

149. Section 70(2) of the 1990 requires that "In dealing with an application for planning permission … the [decision-maker] shall have regard to … (a) the provisions of the development plan, so far as material to the application, … and (c) any other material considerations"

150. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

151. In City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 Lord Clyde said as follows (with reference to what was then the equivalent of s38(6) applicable in Scotland) at [1458Bff]:

> "If it is helpful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission…Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given. Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement…
>
> In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it…"

152. The correct interpretation of policy is a matter of law for the court to determine (Tesco Stores Limited v Dundee City Council [2012] UKSC 13).

153. In Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) Lindblom J (as he then was) summarised the approach to be taken by the court in reviewing appeal decision letters, in terms now very familiar to planning practitioners, as follows at [19]:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph ...

> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration …
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all"… And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision …
>
> (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration …
>
> (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question …
>
> (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored …
>
> (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises …"

154. The guidance in Bloor Homes needs to be read alongside the now equally familiar warning, also given by Lindblom LJ, in Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1134 at [41]:

> "The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin

> to an adjudication made by a court (see paragraph 50 of my judgment in Barwood v East Staffordshire Borough Council). The courts must keep in mind that the function of planning decision making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a "doctrinal controversy". But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker's own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain – because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right (see paragraph 22 of my judgment in Barwood v East Staffordshire Borough Council). That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in every case – good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt."

155. Finally in relation to the standard of reasons given for decisions, Lord Brown of Eaton-under-Heywood in South Bucks District Council v Porter (No 2) [2004] 1 WLR 1953 stated as follows at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn… They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications"

156. Given the close correlation between Grounds 1 and 2 it is convenient to summarise the submissions and then consider each of them together.

Claimant's submissions

157. For the Claimant Mr Blundell submitted, in relation to Ground 1, that the absence of any reference in the DL to paragraph (c) of policy FNP10 is telling as it reveals that the Inspector did not have regard to an important consideration. Paragraph (c) is the only one within the policy that deals with the impact on the AONB, including candidate areas for designation such as the Site.

158. The absence of any reference, suggested Mr Blundell, confirms that the Inspector did not appreciate the special relevance of paragraph (c) (which – he added in his skeleton argument – raises a "discrete and additional consideration"). Permitting development on a site which is a candidate for inclusion in the AONB as part of the current review renders the review exercise entirely academic.

159. The Inspector recorded Natural England's concession that the status of part of the Site as a candidate for designation in the AONB did not confer any additional planning protection. But Mr Blundell submitted that whilst this concession was correctly made (inasmuch as a candidate site does not enjoy the same protection as does a fully designated site), the concession ignores the "specific protection" derived from paragraph (c) of the policy.

160. Moreover, submitted Mr Blundell, it is not enough for the Inspector to note generically a failure to comply with policy FNP10 "as a whole". The relevance of paragraph (c) in its own right is obvious and the specific and discrete issues which it raises should have been addressed by the Inspector specifically.

161. So far as Ground 2 is concerned Mr Blundell submitted that if the Inspector was indeed aware of the significance of policy FNP10(c) but was satisfied that the appeal should be allowed notwithstanding a conflict with it, then she should have said so expressly. Her failure to do so left the Claimant in genuine and substantial doubt about her reasoning, whether she had properly understood this part of the policy, and therefore whether her decision was rational – all contrary to the standards of intelligibility and adequacy for reasons established by South Bucks v Porter (No.2).

162. Mr Blundell added that it is important the Claimant and the Council be able to understand the Inspector's reasoning on the application of the policy so that they can apply it consistently to future applications.

Secretary of State's submissions

163. For the Secretary of State Mr Fry submitted firstly that the absence of any express reference to paragraph (c) of policy FNP10 is unsurprising once it is realised that nobody at the inquiry – not even the Claimant – expressly prayed it in aid. The Claimant now suggests that paragraph (c) is determinative of the issues and yet this was not the

case presented through its written representations to the inquiry. Instead the Claimant focused its submissions on FNP10 around paragraphs (d) and (e), as did everybody else.

164. The Inspector found, perfectly correctly, that the proposals would not comply with policy FNP10 as a whole. This is unsurprising not least because it was common ground between the parties that this was the case. The Inspector nevertheless correctly applied the tilted balance and concluded that there were material considerations in favour of the development which overrode the conflict with policy FNP10. That was a legitimate exercise of the Inspector's planning judgement which the Claimant does not even seek to challenge on grounds of irrationality, nor could it.

165. Moreover it is clear that in substance the Inspector was very well aware of the importance of assessing the impact of the development on the character and openness of the landscape, as is revealed by multiple references to this point in the DL and to a specific reference to part of the Site falling within an Area of Great Landscape Value.

166. So far as Ground 2 is concerned, Mr Fry submitted that the Inspector not only found a conflict with policy FNP10 but she accorded that conflict significant weight. Read fairly and as a whole (as the Court is required to do – per St Modwen) the reasons given by the Inspector for reaching the decision that she did are clear and intelligible.

167. In any event, submitted Mr Fry, even if I were to find a legal error in how the Inspector arrived at her decision it is plain that the result would have been no different without the error and that any relief should be withheld.

Wates's Submissions

168. For Wates Mr White invited the court to consider the detail of paragraph (c). Properly construed, he submits, protection is only afforded to sites that are both within an Area of Great Landscape Value and which are under consideration for protection as part of the AONB. Read in this way one can see that no part of the Site currently falls within the AONB and that only a tiny part of it falls within an AGLV, and hence that paragraph (c) is not breached by the appeal proposals in any event.

169. Mr White also noted that in its closing submissions to the inquiry the Council focused on its arguments that only paragraphs (a), (d) and (e) of policy FNP10 would be breached. Paragraph (c) was not relied upon by the Council at all. This, submitted Mr White, fairly reflects the fact that no party to the inquiry (whether appearing in person or submitting written representations) relied upon a breach of paragraph (c) of the policy.

170. Finally Mr White endorsed the comments made by Mr Fry for the Secretary of State to the effect that the Inspector plainly had at the forefront of her mind, and dealt with, the impact which the development would have on the sensitive landscape. She did this –

as she was obliged to – applying the "titled balance" from national policy applicable to local authorities such as the Council which cannot demonstrate a five-year housing land supply. She concluded that the harm caused by the development (including harm contrary to policy FNP10) would not significantly and demonstrably outweigh the benefits she had also found in the proposals.

171. There is nothing unlawful in the way in which the Inspector approached her analysis (Ground 1) nor in the adequacy or intelligibility of the reasons she gave for her findings (Ground 2), submitted Mr White.

Discussion and conclusions

172. In my judgment the Claimant's grounds proceed from two fundamentally flawed bases. The first relates to what the Inspector actually decided as regards policy FNP10, the second relates to what role paragraph (c) plays in the overall assessment and application of the policy.

173. As to the first of these points, as a reminder policy FNP10 provides as follows:

"***Policy FNP10 Protect and Enhance the Countryside***

Outside of the Built Up Area Boundary, as defined on Map A, priority will be given to protecting the countryside from inappropriate development. A proposal for development will only be permitted where it would:

a) *Be in accordance with Policies FNP 16, FNP 17 and FNP 20 in the Neighbourhood Plan or other relevant planning policies applying to the area,*

b) *Protect the Green Belt,*

c) *Conserve and enhance the landscape and scenic beauty of the Surrey Hills Area of Outstanding National Beauty and its setting – including those areas of Great Landscape Value under consideration for designation as AONB,*

d) *Retain the landscape character of, and not have a detrimental impact on, areas shown on Map E as having high landscape value and sensitivity and Map F Old Part as having high landscape sensitivity and historic value; and*

e) *Enhance the landscape value of the countryside and, where new planting is involved, use appropriate native species"*

174. Thus a proposal for development outside the Built Up Area Boundary will only be permitted if it satisfies all the criteria in paragraphs (a) to (e). It was common ground between the parties at the inquiry that the Development did not meet all of the criteria. It did not meet paragraphs (d) and (e). The Council also maintained in its closing submissions to the Inspector that it did not meet (a) either. Nobody at the inquiry commented on paragraph (c). But in my judgment that makes no difference. The criteria all have to be satisfied for the policy to be met. As soon as it is determined that any one of them is not met then the Development is contrary to policy FNP10.

175. And that is exactly what the Inspector decided. At DL50 she concluded:

> "50. The site is located outside of the built-up area boundary **where Policy FNP10 seeks to protect the countryside from inappropriate development**. The proposal does not come within any of the categories of development permitted outside the built-up area boundary and would therefore not comply with Policy FNP10. **There would also be a breach of criterion d) of this policy** in that the appeal site comes within an area of high landscape value and sensitivity as defined by the Farnham LCA, although for the reasons given above, I afford this matter limited weight. **In addition, there would be a breach of criterion e)** in that it would not enhance the landscape value of the countryside. **I therefore conclude that there would be conflict with Policy FNP10 as a whole**" (my emphasis)

176. I agree with Mr Fry and Mr White that it is unsurprising to see the Inspector not also referring to paragraph (c). No party had put paragraph (c) in issue in their submissions. But more importantly, having concluded that two of the five criteria in the sub-paragraphs of policy FNP10 had not been met it would have added nothing to conclude that a third criterion was also breached.

177. Breach or compliance with policy such as this is a binary concept. A proposal either does one or it does the other. There is no heightened consequence arising from a multi-criteria policy which is 'very breached'. A conclusion that there is conflict with policy FNP10 "as a whole" is as much as the Inspector could have concluded against the proposals, and she has done so.

178. I reject Mr Blundell's contention in his skeleton argument, developed before me orally, that "the clear intention of FNP10(c) is [to] make provision to 'hold the ring' by safeguarding areas which are 'under consideration for designation' (i.e. has 'Candidate Status') until a decision has been made one way or the other". That would only have been a correct submission if all other criteria besides paragraph (c) were clearly satisfied and it were being argued that the development should be permitted because it was not yet within the designated AONB. But where, as here, it had already been decided that other criteria were breached (with the result that there was a conflict with policy FNP10) then a breach also of paragraph (c) alters nothing in the analysis.

179. In oral argument by Mr Blundell I posited that if paragraph (c) were intended to bear the elevated significance he ascribed to it then it would have been a policy in its own

right. Mr Blundell's answer was to say that this is unnecessary because even subsumed amongst the other sub-criteria of policy FNP10 it still has an enhanced significance. I do not agree for the reasons given above.

180. Once it is accepted, as it must be, that the Inspector has correctly identified a breach of policy FNP10 then her task was to assess the planning balance as required by section 38(6). This she did in detail DL87-96, of which the parts most germane to policy FNP10 are as follows:

> "*88. I have found above that the proposal would not recognise the intrinsic character and beauty of the countryside. The landscape harm and visual harm would be localised, but looked at in the round the proposal would fail to comply with LPP1 Policies RE1 and RE3. Due to the very localised nature of this harm I afford it moderate weight. The proposal would involve development outside Policy FNP10 of the Farnham Neighbourhood Plan. I conclude that significant weight should be given to this harm in that the Farnham Neighbourhood Plan has sought to allocate sufficient land to deliver the housing requirements for Farnham as set out at policy ALH1 of LLP1.*
>
> *…*
>
> *91. The adverse benefits of the proposal would be the harm to the intrinsic character and beauty of the countryside, and the localised landscape harm and visual harm. There would also be harm from developing an unallocated site outside the built-up area boundary contrary to Policy FNP10.*
>
> *…*
>
> *92. The delivery of 146 dwellings, including 54 affordable dwellings, would significantly boost the supply of housing in accordance with the Framework. Given the significant need for Market and affordable housing within Waverley, I accord substantial weight to these benefits ...*
>
> *93. There would also be short term economic benefits during the construction period, and more long-term benefits to the local economy due to the increased spending in the area …*
>
> *94. … The provision of new public open space also attracts moderate weight … The Proposed footpaths and cycle links are necessary to make the development acceptable but they would nonetheless provide a benefit to the wider population …*
>
> *95. The proposal would provide new publicly accessible open space on the edge of Farnham, together with biodiversity net gain …*
>
> *96. Overall, I conclude that the adverse effects of the proposal would not significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole"*

181. Mr Fry is correct to observe that Ground 1 is not framed as an irrationality challenge but rather as a failure to have regard to a material consideration. But for the reasons I have given above the Inspector, in identifying a conflict with policy FNP10 as a whole, has had regard to all that she has needed to. The exercise of her planning judgement is both rational and lawful.

182. So far as reasons go, the correct understanding of the facts underlying Ground 1 is generally a sufficient explanation to answer Ground 2 as well. I would just add the following observations. I agree with Mr Fry that paragraph (c) of the policy was not a principle controversial issue in its own right, partly because it was not put in issue specifically by any party to the inquiry and partly because its impact was already absorbed by the common ground that policy FNP10 as a whole was breached.

183. In light of my findings that there was neither error in how the Inspector approached paragraph (c) of policy FNP10 nor inadequate reasoning for her conclusions it is unnecessary for me to address the submissions of the Secretary of State and Wates (based on Simplex GE Holdings Limited v Secretary of State for the Environment [2017] PTSR 1041) that the outcome would inevitably have been the same in any event and there are no exceptional public interest reasons for disturbing that outcome.

184. This claim being heard at a rolled up hearing I conclude that I would have granted permission for Grounds 1 and 2 to proceed but refused the claim on both grounds.

Conclusions

185. It follows for the reasons I have given above that I conclude:

a) The court has no power to extend time for service of the claim,

b) Even if it did have the power I would not have exercised that power in favour of the Claimant in this case, and

c) In any event whilst I would have granted permission for both substantive grounds of challenge to proceed I would have dismissed both grounds

186. For these reasons the claim fails.

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