Neutral Citation Number: [2020] EWHC 872 (Admin)

Case No: CO/4505/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street, Birmingham

Date: 09/04/2020

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

- -

Between:

SOUTH DERBYSHIRE DISTRICT COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
-and-	
D COOPER CONSTRUCTION LTD	**Interested Party**

- -
- -

Timothy Jones (instructed by **Geldards LLP**) for the **Claimant**
Killian Garvey (instructed by **the Government Legal Department**) for the **Defendant**
Christian Hawley instructed by **Howes Percival LLP** for the Interested Party
(written submissions only)

Hearing dates: 31 March 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10am on Thursday 9th April 2020. The deemed hearing has been adjourned to enable the parties to make written submissions on any consequential matters by 4.30pm on Friday 17 April 2020 and for the order on judgment to be drawn up.

MRS JUSTICE ANDREWS:

INTRODUCTION

1. This matter came before me on an oral hearing for determination of a preliminary issue of jurisdiction. The question whether permission should be granted to bring a claim for planning statutory review under s.288 Town and Country Planning Act 1990 ("the 1990 Act") was ordered to be determined at the same hearing if the preliminary issue of jurisdiction was decided in favour of the Claimant, South Derbyshire District Council. The Claimant was represented at the hearing by Mr Jones and the Defendant by Mr Garvey. I have also taken into consideration the summary grounds of resistance settled by Mr Hawley on behalf of the Interested Party.

2. S.288 of the 1990 Act provides, so far as relevant, as follows:

   (1) If any person—

   (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—

   (i) that the action is not within the powers of this Act, or

   (ii) that any of the relevant requirements have not been complied with in relation to that action

   he may make an application to the High Court under this section.

   (4A) An application under this section may not be made without the leave of the High Court.

   (4B) An application for leave for the purposes of subsection (4A) must be made before the end of the period of six weeks beginning with the 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.

   One of the "actions" to which s.288(1)(b) applies is a decision taken by a Planning Inspector on a planning appeal.

3. Before the requirement for leave was introduced in 2015, s.288(3) provided that: "*an application under this section must be made within six weeks of [the decision]*". That provision was superseded by s.288(4B).

4. The relevant provisions of the CPR specifically relating to Planning Court claims are PD8C, CPR 54.5(5) and PD 54E. PD 8C provides, in para. 1.3, that the Part 8 procedure must be used in a claim for planning statutory review. By virtue of paras. 1.1 and 1.2 that expression includes a claim for statutory review under s.288 of the 1990 Act.

5. PD 8C modifies the Part 8 procedure. Para. 2.1 provides 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 1.1. Para. 2.2 stipulates certain matters that must be stated in the claim form in addition to the matters prescribed in CPR 8.2. These include:

   a) The name and address of any person that the claimant considers must be served in accordance with paragraph 4.1 (of PD8C) and

   b) That the claimant is requesting permission to proceed with a claim for planning statutory review.

   Thus, the prescribed means by which a claimant makes an application for the leave of the High Court required under s.288 (4A) is by including a request for permission to proceed with the claim in the Part 8 claim form.

6. PD 54E, which relates to Planning Court claims, provides by paragraph 2.1 that a Planning Court claim must be issued or lodged in the Administrative Court Office of the High Court in accordance with PD 54D. That practice direction relates to the place in which a claim before the Administrative Court should be started and administered and the venue at which it will be determined.

7. CPR 54.5 sets out the time limits for filing a claim form in claims for judicial review and statutory review. CPR 54.5(5) specifies that:

   "*Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose.*"

8. Service of the claim form is dealt with under para.4 of PD8C. This provides that the claim form must be served on the Minister and on relevant interested parties (as set out in a table). Para 4.4 states 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 1.1.*"

WAS THE APPLICATION MADE IN TIME?

9. The preliminary issue which arises for determination is whether the application for permission was made within the six weeks prescribed by the statute. If it was not, then this Court has no jurisdiction to entertain the claim.

10. The decision of the Defendant's Planning Inspector which the Claimant seeks to challenge is dated 9 October 2019. It is common ground that the six weeks expired at midnight on 20 November 2019. The claim, including the application for permission, was issued and filed with the Administrative Court in Wales within that period, on 15 November 2019, in accordance with CPR 54.5 (5) and PD 54E para 2.1.

11. The claim form was then posted by the Claimant's solicitors on 19 November 2019 to the Government Legal Department ("GLD") at One Kemble Street, London WC2. That was the address for service on the Defendant under s.17 of the Crown Proceedings Act 1947 which then appeared in the list set out in Annex 2 to PD66 in

the main volume of the hard copy of Part 1 of the White Book 2019. A certificate of service was filed by a solicitor confirming the date of posting for the purpose of CPR 7.5(1).

12. Unfortunately for the Claimant, the GLD had moved offices on 11 September 2019 to 102 Petty France, London SW1. Section 17 of the Crown Proceedings Act was amended after the move to reflect this change in address. The updated address had been put in the online (electronic) version of the White Book by the time the claim form was posted, and a search for the GLD's address online would have revealed the new address. However, there is no update to PD66 in the 3rd supplement to the hard copy of the White Book, which updated the CPR to 1 October 2019. There is no evidence that any further supplement was published before 19 November.

13. The evidence of Ms Wittkopf, a lawyer at the GLD, is that given the short delay in the amendment of the Crown Proceedings Act, the GLD extended a grace period and decided to accept service of proceedings at either address until 4pm on 25 September 2019.

14. The Claimant had sent a pre-action protocol letter to the Defendant on 29 October 2019, to which the GLD responded on 11 November 2019. The response from the GLD stated in paragraph 30 that the address for service was 102 Petty France. Unfortunately, this was overlooked by the Claimant's solicitors, who were unaware that the GLD's address had changed. They took the address from the hard copy of the White Book.

15. Ms Wittkopf's evidence is that there was an automatic redirection of mail in operation for correspondence addressed to the GLD at One Kemble Street. However, because the new offices are shared with the Ministry of Justice and the Crown Prosecution Service, a private postal company collects the mail for 102 Petty France from Royal Mail and security scans it off-site, before delivering it on the next business day. Therefore, although the claim form was automatically redirected to 102 Petty France, it was collected by the private postal company on 20 November, and it did not arrive at 102 Petty France until 21 November, one day after the six-week period expired. There is no suggestion that there has been any prejudice to the Defendant in consequence.

16. In *Mendip District Council v Secretary of State for the Environment and another* [1993] JPL 434 ("*Mendip")*, Schiemann J decided what was meant by the "making of an application" for the purposes of the statutory time limit (which was then prescribed by s.288(3)). He concluded that whilst the rules of the Supreme Court then in force required that the notice of originating motion had to be entered at the Crown Office and served on the appropriate Minister within the six week time limit, the "application to the High Court" required by the statute was the entry of the notice of motion at the Crown Office. Accordingly, in a case where the application was made within the statutory time limit, but the service was not within the period specified by the rules of court, the Court had power to extend the time for service.

17. In so deciding, Schiemann J followed the approach taken by Morris J in *Summers and others v Minister of Health* [1947] 1 All ER 184, to the provisions which he described as "*the forerunner in as near as makes no relevant difference of the present section 288*". In *Summers,* Morris J made it clear that the question whether the court had

power to extend time for service depended on whether all steps, including service, must take place to constitute an application; or whether the application was made by the entry of the notice of motion in the Crown Office, and the time for service was prescribed by the rules of court. He explained why he considered the latter analysis to be correct:

"*In my view, the application to the High Court is indicated by RSC O.55B, r 71 to be the originating notice of motion which was entered within the six weeks. The service was specified by the rule, and though it was not effected within the time indicated, I think that there is power in the court to enlarge the time."*

18. In *Mendip,* rejecting the submission by counsel for the Minister that *Summers* was wrongly decided, Schiemann J stated that although the purpose of these sorts of enactments is to achieve certainty and finality:

"That, however, is achieved by having an unextendable deadline for the entry of the notice of motion. This does enable the parties most nearly concerned and everyone else to find out where they stand."

He referred to the fact that several Town and Country Planning Acts had been passed since *Summers* was decided, and there had been innumerable changes to the Rules of the Supreme Court, but none which altered the force of the reasoning behind *Summers,* which he had earlier described as "convincing". He did not propose to depart from it.

19. Both Schiemann J and Morris J expressly rejected the proposition that the application to the High Court included both the entering of the originating notice of motion and the service on any person who had to be served with it. The key question that I have been asked to decide is whether the position that has been established for many years as to what is required to "*make an application*" has changed in the light of the provisions of the CPR and the recent decision of the Court of Appeal in *Croke v Secretary of State for Communities and Local Government* [2019] EWCA Civ 54 ("*Croke*").

20. I shall first consider the provisions of the CPR. As set out earlier in this judgment, the amendments made to s.288 of the 1990 Act in 2015 which introduced a requirement for leave to bring the claim for planning statutory review, now specify that the application for leave has to be made within the six week deadline (s.288(4B)). PD 8C para. 2.2 requires that application to be made within the Part 8 Claim Form, which para. 2.1 stipulates as the means by which an application for planning statutory review is to be made to the Court.

21. If anything, that makes the position even clearer than it was under the rules that Schiemann J was considering. RSC O.94 r.1 provided that "*the application must be made by originating motion and… the notice of motion must state the grounds of the application.*" RSC O.94. r.2 (1) provided that "*notice of a motion under rule 1 must be entered at the Crown Office, and served, within the time limited by the relevant enactment for making the application made by the motion*." Schiemann J held that it was O.94 r.1 rather than O.94 r.2 that set out the steps required to "make the application" to the High Court.

22. Under the CPR, unlike RSC O.94 r..2, the time limits for filing the Part 8 Claim Form and service are dealt with separately. The former is dealt with in PD8C para 2.1 and CPR 54.5(5), the latter in PD8C para.4, which uses slightly different language from para.2.1. Para.2.1 states 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 1.1*". That suggests that the time limit in the statute relates to the act of filing the claim form with the Court. This is consistent with the position in respect of any other claim form, whether issued under Part 7 or Part 8; it is generally the action prescribed by the rules for initiating the proceedings before the Court that stops time running for limitation purposes.

23. Para.4.4, however, states that "*the claim form must be served within the time limited by the relevant enactment for making a claim for planning statutory review"*. It is implicit in that phrase that service is not the same thing as making a claim, as the statute is solely concerned with the time limit for making the claim. Thus, just as with previous rules of court, on the face of it service of the claim form forms no part of the "making of the application" for permission. That is hardly surprising, because the application is made to the Court. The time for service of the claim form is prescribed by the Practice Direction and not by the statute itself, and there is power to extend time for service. The next question is whether the Court of Appeal has said anything that constrains me to interpret the provisions of s.288 and the current rules of court differently.

24. *Croke* was not a case about service of a claim form. The decisions in *Summers* and *Mendip* are not referred to in the judgment, as one might have expected if the Court of Appeal had decided to overturn them. The case was solely concerned with the question whether the court had jurisdiction to extend the statutory time limit for making the application. Mr Croke had made two unsuccessful attempts to lodge the application with the court, one before the expiry of the six-week time limit, and one the day after.

25. Lindblom LJ, who delivered the leading judgment, referred to the time limit in s.288(4B) and to numerous authorities in which the six-week period has been treated as immutable. He referred to PD8C and PD54E and to the discretion of the court to enable the correction of defects in the claim form or amendments to be made to it, *so long as it was issued and filed in time*. He also referred to the two accepted exceptions to the rule, namely:

    (i) where the court office was closed on the last day of the six-week period, see *Pritam Kaur v S. Russell & Sons Ltd* [1973] 1 QB 336 and

    (ii) the exceptional case where the denial of an extension would infringe Art 6 ECHR.

26. He said that apart from those exceptions, there was no room for the exercise of judicial discretion. Parliament had provided a strict time limit of six weeks for the making of an application under s.288. Subsection (4B) does not admit any exception to the absolute time limit it lays down. That time limit is precise, unambiguous and unqualified and the statutory language is mandatory. He concluded that any extension of the *Kaur* principle would create uncertainty and inconsistency and act against access to justice for all parties to a planning dispute.

27. There is nothing in the judgment in *Croke* that conflicts with the approach in *Mendip* and *Summers*. Indeed, it is clear from those judgments that Morris J and Schiemann J both considered that the time-limit for making the application (by entry of the motion in the Crown Office) was prescribed by Parliament and could not be extended. The power to extend time for service derived solely from the fact that the time for service was set by the rules of court, not the statute, albeit that the rules prescribed the same time for service as for making the application.

28. I therefore conclude that the application was made within the six-week time limit, and the court has jurisdiction to entertain it.

EXTENSION OF TIME FOR SERVICE OF THE CLAIM FORM

29. Although Mr Jones sought to persuade the court that service was effected within the time limit prescribed by PD8C paragraph 4.4, it was not. It would have been, if One Kemble Street had been the correct address for service on the Minister, but that was no longer the case, and that address is no longer a Government building. There is an application before me for an extension of time, supported by evidence from the Claimant's solicitor Mr Jonathan Griffiths, who explained the factual background to which I have already referred. I am satisfied that the application was made promptly.

30. In deciding whether to extend time for service by one day, I bear in mind that the provisions for service are couched in mandatory terms and that the application to extend time was made after the expiry of the period for service, which the rules deliberately align with the statutory period for making the application. The intention is plainly to achieve certainty and finality, so that all parties to a planning dispute know exactly where they stand at the end of the six-week period. The provisions of CPR 7.6, the guidance in *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 1 WLR 3206 and, by analogy, the considerations in applications for relief from sanctions under CPR 3.9 are relevant to the exercise of the court's discretion.

31. Although the Claimant's solicitors were at fault to some extent for not spotting the change of address in the response to the pre-action protocol letter from the GLD, and in leaving it as late as they did to post the claim form, they did take reasonable steps to serve within time. They acted reasonably in relying on the address for service that was stated in the hard copy of the White Book. The supplement, which was stated to be up to date to 1 October 2019, did not flag up the change of address even though the GLD had moved on 11 September.

32. Moreover, the Claimant's solicitors are not responsible for the additional security measures that led to the short hiatus in the redirection of the post to the correct address. Had it not been for those measures, the GLD would have received the claim form at 102 Petty France within the six-week time limit. There was no prejudice caused by this minimal delay in receipt. Had the letter been addressed to 102 Petty France in the first place, that delay would not have counted in any event, as all relevant steps would have been completed on 19 November when the claim form was posted. The interested party, the developer who is probably the person most affected by the challenge to the grant of planning permission, has made no complaint, and has filed summary grounds of resistance on the merits. Bearing in mind the overriding objective, it seems to me that the justice of the case requires the short extension of time to be granted. In fairness to Mr Garvey, he did not seriously contend otherwise.

SHOULD PERMISSION BE GRANTED?

33. The Planning Inspector granted planning permission to the Interested Party in relation to a site at 4 Church Street, Hartshorne, Swadlincote, which is outside the settlement boundary, for "*the erection of three dwellings and alterations to access"* subject to various conditions. The principles upon which such decisions may be challenged are well established. The interpretation of planning policy is ultimately a matter of law for the Court to determine, but its application is a matter of planning judgment with which the Court will only interfere in limited circumstances, essentially where the decision-maker has fallen into "*Wednesbury*" error (see *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 at [26].) In this case it was common ground that the issue is one of interpretation, not application.

34. The central issue in this application is how policy H1 of the South Derbyshire Local Plan Part 1 ("LP1") should be interpreted, and in particular whether it should be read together with policy HP 21 and whether certain terms used in it should be interpreted in accordance with the glossary in LP1 even though they are not defined in H1 itself.

35. There is clear evidence of a material difference of approach by different Planning Inspectors to the interpretation of these specific policies and how they relate to each other and to the Local Plan. As matters stand, there are three Inspectors who have adopted the interpretation espoused by the Claimant and three, including the Inspector in the present case, who have taken an opposing view.

36. Although Mr Garvey made the fair point that the cases before different Inspectors may have been argued differently, that does not overcome the fact there are currently two distinct and diametrically opposed interpretations of policy H1, which cannot both be correct. One of them must be wrong, and on the face of it there is at least a respectable argument that it was the approach taken in this case. For present purposes all I need to decide is whether the argument has a real prospect of success..

37. Ground 1 is that the Inspector failed to follow the principles explained by Lindblom LJ in *Gladman Developments Ltd v Canterbury City Council* [2019] EWCA Civ 669. I understand that to be a reference to the summary of the law set out succinctly in paragraphs 21-22 of that judgment. Mr Garvey submitted that the judgment in *Gladman* turned on the particular policies relevant to that matter and has no relevance here. If and to the extent that the Claimant seeks to draw any parallels between the way in which the relevant local policies were interpreted in *Gladman* and the approach advocated in the present case, I agree. Indeed, in *Chichester DC v Secretary of State for Housing Communities and Local Government* [2019] EWCA Civ 1640 at [32] Lindblom LJ said that the circumstances in which the basic principles that he adumbrated are applied will vary widely. He sounded a note of caution about reading the analysis in one case across into another because, as he put it, "*the policies of each plan are unique, crafted for the area or neighbourhood to which they relate, not to fit some wider pattern or prescription.*"

38. However, to the extent that the Claimant relies upon paragraphs 21 and 22 of *Gladman* as a useful recent summary of the relevant principles of interpretation, the primacy to be afforded to the development plan and the obligation on the decision maker to "*identify and understand the relevant policies, and… establish whether or*

not the proposal accords with the plan, read as a whole" it is entitled to do so. To the extent that Ground 1 is a complaint that the Inspector failed to consider the Plan as a whole, but instead treated Policy H1 or various aspects of it in isolation, in consequence reaching an incorrect interpretation, it is unexceptionable. I consider that there is more than sufficient evidence that the Inspector misinterpreted the relevant policies to surmount the threshold for permission in the present case.

39. Whilst at first sight, Ground 2 appears to me to be more a statement of the consequences of the alleged misinterpretation of Policy H1 than an independent ground of review, it is put by Mr Jones on the basis that no reasonable Inspector applying the correct principles of interpretation could have reached that conclusion, because it undermines the Development Plan. I consider that the Claimant should be entitled to argue that point even if it adds little or nothing to Ground 1 or is more properly to be viewed as a facet of that Ground.

40. I therefore grant permission to bring this claim on both Grounds.