IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 3627 (Admin)

No. CO/1442/2019

Royal Courts of Justice

Thursday, 19 September 2019

Before:

MRS JUSTICE ELISABETH LAING

B E T W E E N :

THE QUEEN ON THE APPLICATION OF

BELLAMILE LIMITED — Claimant

- and -

ASHFORD BOROUGH COUNCIL — Defendant

- and -

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT — Interested Party

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MS S SHEIKH QC (instructed by Simmons & Simmons) appeared on behalf of the Claimant.

MR R HARWOOD QC (instructed by Ashford Borough Council) appeared on behalf of the Defendant.

MR C ORMONDROYD (instructed by the Government Legal Department) appeared on behalf of the Interested Party.

J U D G M E N T

MRS JUSTICE ELISABETH LAING:

Introduction

1 I have to decide four applications which are described in paragraph 4 of the defendant's skeleton argument: first, the claimant's application for permission to apply for judicial review, which is resisted by the defendant and the interested party both on jurisdiction and the merits; second, a request by the claimant, made in correspondence, that "the court progresses the claim as though it had been made on the relevant Part 8 claim form"; and, third, a request by the claimant, again by letter, to treat a new Part 8 claim form submitted on 23 May as having been filed on the original date that the claim was filed, and, finally, a request that the court permits an extension of time. For reasons which will become clear, I am going to focus on the application for permission to apply for judicial review.

2 On this application, the claimant was represented by Ms Sheikh QC. Mr Harwood QC represented the defendant. Mr Ormondroyd represented the Secretary of State.

3 As a matter of logic, it would make sense to consider the jurisdiction point first. Ms Sheikh, however, submits that the merits of the claim are relevant to the jurisdiction to extend time, so in case that submission is correct I will consider both the merits and jurisdiction.

4 The application for permission to apply for statutory review is for permission to challenge policy 11a in the defendant's local plan which was adopted on 21 February 2019.

The facts

5 The facts have been very fully and helpfully set out by Mr Harwood in his skeleton argument. I express my gratitude to him for doing that. I will summarise them on the basis of the relevant paragraphs of his skeleton argument.

6 The claimant owns the former Bombardier train maintenance site at Chart Leacon, Ashford. The site is referred to in the documents sometimes as "the Bombardier site" and sometimes as "the Chart Leacon site". The claimant is owned by Prescot Business Park Limited, who made some representations against the policy.

7 The adopted policy 11a allocates land for operational railway use and commercial use but safeguards the site for a maximum of two years to see whether operational railway use comes forward. Any land not needed for that could be developed for commercial purposes. The claimant's objection to the policy concerns the temporary safeguarding of the site for railway purposes for a period of two years.

8 A planning consultancy called Lichfield had been acting for Prescot since 2016. Lichfield submitted objections during the planning process. By 14 December 2018, Prescot had instructed Mr Silk at Simmons & Simmons LLP to act for them on a local plan objection, and on 14 February 2019 Simmons & Simmons wrote to the defendant on behalf of the claimant to threaten a legal challenge if the defendant were to adopt the plan. They enclosed an opinion by Ms Sheikh dated 4 February 2019.

9 In the meantime, a Transport and Works Act application had been made by Network Rail involving the compulsory purchase of part of the site and a planning application had been made for trains (inaudible) on that part of the site. The local plan was adopted by the full council of the defendant on 21 February 2019. Lichfields made representations to the defendant about that on 19 February, again threatening a challenge and copying in Mr Silk. An adoption statement was published by the defendant on 21 February 2019, which gave the correct date of adoption and explained how any challenge to the plan had to be made, giving

the correct statutory reference (i.e. section 113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act")) and explaining that any challenge had to be made not later than the end of the period of six weeks beginning with the day after the date the plan was adopted.

10 The claimant's statement of facts and grounds was dated 3 April 2019 and was signed by Ms Sheikh. That had a heading suggesting that it was a section 113 challenge. It referred to section 113 of the 2004 Act but not to CPR Part 8. The witness statement from Mr Goldsmith of Lichfields which was filed with the claim was dated 4 April 2019, i.e. the last day for making any challenge.

11 From the documents, it seems that the people who were involved with filing the claim are Mr Silk, a Ms Katie Bovill, a paralegal, a Mr Martin Murphy, also a paralegal, who is described as being "lead filing clerk of this matter" and a Ms Kathryn Parker, who went to court on 4 April to file the proceedings.

12 The evidence in this case consists of two witness statements from Mr Silk. There is no witness statement from Ms Bovill, who is said to have made enquiries into the court about what the correct fee was, and there is no witness statement from Ms Parker explaining what happened when she went to court to file the claim. The only comment from Ms Parker is that she agrees some points put to her in an email by Mr Silk. That agreement is not supported by a statement of truth. As Mr Harwood points out, there is an almost complete absence of contemporaneous documents about the filing of the claim.

13 Mr Silk's evidence is that Ms Bovill asked the court about the correct fee several days before filing it and later raised a cheque. It appears that Ms Bovill was based in Bristol, but there is no explanation about whether the contact with the court was by telephone or by email, and we do not know precisely what questions Ms Bovill asked of the court, to whom she spoke, or whom she emailed, or what replies the court gave.

14 The fee for filing statutory review proceedings is £528. The fee for an application for permission to apply for judicial review is £154.

15 What seems to have happened on 4 April can be pieced together to some extent from the papers. It seems that Mr Murphy received an email at some stage, either from Mr Silk or from Ms Bovill, which was headed "Chart Leacon – JR challenge". He replied to that email chain at 4.16 pm on 4 April. It is said that Ms Parker took the claim bundle to the Administrative Court at about 3.35 pm on the last day of the six-week period. Mr Silk's evidence is that the claim bundle included a Part 8 claim form, form N208, but that no copy of it had been kept. I asked Ms Sheikh whether there was a digital copy of this document anywhere, and she told me on instructions that there was not.

16 Ms Parker had with her a cheque for the judicial review filing fee, i.e. £154. As Mr Harwood points out, Mr Silk initially asserted that the correct fee had been tendered on 4 April, but he now accepts that a cheque for the wrong fee was tendered on 4 April. The claim bundle was not filed with the Administrative Court Office on the afternoon of 4 April. Mr Murphy emailed Mr Silk and Ms Bovill at 4.16 pm, as I have mentioned, with the heading that I have described. He said:

> "Hi both,
> The Administrative Court have instructed us that you have not included the correct claim form with the application. The correct claim form for judicial review claims in the Planning Court is N461PC and carries a fee of £528.
> Get in touch when you can to discuss (Christian, I tried calling).

Thanks,
Martin."

17 Mr Harwood submits that the email reveals, or perhaps suggests, five things: firstly, that the email had as its subject line, and therefore suggests, that somebody thought that the proceedings were judicial review proceedings; secondly, it seems that Mr Murphy believed that the proceedings were judicial review proceedings because he reports what he appears to have thought was the court's advice about "the correct claim form for judicial review claims" without any question; thirdly, if the Administrative Court thought that judicial review proceedings were what was proposed, it does not seem as though anybody corrected that misapprehension; fourthly, there seems to have been confusion on the part of the paralegals, as Mr Murphy records the Administrative Court having said that the JR form should be used but that the planning statutory review fee should be paid. It does not seem that Mr Murphy appreciated that what he was reporting was contradictory advice. The fifth point, which is contested by Ms Sheikh, is that, despite the fact that the judicial review claim was attempted to be filed in the last hour before the court office closed on the last day, the solicitor with conduct of the case was not available even by telephone in case any problems arose. All that I would infer from the email chain is that Mr Silk was not able to answer his telephone at some point before 4.16 pm when Mr Murphy tried to telephone him.

18 The email to which Ms Parker agrees is dated 22 May 2019. This suggests that Ms Parker did not tell the Court Office that the proceedings were judicial review proceedings, but she does not say what her instructions were or what her understanding was of the nature of the proceedings, or what she said to the court about any of those topics. There is no explanation of what happened when she arrived at the Administrative Court Office with two contradictory documents: a Part 8 claim form and the correct fee for an application for judicial review. She does not disagree with Mr Murphy's email, which appears to suggest that the proceedings were an application for judicial review. She gives no details about what happened at the Administrative Court. She does not identify to whom she spoke, so that anyone in the court could be asked whether they remembered anything about it. It seems that, apart from the fact that the paralegals reported back to Mr Silk, no further steps were taken to contact the court or to file any amended proceedings that afternoon, despite the fact that it was the last day for doing so.

19 Mr Harwood suggests that by the time the Court Office had closed on 4 April it must have been obvious that there was a major problem. However, what happened next was simply that Simmons & Simmons filed the claim the next day on a judicial review claim form N461PC, which apparently replaced whatever had been originally in the bundle, and that they paid the judicial review fee. He suggested that it is surprising, and I agree, that there was no communication with the court from Simmons & Simmons describing what had happened on 4 April and complaining about the fact that the court had given the wrong advice, if indeed that is what the court had done. Mr Harwood suggests, and I agree, that this may be because if the Administrative Court Office wrongly turned the claim away on the last day for filing, one would have expected a prospective claimant to record contemporaneously in a document to the court that that was what had happened.

20 The claim form was later sealed by the Administrative Court Office on 9 April. The papers were served on the defendant on 12 April by courier. Service of the judicial review claim form appears to been done in reliance on CPR 54.7, which provides that service must take place within seven days after the date of issue. Mr Harwood points out that Simmons & Simmons did not refer to, or explain, the late filing of the claim, although they did try and explain that they did not have the original copy of the sealed claim form. The first explanation of the late filing of the claim was in Mr Silk's first witness statement dated

13 May, in which he asked that the claim be treated as though it had been made under Part 8 on 14 May. There was no application for an extension of time for filing, production of the replacement claim form, or any offer of the correct fee at that stage.

21 Counsel responded to that on 22 May, and on 23 May Simmons & Simmons sent in form N208PC and the balance of the fee to the court, asking the court to accept those "as having been filed at the original date of the claim and to seal them. We also request that the court permits an extension of time". On 3 July, Sir Wyn Williams ordered that there be a hearing of the various applications, including the application for permission to apply for judicial review.

22 I turn first to the merits of the claim. Paragraph 41 of the claim form relies on five grounds of challenge. After discussion with Ms Sheikh, it emerged that in reality there were three grounds. The first is that the inspectors are said to have erred in law in deciding that the local plan was sound. The way in which Ms Sheikh put that was to argue that the policy S11a was not justified or effective, and the reason it was not justified or effective was because it was not supported by any evidence. The second ground of challenge, which may or may not be subsumed in the first, is that the inspectors failed to give adequate reasons for their decision that the local plan was sound. The third ground of challenge is that the inspectors erred in law in relying on the sustainability appraisal.

23 It is axiomatic that the question whether a plan is sound is pre-eminently a question of planning judgment for the inspectors. Nevertheless, if there is an arguable public law error in their approach, permission should be granted for that challenge to be made.

24 Ms Sheikh submitted that there was no evidence to support the change in policy 11a from a policy of indefinite safeguarding of the northern part of the site to a two-year safeguarding of the whole site. I accept Mr Harwood's submission that Southeastern Railways made a representation that the site was needed for railway use. That representation explained why. I also accept the submission that the council and inspectors were entitled to rely on that as evidence that the site was needed for railway use. I reject the submission that the council or the inspectors were obliged to interrogate what Southeastern Railways said. I do not accept that it is arguably part of their *Tameside* duty in a case like this. They were entitled to accept what Southeastern Railways said. The Arup report on which Ms Sheikh relied in her submissions is, in my judgment, not arguably relevant to this ground as it was not before the inspectors or the council.

25 In short, the sequence of events is that the council produced a draft which did not identify how much of the site should be safeguarded but simply referred to the northern part. It was therefore not certain in the first draft how much of the site should be safeguarded. In sum, the change is that from the "northern part of the site" being safeguarded indefinitely, what should happen would be that the whole of the site should be safeguarded for a limited period of two years.

26 I have been taken through the documents and I accept Mr Harwood's submissions that it is perfectly clear from the way in which the change occurred that the inspectors looked at the issue in a sensible and lawful way and that they adequately explained the decision to change the policy in the way in which it was changed. I do not consider that this ground is arguable.

27 I also consider that the ground that the inspectors did not give adequate reasons for their decisions is not arguable either. The key passages are paragraphs 43 and 44 in the post-hearing advice and paragraphs 118 and 119 of the report. I accept Mr Harwood's submission that those paragraphs are perfectly intelligible and explain why it was that the

inspectors thought it was sound to change the policy in the way that they did. In short, there is a trade-off between the considerations in play, and although the evidence about the amount of the site which would be needed and whether or not it would be needed and if so when was uncertain, it was perfectly reasonable for the inspectors to conclude that a sensible and sound solution would be to safeguard the whole site for the limited period of two years, and they explained intelligibly that that is what they had done.

28 Ground 3 challenges the inspectors' reliance on the council's sustainability appraisal, and in particular, at page 574 of the bundle, the council's description of the change to policy S11a as a "minor change". Ms Sheikh submitted that the inspectors were bound to take the sustainability appraisal into account and that they must have been influenced by the description of the change as a minor change and that they therefore erred in law.

29 Mr Harwood in his submissions showed me the part of the inspectors' report in which they considered the sustainability appraisal. The inspectors were satisfied with that. He submitted that, since the sustainability appraisal concerned the significant environmental effects of changes to the policy, it was unsustainable to argue that the change to the policy which had occurred was anything other than a minor change. The decision to safeguard the whole of the site for a limited period of two years was not a change which would have significant environmental effects as compared with the original drafting of the policy which was the indefinite safeguarding of the northern part of the site.

30 I accept Mr Harwood's submission. It is not arguable that the inspectors erred in law in relying on the sustainability appraisal.

31 I turn, then, to the question of jurisdiction. It seems to me that the best starting point for discussion of this point is [39] of the decision of the Supreme Court in *Pomiechowski v District Court of Legnica, Poland* [2012] 1 WLR 1604; [2012] UKSC 20. One of the cases which the Supreme Court considered was the case of Mr Halligen. The challenge concerned the seven-day time limit for appealing against an extradition order. Unlike the other appellants in that case, Mr Halligen was a British citizen. At [31], Lord Mance explained that all the cases that the court was considering involved the extradition of aliens, but that the position of a British citizen was different because a British citizen enjoyed a right to come to, and remain in, the jurisdiction.

32 For reasons which he explained, Lord Mance held in [33] that the extradition proceedings against Mr Halligen fell within Article 6(1). He said that any right of appeal under the statute was required by Article 6(1) to be free "of limitations, impairing 'the very essence' of the right", and that any such restrictions had to "pursue a legitimate aim and involve a 'reasonable relationship of proportionality between the means employed and the aim sought to be achieved'..." He identified that that was the standard described in *Tolstoy Miloslavsky v United Kingdom*, a decision of the European Court of Human Rights (1995) 20 EHRR 442. He said that finality and certainty were important legal values, but that the statute was capable of generating considerable unfairness in individual cases unless some further relief were available. He said that the very essence of the right might be impaired in individual cases, and there might still be no reasonable relationship of proportionality between the means employed and the aim sought to be achieved: see [35]. In [39] he said this:

> "In the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. In these

> circumstances, I consider that, in the case of a citizen of the United Kingdom like Mr Halligen, the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6(1) in *Tolstoy Miloslavsky*. The High Court must have power in any individual case to determine whether the operation of the time limits would have this effect. If and to the extent that it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously."

33 In *Croke v Secretary of State for Communities and Local Government* [2019] EWCA Civ 54, the Court of Appeal considered the six-week time limit for bringing a challenge to a decision on a planning appeal under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"). The question for the court was described in [1] by Lindblom LJ, who gave the judgment of the court, as whether that time limit was "absolute, even when the applicant may not himself be entirely responsible for the late filing of the application". I consider (and I do not think that the parties disputed this) that the time limit in section 113 of the 2004 Act is analogous for these purposes to the time limit in section 288 of the 1990 Act, and that therefore I should apply the reasoning of the Court of Appeal in *Croke* by analogy to the position in this case.

34 I consider that the reasoning of the Court of Appeal shows that its view was that, as a matter of construction, the time limit in section 288 was a strict and absolute time limit: see [31] of Lindblom LJ's judgment where he held that, subject to two exceptions: 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 extend time. That that is what the court thought on that point is further supported by [39] of the judgment and by the first sentence of [40] of the judgment.

35 In the *Croke* case, Mr Croke did not invoke any exceptional human rights jurisdiction to extend time (see [40] of the judgment), so I accept that anything the Court of Appeal said about any exceptional human rights jurisdiction to extend time was therefore *obiter*. However, in [43] - [45], I consider that the Court of Appeal indicated, for cogent and clear reasons, that their view was that this was not a statutory scheme which intrinsically impaired the very essence of anybody's Article 6 rights. It follows, therefore, in my judgment, that in the analogous scheme provided for by section 113 there is not either any exceptional jurisdiction to extend time on human rights grounds.

36 I have been taken to an earlier decision of the Court of Appeal in *Yadly Marketing Company Limited v Secretary of State for the Home Department* [2016] EWCA Civ 1143; [2017] 1 WLR 1041. That appeal concerned the operation of the time limit in section 17(4) of the Nationality, Asylum and Immigration Act 2006 for appealing to the county court against a decision of the Secretary of State to issue a penalty notice to an employer for employing people who had no permission to work in the United Kingdom. The time limit for bringing such an appeal was 28 days. Time expired in that case on a Bank Holiday. The Court of Appeal held in relation to the first ground of appeal that what Lindblom LJ referred to as the *Kaur* principle applied in that statutory scheme, so that as a matter of statutory construction time expired on the next day when the Court Office was open. What then happened was that the appellant was twice rebuffed wrongly by the court staff, firstly on the day before the

time limit expired and I think secondly on a day when it had expired. In those circumstances the court extended time.

37 Ground 2 of the appeal concerned the court's discretion to extend time on human rights grounds. Beatson LJ did not accept the submission that a party had to be incapacitated throughout the period of the time limit: see [38] of the judgment. He concluded that the appellant had been entitled to wait until the very end of the period and had done all that it could to lodge the claim in time: see [39]. There is no detailed reasoning addressed to the first part of the test set out by Lord Mance in *Pomiechowski*. I therefore infer that the court must have assumed that it was met in the statutory scheme which the court was considering in *Pomiechowski*.

Discussion

38 As I have already indicated, Ms Sheikh submitted that the merits of the claim were relevant to the exercise of any exceptional jurisdiction to extend time. She was not able to point me to any passage in the authorities which in my judgment showed that the merits of the claim are in any way relevant. I nonetheless considered the merits, as it were, *de bene esse*, but it is my view that there is nothing in the authorities that supports the submission that the merits of the appeal or claim are relevant to the exercise of the discretion, and I so hold.

39 As I have said, it is clear to me from the reasoning in *Croke* that there is no general discretion to extend the time limit which is set out in section 288, and I would apply that reasoning by analogy to section 113 of the 2004 Act.

40 The next question, then, is whether there is a discretion to extend on human rights grounds. Ms Sheikh submitted that there is such a discretion. She submitted that the true meaning of [39] of *Pomiechowski* is that the court always has a discretion when there is a finite and apparently unextendable statutory time limit to extend time on human rights grounds.

41 I reject that submission. I do not consider that that is what Lord Mance was saying in [39] of *Pomiechowski*, and I do not consider that that is the way in which what he said was approached by the Court of Appeal in *Croke*. I appreciate that the reasoning of the Court of Appeal on this point in *Croke* is *obiter*, but I consider, for the reasons given by Lindblom LJ in *Croke*, that there is nothing in this scheme which impairs the very essence of a person's right to challenge a relevant decision. The six-week period is quite a long period, and one has to bear in mind that, unlike the types of decisions which were considered in *Pomiechowski* and in *Yadly*, a planning decision affects the rights not only of the parties but also the rights of others who are not before the court. The position is *a fortiori* the position in *Croke* because this is a challenge to a local plan. The six-week time limit is to be contrasted with the very short seven-day time limit in an extradition case, and the context is also to be contrasted because in the case of a British citizen he has seven days in which to challenge a very intrusive interference with his right to be in the territory of the United Kingdom, whereas this is a challenge to a local plan.

42 In case I am wrong about that, I should go on to consider whether or not the claimant has "personally done all that he can to bring and notify the claim timeously". I am not satisfied that the claimant has done so. There is, first of all, an important procedural reason why not. It is clear from the decision of the Court of Appeal in *Yadly* that the county court judge in that case was happy to and did accept what he was told on instructions about what the factual position had been: see [8] and [14] of the judgment in *Yadly*. The Court of Appeal held that the judge was entitled to proceed on the basis of what he had been told by counsel. Whatever the position may be in the county court, it is not the position in the Administrative Court or the Planning Court that a claimant is entitled to ask the court to take matters on

trust or on instructions or second-hand. The practice in both courts is that if the claimant has missed the time limit, the claimant must, when making the claim, apply for an extension of time, with a full and candid explanation verified by a statement of truth of the reasons why the claim was not made in time.

43 I have already set out in some detail, on the basis of the points made in Mr Harwood's helpful skeleton argument, what I consider to be the deficiencies in the evidential material before the court. I do not consider that the claimant has given a full explanation verified by a statement of truth of everything that happened. There was no application to extend time when the claim was lodged, there is no witness statement from Ms Bovill explaining what she asked and what she was told, there is no witness statement from Ms Parker giving a detailed chronological account of what happened when she presented the claim, but all that the court has is an email from her answering points put to her in an email by Mr Silk. There are many gaps and many things that require to be explained and have not been. The email from Mr Murphy seems to me to be internally inconsistent. It suggests implausibly that the court staff both rejected the Part 8 claim and yet insisted on the fee for a Part 8 claim, the fee for a judicial review claim having been tendered by cheque. Moreover, the court has not been given any contemporaneous opportunity to comment on the suggestions and assertions about what happened on 4 April. I consider that it was important for the court to be given that opportunity and it was not. Nor do I accept Ms Sheikh's submission that the fact that the court accepted a JR claim and the JR fee on the following day supports the suggestion in what evidence there is that the court rejected a Part 8 claim on the previous day. It is equally plausible that the court rejected the claim because the proper fee had not been tendered. I am not prepared to accept on the state of the evidence that the court made the mistake that it is suggested that it made. For those reasons, I do not consider that the claimant has satisfied the second part of the test in *Pomiechowski*.

44 For those reasons, therefore, I dismiss the application for permission to apply for judicial review, and that conclusion makes it unnecessary for me to deal with the two procedural applications.

CERTIFICATE

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