IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
[2021] EWHC 3561 (Admin)

No. CO/3165/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 16th December 2021

Before:

MR JUSTICE EYRE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
SAVE BRITAIN'S HERITAGE — Claimant

- and -

CITY OF LONDON CORPORATION
(as local planning authority) — Defendant

-and-

CITY OF LONDON CORPORATION
(as applicant for planning permission) — Interested Party

Mr Richard Harwood OBE QC and **Miss Kimberley Ziya** (instructed by D**avid Cooper Solicitors**) appeared on behalf of the **Claimant**.

Mr. James Maurici QC and **Mr Ben. Fullbrook** (instructed by the **City of London Corporation**) appeared on behalf of the **Defendant**.

Mr Rupert Warren QC and **Miss Anjoli Foster** (instructed by **Pinsent Masons**) appeared on behalf of the **Interested Party**.

J U D G M E N T

MR JUSTICE EYRE:

1 These proceedings relate to a permission that was given by the Defendant as planning authority to itself as the applicant for full planning permission for the demolition of six buildings in the area bounded by Fleet Street, Salisbury Court, Salisbury Square, Primrose Hill and Whitefriars Street in the City of London. That demolition was to be followed by the erection of three new buildings: a court building, a police headquarters and a commercial building. There was to be an enlargement of Salisbury Square consequent upon the demolition of at least some of those buildings.

2 On 30th July of this year the permission was granted. It was issued to the Corporation, as applicant, and uploaded to the Defendant's website.

3 On 4th August of this year that decision was notified to the Claimant. The Claimant is, as its name indicates, a body interested in preserving, the heritage of the country. The Claimant had objected to the application. The summary in the Officers' Report said that Save Britain's Heritage had objected strongly to the applications and that it considered that the application raised issues of strategic and national significance such as to indicate that the Secretary of State should cause them to be determined at a public inquiry.

4 Understandably and properly, consideration of the matter by the Defendant had been preceded by consultation. There had been responses not only from the Claimant but from others and in particular from Historic England. That body's letter of 5th February of this year is in the bundle. I will not quote it *in extenso*. The key points are that Historic England identified a high level of harm to the significance of the Fleet Street Conservation Area with a high level of harm to the particular part of that Area affected by these proposals. For the purposes of the National Planning Policy Framework the harm was less than substantial though as Historic England's letter pointed out that category covers a range of harms. The letter made the point that a convincing justification was needed for the proposed works and said it was a matter for the Defendant, as planning authority, to determine if there was such justification. However, a particular point was made as to the demolition of two of the properties. Those are 1 Salisbury Square and 8 Salisbury Court, 1 Salisbury Square is a replica Queen Anne/Georgian house and 8 Salisbury Court is a narrow, late 19th or early 20th Century warehouse (I take those descriptions from Historic England's letter). Historic England said this in respect of those properties:

> "We see no justification for the demolition of 8 Salisbury Court and 1 Salisbury Square (both acknowledged as unlisted historic buildings which contribute to the significance of the conservation area). We are not convinced that this element of harm is needed to achieve the public benefits that we acknowledge might be delivered by other aspects of the proposals."

5 I will turn to the Officers' Report in rather more detail later but suffice to say at this stage that the lengthy and detailed report acknowledged the effect of the proposals but concluded that the benefits to be obtained from the proposed works justified the detrimental consequences.

6 I have already indicated that it was on 4th August that the Claimant learned of the grant of permission. On 17th August, the Claimant's solicitors sent a pre-action protocol letter that referred to a permission that was granted on 30th July and set out in some detail the grounds which the Claimant contended would be the basis of a public law challenge to that permission. Such a challenge was, indeed, made and the claim form filed at the court on 14th September of this year. If the relevant date for the purposes of CPR 54.5(5) is 30th July then that claim form was filed out of time: if the relevant date is 4th August then it would be within time.

7 The Statement of Facts and Grounds advanced two grounds of challenge. The first was a failure to advise the Planning Committee of the "great weight" to be given to the comments of Historic England as a statutory consultee. The second was the failure by the officers, and consequently the Committee, to conduct a lawful weighing of the harms and benefit associated with the demolition of 8 Salisbury Court and 1 Salisbury Square.

8 The matter was considered by Jay J on the papers and by his order of 18th October permission was refused. Jay J gave three reasons for that refusal. The first was that the decision had been made on 30th July and the claim was out of time and so Jay J refused permission on the ground of delay. Next he explained that ground 1 was not arguable because the essence of Historic England's objections had been captured in the report and in the view of the experience of the Planning Committee the need for great weight to be attached to those views did not need to be spelt out in the Officers' Report. Ground 2 was, in the view of Jay J, merely an attempt to assail the planning merits and he concluded that, in reality, it stood or fell with ground 1. In addition, Jay J disapplied the Aarhus Convention to the extent of making a costs cap of £20,000 instead of the limit of £5,000 which he characterised as being the default position.

9 The matter came before me on the Claimant's oral renewal of the application for permission.

10 Two questions arise in respect of the timing of this matter. The first is whether the claim was commenced in time and the second is whether, if it was not commenced in time, I should give an extension of time.

11 The grounds for reconsideration advanced a number of points as to timing. Mr Harwood QC, who appears today for the Claimant, does not pursue the ground that was advanced in [13] based on what was said in [12] of that document. Rightly, in my view, he accepts that if domestic considerations prevail the relevant starting date for the purposes of CPR 54.5(5) was 30th July. However, Mr. Harwood does advance an argument based on the Environmental Impact Assessment Regulations (the "EIA Regulations") and retained Community Law. In short, he says that those regulations apply to the application of permission here; that as a consequence the Defendant had to publicise its decision; that any challenge to the decision is governed by the principles laid down in the case of *Uniplex (UK) Limited v NHS Business Services* [2010] CMLR 47; and that, accordingly, time runs from the date when the Claimant at least was informed of the decision He says that this is the position by an extension of the reasoning enunciated by Sir Richard Buxton in the case of *R (on the application of Berky) v Newport City Council* [2012] EWCA Civ 378.

12 Mr Harwood's argument amounts to saying that where the EIA Regulations apply then the time for any challenge to any decision runs from the date when the consultees were informed of the decision even if the only challenge is one which is wholly unrelated to the EIA Regulations. There is no authority in support of that proposition which, in my judgement, goes beyond what Sir Richard Buxton said in *Berky* and is contrary to the obiter views of the majority in that case.

13 It is necessary to look in a little more detail at what was said in *Berky*. That was a case where the planning decision was challenged on three grounds. One of those was based on the Environment Impact Assessment Regulation; another alleged bias; and the third related to rationality taking the form of an attack on the adequacy of the reasoning of the decision. There were issues as to whether the claim had been brought in time and as to the merits. The Court of Appeal concluded that the EIA challenge was unmeritorious as, indeed, were the others. It follows that the dicta of the members of the Court as to timing were obiter. There

was an issue as to the application of s.31(6) of the Senior Courts Act but also a question as to time limits. In respect of time limits, Carnwath and Moore-Bick LJJ took the view that there could be different time limits for different categories of challenge. Thus if one looks firstly at the judgment of Carnwath LJ at [32] and following. The background was set out; then at [33] his Lordship quoted s.31(6); and at [34] he said this:

> "For this purpose [I take that to be a reference to timing generally] it is necessary to distinguish between ground 1 (EIA), which turns on a requirement derived from a European directive, and grounds 2 (bias) and 3 (irrationality) which depend on purely domestic law."

14 He then went on to summarise, at the beginning of [35] a submission which Mr Harwood made in that case mirroring, to some extent, that which he makes today namely that the same approach, namely the *Uniplex* approach, should apply to grounds based purely on domestic law as to those governed by the EIA. Carnwath LJ quoted from Mr Harwood's submission and said this:

> "I see no reason why the court's approach to domestic law challenges should be materially affected by the inclusion of a European point."

15 Then at [43] he said this:

> "…the proceedings were not commenced promptly. The judge was entitled to hold that in respect of the domestic grounds, permission should be refused on these grounds alone. Even if that is not a sufficient ground for refusing challenge on the EIA argument, I would have refused permission on the basis that it did not provide a realistically arguable basis for challenging the validity of the permission."

16 At [52] Moore-Bick LJ said:

> "Carnwath LJ is of the view that the decision of the Court of Justice in *Uniplex* is concerned only with the time allowed for commencing proceedings and does not affect the court's power under section 31(6) to withhold remedies. However, I am unable to accept that distinction…"

17 In the balance of that paragraph his Lordship explained his view that the *Uniplex* approach applied to s.31(6). However, at [53] he said:

> "Like Carnwath LJ, I see no reason why Community and domestic law challenges should not be subject to different time limits…"

18 It follows that both Carnwath and Moore-Bick LJJ regarded it as perfectly proper where there were a number of challenges in the same proceedings for those governed solely by domestic law to be subject to the normal domestic provisions while other challenges could be subject to the *Uniplex* approach.

19 Sir Richard Buxton took a different view. At [68] through to [69] he explained his view, adopting the argument which Mr Harwood advanced, that there was a single set of proceedings and that the same limitation period must apply to both. So he said at [69]:

> "This ability to rely on a "Community" point to change the limitation rules applying to the whole application also requires consideration of what would count as such a point."

He then concluded that paragraph by saying:

> "The prospect must therefore be that any assertion of a Community point that is not plainly unarguable will attract the jurisprudence contended for by the applicants. [sc the jurisprudence of time running from when there is notification rather than the date of the decision]"

20 I conclude, therefore, that the approach that Mr Harwood urged on me today is contrary to the views expressed, albeit obiter, by Carnwath and Moore-Bick LJJ and goes beyond that expressed by Sir Richard Buxton. Sir Richard Buxton contemplated the community approach, the *Uniplex* approach, applying when there was a community point that had been asserted as one of the grounds of challenge. However, he did not go as far as to contemplate it applying in the circumstances adverted to by Mr Harwood of there being an application and permission governed by the EIA but where no challenge based on EIA grounds was being made.

21 I do not need here to consider what would have been the position if there had been a challenge on EIA grounds. It suffices to say that I find no basis for holding that the time limit for a challenge which is unrelated to the EIA provisions is affected by the fact that those regulations apply or by the fact that there is a potential argument that a different challenge which could have been made or which might have been made but which was not made would have been subject to the *Uniplex* time limit approach. Such an approach would, in my judgement, be potentially conducive of uncertainty. I respectfully agree with the view of Carnwath and Moore-Bick LJJ that there is ample basis for believing that there is scope for different time limits for different grounds of challenge.

22 The underlying position is that the *Uniplex* approach is an exception to the general approach which is predicated on the need for a strict time limit for public law challenges. Those strict time limits derive from the public interest in proper administration and in the prompt resolution of disputes as to the validity or otherwise of public law decisions. The considerations which support that general approach also support confining any exception to it narrowly.

23 In those circumstances the fact that the application here and the treatment of it were subject to requirements under the EIA Regulations does not certainly in the absence of a challenge based on those regulations alter the time limits that apply. It follows that the relevant date for the start of the six-week period under CPR 54.5(5) was 30th July. The claim was accordingly filed out of time, albeit by only a short period, but out of time nonetheless.

24 I next have to consider whether there should be an extension of time. That question is to be addressed in the context of the requirement that judicial review of planning decisions be pursued with celerity. It is of note here that no evidence at all has been put forward explaining why the application is not made in time or why it was not possible for it to be brought within time nor is there any of the kind of material which one would often expect to see explaining what had happened; explaining and apologising for the delay; or the like.

25 It is of note that the Claimant was informed of the decision on 4th August. What is more significant is that the pre-action protocol letter was sent on 17th August. It follows that by 17th August the Claimant knew that permission had been granted on 30th July. Moreover, it knew sufficient to be in a position to instruct and to have instructed solicitors. Moreover, those solicitors were in a position to send a five-page pre-action letter setting out the grounds of challenge to the decision in some considerable detail. On the face of matters the Claimant would have been in a position at that date to commence proceedings by, in effect, cutting and pasting from the pre-action protocol letter into a claim form and a Statement of

Facts and Grounds. Indeed, that ultimately appears to have been in substance what was done. There is simply no explanation proffered as to why that was not done and why it could not have been done either immediately after 17th August or, at any event, in the period of about three weeks between 17th August and the expiry of the six-week period from the date of the decision.

26 The reconsideration grounds advance a number of alleged grounds for extension of time. The first, at [14.1], is to say that when the Claimant received the letter of notification of 4th August it had no way of knowing that the decision had not been issued on the same date and that it was perfectly reasonable for the Claimant to assume that 4th August was the issue date. The first point I make is that there is no evidence that such an assumption was, in fact, made. However, even if that assumption was made, the Claimant had learned of the true position well before the pre-action protocol letter on 17th August. That is apparent from the matters I have already mentioned namely that by 17th August solicitors had been instructed; potential grounds had been set out; and the correct decision date of 30th July had been identified.

27 Paragraph 14(2) of the grounds for reconsideration is not pursued by Mr Harwood - rightly, in my view.

28 At [14(3)] this is said:

> "There clearly can have been no prejudice suffered as a result of such a brief delay. This is supported by the fact that the interested party's own evidence only describes prejudice which arises from the issuing of this claim, not as a result of the date of issue. Moreover, the Defendant and the interested party were aware that the claim was coming."

Then there is reference to the pre-action protocol exchanges and, indeed, to further emails about the Aarhus costs protection.

29 Even absent the effect of s.31(6), the absence of prejudice to the Defendant and the Interested Party would not, of itself, be a ground for extending time. At most, it would amount to a factor, indeed, a factor of comparatively limited weight, supporting some other ground for the extension of time. Even then it would need to be seen in the context of the need for celerity in bringing such applications. But that is as far as the absence of prejudice goes.

30 Paragraph 15 of the grounds for reconsideration says this:

> "Whichever way one looks at it, the position is that the Defendant, supported by the interested party, seeks to rely on the consequence of its own admitted delay in issuing the decision to the Claimant in order to deprive the Claimant of the ability to bring this claim. That is patently not in accordance with the interests of justice."

31 Leaving aside the overblown language that is used in that paragraph it contains nothing of substance and it again founders on the fact that the Claimant was in a position to send the detailed pre-action protocol letter on 17th August.

32 It follows that there is nothing put forward in the material advanced by the Claimant which could, of itself, justify an extension of time. In those circumstances, I simply decline to extend time no proper basis for the extension sought having been advanced at all.

33 The effect of that is that the claim falls to be refused as being out of time in circumstances where there is no scope for an extension of time being granted. I reach that conclusion, as will have become apparent, without needing to consider the effect of s.31(6), although potentially that would be a further significant factor in support of the refusal of permission.

34 I will, however, briefly explain why even if the matter had been in time or I had extended time, I would have refused permission.

35 The test is whether the grounds advanced are grounds which are properly arguable with a real prospect of success.

36 In reality, ground 1 has been abandoned. Mr Harwood did not, in terms, go quite that far but he accepts that the Committee would have been fully aware of the role and position of Historic England and of the need to attach great weight to the views of that body. The absence of an express reference to the need to give great weight to Historic England's consultation response is not, of itself, a public law failing and could not, of itself, form the basis for a challenge to the decision.

37 Mr Hardwood does, however, rely on ground 2. The Claimant's case, in short, is that Historic England took the view and expressed the concern that there was no justification for the demolition of 8 Salisbury Court and 1 Salisbury Square and that the public benefit of the scheme do not outweigh the detriment which would result from that demolition. There was, the Claimant says, a failure by the Defendant to grapple with the concern expressed by Historic England. The Defendant's failure combined: a failure to recognise that concern as an important factor; a failure to address directly whether the benefit and potential benefit from the scheme outweighed the particular harm; and a failure to consider whether the benefit could be achieved or substantially achieved without this harm. Mr Harwood says that for the decision to have been a proper one Historic England's concern as to these two buildings had to be particularly and directly addressed. In addition cogent reasons for coming to a different conclusion from Historic England on the question of the presence of justification needed to be given and were not.

38 There is, in my judgement, no real prospect of a challenge based on that ground succeeding. I will not recite, as they are common ground and well known, the approach to be taken to the reading of officers' reports as laid down in *Mansell v Tonbridge & Malling Borough Council* [2017] EWCA Civ 1314 but I have that approach well in mind.

39 The matters advanced by Mr Harwood were matters of planning judgement for the Defendant. When the Officers' Report is read as a whole it is clear that the officers and so the Committee were well aware of Historic England's concerns about those two building and were well aware of the impact of the loss of the buildings; that they considered the benefits resulting from the scheme as against the harm resulting from that loss; and that they considered the relevance of the loss of those two buildings to the scheme. The exercise is necessarily a balancing exercise and the requisite balancing exercise was undertaken. There is simply no prospect of a public law error in that regard being established.

40 The Officers' Report is to be read as a whole but particular passages do show that the officers and so the Committee were very conscious of the need to weigh the benefits against the harm when considering if the former justified the latter. I am not going to quote the report at length but in saying that the report shows that I have regard to the following parts of the report: the comprehensive summary; the reporting of Historic England's position which Mr Harwood rightly accepted was comprehensive and which, in particular, noted Historic England's position about these two buildings; the response to Historic England's

concerns as set out in the reporting of Historic England's position and then the treatment of these matters at para.99, 105 to 111, 229 and following and noting before that para.171 and 172, which explain the benefit of the expansion of Salisbury Square and its centrality to the success of the scheme; paragraphs 238 to 242 addressed, in particular, the loss of these two buildings. The balancing exercise was again set out with elements of it at paragraphs 283 to 284, 287 to 290, 292 to 299 and 300 and 301, 430, 435 to 436, at 490 (where there was a particular reference to the demolition), 758 to 764, 766 to 757, 812 to 813 The number of passages to which I have referred shows the comprehensive nature of the report and the way in which the issues were addressed.

41 I revert to the point that it is clear that the members of the Committee were aware of Historic England's concerns about these buildings; were aware of the test to be applied; and were aware of the need to balance benefit and harm; and that they considered carefully the benefits to be derived from the demolition and the harm resulting. The drawing of the balance between the benefit and the harm was a matter for the Committee. It was a classic example of planning judgement and there is nothing here that can be said to amount to a failure of planning judgement such as to give rise to a public law challenge.

42 It follows that the claim is out of time and the extension sought is not granted but that in any event permission would have been refused on the merits.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.