Case Name: *R (on the application of Amalgamated Smart Metering Limited) v Rotherham Metropolitan Borough Council* [2025] EWHC 97 (admin)

Full case: Read here

Commentary: This case concerned an application made out of time for judicial review of Rotherham Metropolitan Borough Council's ("the Council") grant of outline planning permission for residential development abutting a backup electricity generation facility operated by the claimant, Amalgamated Smart Metering Limited ("the Claimant").

The Claimant was concerned about the potential for noise disturbance to the new development, and that large-scale housing so close to their facility would risk them having to scale back or cease existing operations and limit the scope for future development. They contended that the noise impact assessment submitted in support of the application by the Council's Environmental Health Officer ("EHO") was deficient, and that the proposed mitigation measures were inadequate.

The Court dismissed the Claimant's application for an extension of time for filing the claim form and refused permission to apply for judicial review.

The Claimant had discovered the existence of the planning permission on 11 June 2024, despite it being granted in February 2024, and applied for an extension of time to file a claim for judicial review under CPR 3.1(2)(a). They said that the reason for their lack of awareness not a lack of diligence, but the Council's failure to carry out a lawful consultation exercise and an error in the Council's planning software that meant neither the application nor the outline permission appeared on their online planning application map. The claim form was served well within the required period of seven days after the date of issue.

Then, the Council and the Developer ("the Interested Party") each filed an Acknowledgement of Service where they stated that they intend to dispute the Court's jurisdiction to try the claim pursuant to CPR Part 11, relying on the Court of Appeal's decision in *Good Law Project Ltd v Secretary of State for Health and Social Care* [2022] EWCA Civ 355 ("*Good Law Project*"). They did not address whether the Claimant's grounds were arguable and instead requested that if the Claimant's application was granted and theirs refused, they should be granted an extension of time for service of their Summary Grounds of Defence.

It was held that the Part 11 procedure was not applicable because the case concerned an extension of time to filing the claim form for judicial review, not the service of the claim form. The question of whether time should be extended for filing the claim form required the exercise of judicial discretion in accordance with the principles in *R (Thornton Hill Hotel) v Thornton Holdings Ltd* [2019] EWCA Civ 737 ("*Thornton Hill Hotel*"),

which may include, among other things, a broad assessment of the merits of the claim. CPR 11 did not allow this, and so the Part 11 Applications were dismissed.

The Court did grant an extension of time for service of the Summary Grounds of Defence as there was no prejudice to the Claimant but the costs were to be borne by the Defendant and Interested Party in any event.

The Court then went on to consider a) if the Court should extend time for the Claimant to file; and b) if permission to apply for judicial review should be granted.

The Claimant's extension of time application

The Claimant relied upon the following matters in support of its application to extend the six-week time limit for filing its claim:

1. The delay was caused by the Council's failure to consult the claimant and the fault with the Council's planning software which meant the application was undiscoverable online;
2. Once the permission was discovered by the Claimant, they acted with appropriate urgency;
3. The issues raised by the Claimant are serious: potential adverse noise could affect the health and quality of life of future residents;
4. The development had the potential to affect the operation of an existing business, located in a business-designated area, which made an important contribution to the provision of energy at times of peak demand;
5. The development would also jeopardise any potential future use of the Claimant's site for battery storage, which would assist in meeting the challenges of climate change;
6. The development site is a windfall site, and the Council concluded that there was no shortage of housing land, and is confident of meeting its housing requirement and need targets; and
7. Refusing to extend time would be inconsistent with the UK's commitments under the Aarhus Convention and Articles 6, 14 and Article 1 of the First Protocol to the ECHR to refuse to extend time.

The Court first set out the approach of the Court of Appeal in *Thornton Hall Hotel* to out-of-time claims for judicial review of a planning permission, before considering the import of *R (Gerber) v Wiltshire Council* [2016] EWCA Civ 84, upon which both parties relied, and Sales LJ's consideration of the relationship between publicity requirements attached to notices of planning permission and the justification for strict time limits to challenge a planning permission.

In *Gerber* and *Thornton Town Hall,* significant weight was placed on the fact that a planning application would be advertised, and that fulfilment of the relevant publicity requirements is taken to be sufficient to put a person on notice of the existence of the planning application, even if they do not see any advert. If there had been a complete failure to advertise an application or make it known to the public, then it could not be said that anyone had been put on notice.

The Council publicised their application in the following ways:

- It posted site notices on four street lights around the boundary of the Development Site.
- It sent letters to all surrounding addresses for which the Defendant had addresses on the Royal Mail mapping system. The claimant's address did not appear on the Royal Mail mapping system, and the electricity generation facility was generally unmanned, though it had a postal address and post box on its front gate which was occasionally checked by visiting staff. Although the Council's business rates team did have a correspondence address for the Claimant, the Council's data protection obligations prevented them from sharing it internally, and so no letter was sent to the Facility.
- Details of the application were made available on the Council's online Planning Portal on 26 September 2023. However, a fault meant that the Interested Party's application did not appear on the Map Search facility. The map is offered 'for information purposes only' and has an express disclaimer that the Council 'offers no warranty to its accuracy or completeness.'

However, the Council had failed to publish a statutory notice in the local newspaper. The Court therefore held that the requirements of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the 2015 Order") had only partially been fulfilled: although site notices were posted, so there was no need to fulfil the alternative notice requirements, no newspaper notice had been published as required by Article 15(4)(b) of the 2015 Order.

The Court then considered by what time the Claimant had a fair opportunity to become aware of, and object to, the proposed development. There was no adequate evidence that any searches were conducted by the Claimant between 16 February 2024 and 11 June 2024. Had they done so, they would have led to the Planning Portal (which was also available to be searched at any time), and after 29 February 2023, would additionally have led to a BBC news report of the grant of outline planning permission. While the Council's failure to publish a local press notice could not be overlooked lightly, it would have made no difference to when the Claimant became aware of the application had they done so. The Claimant's reliance on the Council's Map Search function was at their own risk.

The judge noted that the Claimant had acted with some degree of celerity, but not until after 11 June 2024. By 16th February 2024, when it discovered a press report stating that the application for outline planning permission had been submitted, the Claimant had a fair opportunity to make an objection. Although the application was due to be determined days after the 16th, the Claimant could have asked for its deferred consideration in light of the failure to advertise it properly. From this point, the Claimant was required to act with the greatest possible celerity, but failed to do so.

The Court then considered the strength of the Claimant's case for saying the grant of outline planning permission was *ultra vires,* as *Thornton Hill Hotel* provided that the strength of proposed grounds of challenge are relevant to the exercise of judicial discretion to grant an extension of time:

- Ground 1: The Council failed to consult the Claimant on the planning application, which in the circumstances, was manifestly unfair. The officer's report materially misled members as to the nature of the consultation, and the reason given for not consulting the Claimant was irrational. This was held not to be strongly arguable. The Council was under no obligation to individually notify the Claimant of the planning application; nor was it conspicuously unfair not to do so.
- Ground 2: the Noise Impact Assessment, and the Council's reliance upon it, was based on a mistake of fact, namely that the power facility could only operate between 07:00-22:00, when there are in fact no restrictions on night-time operations. Consequently, the assessment did not cover any potential adverse impacts from any night-time use. This was held to be strongly arguable. While the facility did not typically operate throughout the night, there was no condition imposed limiting to the hours of 07.00-22.00, and the facility routinely operated before 06.00 and 07.00.
- Ground 3: conditions imposed on the outline planning permission were inconsistent, insofar as they required acoustic mitigation to be provided by reference to detailed plots and elevations, despite advice to members that the site's layout was not yet determined, and therefore various issues could be addressed through the reserved matters application. This was considered to be strongly arguable. The acoustic conditions imposed were to protect the amenity of future occupiers of the housing, but inappropriately sought to tie the noise mitigation measures to a layout which was expressly to be dealt with as a reserved matter, and was not the subject matter of any consideration or approval by the Council. However, the judge also noted that there was no reason in principle why a S.73 application under the Town and Country Planning Act 1990 for a variation of those conditions could not remedy the defect. Consequently, the fact that this ground was strongly arguable did not mean it had to be given significant weight in considering whether an extension of time should be granted.

- Ground 4: the officer's report materially misled members by relying upon a noise impact assessment that was obviously flawed. This was held to be arguable, but not so arguable as to weigh heavily in the balance when considering the application to extend time: the 'flaws' in the impact assessment were only identified by reference to an expert report, for whose admission into evidence the Claimant was also applying, and the EHO was satisfied by the proposed mitigation, which was reported to members. The Officer report did not 'significantly mislead' members as to any established fact.

The Court then considered the prejudice to third parties and detriment to public administration that would be caused by an extension of time, and found that the Claimant's submissions substantially understated the true prejudice caused to the Interested Party and ignored the detriment to good public administration.

The Court then dealt with the four additional points made by the Claimant which they said should be weighed in the overall balance, concerning the facility's contribution to the grid and potential for future use for battery storage, the fact that the development site was a windfall site and the Aarhus Convention and the ECHR. None of these points offered any reason for extending time.

Overall conclusion

Considering all the above in the overall balance, the Court decided to dismiss the Claimant's application for an extension of time for filing the claim form, and so permission to apply for judicial review was also refused.

Case summary prepared by Gregor Donaldson