Case Name: *Halton Borough Council v Secretary of State for Levelling Up, Housing And Communities* [2023] EWHC 293 (Admin) (13 February 2023)

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Commentary:
This case concerned:

1. The appropriate test to apply when considering the claimant's application for an extension of time for serving a claim form in a claim for statutory review under s.288 of the Town and Country Planning Act 1990 ("TCPA").
2. Whether, applying the appropriate test, the claimant is entitled to an extension of time to serve its claim form.
3. Whether the claimant should be allowed to amend the claim form so as to bring the claim as a claim for judicial review because the claimant would not have needed to seek an extension of time for service had the claim been formulated as a claim for judicial review from the outset.

The underlying substantive claim which the claimant is seeking permission to bring, is a claim for statutory review under s.288 TCPA of decisions made by the defendant to award costs against the claimant in favour of the Health and Safety Executive and Viridor Energy Limited ("Interested Parties") in relation to their costs of a planning inquiry.

The inquiry concerned an application for planning permission that the claimant had resolved to approve but was called in for determination by the defendant under s.77 TCPA. During the course of the inquiry, the applicant withdrew its application once the claimant had informed the inquiry that it could no longer support the application having considered evidence given by its expert risk management witness the previous day. This led to the Interested Parties submitting applications for and the defendant making adverse costs orders against the claimant who seeks to challenge them.

By virtue of CPR PD54D paragraph 4.11, the claim form must be served within the period of six weeks for making a claim for statutory review under s.288 TCPA. This differs from the general provision in CPR 54.7 relating to judicial review claims which requires the claim form to be served within seven days of issue. The claimant served the s.288 claim on the defendant and Interested Parties late, under the misapprehension that it had seven days from issue to serve. The claimant subsequently made the extension of time application, which this case considers.

In Corus UK Limited v Erewash [2006] EWCA Civ 1175 ("Corus"), the Court of Appeal held (in relation to a claim under s.287 TCPA) that the court had jurisdiction to extend the time for service of the claim form and that the principles to be applied were those found in CPR 3.1(2)(a) rather than the (more demanding) requirements of CPR 7.6, which only

apply to cases of service under CPR 7.5 and CPR 7.5 does not apply to statutory review claims.

In Good Law Project Ltd v Secretary of State for Health and Social Care [2022] EWCA Civ 355 ("Good Law") on the other hand, the Court of Appeal held (in relation to a judicial review claim) that although it is CPR 3.1(2)(a) and not CPR 7.6 which applies, the principles of CPR 7.6 should be followed. This approach has also been adopted by Lang J in decisions on the papers in two cases – one under s113 of the Planning and Compulsory Purchase Act 2004 and one under s.288 TCPA.

In Good Law even though CPR 7.6 did not directly apply, it fell to be applied by analogy. The same analogy applies to statutory review cases as judicial review cases. HHJ Stephen Davies therefore accepted the defendant's submission that unless Corus was good authority against the court should follow the approach in Good Law in relation to a statutory review case. The point was not expressly argued or decided in Corus. Therefore, the proper approach is to apply Good Law to the current case.

Under CPR 3.1(2)(c) applying CPR 7.6 by analogy, the claimant accepted that it cannot succeed in its extension of time application on that basis. This was sufficient to dispose of issue 2.

Issue 3 rested on whether a claim seeking to challenge an adverse costs decision made following the withdrawal of a planning application during a planning inquiry should be made as a claim for statutory review or judicial review.

By s.284(1)(g) TCPA the validity of "a relevant costs order made in connection with… an action mentioned in subsection (3) shall not be questioned in any legal proceedings whatsoever except insofar as may be provided by this Part". Actions mentioned in subsection (3) include "any decision on an application referred to the Secretary of State under section 77". This raised the question of whether the costs order in this case was made "in connection with" a "decision on an application referred to the Secretary of State under section 77 [TCPA]". The claimant argued that because the application was withdrawn there was no decision made by the Secretary of State on the application under s.77 and, hence, the costs order could not have been made in connection with any such decision, whereas the defendant argued that the words "in connection with" were sufficiently wide to include the situation where the application was referred to the Secretary of State under s.77 but subsequently withdrawn before a decision was made.

Apart from s.284(1)(g), with which this case is concerned, the other categories of conduct covered by s.284(1) are the orders and decisions specified in s.284(2) and s.284(3) respectively, where the words "in connection with" do not appear. However, the relevant costs order has to be made "in connection with" such specific orders or decisions. This emphasises the need for a connection between the costs order and a

formal decision, which favours the claimant's case. HHJ Stephen Davies concluded that the correct interpretation of "in connection with" in s.284(1)(g) is that the relevant cost order has to be connected with an actual decision under s.284(3), in this case an actual decision on a called-in application under s.77. Therefore, this claim must be brought by way of judicial review.

Had the claim form made clear from the outset that it was a claim for judicial review in a planning claim, it could not have been suggested by the defendant that it was not issued and served within time. The defendant also did not identify any prejudice due to the overall delay and the mistake was not considered to be so serious as to justify the court refusing permission. On that basis, HHJ Stephen Davies exercised his discretion and granted permission to the claimant to amend its statement of case subject to filing and serving an amended claim form in the proper form, making only a claim by way of planning judicial review and confirming the Aarhus Convention does not apply, within 14 days of receipt of the order giving effect to his judgment. HHJ Stephen Davies also extended the time for the defendant and Interested Parties to file and serve summary grounds of defence to 28 days from the date of such order.

Case summary prepared by Nikita Sellers